Graham Oates v Secretary of State for Communities and Local Government v Canterbury City Council

Case Nos: C1/2017/3197

C1/2017/3198

Court of Appeal (Civil Division)

12 October 2018

[2018] EWCA Civ 2229

2018 WL 05018371

Before: Lord Kitchin Lord Justice McCombe and Lord Justice Lindblom

Date: 12 October 2018

On Appeal from the Administrative Court Planning Court

His Honour Judge Waksman Q.C. (sitting as a deputy judge of the High Court)

[2017] EWHC 2716 (Admin)

Hearing date: 11 July 2018

Representation

Mr Timothy Straker Q.C. and Mr Jonathan Powell (instructed by Russell-Cooke Solicitors) for the Appellant.
Mr Leon Glenister (instructed by The Government Legal Department) for the Respondent.
The Interested Party did not appear and was not represented.

Judgment Approved

Lord Justice Lindblom:

Introduction

1 Was it wrong in law for an inspector deciding an appeal under section 174(2) of the Town and Country Planning Act 1990 to uphold an enforcement notice that required the complete demolition of three "new buildings" whose construction had incorporated parts of the buildings previously on the site? That is the basic question in these two appeals. It raises no legal issues that are new.

2 With permission granted by Lewison L.J. on 8 January 2018, the appellant, Mr Graham Oates, appeals against the order dated 4 November 2017 of H.H.J. Waksman Q.C., sitting as a deputy judge of the High Court, by which he dismissed an application

under section 288 of the 1990 Act and an appeal under section 289 , challenging the decisions of an inspector appointed by the respondent, the Secretary of State for Communities and Local Government, to dismiss appeals against an enforcement notice issued by the interested party, Canterbury City Council, and the council's refusal of planning permission for development on the same site.

3 The enforcement notice was issued on 22 August 2016. It alleged a breach of planning control by the erection of three "new buildings", without planning permission, on the site of three former chicken sheds at Hoath Farm, Bekesbourne Lane, in Canterbury, and required the total demolition of those three "new buildings". Planning permission for the development of eight residential units had been refused by the council on 22 April 2016. Mr Oates' subsequent appeals, under section 174 and section 78 of the 1990 Act, were heard by the inspector at an inquiry held over four days in April 2017. Her decision letter is dated 2 June 2017.

4 The challenge to the inspector's decisions was brought on several grounds, all of which the judge rejected.

The issue in these appeals

5 Although there are five grounds of appeal, it is agreed that they all go to the same principal issue, which is whether the inspector went wrong in her approach to Mr Oates' contention that the surviving parts of the original, lawfully erected buildings on the site could not properly be enforced against, and that the enforcement notice, if upheld, should therefore have been varied.

The statutory provisions

6 Section 172(1) of the 1990 Act gives a local planning authority the power to issue an enforcement notice where it appears to it that there has been a breach of planning control and that it is expedient to issue the notice. Under section 171A(1) , "carrying out development without the required planning permission" constitutes a breach of planning control. 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 …".Section 173(3) provides that the steps required by the enforcement notice must be directed to achieving "wholly or partly" any of the purposes referred to in subsection (4), which are "(a) remedying the breach" of planning control and "(b) remedying any injury to amenity which has been caused by the breach". Where the enforcement notice requires less than a full remedy of the alleged breach of planning control, section 173(11) provides for deemed planning permission for such development as remains after the notice has been complied with (see paragraph 31 of the judgment of Carnwath L.J., as he then was, in *Tapecrown Ltd. v First Secretary of State [2006] EWCA Civ 1744* , with which Wilson and Hughes L.JJ., as they then were, agreed).

7 Section 174(2) provides that an appeal may be brought against an enforcement

notice on any of eight specified grounds. The relevant grounds here are grounds (a), (b), (c), (f) and (g). Ground (a) is "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 …". Ground (b) is "that those matters have not occurred". Ground (c) is "that those matters (if they occurred) do not constitute a breach of planning control". Ground (f) is "that the steps required by the notice to be taken … 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". And ground (g) is "that any period specified in the notice in accordance with section 173(9) falls short of what should reasonably be allowed".

8 Section 176(1) provides a power for the Secretary of State to vary an enforcement notice "if he is satisfied that the correction or variation will not cause injustice to the appellant or the local planning authority".

9 Section 177(1) provides that, on the determination of an appeal under section 174 , the Secretary of State may "(a) grant planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control, whether in relation to the whole or any part of those matters or in relation to the whole or any part of the land to which the notice relates …".Section 177(5) provides that, where an appeal is brought under section 174(2)(a) , "the appellant shall be deemed to have made an application for planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control".

