Neutral Citation Number: [2016] EWHC 3108 (Admin)

Case No: CO/3055/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/12/2016

Before:

THE HON. MR JUSTICE CRANSTON

- -

Between:

EATHERLEY	**Claimant**
- and -	
LONDON BOROUGH OF CAMDEN	**Defendant**
- and -	
JAMES IRELAND	**Interested Party**

- -
- -

Mr Martin Westgate QC, Mr Gwion Lewis and **Mr Matthew Fraser** (instructed by **Hodge Jones & Allen Solicitors**) for the **Claimant**
Mr Timothy Straker QC and **Ms Sappho Dias** (instructed by **Mr Pritej Mistry**) for the **Defendant**
Mr Meyric Lewis (instructed by **Ashtons Legal**) for the **Interested Party**

Hearing date: 22 November 2016

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Approved Judgment

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

....

THE HON. MR JUSTICE CRANSTON

Mr Justice Cranston:

Introduction

1. This is a challenge to the decision of the London Borough of Camden ("the Council") to grant a lawful development certificate under section 192 of the Town and Country Planning Act 1990 ("the 1990 Act") to the interested party, Mr James Ireland. It was for a development described in it as the excavation of a single story basement under the footprint of what is a terrace house in north London. The challenge is brought by a neighbour, Mr Michael Eatherley.

2. The challenge is by means of a claim for judicial review and raises a question about the extent to which subterranean development can be carried out relying on the current regime of permitted development rights. The question is of general interest but arises particularly frequently in central London because of economic and social factors, in general terms, the increasing pressure for space. It is a matter of controversy in the planning world and there is a split between local planning authorities as to the correct answer: *Lisle-Mainwaring* v. *Royal Borough of Kensington and Chelsea* [2015] EWHC 2105 (Admin), [43]-[45], per Lang J.

Background

3. On 18 December 2015, Mr Ireland applied for a lawful development certificate for the formation of new basement accommodation. He had applied in November 2013 with a basement proposal including a front lightwell, but that application was withdrawn. An application for a lawful development certificate was made in March 2014, but that was rejected by the Council's development control (planning) committee in October 2014. An appeal against that decision was later withdrawn.

4. The December 2015 application was accompanied by a series of drawings and a design and access statement dated March 2014. The proposal was submitted under permitted development rights as set out within the Council's policy *CPG4 Basement and Lightwells* "which allows such applications that are not within Conservation Areas or subject to Article 4 Directions." The Council's director of culture and environment referred Mr Ireland's application to the planning committee.

5. The officer's report for the meeting of the planning committee recorded that the existing floor space of Mr Ireland's house was 128 square metres; the proposed floor space with the basement would be 161 square metres. The report described the site as comprising a two storey, mid-terrace, single family dwellinghouse with rooms in the roof located on the north side of the street. The site was not listed nor was it located within a conservation area. The proposal was outlined as follows:

> "The proposed works comprise the excavation of a basement beneath the footprint of the existing dwellinghouse. The proposed depth of the basement is approximately 2.85m, with the width (side to side of the house) a maximum of 4.5m and length (front to back of house) a maximum of 7.5m. A single internal staircase is proposed to link the existing ground floor with the proposed basement. To clarify, the proposed basement

> does not include any lightwells or associated works which would allow natural light to this space."

6. The officer's report moved on to review the inspectors' decisions in two other basement cases in the borough, when appeals by applicants against the Council's refusals were allowed. It also mentioned three approvals of basements by the Council – one basement, one basement extension and one wine cellar below a basement. The officer's report stated that there were 15 objections from adjoining occupiers, including a petition with 32 signatories. Among the objections were that:

    - the construction work will be very disruptive to residents
    - as the street is so narrow the impact of the dirt and noise from the excavations is going to be exaggerated
    - road access will be limited due to the builders' vehicles, diggers, skips, etc.
    - the excavating of the ground, design of the retaining walls and propping arrangements are an "engineering operation"
    - there will be a loss of parking for residents
    - there will be structural damage to adjacent houses
    - the works will create instability to the houses and street given the fragility of these mid-nineteenth century workers' cottages
    - the creation of the basement will set a precedent and ruin an attractive street.

    The ward councillor, Cllr Kelly, supported the residents.

7. The officer's report noted that what was involved was a legal determination. No account could be taken of policy or guidance within the Camden development plans or the planning merits of the scheme in terms of issues such as its impact on hydrogeology, structural stability, neighbour amenity, and transport.

8. Under the heading "Assessment", the report first noted that the Council had had a number of appeals allowed for the construction of a basement under permitted development rights. Costs had been awarded against it. The report then turned to consider in tabular form the limitations, conditions and exceptions of Class A, Part 1, Schedule 2 of the Town and Country Planning (General Permitted Development) (England) Order 2015, SI 2015 No 596 ("the GPDO"). It was satisfied that the proposal met them.

