David Sidney Murrell, Christine Ruth Murrell v Secretary of State for Communities and Local Government, Broadland District Council

Case No: C1/2010/0934

Court of Appeal (Civil Division)

3 December 2010

[2010] EWCA Civ 1367

2010 WL 4863690

Before: Lord Justice Rix Lady Justice Smith and Lord Justice Richards

Date: 03/12/2010

On Appeal from the High Court of Justice Administrative Court

Mr Justice Beatson

[2010] EWHC 1045 (Admin)

Hearing date: 18 November 2010

Representation

Mr Niall Blackie (solicitor-advocate of FBC Manby Bowdler LLP) for the Appellants.

Mr Daniel Kolinsky (instructed by The Treasury Solicitor) for the Secretary of State.

The Second Respondent did not appear on the appeal or in the court below.

Judgment

Lord Justice Richards:

1 The appellants run a farm at South Walsham in Norfolk. They proposed to erect a cattle shelter on the farm, which constituted development requiring planning permission. The development was permitted by Class A of Part 6 of Schedule 2 to the Town and Country Planning (General Permitted Development) Order 1995 (“the GPDO”), subject, so far as material, to the conditions set out in paragraph A2(2) of Part 6 . Those conditions require the developer to apply to the local planning authority for a determination as to whether the prior approval of the authority is required to the siting, design and external appearance of the building. The appellants applied to the local planning authority, Broadland District Council (“the council”), for such a determination. The council determined that prior approval was needed and in the same decision it refused approval. A planning inspector appointed by the Secretary of State dismissed an appeal. A challenge under s.288 of the Town and Country Planning Act 1990 (“the 1990 Act”) to the inspector's decision was dismissed by Beatson J. An appeal against his order is now brought to this court.

2 The first issue on the appeal is procedural, namely whether the council's determination was made more than 28 days from the date of receipt of a valid application (the period specified in paragraph A2(2)), with the consequence that permission for the development accrued on the expiry of the 28 day period and the subsequent refusal of prior approval was of no legal effect. Permission to appeal on that ground was granted by Beatson J.

3 The second issue concerns the correct approach when determining whether prior approval should be given. It involves consideration of the permitted development right under the GPDO and of the guidance in Annex E , *Permitted Development Rights for Agriculture and Forestry* , to

Planning Policy Guidance 7 (“PPG7”). The appellants' contention is that the inspector failed to take into account Annex E or misinterpreted it, and that she erred by approaching the case as if it were an ordinary application for planning permission as opposed to an application for prior approval in which the principle of development was not in issue. Permission to appeal on the grounds relevant to that issue was granted by Sullivan LJ, on the basis that they raise an important point of principle as to the ambit of the GPDO permission for agricultural buildings.

The legislative framework

4 The general rule laid down by s.57(1) of the Town and Country Planning Act 1990 (“the 1990 Act”) is that planning permission is required for the carrying out of any development of land. By s.58(1)(a) , planning permission may be granted by a development order made by the Secretary of State pursuant to s.59 . By s.60(1) and (2) , planning permission granted by a development order may be granted either unconditionally or subject to such conditions or limitations as may be specified in the order, including conditions as to prior approval.

5 The GPDO is the principal development order made pursuant to those powers. It provides in article 3 :

> (1) Subject to the provisions of this Order …, planning permission is hereby granted for the classes of development described as permitted development in Schedule 2 .
>
> (2) Any permission so granted is subject to any relevant exception, limitation or condition specified in Schedule 2 .”

6 Part 6 of Schedule 2 relates to agricultural buildings and operations. The relevant class of development within Part 6 is Class A which reads, so far as material:

> **“Permitted development**
>
> The carrying out on agricultural land comprised in an agricultural unit of 5 hectares or more in area of –
>
> (a) works for the erection … of a building; …
>
> which are reasonably necessary for the purposes of agriculture within that unit.”

7 Such permission is subject to the exceptions in paragraph A1 (e.g. that development is not permitted by Class A if the ground area which would be covered by the building would exceed 465 square metres) and to conditions contained in paragraph A2. The relevant conditions are these:

> (2) Subject to paragraph (3), development consisting of –
>
> (a) the erection … of a building; …
>
> is permitted by Class A subject to the following conditions –
>
> (i) the developer shall, before beginning the development, apply to the local planning authority for a determination as to whether the prior approval of the authority will be required to the siting, design and external appearance of the building …;
>
> (ii) the application shall be accompanied by a written description of the proposed development and of the materials to be used and a plan indicating the site together with any fee required to be paid;

(iii) the development shall not be begun before the occurrence of one of the following –

(aa) the receipt by the applicant from the local planning authority of a written notice of their determination that such prior approval is not required;

(bb) where the local planning authority give the applicant notice within 28 days following the date of receiving his application of their determination that such prior approval is required, the giving of such approval;

(cc) the expiry of 28 days following the date on which the application was received by the local planning authority without the local planning authority making any determination as to whether such approval is required or notifying the applicant of their determination.