The enforcement notice

10 The site has a long planning history, which need not be fully narrated here. The three former chicken sheds had been divided into six units. The council had granted planning permission for the change of use of those six units from agricultural use to use in Class B1 and B8. As the inspector noted (in paragraph 7 of her report), there was "no dispute that this change of use was implemented and also that prior approval was not needed for a change of use from offices to residential". She reminded herself, however, that "[the] development permitted by Class J [of Part 3 of Schedule 2 to the Town and Country Planning (General Permitted Development) Order 1995 , as amended] was for 'development consisting of a change of use of a building and any land within its curtilage to a use falling [within] Class C3 (dwellinghouses) … from a use falling within Class B1(a) (offices)', that is, for a change of use only with no permission for any operational development" (paragraph 8).

11 By May 2015, extensive building work had taken place on the site, without planning permission. On 11 January 2016 Mr Oates made an application for planning permission for "[external] alterations and extensions to 5 existing buildings including retro-fitting insulation and new external cladding/roof materials in connection with the formation of 8 no. residential [dwellings] (comprising 7 x 3 bedroom and 1 x 4 bedroom units) …". It was the council's refusal of this application that was the subject of the section 78 appeal before the inspector.

12 The council issued the enforcement notice on 22 August 2016. In paragraph 3 of the

notice the alleged breach of planning control was stated to be:

> "Without planning permission, the erection of three new buildings in the open countryside for residential use."

The requirements of the notice, stated in paragraph 5, were these:

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

13 Mr Oates appealed against the notice on the grounds in section 174(2)(a), (b), (c) , (f) and (g) .

The inspector's findings and conclusions

14 In her decision letter (in paragraphs 10 to 13), under the heading "The works (Buildings A, B and C; Units 1-6)", the inspector set out these findings about the works that had been carried out on the appeal site:

> "10. In or around May 2015 the Council was made aware of works taking place to the three buildings. No document or list of the works undertaken has been provided but Mr Harper produced a schedule of works in the ground (f) appeal which he suggested comprised the lesser steps necessary to remedy the breach. From this schedule it is apparent that the works undertaken included the erection of an exo-skeleton shell around each of the three buildings; drystone walling to the corners of each building; blockwork between the steel posts; the installation of 24000 natural roof slates; the installation of Tyvek roofing battens; 200mm Cellotex Insulation between the rafters; the provision of Gluelam rafters; welding to the steel sections; the addition of scarfed sections of the timber rafters; and bolts to the steel posts.
>
> 11. Photographs also show that the floors of the buildings were removed and re-laid with concrete. In addition, as I saw on my visit, interior works have included the erection of a block wall to separate the two halves of each building; the creation of rooms by studwork and plasterboards; and plaster boarding around what were the original exterior walls and the remaining parts of the original wooden frame to create walls and ceilings.
>
> 12. In order to re-instate the buildings as they were before it would be necessary to refit the timber ridge; refit the timber scarfed rafters; re-felt and batten; fit corrugated roof panels; remove ply panels; and refit shiplap boarding. In addition the schedule listed works not being as before which included the barn doors being removed; new windows and glazed doors being inserted; the asbestos roofing being replaced with zinc replacements; the

> ventilation units on the roof being removed; and the internal concrete dividing wall being built to divide each building into two units.
>
> 13. The Council's list of the works that have been done include the erection of new steel frames partially clad; the removal of existing structures' walling; removal of existing structures' frames; retention of some existing structures' fenestration; the erection of new internal layout, timber frames/partitions; and the erection of a new roof on each structure.
>
> 14. There was and still is considerable dispute between the Parties about who said what to whom about the works and their respective interpretations of what those works entailed. These interpretations included whether the original buildings had been demolished or not; whether the original buildings had been retained or not; whether the re-cladding of the walls and the replacement of the roofs amounted to a conversion of the original buildings or the erection of new buildings."

15 She then summarized "The reports submitted by the Appellant", including a "structural appraisal by Mr Stocker, a chartered structural engineer" (paragraphs 15 to 19), a "letter from Mr Edwards, a consultant civil engineer" (paragraph 20), a "report from Mr Webborn, a building surveyor …" (paragraph 21), and a "drawing showing the existing and proposed structural arrangements" submitted by Mr Oates' planning consultant, Mr Harper (paragraph 22).

16 She noted (in paragraph 24) the council's view that the original buildings on the site had been demolished. In the light of the judgment of Green J. in *Hibbitt v Secretary of State for Communities and Local Government and Rushcliffe Borough Council [2016] EWHC 2853 (Admin)* , she observed (in paragraph 25) that, "depending on the works undertaken, an original building need not be demolished for it to become a new building". And she recorded the counter-assertion made on behalf of Mr Oates that "given the Council's misdirection of itself that there had been demolition, the breach of planning control was incorrectly described because what had occurred was not the erection of three new buildings but the erection of an external structure around the original building" (paragraph 26).