9. Under the sub-heading "Engineering", the officer's report considered whether the engineering activities associated with basement construction were within the Class A

right. Earlier it had noted that the local residents' association had claimed that the proposals involved excavation works which, as a matter of fact and degree, constituted "an engineering operation" which did not benefit from any permitted development right under section 55 of the 1990 Act. After further discussion of the two recent appeal decisions by planning inspectors, and legal advice which had been given on the issue, the report reached an overall conclusion on the engineering aspects as follows:

> "6.24 The proposals [are] for a new basement under the footprint of the house with a depth of 2.8m from ground floor to top of basement slab. The basement footprint would be c33sqm. No lightwells are proposed. The basement works will, by necessity, involve temporary engineering works associated with protecting the structural stability of the house and neighbouring building. However it is considered that these works would be entirely part of the basement works to [the house], and they do not constitute 'a separate activity of substance that is not ancillary to the activity that benefits from permitted development rights.'"

The quotation in the passage was from the inspector's decision in one of the two appeals.

10. The officer's report concluded that the proposal could be considered permitted development as it fell under Class A in the GPDO and that the committee should grant a certificate of lawfulness, subject to a section 106 legal agreement.

11. The section 106 agreement arose because Mr Ireland had offered to enter into it as a measure of goodwill to secure a construction management plan. The report had welcomed this and, on that basis, included it in the recommendation.

12. In the section 106 agreement the construction management plan is defined in terms of the construction phase of the development. It is to include details of the environmental protection, highway safety and community liaison measures proposed to mitigate potential impacts of the works; how the health effects and amenity of local residences and others are to be ameliorated and monitored; and traffic measures, including procedures for notifying residents in advance of major operations. Under the section 106 agreement, Mr Ireland agrees that, amongst other things, the Council will not approve the construction management plan unless it demonstrates to the Council's reasonable satisfaction that the construction phase of the development can be carried out safely and with minimal possible impact and disturbance to the surrounding environment and highway network.

13. Once the section 106 agreement between the Council and Mr Ireland was in place, the Council granted the certificate of lawfulness dated 5 May 2016.

14. Meanwhile, the claimant, Mr Eatherley, had obtained a *Commentary on Mr Ireland's proposal* ("the Commentary") from a chartered civil engineer employed by the consultant engineers, Arup. In an overview of the nature of the engineering involved, the Commentary stated:

> "A basement dug beneath an existing building within a terrace is one of the riskiest situations in which to construct a basement. Because the property shares its existing foundations with its neighbours and also because it provides lateral support to its neighbours, any movement of the existing house resulting from the works will directly impact on its neighbours."

The Commentary continued that construction of the proposed basement could not be considered simply as a building operation. Both the permanent and temporary works needed to be designed by a qualified civil engineer to ensure that the balance of forces in both directions was understood and controlled. There may be works involved in fitting out the basement which could be defined as building operations, it explained, but these would come later, once the permanent basement box and its permanent structural supports were in place.

15. There was then a discussion in the Commentary of the possible design of the basement and the potential ground movements and damage. Typically with basements, it said, an underpinning solution was adopted. Temporary and permanent lateral support measures had to be considered, the vertical loads on the existing foundations and bearing capacity needed assessing, and the design developed sufficiently "to result in a robust ground movement and damage assessment for the adjacent and nearby properties and any critical infrastructure…". In addition, said the Commentary, any impact on the groundwater flow and the drainage system local to the site had to be assessed as not significant.

16. There was also a section in the Commentary on the need to assess the impact of the construction on the street. The work would probably take several months to complete. Demolition material from the existing ground floor and any other internal demolition, and excavated ground from within the new basement area, would need to be removed. Excavation of the underpins and the internal basement space would lead to an in situ volume of ground of about 8m long x 5m wide x 3m deep = 120m^3 being excavated. Allowing a typical bulking factor from in situ to back of lorry of 1.4 to 1.5, this would lead to a volume of excavated material of about 180m^3. New materials and concrete would need to be brought in. The construction vehicles would need space to park on the street, at least for certain periods. There would be noise and potentially dust associated with the works. Public safety would need to be ensured.

The 1990 Act, the GPDO and case law

17. Planning permission is required for carrying out any development of land: Town and Country Planning Act 1990 ("the 1990 Act"), s.57(1). Section 55(1) of the 1990 Act defines "development" as "the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of buildings or other land". Section 55(1A) defines "building operations" as including: (a) demolition of buildings; (b) rebuilding; (c) structural alterations of or additions to buildings; and (d) other operations normally undertaken by a person carrying on business as a builder. "Engineering operations" are not defined by the 1990 Act, except that in section 336 the term is defined to include "the formation or laying out of means of access to highways".