(aa) where the local planning authority give the applicant notice that such prior approval is required the applicant shall display a site notice by site display on or near the land on which the proposed development is to be carried out, leaving the notice in position for not less than 21 days in the period of 28 days from the date on which the local planning authority gave the notice to the applicant …"

8 Save for the matters set out in para A2(2)(i) and (ii), there are no specific requirements as to the form of an application. At the material time the GPDO provided by Article 4E for applications for *planning permission* to be made in a standard form published by the Secretary of State, but those provisions did not apply to applications for a determination as to whether *prior approval* is required: see, now, article 6 of the Town and Country Planning (Development Management Procedure) (England) Order 2010 which is to similar effect. The Secretary of State has in fact published a model form for use in the making of applications for a determination as to whether prior approval is required, but use of the form is not mandatory: that is apparent from the terms of the GPDO itself and is spelled out in para 10 of Circular 02/2008 issued by the Department for Communities and Local Government. The fee payable for an application is prescribed by separate regulations.

Annex E to PPG7

9 National planning policy guidance concerning the prior approvals process in respect of Class A permitted development is to be found in Annex E to PPG7 , which is very helpful for the light it casts on the operation of the prior approvals process and to which a decision-maker should have regard as a material consideration when considering whether prior approval is required and whether it should be given. The following passages, under the main heading "The determination procedure", are of particular relevance to this case:

"Introduction

E12. In certain cases, the permitted development rights for development on agricultural units of 5 hectares or more and forestry cannot be exercised unless the farmer or other developer has applied to the local planning authority for a determination as to whether their prior approval will be required for certain details … The local planning authority have 28 days for initial consideration of the proposed development. Within this period they may decide whether or not it is necessary for them to give their prior approval to these details of development involving new agricultural and forestry buildings …

E14. The determination procedure provides local planning authorities with a means of regulating, where necessary, important aspects of agricultural and forestry development for which full planning permission is not required by virtue of the General Permitted Development Order . They should also use it to verify that the intended development does benefit from permitted development rights, and does not require a planning application … There is no scope to extend the 28 day determination procedure, nor

should the discretionary second stage concerning the approval of certain details be triggered for irrelevant reasons. A local planning authority will therefore need to take a view during the initial stage as to whether Part 6 rights apply.

E15. Provided all the General Permitted Development Order requirements are met, the principle of whether the development should be permitted is not for consideration, and only in cases where the local planning authority considers that a specific proposal is likely to have a significant impact on its surroundings would the Secretary of State consider it necessary for the authority to require the formal submission of details for approval. By no means all the development proposals notified under the Order will have such an impact.

E16. In operating these controls as they relate to genuine permitted development, local authorities should always have full regard to the operational needs of the agricultural and forestry industries; to the need to avoid imposing any unnecessary or excessively costly requirements; and to the normal considerations of reasonableness. However, they will also need to consider the effect of the development on the landscape in terms of visual amenity and the desirability of preserving ancient monuments and their settings, and sites of recognised nature conservation value. They should weigh these two sets of considerations. Long term conservation objectives will often be served best by ensuring that economic activity, including farming and forestry which are prominent in the rural landscape, is able to function successfully.

Handling

E17. The 28 day determination period runs from the date of receipt of the written description of the proposed development by the local planning authority. If the local planning authority give notice that prior approval is required they will then have the normal 8 week period from the receipt of the submitted details to issue their decision, or such longer period as may be agreed in writing (see Article 21 of the Town and Country Planning (General Development Procedure) Order 1995) …

E18. The Secretary of State attaches great importance to the prompt and efficient handling of applications for determination and of any subsequent submissions of details for approval under the provisions of the General Permitted Development Order . Undue delays can have serious consequences for agricultural and forestry businesses, which are more dependent than most on seasonal and market considerations. The procedures adopted by authorities should be straightforward, simple, and easily understood …

E19. Authorities should prepare forms which developers can use to apply for determination, along the lines of the example in the Appendix. This will help to minimise the number of cases in which submission of details may be necessary. Authorities should acknowledge the receipt of the written description, giving the date of receipt. Where the authority do not propose to require the submission of details, it would be helpful and courteous to inform the developer as soon as possible, to avoid any unnecessary delay or uncertainty.