17 She went on to determine the ground (b) appeal in this way (in paragraphs 27 to 30):

> "27. From the evidence, both written and oral, including the photographs and reports and from what I saw on my visit there can be no dispute that as a matter of fact a substantial amount of operational development has taken place in respect of Buildings A, B and C. Put simply this operational development includes: the erection of a metal framed exo-skeleton around the original building which provides a structure for the slate roof and blockwork walls; this exo-skeleton has been erected some 0.3m from the original building and has its own foundations; the walls of the original building have largely been removed save for the short blockwork elements and replaced with plasterboard which now forms the interior walls; there are new concrete floors;

the original internal wooden structure remains, although it has been extensively repaired and parts re-placed.

28. Whilst elements of the original buildings remain, and in particular I note that the proposal in the s.78 appeal does not include retention of parts of the currently existing internal wooden structure, taking all the above matters into account together with the judgement in *Hibbitt* there is no question in my mind that Buildings A, B and C are new buildings as a matter of fact as alleged on the notice.

29. In the circumstances I consider that the description of the breach as stated on the notice is correct and there is no need for it to be corrected.

30. The appeal on ground (b) fails."

18 On the ground (c) appeal she concluded (in paragraphs 32 to 35):

"32. The prior notification to convert the existing offices in Units 1, 2 and 3 … into residential use related to a change of use only and related to the buildings present at that time. This is clear from the notice dated 27 November 2013 which, among other things, cites the submitted drawings. No permission or deemed permission was granted for operational development.

33. The allegation is 'the erection of three new buildings in the open countryside for residential use' and is in respect of operational development. I have found that the operational development that has taken place amounted to the erection of three new buildings and these three new buildings cannot benefit from any consent for a change of use because that consent applies to buildings which had existed before the operational development took place but which no longer exist. The prior approval is therefore not capable of implementation.

34. In this respect it is also pertinent to note that the use of the buildings for residential purposes took place after the operational development had taken place, that is, in the new buildings and there was no actual change of use of the buildings that had been the subject of the prior approval.

35. The erection of three new buildings for residential use requires planning permission and none has been granted. The matters alleged in the notice constitute a breach of planning control; three new buildings have been erected; and the ground (c) appeal fails."

19 In her conclusions on the appeal on ground (a), the deemed application for planning permission and the section 78 appeal – all of which failed – she said this (in paragraph 45):

"45. I accept that the Appellant's case is that that erection of the exo-skeleton was purely an enhancement to the buildings' external appearance which would

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

20 When she came to the ground (f) appeal, the inspector dealt with the argument that even if there had been a breach of planning control, the appropriate remedial action was not the demolition of all the buildings as they now were, but works to reinstate the buildings as they had previously been, with office layouts, in accordance with a draft schedule of works provided on behalf of Mr Oates. She said (in paragraphs 81 to 86):

> "81. In determining this ground of appeal I have to consider whether there are any obvious alternatives to the stated requirements that would remedy the breach. The obvious alternative in this appeal is the schedule of works that the Appellant has prepared as an alternative to the requirement to demolish the three buildings. The schedule is marked as a 'draft' and is in three parts, A/'Removal of the exo-skeleton shell'; B/'Work to be carried out to re-instate commercial buildings as before'; and C/'Works we would like the Inspector to accept, not being as before'. Mr Harper, who prepared the schedule, is not an architect or an engineer but he has a great deal of experience of all types of buildings and matters pertaining to them. Nevertheless part A of the schedule is merely an outline list of works and it lacks the precision and specificity required in the drafting of requirements; in addition it is incomplete with regard to the totality of the works undertaken because it concerns only the exo-skeleton and there is no mention of other works, such as the relaying of the floors and the foundations that have been provided for the exo-skeleton.
>
> 82. With regard to the other parts of the schedule, I have no powers to order re-instatement as set out in part B or to permit the matters set out in part C.
>
> 83. Given the terms of the schedule of works I have considered whether it would be appropriate to vary the requirements to provide for a scheme of the works to be submitted which would overcome the lack of detail as submitted by the Appellant. A variation of a requirement to restore the land to its former state to a requirement that the land be restored to a scheme to be agreed with the local planning authority was upheld in [*Murfitt v Secretary of State for the Environment (1980) 40 P. & C.R. 254*]. But in a later case the notice required the submission of a scheme of levelling and planting … to the local planning authority for approval; the Inspector found that the notice did not comply with s.173(3) in that it did not specify the steps which the authority required to be taken and he substituted precise requirements. It was held that having found

that the notice did not comply with s.173 , the Inspector had erred in varying its terms and he had no power to do so because the notice was a nullity.