18. Section 55(2)(a) makes clear that works begun after 5 December 1968 for the alteration of a building by providing additional space in it underground constitutes development for the purposes of the 1990 Act. So far as relevant that section provides:

> "(2) The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land
>
> (a) the carrying out for the maintenance, improvement or other alteration of any building of works which –
>
> (i) affect only the interior of the building, or
>
> (ii) do not materially affect the external appearance of the building, and are not works for making good war damage or works begun after 5th December 1968 for the alteration of a building by providing additional space in it underground."

19. Certificates of lawfulness of a proposed development are dealt with in section 192 of the 1990 Act. If the local planning authority is provided with information satisfying it that the use or operations described would be lawful if begun at the time of the application, it must issue a certificate: s.192(2). The lawfulness of any use or operations for which a certificate is in force is conclusively presumed unless there is a material change in any of the relevant matters before the use or operations are begun: s.192(4).

20. Under the 1990 Act, planning permission may be granted in various ways, including by means of a development order made by the Secretary of State pursuant to section 59. Section 60(1) provides that permission granted by a development order may be subject to conditions.

21. One such development order made under section 59(1) is the GPDO. As the *Encyclopaedia of Planning Law and Practice* explains, general development orders had their origin in the Housing, Town Planning etc Act 1919. They were designed to give the local government board power to permit the development of estates and buildings to proceed, pending the adoption of a town planning scheme: para. 3B-1001.3. The idea behind such orders in the Town and Country Planning Act 1947 was that, being revocable, they could relax or tighten restrictions in such a way as to encourage forms of development which were from time to time the most necessary or desirable. The first such order under that Act in 1948 was replaced in 1950 by an order which broadened development rights so as to remove from the need to obtain express planning permission a number of minor operations. This had occupied an amount of time and resources out of all proportion to their importance to planning: para. 3B-1001.4.

22. The Explanatory Memorandum to the current GPDO states that it

> "grants permission for a range of predominantly minor development, subject to certain limitations and conditions."

23. Article 3 of the GPDO provides for permitted development.

> "(1) Subject to the provisions of this Order and regulations 73 to 76 of the Conservation of Habitats and Species Regulations 2010 (general development orders), planning permission is hereby granted for the classes of development described as permitted development in Schedule 2.
>
> (2) Any permission granted by paragraph (1) is subject to any relevant exception, limitation or condition specified in Schedule 2."

Generally speaking, Article 3 does not permit development within the meaning of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 ("the EIA Regulations"): Article 3(10).

24. The Secretary of State or a local planning authority may make directions under Article 4 of the GPDO so that what would otherwise fall within Article 3 may not be carried out unless specific planning permission is granted.

25. On 3 October 2016 the Council confirmed a direction made under Article 4(1) of the GPDO, covering the whole of the borough. From 1 June 2017 planning permission will be required for basements. The direction covers:

> "The enlargement, improvement or other alteration of a dwellinghouse by carrying out below the dwellinghouse or its curtilage of basement or lightwell development integral to and associated with basement development, being development comprised within Class A, Part 1 of Schedule 2 to the Order and not being development comprised within any other Class."

26. Schedule 2 to the GPDO, "Permitted development rights", is divided into a number of parts. Part 1 covers "Development within the curtilage of a dwellinghouse". Class A of part 1 is entitled "enlargement, improvement or other alteration of a dwellinghouse". It provides, in part:

> "*Permitted Development*
>
> A. The enlargement, improvement or other alteration of a dwellinghouse.
>
> *Development not permitted*
>
> A.1 Development is not permitted by Class A if –
>
> (a)…
>
> (b) as a result of the works, the total area of ground covered by buildings within the cartilage of the dwellinghouse (other than the original dwellinghouse) would exceed 50% of the total area of the curtilage (excluding the ground area of the original dwellinghouse);

(c) the height of the part of the dwellinghouse enlarged, improved or altered would exceed the height of the highest part of the roof of the existing dwellinghouse;

(d) the height of the eaves of the part of the dwellinghouse enlarged, improved or altered would exceed the height of the eaves of the existing dwellinghouse;

(e) the enlarged part of the dwellinghouse would extend beyond a wall which –

(i) forms the principal elevation of the original dwellinghouse; or

(ii) fronts a highway and forms a side elevation of the original dwellinghouse;

(f) subject to paragraph (g), the enlarged part of the dwellinghouse would have a single storey and –

(i) extend beyond the rear wall of the original dwellinghouse by more than 4 metres in the case of a detached dwellinghouse, or 3 metres in the case of any other dwellinghouse, or

(ii) exceed 4 metres in height;

(g)…

(h) the enlarged part of the dwellinghouse would have more than a single storey and –