E20. There will often be scope for informal negotiations with the developer, as an alternative or preliminary to requiring a formal submission of details. Developers for their part may find it useful to provide more than the minimum information required by the Order when informing authorities of their proposals, if this is readily available. For example, a sketch showing the proposed elevation of a building may clarify the effect of the proposal …

Scope of controls

E22. The arrangements do not impose full planning controls over the developments to which they apply — those developments remain ‘permitted development’ under the General Permitted Development Order . The principle of development will not be relevant providing the Order conditions are satisfied, nor will other planning issues. When details are submitted for approval under the terms of the Order, the objective

should be to consider the effect of the development upon the landscape in terms of visual amenity, as well as the desirability of preserving ancient monuments and their settings, known archaeological sites, listed buildings and their settings, and sites of recognised nature conservation value … Details should be regarded in much the same light as applications for approval of reserved matters following the grant of outline planning permission …

Siting, design and appearance

E24. Local planning authorities may concern themselves with:

- the siting, design and external appearance of a proposed new agricultural or forestry building and its relationship to its surroundings …

Siting

E27. The siting of a new agricultural or forestry building … can have a considerable impact on the site and the surrounding landscape. Developments should be assimilated into the landscape without compromising the functions they are intended to serve. New buildings should normally form part of a group rather than stand in isolation, and relate to existing buildings in size and colour …

Design and appearance

E31. The choice of design and materials, and the relationships of texture and colour to existing development, local traditions, and the landscape, can be important considerations for both agricultural and forestry buildings and roads. For example, a single large building may have a greater impact on the countryside than one or more smaller buildings, which can be more easily incorporated into an existing group and provide greater flexibility, although the function of the building will be material to shaping its form …

The facts

10 By an application dated 28 November 2008, the appellants applied to the council for a determination as to whether prior approval would be required in respect of the erection of the cattle shelter. The application was on one of the council's standard forms, though by this date the particular form used had been superseded by a new form based on the model form issued by the Secretary of State (see para 8 above). All relevant details on the form were completed, including a description of the proposed development, its dimensions and the materials to be used. The required fee of £70 was enclosed. A location plan was also enclosed: that was a matter of debate before Beatson J but is now common ground, as a result of further evidence filed since the hearing before the judge.

11 The application form was date-stamped as received by the council on 1 December 2008. Receipt of the fee was noted in manuscript on the top of the form. On the same day the council wrote to the appellants, stating:

“Invalid Application

Your application has been received and upon inspection it does not comply with the statutory requirements and as such is invalid for the following reasons:

- 4 copies of proposed elevations are required to a scale of 1:50 or 1:100.

> • 4 copies of a block plan to a scale of 1:500 are required showing the size and position of the proposed development.
>
> • The Government has introduced new standard planning application forms, which are now the only forms that we can accept. Please complete and return the 4 enclosed application forms.
>
> • Please supply a further 3 copies of the location plan.
>
> The statutory period for determination of your application cannot commence until these requirements have been fulfilled and a formal letter of acknowledgement giving details of the statutory period for the determination of the application will then be sent to you. Please reply to this letter within 14 days from the date specified at the top of the page to inform us if you wish to withdraw the application or proceed."

The letter did nevertheless assign an application number (20081652) to the application.

12 Whether the council was in error in treating the application as invalid and, if so, what are the consequences of that error are the subject of the first issue on the appeal.

13 The appellants' reaction to the council's letter was to complete the new form and to send it to the council, together with the requested elevations and plans and the requested number of copies. The new form was dated 4 December 2008 and was date-stamped as received by the council on 9 December. The form was endorsed on receipt by the council with the application number given in the letter of 1 December. It was also endorsed with a manuscript note referring to the payment of the fee of £70 on 1 December.

14 By letter dated 9 December 2008, the council acknowledged receipt of the new form. The letter gave the application number assigned on 1 December and stated:

> "The application was validated on 09/12/2008, with fees of £70.00. Every effort will be made to reach a decision within the statutory 28 day period which expires on 05 January 2009".

By paragraph A2(2)(cc) of Part 6 , the statutory period ends on "the expiry of 28 days following the date on which the application was received". If a valid application was made on 1 December 2008, the period expired on 29 December.

15 The next the appellants heard about the matter was when they received a written determination dated 31 December 2008, by which the council decided that prior approval was required and that such approval was refused, on the ground that the proposed development did not comply with a number of planning policies referred to in the determination. One of the points noted in the course of the determination was that no detailed landscaping scheme had been provided.