84. It seems to me therefore that to vary the notice as submitted by the Appellant could render it a nullity.

85. The Appellant submits that there are pre-existing lawful use rights and the requirements to return the site of Buildings A, B and C to an empty space go beyond the breach of planning control which arises from the erection of the exo-skeleton and do not comply with the [*Mansi v Elstree Rural District Council (1965) 16 P. & C.R. 153*] principle which established that the requirements must not purport to prevent an appellant from doing something he or she is entitled to do without planning permission, relying on lawful use rights or rights of reverter, GPDO or UCO rights, or any of the exceptions from the definitions of development. However, in this appeal I have found that as the three buildings are new buildings as alleged in the notice, they have no pre-existing lawful use rights.

86. The purpose of the requirements [of the enforcement notice] is to remedy the breach by restoring the land to its condition before the breach took place. The alternative solution offered by the Appellant in the schedule of works does not describe the works to the necessary level of precision and I do not consider it appropriate to vary the requirements to provide for a scheme to be submitted. There are therefore no obvious solutions which would remedy the breach and overcome the harm identified. I consider that the requirement to remove the three buildings, together with the requirement to remove the resulting materials, does not appear to me excessive in that it accords with the statutory purpose so far as the allegation is concerned."

Although she varied the notice by deleting the third requirement (paragraph 87), the ground (f) appeal failed (paragraph 88).

21 On the ground (g) appeal, the inspector varied the notice, extending the time for compliance from six months to nine. Subject to those two variations, she upheld the notice.

The judgment of H.H.J. Waksman Q.C.

22 Before the judge there were three grounds of challenge. The third ground, in which it was asserted that, in the light of the decision of the Court of Appeal in *Miller-Mead v Minister of Housing and Local Government [1963] 2 W.L.R. 225* , the enforcement notice was a "nullity" is not pursued before us – permission having been refused on the ground of appeal in which that argument was advanced. In the first and second grounds it was contended that the inspector erred in law in concluding that the works undertaken on the site had created three "new buildings", and that she was therefore also wrong to find there had been a breach of planning control as alleged in the enforcement notice, and to refuse planning permission on the basis that Mr Oates had

no valid "fall-back" position.

23 The judge rejected that argument. He concluded (in paragraph 17 of his judgment) that the approach indicated by Green J. in *Hibbitt* was correct. It was possible to conclude that there was a "new building" even where parts of the "old" building remained, rather than being demolished. Whether what had happened, or was contemplated, had gone beyond a conversion of, or addition to, an original building, and whether there was now a new building, was "obviously a question of fact and degree" and "pre-eminently a question of planning judgment for the decision-maker". Unless the inspector's conclusion that there were "new" buildings could be successfully challenged on "Wednesbury" grounds, it must stand (paragraph 18). There was no such error here (paragraph 19).

24 The judge also rejected the submission that the inspector ought to have found that what remained of each of the original buildings amounted to a "building" within the definition in section 336 of the 1990 Act, which includes "… any part of a building …"; and the submission that if she had done so and had taken into account the permitted change of use for the original buildings, she could not have concluded that the buildings now present were, in law, "new buildings". In his view the inclusion of parts of a building in the statutory definition did not bear on the correctness of the allegation in the enforcement notice, which was, he said, "not about the nature of the building but whether it is "new"". The question here was "whether as a matter of law or fact it was correct to say that what was on site now were new buildings rather than the original buildings for the purpose of establishing a breach of planning control as a result of operational development" (paragraph 23).

25 In the judge's view, the exercise the inspector had conducted was "directed to the extent to which in substance and by reference to the facts on the ground …, the original buildings had really survived at all or whether in reality new buildings had emerged". The statutory definition had "no relevant application to that exercise". If the argument were right, it would never be possible for an inspector to find that new buildings had emerged where "remnants" of previous buildings survived. This would not accord with the reasoning of Green J. in *Hibbitt* , or with common sense (paragraph 24).

26 The judge did not accept an argument based on the principle in *Mansi* – which is, essentially, that established rights should be safeguarded in enforcement action where this is still possible. It was submitted to the judge that this principle applied by analogy here. Because the original buildings had the benefit of a lawful change of use to residential use, this should be protected from any remedial steps required by the enforcement notice. The judge saw no force in that argument. In the first place, there was, he said, "no reason in principle or by reference to any decided case to extend the reasoning in *Mansi* which was all about a change of use, to an enforcement notice issued where the breach of planning control was operational development" (paragraph 29). Secondly, there was "clear authority to the effect that the reasoning in *Mansi* does not have any application outside the change of use context so as to apply to buildings" – namely the judgment of Gilbart J. in *Mohamed v Secretary of State for Communities and Local Government and Brent London Borough Council [2014] EWHC 4045 (Admin)* , at paragraphs 22 and 23 (paragraphs 30 to 32). Thirdly, even if the *Mansi* principle was potentially relevant here, it "would not make any difference", because if the