(i) extend beyond the rear wall of the original dwellinghouse by more than 3 metres, or

(ii) be within 7 metres of any boundary of the curtilage of the dwellinghouse opposite the rear wall of the dwellinghouse;

…

(i) the enlarged part of the dwellinghouse would be within 2 metres of the boundary of the curtilage of the dwellinghouse, and the height of the eaves of the enlarged part would exceed 3 metres;

(j) the enlarged part of the dwellinghouse would extend beyond a wall forming a side elevation of the original dwellinghouse, and would –

(i) exceed 4 metres in height,

(ii) have more than a single storey, or

(iii) have a width greater than half the width of the original dwellinghouse; or

(k) it would consist of or include –

(i) the construction or provision of a verandah, balcony or raised platform,

(ii) the installation, alteration or replacement of a microwave antenna,

(iii) the installation, alteration or replacement of a chimney, flue or soil and vent pipe, or

(iv) an alteration to any part of the roof of the dwellinghouse.

…

Conditions

A.3 Development is permitted by Class A subject to the following conditions

…

(c) where the enlarged part of the dwellinghouse has more than a single storey, the roof pitch of the enlarged part must, so far as practicable, be the same as the roof pitch of the original dwellinghouse."

27. Class B of Part 1 deals with additions to the roof of a dwellinghouse, Class C with other alterations to its roof, Class D with porches, Class E with a building, enclosure, or swimming pool required for a purpose incidental to the enjoyment of the dwellinghouse, Class F with hard surfaces, Class G with chimneys, and Class H with antennae.

28. Part 2 to Schedule 2 provides for minor operations. Class A covers gates, fences and walls.

29. Part 6 of Schedule 2 is headed "Agricultural and forestry". Class A is concerned with agricultural development on units of 5 hectares or more. It provides in part:

"*Permitted development*

A. The carrying out on agricultural land comprised in an agricultural unit of 5 hectares or more in area of –

(a) works for the erection, extension or alteration of a building; or

> (b) any excavation or engineering operations, which are reasonably necessary for the purposes of agriculture within that unit.
>
> *Development not permitted*
>
> A.1 Development is not permitted by Class A if –
>
> …
>
> (c) it would consist of, or include, the erection, extension or alteration of a dwelling…"

30. *West Bowers Farm Products* v. *Essex County Council* (1985) 50 P & CR 368 concerned what was the counterpart to Part 6 of Schedule 2 regarding agricultural and forestry development in the 1977 GPDO. The farm's planning proposal in that case was for an irrigation reservoir on a farm of some 18 acres in extent and 6.5 metres in depth. The construction of the reservoir necessitated the extraction of large quantities of sand and gravel, which were to be sold. The issue was whether this extraction fell within permitted development in the GPDO or constituted the use of the land for the winning or working of minerals for which planning permission was required. Nolan J rejected the farmers' case that the proposal constituted only the carrying out of engineering operations requisite for the purposes of agriculture.

31. The Court of Appeal agreed. It held that whether a single process amounted for planning purposes to two activities was a question of fact and degree. Nourse LJ said that the test was objective, not subjective, so that the purpose and motive of the developer were irrelevant. What was needed was that the characteristics of a hybrid had to be recognisable in a substantial degree. The farm had submitted that the impossibility of constructing the reservoir without extracting the gravel demonstrated that the latter activity was an integral part of the former and there was one indivisible process. Nourse LJ said (at 374):

> "I accept the premise of that submission but reject the conclusion. The planning legislation is not impressed by the indivisibility of single processes. It cares only for their effects. A single process may for planning purposes amount to two activities. Whether it does so or not is a question of fact and degree. If it involves two activities, each of substance, so that one is not merely ancillary to the other, then both require permission.
>
> Applying that test to the facts of this case, I am left in no doubt that the construction of the reservoir will involve two activities, each of substance. The extraction of so much gravel will not merely be ancillary to the carrying out of the engineering operations, as it would usually be, for example, where foundations were dug for a bridge or a building…"

32. Neill LJ agreed, highlighting that the development would yield many thousands of tons of minerals. Sir John Donaldson MR said that purpose was a factor to be taken into account and added (at 378):

> "It is a question of fact and degree in each case. Looking at the facts of this case, which involves the removal of so large a quantity of minerals, the only possible conclusion is that the development would consist of a mining operation followed by an engineering operation."

33. In *Wycombe DC* v. *Secretary of State for the Environment* [1995] JPL 223, Class F of the GPDO then in force was at issue. The front garden of a dwellinghouse in an elevated position on the north side of a road was almost totally excavated, leaving a hard standing for vehicles on level with the road - 6.8 metres wide, 4.5 metres deep and 2 metres in height at the rear. The Secretary of State decided on appeal that there was no breach of planning control because what was done was permitted under Class A.