The appeal to the inspector

16 The appellants appealed against the council's decision on grounds to the effect that (1) the council had not made a determination as to the need for prior approval within the statutory 28 day period and permission for the development was therefore granted within the terms of the GPDO ; (2) the appellants had been given no opportunity to submit further details, in particular about landscaping, because the council had combined the decision that prior approval was needed with the decision refusing it; and (3) the proposed development was consistent with the relevant policies and approval should be granted.

17 The inspector who decided the appeal was Ms Janet L Cheesley. On the procedural matters, she held that the correct procedure had been followed and that the council's refusal notice of 31 December 2008 was valid. She accepted that use of the new standard form was not required for prior approval applications but considered that "the Council needed sufficient details to judge the design, siting and appearance of the proposed building" and had acted reasonably in requesting the additional information referred to in the letter of 1 December. She was not persuaded that it was impermissible for the council to combine in one decision its determination that prior approval

was required and its refusal of approval. She observed that there had been nothing to prevent landscaping details being submitted at any time before the council made its decision.

18 Turning to the substantive appeal, the inspector considered the main issue to be "the effect of the proposal on the character and appearance of the surrounding countryside". Under the heading "Planning Policy", she first quoted key principle 1(iv) (mistakenly described by her as key principle 1(vi)) in Planning Policy Statement 7: *Sustainable Development in Rural Areas* ("PPS7"):

> "New building development in the open countryside away from existing settlements, or outside areas allocated for development in development plans, should be strictly controlled; the Government's overall aim is to protect the countryside for the sake of its intrinsic character and beauty, the diversity of its landscapes, heritage and wildlife, the wealth of its natural resources and so it may be enjoyed by all."

19 She then referred to the development plan, which included the Broadland District Local Plan (Replacement) 2006, and she stated that the most relevant policies in the local plan were "Policy GS1, restricting development outside settlement limits; GS3 with regard to protecting the character and appearance of the surrounding area; ENV1 protecting the character and appearance of the countryside; ENV2 seeking a high standard of layout and design respecting the wider setting; and ENV8, protecting the inherent visual qualities and distinctive character of Areas of Landscape Value". She also referred to policy EMP8, which "permits agricultural development if it meets a list of criteria including that a building is designed to help maintain and improve the appearance of the locality, it integrates with existing features and respects the character of the area".

20 The inspector then gave these reasons for dismissing the substantive appeal:

> "10. The appeal site lies within open countryside characterised by large open fields with small woodland areas. … [T]he essential characteristic and appearance of the area is one of an open rural working landscape within which are farm complexes.
>
> 11. The appeal site is situated on open rising land. The proposal includes a cattle shed within a new woodland landscape setting. Whilst being designed as an agricultural building, due to its size and prominent position, I consider that it would appear as an unduly prominent form of development, which would have an unacceptably adverse visual impact on this part of the Area of Landscape Value. Therefore, I conclude that the proposal would have an adverse effect on the open character and appearance of the surrounding countryside. This would not be in accordance with the objectives of PPS7 and Local Plan Policies GS1, GS3, ENV1, ENV2, ENV8 and EMP8.
>
> 12. Whilst the landscaping details were not submitted with the application, I have been provided with details, which I consider appropriate to take into consideration in my determination of this appeal. These details include new woodland and hedgerow planning. Due to the scale and position of the proposed building, it would be many years before an appropriate substantially significant screen could be established. I consider it unacceptable, due to the adverse visual impact of the proposed building, to allow such development in such an open location, which would be open to public views for a considerable time.
>
> 13. I note the presence of large modern farm buildings in the surrounding area, but these are characteristically generally within established farm complexes, rather than isolated buildings.
>
> …
>
> 15. In reaching my conclusion, I have had regard to all other matters raised upon which I have not specifically commented including the need to relocate an existing family beef cattle business. Whilst I recognise the operational needs of the agricultural business, it is necessary to weigh this consideration against the harm I have identified with regard to impact on the character and appearance of the area. In the light of the significant harm I have identified above, I do not consider this matter justifies allowing the appeal."

The case before Beatson J

21 The appellants challenged the inspector's decision by an application under s.288 of the 1990 Act. There was a related judicial review claim in respect of the inspector's decision on costs, but that fell away in the light of the judge's decision on the s.288 application and is not pursued before this court.