inspector found that the buildings on the site were new buildings – as she did in paragraph 85 of her decision letter – "it would make no sense to say that there were any original buildings which now required to be "protected"" (paragraph 33). There was an extant planning permission for a change of use to residential use. But there was "no evidence of any change to residential use actually having been implemented prior to the further works being undertaken", and the inspector had expressly found to the contrary in paragraph 34 of her decision letter. It "would be wrong to say that there were buildings with a pre-existing use which required protection". And "[the] fact that any residential use after the operational development was in whole or in part in those sections of the new buildings" was, said the judge, "not relevant … given the Inspector's characterisation of what is there now as new buildings" (paragraph 34).

27 Finally, the judge endorsed as lawful the inspector's rejection of Mr Oates' "draft schedule of works designed to remove all the offending parts of the new operational development in order to effect a reinstatement". The inspector was, he said, "entitled to reject that for the reasons given in paragraphs 81-83 of the [decision letter]" (paragraph 37).

Did the inspector err in law in her approach and conclusions?

28 For Mr Oates, Mr Timothy Straker Q.C. presented to us an argument largely replicating the submissions that failed before the judge. On the first and second of the five grounds of appeal, which go together, he submitted that the requirements of the enforcement notice went beyond what was necessary to correct the breach of planning control. They interfered with Mr Oates' established rights to retain and use those parts of the original buildings that remained on the site. They constituted "over-enforcement". The inspector had simply focused on the question of whether or not the buildings were "new buildings". She had not identified, as she ought to have done, the precise extent of the breach of planning control, and so had failed to consider what had to be done to correct that breach. She had found, in effect, that lawful structures were still present on the site – as one can see, for example, in her reference in paragraph 27 of her decision letter to the "exo-skeleton" having been erected "some 0.3m from the original building …", and in paragraph 28 to the "elements of the original buildings" that "remain". The new buildings incorporated parts of what was there before – and what was there before was lawful and should be protected from enforcement. The inspector could and should have used the power she had under section 176(1) to vary the notice, to prevent "over-enforcement". The original buildings had not been completely demolished. Lawful buildings within the extended definition of a "building" in section 336 of the 1990 Act remained on the site. Mr Straker acknowledged that *Mansi* concerned a lawful use of land rather than operational development (cf., for example, *Worthy Fuel Injection Ltd. v Secretary of State for the Environment [1983] J.P.L. 173*). But, he submitted, the principle – that a landowner is not to be deprived of existing lawful development by subsequent unlawful development – was equally applicable to operational development, and in so far as the first instance judgment in *Mohamed* suggested otherwise, it was incorrect.

29 On the third ground, Mr Straker submitted that the judge had failed to consider the

effect of section 57(4) of the 1990 Act which provides that "[where] an enforcement notice has been issued in respect of any development of land [including development comprising "building operations", as defined in section 55 (1) and (1A)], planning permission is not required for its use for the purpose for which (in accordance with the provisions of this Part of this Act) it could lawfully have been used if that development had not been carried out". The lawful use of the site was either a Class B1 use or residential use within Class C3. Whichever it was, the total demolition of the buildings required by the enforcement notice would make it impossible to carry out. And much of the operational development to which the inspector referred in paragraphs 10, 11 and 27 of the decision letter was within the scope of relevant permitted development rights.

30 On the fourth ground, Mr Straker submitted that, in finding that the buildings on the site were "new buildings", the inspector had failed to have regard to structural elements of the original buildings that were still in place, but also took account of works not yet undertaken.

31 On the fifth ground, Mr Straker contended that the inspector's decision was "over-enforcement", and unlawful. Her finding that the buildings on the site were "new buildings", as the enforcement notice alleged, was mistaken. She had not recognized that the description of unlawful development in the enforcement notice was an overstatement of the breach for the sake of stating the remediation required, which involved the demolition of lawful development. The principle stated by Green J. in *Hibbitt* had no place here – because that case did not involve the overriding of lawful rights.

32 I cannot accept those submissions, forcefully as they were put to us by Mr Straker. As the judge held in the court below, and as Mr Leon Glenister submitted to us on behalf of the Secretary of State, they are based on a misconception: that the inspector accepted, or at least ought to have accepted, that "lawful" parts of the original buildings remained on the site and could properly be distinguished from the new works of construction following the partial demolition of those original buildings. This seems to me to be a misreading the inspector's decision letter. On a true understanding of her findings and conclusions, she was clearly satisfied that the buildings now on the site were, as she described them, "new buildings" – not new buildings and original buildings, but simply "new buildings" – which were not, in whole or in part, lawful. And in my view, as the judge concluded, she did not err in law.