34. In the High Court Nigel Macleod QC, sitting as a judge of the High Court, agreed that the proper approach to the application of Class F was to look first at what the order permitted, and then to consider as a matter of fact and degree whether anything done or to be done beyond that specific permission was incidental to what was specifically permitted. He said (at 225-226):

> "In the present case the Secretary of State had not determined what was incidental to the provision of a hard surface, but went straight to the purpose and the indivisibility of the operation. He had substantial regard to purpose. For example he referred to the "sole purpose of the excavations" and went on to find that "the removal of the necessary quantity of earth to achieve that aim took place as an integral part of the operation …" In that way he had reached his overall conclusion...[T]he Secretary of State was fatally in error in omitting to consider the correct test, and in applying tests which were not appropriate."

Policy and policy development

35. Camden Planning Guidance, *CPG4 Basements and Lightwells*, July 2015, states that while basement developments can help to make efficient use of the borough's limited land, in some cases they may cause harm to the amenity of neighbours, affect the stability of buildings, cause drainage or flooding problems, or damage the character of areas and the natural environment. The guidance considers the principal impacts of basements in Camden such as groundwater flow, land stability, surface flow and flooding and the impacts on neighbours of demolition and construction.

36. The Department of Communities and Local Government's ("DCLG") website, the "Planning Portal", described as a one-stop shop for processing planning applications, includes guidance on various aspect of the planning system, including basements. It reads:

> "Converting an existing residential cellar or basement into a living space is in most cases unlikely to require planning permission as long as it is not a separate unit or unless the usage is significantly changed or a light well is added, which alters the external appearance of the property.
>
> Excavating to create a new basement which involves major works, a new separate unit of accommodation and/or alters the external appearance of the house, such as adding a light well, is likely to require planning permission."

37. The issue of permitted development rights for basements has been on the agenda of central government for some time. In 2007 the DCLG published *Housing Development Consents Review: Implementation of Recommendations* ("the Review"). That stated that the planning system was underpinned by the concept of "impacts". If the impact of a development proposal was acceptable it should proceed; if the impact was not acceptable, ways had to be found to mitigate it, failing which the proposal should not proceed. Such an approach, the Review said, could be applied equally to large and small development proposals. The way in which the planning system dealt with proposals to extend or otherwise alter dwellinghouses mirrored the impact approach. The Review continued:

> "1.13 All additions to dwellinghouses, apart from very minor changes and purely internal alternations, are classed as 'development'. However, not all 'developments' require express planning permission, because many smaller additions to dwellinghouses are granted a "deemed" consent by the GPDO provided they comply with specific criteria relating to their size and position. This creates a situation whereby larger or more prominent additions to dwellinghouses are fully tested through the planning application process to discover whether adverse impacts occur; whilst smaller developments are deemed to be acceptable provided specific tolerances are complied with."

38. As to basements, the Review stated:

> "7.2 Basement extensions are an increasingly popular method of extending houses, particularly in urban areas characterised by terraced houses where other forms of extension may not be possible. The excavation of basements is a form of development, but the GPDO is silent as to whether there are circumstances in which basements can be viewed as 'permitted development'. Notwithstanding this silence, the volume limitations imposed by Class A of Part 1 are capable of being interpreted to include basement extensions, and anecdotal evidence suggests that many local authorities do this. A small minority of design guides published by local authorities contain guidance on designing basement extensions, suggesting that a set of tolerances to guide basement extensions could be designed."

39. The DCLG released a consultation paper 2, of the same year, *Changes to Permitted Development: Permitted Development Rights for Householders*, which stated that work was being undertaken to test possible limitations.

40. In November 2008 the Department published *Supplementary Reports: Basement Extensions*. It said that given that roof extensions were covered by a specific category, it was arguable whether basement extensions were simply overlooked when the GPDO was formulated. The document stated:

> "[T]he overwhelming majority of local authorities (see questionnaire results below) interpret Part 1 of the GPDO to include underground extensions. Basement lightwells, on the other hand, being classed as an engineering operation rather than the enlargement of a dwellinghouse, do not benefit from 'permitted development' rights."

Later, the document recommended the creation of a new basement extensions class with limitations on length, breadth and depth, to resolve the anomalous situation in the current GPDO where, unlike roof extensions, basement extensions "are simply not referred to".

41. Most recently, in November 2016, the DCLG published *Basement Developments and the Planning System – Call for Evidence*. This noted that the permitted development rights for householder development allow limited alterations or extensions to dwellinghouses. That provided certainty for householders wishing to carry out development and helped to reduce the administrative burden on local authorities through a reduction in the number of planning applications coming forward. The document also said:

> "Where it is considered that a smaller basement development falls within the specific limitations set out in the Order an application for planning permission is not required."