22 The main issues before Beatson J on the s.288 challenge were the same as those before this court, relating first to whether the council's determination was made outside the 28 day period and secondly to whether the inspector erred in her approach when assessing whether approval should be given. The appellants did not pursue the separate procedural point that the council had been wrong to combine in a single decision its determination that prior approval was needed and its decision refusing it. Their reason for not pursuing the point was that the prejudice they had suffered by being denied the opportunity to submit landscaping details was cured by the appeal process in which the inspector received and took into account those details.

23 On the issue relating to the 28 day period, Beatson J described the appellants' position as technical and observed that it was striking that no complaint or challenge was made by the appellants at the time. Having made a number of observations about the facts, he referred to the submission by counsel for the Secretary of State that the inspector approached the matter in a practical way, that both parties proceeded on the basis of a common understanding as to the council's time for determining the application, and that there was no challenge to that common assumption until after the decision. He continued:

> "34. The Inspector took what I accept is a practical approach. There was certainly no prejudice to the claimants of the sort that the 28-day rule is designed to prevent in this case, because the council acted with speed. The letter indicated that on the material it had, it was not able to state whether prior approval was required. In this context, given the speed at which this letter was sent, and given the common assumption of both parties, the implication must be that the Council had effectively, although not in very straightforward language, stated that they would require prior approval because it did not have enough information to assess this matter.
>
> 35. Mr Blackie submitted that if one looks as the regulations, all the Claimants had to do was to provide a written description of the development materials and a plan indicating the site: that is seen from A2(2)(i). The materials submitted must have been ones which enabled the Council to operate the statutory procedure. I conclude that it was entitled to ask for what it asked for, that had the effect of stopping the clock, and therefore the procedural challenge is not made out."

24 On the substantive issue, Beatson J rejected various submissions on behalf of the appellants as to the nature of permitted development rights. He referred to the guidance in Annex E to PPG7 , and to the absence of reference to that guidance in the inspector's decision. He said that it was unfortunate that the inspector made no explicit reference to Annex E but the inspector weighed the effect of the development on the landscape in terms of visual amenity and her reference to the planning policies reflected the cases put to her by the parties. He had regard to South Somerset District Council v Secretary of State for the Environment [1993] I PLR 80 , 83. He concluded:

> "In this case I accept Mr Kolinsky's submission that the Inspector addressed the right questions. Her failure to refer to Annex E must be seen in the light of the fact that she addressed the criteria set out in it and balanced them. Her reference to the other policies must be seen in the light of the emphasis placed on those policies and their relevance in the submissions of both parties …"

25 The judge went on to reject an argument as to inadequacy of reasons, which is not pursued in that form before us.

The procedural issue

26 The appellants' case on the procedural issue is straightforward. Mr Blackie submits that the application received by the council on 1 December 2008 met the requirements in paragraph A2(2)(ii) and was a valid application; the council was not entitled to require the completion of the new standard form or the submission of further material before treating the application as valid; the 28 day period specified in paragraph A2(2)(iii)(cc) therefore expired on 29 December; and the permission granted by the GPDO accrued or crystallised on the expiry of that period without a determination having been made or notified.

27 For the Secretary of State, Mr Kolinsky stressed, by reference to para E15 of Annex E , that the purpose of the prior approval procedure is to fast-track simple applications but to enable local planning authorities to regulate more controversial applications where necessary. He accepted that in this case the council made errors, both in its assessment that the original application was invalid and in proceeding to make a composite decision dealing at the same time with the need for prior approval and the refusal of approval, but he submitted that those errors were not material in the circumstances and that it would be contrary to the public interest to allow the appellants' overly technical approach to prevail. In the absence of any challenge at the time to the council's decision of 1 December that the original application did not comply with the statutory requirements, or to the timetable set out in the council's letter of 9 December, the practical reality was that everyone proceeded on the basis of that timetable and it was not open to the appellants to turn round thereafter and dispute it. The letter of 9 December gave rise to a common understanding between the parties. Another way in which he put the argument was that, if the original application received on 1 December was valid, it was withdrawn or superseded by the later application. He also relied, in the alternative, on the judge's reasoning at para 34 of his judgment that by its letters the council had effectively stated that prior approval was needed.

28 In my judgment, the appellants' case on this issue is well founded. The original application received on 1 December complied with the statutory requirements and was a valid application. The statutory 28-day period for consideration of the need for prior approval ran from that date. The mistakes made by the council in the handling of the application, and the fact that the appellants submitted a new form and further plans in accordance with the council's request, did not stop the clock running or otherwise affect the position. On the expiry of the statutory period, on 28 December, permission for the development accrued under the GPDO. The council's determination of 31 December came too late to have any legal effect.