33 The decision letter must be read fairly, and as a whole. As was emphasized in this court in *Arnold v Secretary of State for Communities and Local Government [2017] EWCA Civ 231* (at paragraph 20):

> "20. It is necessary, as always, to read the inspector's relevant conclusions fully, in their proper context, and bearing in mind that the decision letter was written principally for the parties to the appeals, who were of course familiar with the evidence and submissions presented on either side at the inquiry. One should not isolate particular passages in the inspector's conclusions from others which are also relevant to the specific point being considered in the passage in question. The inspector's conclusions on the ground (a) and ground (f) appeals are not wholly discrete. They relate to each other, and, to an extent, depend upon each other. They must be considered together."

34 In this case it is necessary to take the inspector's findings and conclusions on the ground (b) appeal together with her findings and conclusions on the appeals on grounds (a), (c) and (f). When this is done, it is, I think, quite clear that she was alive to the possible mischief of "over-enforcement", and that she took care to satisfy herself that the council's enforcement action was soundly based in fact and justified in law.

35 In paragraphs 10, 11, 27, 28 and 29 of the decision letter the inspector described how the "original buildings" had been largely demolished and the remaining elements of them intimately incorporated into the fabric of the "new buildings". On the evidence before her and with the benefit of her site visit, she was entirely clear in her finding, as a matter of fact and degree, that there were three "new buildings" on the site, and that the "original buildings" no longer existed as recognizable, independent structures. Such parts of the "original buildings" as had not been destroyed or removed had now been integrated fully into the structure of the "new buildings". This question was squarely before the inspector as a contested issue between the parties. She was plainly well aware of its significance for her decision on the enforcement notice appeal. She faithfully recorded the rival assertions in paragraphs 24 to 26. She set out a thorough summary of the evidence of the works of demolition and construction that had been carried out on the site, and the documentary evidence submitted on behalf of Mr Oates. In finding as she did, she was explicitly and unequivocally rejecting the assertion made on Mr Oates' behalf, which she had recorded in paragraph 26, that the breach of planning control alleged in the enforcement notice had been inaccurately described, and that "what had occurred was not the erection of three new buildings but the erection of an external structure around the original building". This was classically a matter of fact and evaluative judgment for her as decision-maker. It is not for the court to consider and determine afresh in an appeal under section 289 .

36 The content of the passages in the decision letter to which I have referred is, in my view, unimpeachable. There can be no suggestion that the inspector made incomplete or erroneous findings of fact, that she ignored any relevant considerations or took into account considerations that were irrelevant, or that her exercise of judgment was unreasonable in the "Wednesbury" sense, or otherwise unlawful. She did not misdirect herself on the relevant law.

37 She was entitled to find as she did – that the buildings on the site were "new buildings" – even though they were partly composed of what was left of the buildings that had stood there before. As she said in paragraph 25, "depending on the works undertaken, an original building need not be demolished for it to become a new building". Here, when she said "demolished", she was clearly referring to total or near-total demolition. Her reference to, and reliance upon, the first instance judgment of Green J. in *Hibbitt* was appropriate. As Green J. said (in paragraph 27 of his judgment):

> "27. … In my view whilst I accept that a development following a demolition is a rebuild, I do not accept that this is where the divide lies. In my view it is a matter of legitimate planning judgment as to where the line is drawn. The test is one of substance, and not form based upon a supposed but ultimately artificial clear bright line drawn at the point of demolition. And nor is it inherent

> in " *agricultural building* ". There will be numerous instances where the starting point (the " *agricultural building* ") might be so skeletal and minimalist that the works needed to alter the use to a dwelling would be of such magnitude that in practical reality what is being undertaken is a rebuild. …".

38 Put simply, the principle here is unsurprising: that a building constructed partly of new materials and partly of usable elements of previous structures on the site, after other elements of those previous structures have been removed through demolition, may in fact be a "new" building; or it may not. The facts and circumstances of every case will be different. But, in principle, the retention of some of the fabric of an original building or buildings within the building that has been, or is being erected, does not preclude a finding by the decision-maker, as a matter of fact and degree, that the resulting building is, physically, a "new" building, and that the original building has ceased to exist. This, in effect, is what the inspector found here. In doing so she made no error of law. She was not compelled to find that because some elements of the original buildings had survived in the construction of the buildings now on the site, the buildings were not and could not be, as a matter of fact, "new buildings". That suggestion is untenable.