The arguments

42. The claimant's case is advanced on three grounds: (1) the proposed development includes a substantial engineering operation which is not within the permitted development right relied upon in the certificate; (2) the Council misdirected itself before concluding that the engineering works proposed were not a separate activity of substance, alternatively, if this was a question of planning judgment, the Council's judgment was infected by public law errors and/or in any event irrational; and (3) the interpretation of the Class A permitted development right as including the engineering works proposed in this case frustrated the legislative purpose of section 59 of the 1990 Act or the GPDO and was therefore ultra vires.

43. These grounds reduced in argument mainly to the correct interpretation of the 1990 Act and the GPDO, in particular to the meaning of the permitted development in Class A of Part 1, Schedule 2, "enlargement, improvement or other alternation of a dwellinghouse". In summary, Mr Westgate QC for the claimant contended that these words did not encompass this basement development because it involved a separate engineering development requiring separate planning permission. By contrast, both

Mr Straker QC, for the Council, and Mr Lewis, for Mr Ireland, submitted that his basement proposal fell squarely within this description of permitted development: it constituted the enlargement, improvement and other alteration of his dwellinghouse.

44. Before turning to what, in my view, is the essential issue, let me consider five other issues between the parties as to the interpretation of this Class A permission, the "enlargement, improvement or other alternation of a dwellinghouse".

45. First, it was put to me that the question in interpreting a permission in the GPDO was how a reasonable reader would understand it, regard being had to any conditions and reasons for them. That was the approach to interpreting planning conditions adopted in *Trump International Golf Club Scotland Limited* v. *Scottish Ministers* [2015] UKSC 74, [2016] 1 WLR 85, [34], per Lord Hodge (with whom the other judges agreed) and the authorities culminating in it such as *Barnett* v. *Secretary of State for the Communities and Local Government* [2009] EWCA Civ 476; [2010] 1 P & CR 8 [8], per Keene LJ; *R* v. *Ashford Borough Council, ex p Shepway District Council* [1999] PLCR 12, pp 19C-20B, per Keene J; and *Carter Commercial Developments Ltd* v. *Secretary of State for Transport, Local Government and the Regions* [2002] EWCA Civ 1994; [2003] JPL 1048, [13], per Buxton LJ and [27], per Arden LJ.

46. Although in practice it may not matter, I do not accept this as the governing principle. These cases concerned permissions granted by planning authorities, not those laid down in a statutory instrument. It seems to me that in interpreting a permission in the GPDO one applies the ordinary rules of statutory interpretation. The words, their context and the statutory purpose are relevant to that task.

47. A second area of dispute concerned the purpose behind this development order. Mr Westgate's submissions were, in outline, that there was nothing to indicate that it was intended that the Class A right should extend to include substantial engineering activity. Not only did Mr Straker reject this specific submission, but he contended that the purpose of GPDOs has been expansive, to ensure development happens, thereby encouraging economic activity. It would not facilitate development if local planning authorities were clogged up with applications by householders for permission to build a basement. In any event, development orders were not confined to minor activities and could well have a wider ambit: for example, *R (on the application of the Licensed Taxi Drivers Association)* v. *Transport for London* [2016] EWHC 233 (Admin) (the cycle super highway in London).

48. The width of the GPDO (which Mr Straker conceded) to my mind makes the task of determining its overall purpose well nigh impossible. Mr Straker was undoubtedly correct in pointing to its coverage of aerodromes (defined in Article 2(1) of the order) and the specific provision in Article 3 for the Habitats and Species Regulations. That was to fortify his contentions that the GPDO extended beyond minor developments so that basements could fall within Class A of Part 1. Against that are the permissions in Part 1 of Schedule 1 addressed to chimneys and antennas, and to the minor operations covered in Part 2 with permissions for matters such as gates, fences and walls. To my mind, the GPDO covers a disparate collection of topics, minor and not so minor. One is driven to the words of each individual permission, its attendant conditions and, if it is possible to detect, its underlying purpose.

49. The next area of debate concerned the discussions in the various DCLG documents. Mr Westgate used the recommendation in the 2008 DCLG Supplementary Reports for a new basements class in the GPDO (which was never taken forward) to support his argument that the substantial engineering operation in this case was not within Class A. On the other hand, Mr Straker underlined the document's reference to the fact that, at the time, the overwhelming majority of local authorities interpreted the GPDO to include underground extensions. Mr Straker suggested that, by not making specific provision for basement development when it made the 2015 GPDO, Parliament could be taken to have endorsed that majority view.