29 The prior approval procedure for Class A permitted development, as set out in paragraph A2(2) itself and explained in Annex E to PPG7 , is attended by the minimum of formalities and should be simple to operate. The application for determination as to whether prior approval is required does not need to be in any particular form and does not need to be accompanied by anything more than a written description of the proposed development and of the materials to be used and a plan indicating the site, together with the required fee (see paragraph A2(2)(i) and (ii)). In practice it will be advisable to use an up-to-date standard form and to provide the information referred to in the standard form, because that will facilitate the council's consideration of whether prior approval is needed and, if so, whether it should be given, and will minimise the need for the provision of further information at a later stage. It is not, however, mandatory to use the standard form or to provide any information beyond that specified in paragraph A2(2)(ii).

30 When an application is submitted, it engages a two-stage process, the nature of which is set out clearly in Annex E (see, in particular, paragraphs E12-E20). The first stage involves consideration of whether prior approval is required. If the council determines that it is not required, it should notify the applicant accordingly. If it determines that prior approval is required and notifies the applicant of the decision, it moves into the second stage, in which it has 8 weeks or such longer period as may be agreed in writing to decide whether to give approval (see article 21 of the Town and Country Planning (General Development Procedure) Order 1995 , which applied to applications for approval other than those under Part 24 of Schedule 2 to the GPDO ; now replaced by article 30 of the Town and Country Planning (Development Management Procedure) (England) Order 2010). The existence of a discrete second stage is underlined by the requirement in paragraph A2(2)(iv) as to the display of a site notice where the local planning authority has given notice that prior approval is required.

31 The council can request further details at any time, though Annex E appears to contemplate that they will generally be called for only at the second stage, after it has been determined that prior approval is required.

32 Paragraph E18 of Annex E emphasises the importance attached by the Secretary of State to the prompt and efficient handling of applications at both stages and states that the procedures adopted by authorities should be straightforward, simple and easily understood.

33 It is plain to me that the appellants' original application received on 1 December complied with the requirements of the GPDO and was a valid application. Each of the points made in the council's letter of 1 December was a bad one. The GPDO does not require an application to be accompanied by proposed elevations or a block plan. It does require a location plan, but such a plan was provided with the application. It does not require multiple copies of any documents. Since use of the new standard application form is not mandatory, the council was mistaken in stating that these were the only forms they could accept and in requesting the appellants to complete and return, in quadruplicate, the new standard form. Accordingly, the council's assertion that the application was invalid was wrong in law.

34 Since the application was valid, the 28 day period referred to in paragraph A2(2)(iii)(cc) began to run on 1 December, despite the council's assertion to the contrary. Mr Kolinsky sought to rely on the absence of any challenge at the time to the council's “decision” that the application was invalid. The GPDO , however, does not make the running of time dependent on a decision by the local planning authority to accept an application as valid. Whether there was a valid application or not is an objective question of law. Mr Kolinsky referred us to *R v Caradon District Council, ex parte Lovejoy (1999) 78 P&CR 243* , at 244–5, where Jowitt J stated that a local planning authority has first to consider whether it has an application which complies with the procedural requirements and that “[i]f there is no compliance, then there is no application under the order”. But the converse is that if there is compliance, then there is an application; and Jowitt J said nothing to support Mr Kolinksy's argument as to the significance of the council's decision for the question when time starts to run.

35 Nor do I think that the running of time was affected by the fact that the appellants complied with the council's request to submit the new forms and further information. The submission of that material did not constitute a fresh application superseding, or amounting to an implied withdrawal of, the original application. The new form was given the same application number as that assigned on 1 December to the original application. No further fee was paid: the new form was endorsed with a reference to the fee received with the original application. Nothing was said by the appellants to suggest that they were withdrawing the original application or that the new form superseded it. They simply sent to the council the further material requested. It was the decision of the council alone to treat the receipt of that further material on 9 December as the point at which a valid application was made and time began to run.

36 For the same reasons I cannot accept Mr Kolinsky's submission as to the existence of a common understanding between the parties that time was to run from 9 December. In any event, even an express agreement between the parties could not have altered the time limit under the GPDO , which makes no provision for extension of the 28-day period by agreement. As stated in paragraph E14 of Annex E , “[t]here is no scope to extend the 28 day determination procedure”. If it cannot be extended by express agreement, I do not see how it can be extended – or how time can be somehow be stopped from running – by a common understanding of the kind contended for.