39 On the ground (b) appeal the inspector's crucial finding is in paragraph 28 of the decision letter. She acknowledged there that "elements of the original buildings remain". She found, however, "taking all the above matters into account together with the judgement in *Hibbitt* " that "Buildings A, B and C are new buildings as a matter of fact as alleged on the notice". This led to her conclusions in paragraphs 29 and 30: that the breach of planning control was correctly stated in the enforcement notice (paragraph 29), and that the ground (b) appeal must fail (paragraph 30).

40 As one would expect, the inspector's findings and conclusions on the ground (c), ground (a) and ground (f) appeals were consistent with her findings and conclusions on ground (b). She considered the appeal on each of these three grounds separately, reaching the relevant findings and conclusions for the determination of each. The outcome of each is based on the same, and ultimately decisive, finding of fact: that the buildings now on the site, against which the council had enforced, were indeed, and only, "new buildings", not original buildings encased by new buildings, but simply "new buildings", for which planning permission had not been granted.

41 As on the ground (b) appeal, the inspector's conclusions on all three of these grounds are, in my view, impeccable.

42 On the ground (c) appeal, in paragraph 33, she confirmed and relied upon her finding on the ground (b) appeal that "the operational development that has taken place amounted to the erection of three new buildings". In the light of that finding, she reached three conclusions, all of which are legally faultless: first, in paragraph 33, that in the circumstances the three "new buildings" on the site could not benefit from any "consent" for change of use because such "consent" had applied only to "buildings which had existed before the operational development took place but which no longer exist", with the result that the "prior approval is therefore not capable of implementation"; second, in paragraph 34, that the residential use had taken place in

the "new buildings" and there was "no actual change of use of the buildings that had been the subject of the prior approval"; and third, in paragraph 35, that the erection of the three "new buildings" for residential use was development that "requires planning permission and none has been granted". In summary, the "new buildings" were not lawful development; they had been constructed unlawfully, in breach of planning control.

43 The inspector's corresponding conclusions on the ground (a) appeal, in paragraph 45, were consistent with those previous conclusions. She rejected the contention on behalf of Mr Oates that the "erection of the exo-skeleton was purely an enhancement to the buildings' external appearance …". She referred again to the finding she had made for the purposes of the appeals on grounds (b) and (c) that the buildings "as they now exist are new buildings". She concluded therefore that what Mr Oates was now seeking was "permission for the erection of three new buildings and their use for residential purposes". She reiterated her finding on the ground (c) appeal, in paragraph 33, that "these three new buildings cannot benefit from any consent for a change of use because that consent applies to buildings which had existed before the operational development took place but which no longer exist". All of this, it seems to me, is beyond criticism in proceedings such as these.

44 The same findings and conclusions also informed the inspector's consideration of the ground (f) appeal. In paragraph 85 she confronted the argument put forward on the basis of "the *Mansi* principle". She stated the principle accurately. But she concluded, in effect, that there could be no application of it in a case such as this, where the three buildings were "new buildings" and had "no pre-existing lawful use rights". This conclusion matched her relevant findings of fact on the previous grounds, and it was correct in law. She also found, in paragraph 86, that, despite the "alternative solution" put forward on behalf of Mr Oates in the "schedule of works", which she considered insufficiently precise, there were no "obvious solutions which would remedy the breach and overcome the harm identified" – a conclusion that is not said to be irrational. In the circumstances she could only conclude that the requirement in the enforcement notice to remove the three buildings was not excessive. These, again, were issues of fact and judgment for the inspector. They are not matters for the court.

45 In summary, in my view, the inspector correctly applied the relevant provisions of the statutory scheme to her determination of each ground of appeal against the enforcement notice, and her conclusions were entirely consistent with relevant authority, including *Mansi* .

46 On that analysis, the appeals cannot succeed on the first two grounds, or on the fifth. Mr Straker's attack on the inspector's approach and conclusions fails in its main thrust. It does not, and cannot, dislodge her finding, contrary to the evidence and argument presented to her on behalf of Mr Oates, that the buildings against which the council had enforced were, in fact, "new buildings", in whose structure the remaining fabric of the original buildings had been fully integrated, so that they no longer existed as buildings, even in part. Having made that finding on the ground (b) appeal, and having reached the conclusion she did on that ground, she was entitled to find and conclude as she did on the others.