50. In the absence of any indication as to Parliament's intention, for instance in an Explanatory Memorandum, there is no way that a Parliamentary intention can be divined from a failure to act. In this case all the documents show is that the issue of basements and permitted development rights has been on the political agenda for some considerable time but that for some reason (perhaps its controversial nature) no clear Parliamentary intention had ever been formulated. To my mind the DCLG documents are of no assistance in interpreting the GPDO, even if they do not fall within the category of extrinsic material which the courts should eschew in interpreting a statutory instrument.

51. A fourth area of contention was over the light thrown on the meaning of this Class A permission because the Council had recently made the direction under Article 4(1) of the GPDO, so that after June next year specific permission for basement developments in Camden will be required. Mr Straker contended that the direction would have been unnecessary if the claimant were correct.

52. To my mind the controversy about the subject over many years, and the differences of opinion, cannot give the making of this Article 4 direction the force Mr Straker suggested. The fact is that Camden, and I understand from Mr Straker other London boroughs, have seized the bull by the horns in the light of central government inactivity and local controversy to make such Article 4 directions.

53. Finally, there was debate about whether reading the Class A permission in the context of its exceptions, limitations and conditions assisted in the resolution of its meaning. Mr Westgate submitted that the limitations, exceptions and conditions to this Class A permission are directed to constraining above-ground building operations. That seems to me to be correct. Mr Straker's response that "storey" could be construed to include a basement does not seem to follow, especially when used in the context of the A.3 condition, quoted earlier in the judgment. However, acceptance of Mr Westgate's premise that none of the limitations, exemptions or conditions to Class A are suitable for basement development does not lead to any conclusions about its application to basements. Because they contemplate above ground development to my mind casts no light on the ordinary meaning of the words of this permitted development, namely, the enlargement, improvement or other alteration of a dwellinghouse.

The crucial issue

54. In my view the issue reduces to one of the meaning of the plain words of the planning permission: Article 3(1) of the GPDO provides that planning permission is granted for the classes of development described as permitted development in Schedule 2; Part 1

of Schedule 2 addresses development within the curtilage of a dwellinghouse; and Class A records as permitted development the enlargement, improvement or other alteration of a dwellinghouse. So, the issue is one of the meaning of the planning permission to enlarge, improve or alter a dwellinghouse.

55. For the Council, Mr Straker's submissions in this regard had an attractive simplicity. He proceeded as follows. Development as defined in section 55 covers underground development. Planning permission granted for development includes permission under the GPDO. The words of the permission in Class A of Part 1 of the GPDO are straightforward, English words intended to be understood and utilised by, amongst others, householders. The words embrace domestic basements in that a basement undoubtedly enlarges, improves, or alters a dwellinghouse. Thus when Mr Ireland asked the local planning authority to certify that the formation of new basement accommodation within the curtilage of his residential dwelling was lawful, he was asking for what he already had planning permission to do.

56. Mr Straker drew the analogy with a grant of planning permission for a house. Different parts of its construction may be labelled as building, engineering or other operations. In his submission, the essential point was that the permission to construct a house carries the implication that those operations necessary for its construction are permitted, be they engineering, building, or other works. The same, in Mr Straker's submission, applied here. The engineering operations for the basement are not gratuitous but necessary for the enlargement, improvement or other alteration of the house. They are part and parcel to the development which has planning permission. There is no separate activity for which planning permission is required, rather activity for the enlargement, improvement and alteration of the dwellinghouse.

57. To my mind the difficulty with these submissions with a basement development is the absence of any boundaries to the permission. Apart from the point about applying the storey limitations in Class A to basements, Mr Straker suggested none. Yet there must be a point where the excavation, underpinning and support for a basement for a dwellinghouse becomes an activity different in character from the enlargement, improvement and alteration of that dwellinghouse. For that reason, engineering operations for the basement are at some point different in character to those involved in the preparation of foundations for a house.

58. Although imprecise, the answer about boundaries drawn from the legal authorities is whether, as a matter of fact and degree, the single process of making the basement amounts to different activities, each of substance, so that the one is not merely ancillary to the other: *West Bowers Farm Products* v. *Essex County Council*, applied in *Wycombe District Council* v. *Secretary of State for the Environment*. Mr Lewis protested that to apply a "substantial engineering" test (to put it in broad terms) would be extra-statutory, but that is the law I must apply.

59. In the context of an original "two up two down" terrace house in suburban London, it seems to me that the development of a new basement, when there is nothing underneath at present, could well amount, as a question of fact and degree, to two activities, each of substance. There is the enlargement, improvement and alteration aspect, but there is potentially also an engineering aspect of excavating a space and supporting the house and its neighbours. That is the position, even though the latter is necessary to achieve the developer's aim, indeed is indivisible from it. If there is this

separate aspect in the development, it requires planning permission. The Class A right grants planning permission for one of the two activities of the development but not for the engineering aspect.