37 The substance of the arguments advanced by Mr Kolinsky came close at times to a case of estoppel – that since the appellants raised no challenge at the time to the council's decision of 1 December that the original application was invalid or to the timetable contained in the letter of 9 December, and since they did not even enter any reservation or warning that they regarded the original application as valid, it was not open to them subsequently to assert that time started to run from 1 December. But estoppel cannot operate in the circumstances of this case to deny the appellants the benefit of the statutory time limit, and Mr Kolinsky expressly disavowed any reliance on it.

38 With great respect to Beatson J, I cannot accept the reasoning upon which he decided the case in favour of the Secretary of State. No doubt the inspector took a practical approach, as the judge said at paragraph 34 of his judgment, but practicality cannot displace the legal effect of the

GPDO . So too, although it is no doubt true that the delay of a few days did not of itself cause the appellants prejudice, the start-point and end-point of the 28 day period are fixed by the terms of the GPDO and the question of prejudice is of no legal relevance. Further, it cannot be right, as suggested by the judge, that the letter of 1 December was effectively stating that prior approval was required, so as to take the case into the second stage. That is not what the letter states, nor can it be implied: since the letter asserted in terms that there had been no valid application, it cannot have been purporting at the same to make a determination, pursuant to the application, that prior approval was required. No determination as to the need for prior approval was made until the decision of 31 December.

39 In paragraph 35 of his judgment, Beatson J said that the council was entitled to ask for what it asked for in the letter of 1 December and that this had the effect of stopping the clock. I have accepted that the council was entitled to ask for further information. It was not, however, entitled to refuse to treat the application as a valid application until that further information was received. The clock carried on ticking from 1 December until the expiry of the statutory period on 29 December.

40 It was common ground before us that if a determination as to the need for prior approval was not made or notified to the appellants before the expiry of the 28 day period, the permission granted by the GPDO for the proposed development accrued on the expiry of the period and could not be affected by a subsequent determination that prior approval was needed. Paragraph A2(2)(iii) states that “the development shall not be begun” before the occurrence of one of the events listed, including the expiry of the 28 day period, but it is clear that the permission accrues on the expiry of the 28 day period rather than when the development is begun.

41 That conclusion is supported by *R (Orange Personal Communications Services Ltd) v Islington LBC [2006] EWCA Civ 157, [2006] JPL 1309* . In that case, which arose under Part 24 of Schedule 2 to the GPDO , prior approval had been applied for and a notice had been issued that prior approval was not required, but at a later date the area had been designated a conservation area. There were certain factual complications but the essential issue was whether the developer had an accrued right to develop the site (in accordance with the details submitted in the application for prior approval) at least from the date of issue of the prior approval notice, so that the right to develop was unaffected by the subsequent designation of the conservation area. The court answered that issue in the affirmative. Laws LJ, with whom the other members of the court agreed, stated at para 28:

> “In a prior approval case the planning permission accrues or crystallises upon the developers' receipt of a favourable response from the planning authority to his application. I acknowledge the court, in dealing with the conundrum presented by this case, has had to deploy ideas such as accrual and crystallisation which do not appear on the face of the legislation. But the two extremes to which I referred earlier demonstrate the need for an approach to be taken to the statute – notwithstanding that it requires assistance from such sources – that produces in the end fairness and overall conformity with the scheme and the planning legislation.”

In reaching that conclusion, Laws LJ considered and rejected a contention that the benefit of the permission did not accrue or crystallise until work had been started (see paras 23 and 25 of his judgment).

42 The court in *Orange Personal Communications Services Ltd* was not considering a case where an application for prior approval has been duly made but there has been no determination or notification within the 28 day period. Application of the court's reasoning, however, leads inevitably to the conclusion that planning permission in such a case accrues or crystallises on the expiry of the 28 day period. There can be no principled basis for adopting a different approach in such a case.

43 It follows that in my view the inspector ought to have allowed the appeal before her on the basis that the appellants had an accrued permission for the proposed development and the question of prior approval did not arise.

The substantive issue

44 It is not strictly necessary for me to go on to consider the second issue, concerning the inspector's approach to the question whether, if prior approval was required, it should be given. But since permission to appeal on that issue was granted because it raised an important point of principle, and since we heard full argument on it, I think it right to make some observations on it.