47 As the judge held, it is also wrong to suggest that the inspector was at fault in failing

to consider the definition of "building" in section 336 of the 1990 Act, which includes a "part" of a building. The situation here is quite different from that considered by the court in *Wyre Forest District Council v Secretary of State for the Environment [1990] 2 A.C. 357* , on which Mr Straker relied. In that case the validity of the enforcement notice depended on whether there was a "caravan" or not, within the relevant statutory definition. This was a question with only one possible answer, applying the statutory definition. In this case, by contrast, there is no dispute that there were "buildings" on the site, within the definition in section 336 . The inspector was not considering whether there was or was not "part" of a building on the site, such as to be, in itself, a "building" within the statutory definition, but rather whether, as a matter of fact, the buildings that had now been erected on the site were or were not "new buildings" – even though parts of the original buildings left in place after the works of demolition had been incorporated into those now constructed. She dealt with the right question, not the wrong one. Her finding that there were now, in fact, three "new buildings" on the site is not upset by the submission that parts of those "new buildings" were not, in themselves, new fabric but old. And, as Mr Glenister submitted, for a structure or piece of structure to be "part of a building" there must in the first place be a building of which it can be a part. If the buildings now on the site were, as the inspector found, "new buildings", it follows that the remaining fabric of the original buildings was no longer part of those original buildings, but was now part of the "new buildings" themselves.

48 Having found that the buildings were "new buildings", constructed without planning permission, the inspector was not compelled to conclude that the remedy for the breach of planning control was anything less than complete demolition. Indeed, in the circumstances it is hard to see how any other conclusion could have been justified.

49 Mr Straker was, of course, right to submit that the enforcement of planning control should not be used to deprive landowners of lawful rights. That, however, is not what happened in this case. Here, as the inspector concluded, the landowner had no lawful rights in the three "new buildings" he had constructed on the site without having first sought and obtained the necessary planning permission for them. Such lawful use rights as had attached to the original buildings were lost when those buildings ceased to exist as buildings and "new buildings" had replaced them. That is the effect of the inspector's relevant findings and conclusions. So the requirement in the enforcement notice to demolish the buildings entirely did not deprive Mr Oates of any established lawful rights. No such rights subsisted. There was, therefore, no breach of the " *Mansi* principle". On the facts as found by the inspector, that principle was simply not engaged.

50 Whatever force there might be in Mr Straker's argument that the *Mansi* doctrine could, in principle, be extended to apply not only to lawful use rights but also to operational development, I cannot see how, at least in a case such as this, it could offer any greater protection against "over-enforcement" than is already inherent in the express provisions of the statutory scheme. But that point can remain moot in these appeals, because on the inspector's findings of fact it does not arise. The operational development here, as found by the inspector, was the construction of three "new buildings", which had not been lawfully erected and which had no lawful use rights of their own. The buildings to which lawful use rights had attached were no longer in existence. There was nothing, either by way of lawful use or by way of lawful

operational development, for the " *Mansi* principle" to bite upon.

51 For essentially the same reasons, the argument in the third ground of appeal must also be rejected. As Mr Glenister submitted, a lawful use right attaching to a building can only be exercised while that building survives so as to be physically capable of being used for the relevant purpose. In this instance, on the inspector's findings of fact, that was not so. The identifiable remains of the original buildings no longer had any independent existence as buildings capable of being lawfully used as such. They had been metamorphosed into "new buildings". The "pre-existing lawful use rights", as the inspector described them in paragraph 85 of the decision letter, did not subsist after the buildings to which they had attached were replaced by "new buildings" with no lawful use of their own. As the inspector effectively concluded, on the facts of this case, section 57(4) did not produce that result.

52 The fourth ground of appeal is also unsustainable. There is nothing in the decision letter to indicate that the inspector left out of account any relevant matter of fact, or that she reached her conclusions on any of the statutory grounds of appeal on the basis of her anticipation of further works of construction on the site, and not merely the works already carried out. If she did not refer to every piece of evidence, or give to any of the evidence as much weight as she was invited to do by counsel for Mr Oates at the inquiry, that does not amount to an error of law. She referred to the salient parts of the evidence as to what had been done on the site. She did not base her findings and conclusions on work not yet undertaken. Her reference to the drawings of the proposed development, which had been presented to her in evidence on behalf of Mr Oates, did not pre-empt her consideration of the development already in place. This is plain from paragraph 27 of the decision letter.

53 Lastly, I should acknowledge a point made on behalf of the Secretary of State in his respondent's notice – that in an appeal under section 289 the court should refuse to entertain arguments not put to the inspector in the appeal under section 174 (see, for example, the judgment of Mr George Bartlett Q.C., sitting as a deputy judge of the High Court, in *South Oxfordshire District Council v Secretary of State for the Environment, Transport and the Regions [2000] P.L.C.R. 315* , at p.329). In many cases, however, it will not be easy to disentangle from each other arguments with a common thread. The arguments put to us here do have a common thread, which is the complaint of "over-enforcement". I have therefore dealt with them all, without attempting to distinguish those that were firmly before the inspector from those that were not.

Conclusion

54 For the reasons I have given, I would dismiss these appeals.

Lord Justice McCombe

55 I agree.

Lord Kitchin

56 I also agree.