60. With this as background, let me consider the grounds advanced on the claimant's behalf.

Grounds

Ground 1: proposed development includes a substantial engineering operation that is not within the permitted development right relied upon.

61. Mr Westgate's argument on this ground was that what was involved here was the excavation of a large volume of ground and soil underneath the house, and the necessary underpinning and support, to enable the building works involved in constructing the basement to take place. The Council's decision to grant a certificate was an error of law because the Class A permission did not cover this.

62. In advancing this argument, Mr Westgate highlighted that the drawings Mr Ireland provided in support of the application showed only the space to be created through the building works, not the engineering works required to enable the excavation to take place, for example, the support required for party walls. The design and access statement was, as he pointed out, also silent on this. In Mr Westgate's submission, the Arup report demonstrated the true nature of the engineering works required. Extensive works of structural support would be required, in conjunction with the excavation of a considerable volume of ground and soil. In planning terms, the Arup report said, this was an engineering operation in its own right with its own material planning impacts in terms of noise, dust, visual impact, impact on groundwater and associated traffic movements, besides the planning impacts of the building works.

63. These were persuasive submissions. However, in my view this ground fails. This is a judicial review and it is not for me to decide whether as a question of fact and degree all this constituted a separate activity of substance to the making of the basement under the permitted development right. That was for the planning committee. It had the responsibility of considering the type of matters Mr Westgate raised and deciding whether the requisite engineering operation for the basement was a separate activity of substance requiring its own planning permission.

Ground 2: (a) The Council misdirected itself before concluding that the engineering works proposed were not a "separate activity of substance"; (b) Alternatively, if this was a question of planning judgment, the Council's judgment was infected by public law errors and/or in any event irrational.

64. At paragraph 6.24, quoted earlier in the judgment, the officer's report, advising the Council to grant the certificate, accepted that the basement works will, "by necessity", involve temporary engineering works associated with protecting the structural stability of the host and neighbouring buildings. However, it added, these would be "entirely part of the basement works", and did not constitute a separate activity of substance that is not ancillary to the activity that benefits from permitted development rights.

65. Mr Straker defended this formulation since the permission in Class A of Part 1 of the GPDO carries the necessary implication that operations for the making of the basement, be they engineering, building, or otherwise, are permitted. The engineering operations were, in his submission, part of the enlargement, improvement or alteration of the dwellinghouse. They were no more than necessary to carry into effect the permission. The planning committee were asked the correct question whether the construction of a domestic basement constitutes an enlargement, improvement or other alteration to enable them to grant a certificate of lawful development. To that question, he submitted, there was only one answer.

66. In my judgment the planning committee asked itself the wrong question with its focus on the works being "entirely part" of the overall development, which would "by necessity" involve engineering works. It concluded that because this was the case it followed that the works did not constitute a separate activity of substance. That is not the approach laid down in the authorities. The Council's conclusion that the engineering works were not a separate activity of substance followed from a misdirection. It should not have asked itself whether the engineering works were part and parcel of making a basement but whether they constituted a separate activity of substance. The Council needed to address the nature of the excavation and removal of the ground and soil, and the works of structural support to create the space for the basement.

67. In other words, if the planning committee had asked itself the right question, it would have needed to assess the additional planning impacts of the engineering works to decide whether they amounted to a separate activity of substance. It would have been in a somewhat difficult position in undertaking that task without any description of the engineering works required in support of the application, although it may have been able to draw on its own experience of the common and predictable ramifications of this type of basement development with this type of terrace house in this area. It was only afterward, with the construction management plan secured by the section 106 agreement, that the Council gave attention to some of the impacts of the development. At that point it was too late. The issue was one of planning judgment, but since the planning committee misdirected itself as to the issue it never got as far as properly exercising that judgment.

Ground 3: An interpretation of the Class A right as including the engineering works proposed in this case would frustrate the legislative purpose of section 59 of the 1990 Act and/or the GPDO

68. Mr Westgate's argument here is that the overall purposes of the 1990 Act are that planning permission is required for development and that decisions about planning permission should be made based on relevant planning considerations. Given this, the exercise of the power to make a general permitted development order can only be compatible with the objects of the Act if the permission is limited to cases that, as a class, do not involve development impacts of a degree that demand individual consideration of the planning merits, as with this sort of basement.

69. Mr Westgate's premise is difficult to accept, given that section 59 allows the making of general development orders. In any event, as Mr Straker pointed out, this ground overlooks Article 4 of the GPDO, which enables local planning authorities to make a direction removing the grant of permission otherwise given by Article 3. As with the

Council's recently made direction on basements, if thought necessary Article 4 can be used to require an individual application for planning permission. I am not persuaded by this ground.

Conclusion

70. For the reasons given I grant judicial review and quash the certificate of lawful development the Council granted Mr Ireland earlier this year.