45 The question of prior approval under paragraph A2(2) can only arise in respect of "permitted development" within Class A (i.e. development falling within the terms of Class A and not excluded by paragraph A1). Such development is permitted subject to the conditions in paragraph A2, including the condition relating to prior approval, but those conditions do not affect the principle of development. In recognition of the importance of agriculture and its operational needs, the GPDO has already taken a position on the issue of principle. Thus, as the guidance in Annex E spells out, if the GPDO requirements are met, "the principle of whether the development should be permitted is not for consideration" in the prior approval procedure (paragraph E15).

46 Paragraph E22 draws an analogy with outline planning permission, stating that details submitted for prior approval "should be regarded in much the same light as applications for approval of reserved matters following the grant of outline permission". The analogy is not a precise one and is not put forward as such in Annex E . One obvious difference is that in the case of an outline planning permission there exists an accrued permission, whereas in a Class A prior approval case no permission accrues until the occurrence of one of the events in paragraph A2(2)(iii). In practice there may also be differences of detail: for example, although both cases may involve the approval of siting, design and external appearance, in the case of outline planning permission there is likely to have been an assessment of the general suitability of the site at the permission stage, leaving less flexibility at the reserved matters stage. Nevertheless, the two situations call for a broadly similar approach, and the analogy with outline planning permission has a real value in underlining the point that the assessment of siting, design and external appearance has to be made in a context where the principle of the development is not itself in issue.

47 What troubles me about the inspector's decision on the substantive appeal in this case is that, far from acknowledging that the principle of development was not in issue, she appears to have based herself on policies where the principle of development was very much in issue, so that on the question of impact on visual amenity her decision reads more like the determination of an ordinary planning application than the determination of an application for prior approval of a Class A permitted development. Thus:

> i) She makes no explicit reference to Annex E , the most important policy guidance for the decision she had to make. I accept that there are indications that she had the guidance in mind: in particular, the passage in paragraph 13 of her decision about isolated buildings (cf. paragraph E27 of Annex E) and the passage in paragraph 15 about the operational needs of the agricultural business (cf. paragraph E16 of Annex E). All the same, the absence of explicit reference to Annex E is very surprising and there is insufficient in her reasons to show that she took the guidance properly into account.
>
> ii) The only policy that she actually quotes is key principle 1(iv) of PPS7, which provides for strict control of new building development in the countryside. It is not apposite in the context of a Class A permitted development, and we were told that neither party referred the inspector to that sub-paragraph. The Local Plan policies to which she refers are likewise concerned with the principle of development in rural areas, and a number of them (Policies GS1, GS3 and ENV8) provide that development will not be permitted unless specified criteria are met. It is true, as Beatson J pointed out, that her reference to those policies reflected the cases put to her by the parties, but that does not meet my concern about the use she made of them.

48 It was permissible for the inspector to take the policies into account in so far as they bore on the question of impact on visual amenity, and it is possible that she did in fact use them only for that limited purpose: she said in paragraph 11 that the adverse effect of the proposed development on the open character and appearance of the surrounding countryside would be contrary to the "objectives" of the policies. I have borne in mind what was said by Hoffmann LJ in *South Somerset District Council v Secretary of State for the Environment [1993] 1 PLR 80* as to

how a decision letter of this kind should be read. Reading the decision letter in that way and as a whole, I am far from persuaded that the inspector did adopt the correct approach.

49 The question whether the particular form of development proposed is acceptable in terms of siting, design and appearance involves a balancing exercise. Paragraph E16 of Annex E refers to the weighing of two sets of considerations: on the one hand, the operational needs of agriculture and related matters; on the other hand, the effect of the development upon the landscape in terms of visual amenity, as well as the implications for ancient monuments, archaeological sites and sites of recognised nature conservation value. That exercise involves potentially difficult planning judgments, which are the province of the local planning authority and, on appeal, the planning inspector and with which the court will not interfere otherwise than on grounds of irrationality. That makes it all the important for the court to be satisfied that the decision-maker has approached the exercise from the right perspective when attributing weight to the competing considerations. An approach premised, for example, on the need for strict controls over development in the countryside could produce a different result from an approach premised on an acceptance of the principle of development in the countryside. This adds to my concern about the inspector's decision in this case.

50 Accordingly, if the substantive decision as to prior approval had been a live issue, I would have been in favour of allowing the appeal on that issue, quashing the inspector's decision and remitting the matter for a fresh decision.

Conclusion

51 As it is, however, I would allow the appeal on the procedural issue for the reasons already given. Subject to any further submissions, it seems to me that the only relief required is to quash the inspector's decision, without remittal of the case or any further order. The judgment of this court will make clear the existence and scope of the permitted development right for the proposed development.

Lady Justice Smith:

52 I agree.

Lord Justice Rix:

53 I also agree.