Neutral Citation Number: [2023] EWCA Civ 194

Case No: CA-2022-000552

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
MR JUSTICE HOLGATE
[2022] EWHC 208 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 February 2023

Before :

SIR KEITH LINDBLOM
(SENIOR PRESIDENT OF TRIBUNALS)
LADY JUSTICE ANDREWS
and
LADY JUSTICE WHIPPLE

- -

Between :

CAB HOUSING LIMITED	**Appellant**
- and -	
(1) SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES	
(2) BROXBOURNE BOROUGH COUNCIL	**Respondents**

- -
- -

Charles Streeten (instructed through **Direct Public Access**) for the **Appellant**
Thea Osmund-Smith (instructed by the **Government Legal Department**) for the **First Respondent**
The **Second Respondent** did not appear and was not represented.

Hearing date: 29 November 2022

- -

Approved Judgment

This judgment was handed down remotely at 4.30pm on 23 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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The Senior President of Tribunals:

Introduction

1. How should a local planning authority approach an application for prior approval under Class AA of Part 1 of Schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015 ("the GPDO"), which provides for "permitted development" rights to enlarge dwelling houses by the construction of additional storeys? That is the central question in this appeal.

2. With permission to appeal granted by Lewison L.J., the appellant, CAB Housing Ltd., appeals against the order of Holgate J. dated 3 February 2022, by which he dismissed its application under section 288 of the Town and Country Planning Act 1990 for statutory review of the decision of an inspector appointed by the first respondent, the Secretary of State for Levelling Up, Housing and Communities, dismissing its appeal against the refusal by the second respondent, Broxbourne Borough Council, of an application for prior approval for the addition of a single storey to the existing single-storey dwelling at 31 Gaywood Avenue, Cheshunt.

The main issues in the appeal

3. There is a single ground of appeal, which asserts that the judge erred by misinterpreting Class AA of Part 1 of Schedule 2 to the GPDO. It has given rise to three main issues, all of which involve an exercise of statutory interpretation: first, whether the judge was wrong to hold that the "the decision-maker may decide that the scale of the proposal … is too great, acting within the ambit of the prior approval controls in paragraph AA.2.(3)(a)" (paragraph 80 of the judgment); secondly, whether he was wrong to reject CAB Housing's submission that the words "adjoining premises" in paragraph AA.2(3)(a)(i) refer only to "those properties which abut, or are contiguous with, the subject property" (paragraph 82); and thirdly, whether he was wrong to reject the submission that paragraph AA.2(3)(a)(i) limits the consideration of "amenity" impacts to overlooking, privacy or loss of light, and to hold that the design or architectural features of elevations other than the principal elevation and any side elevation fronting a highway may be considered under paragraph AA.2(3)(a)(ii) (paragraphs 94 to 97), and that the control on the "external appearance" of the dwellinghouse under that provision goes beyond the building itself and includes impacts on neighbouring premises and the locality (paragraph 98).

Part III of the 1990 Act

4. In Part III of the 1990 Act, "Control over development", section 58(1) provides that planning permission may be granted in several ways, which include "(a) by a development order …", and "(b) by the local planning authority … on application to the authority … in accordance with a development order".

5. Section 60, under the heading "Permission granted by development order", provides that "[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" (subsection (1)); that "where planning permission is granted by a development

order for building operations in England, the order may require the approval of the local planning authority … to be obtained … (a) for those operations, or (b) with respect to any matters that relate to those operations, or to the use of the land in question following those operations, and are specified in the order" (subsection (1A)); that "[without] prejudice to the generality of subsections (1) and (1A), a development order may include provision for ensuring … (b) that, where within that period an owner or occupier of any adjoining premises objects to the proposed development, it may be carried out in reliance on the permission only if the local planning authority consider that it would not have an unacceptable impact on the amenity of adjoining premises" (subsection (2B)); and that "[in] subsection (2B) "adjoining premises" includes any land adjoining … (a) the dwelling house concerned, or (b) the boundary of its curtilage" (subsection (2C)).

Class AA of Part 1 of Schedule 2 to the GPDO

6. Class AA of Part 1 was introduced by the Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 2) Order 2020 (S.I. 2020 No. 755), which was made on 20 July 2020 and came into force at 9 a.m. on 31 August 2020. Its provisions are set out in full in an annex to Holgate J.'s judgment. I shall quote only those that have been referred to in argument in this appeal.

7. Class AA is the "enlargement of a dwellinghouse by construction of additional storeys". The provisions under the heading "Permitted development" are these:

> "AA. The enlargement of a dwellinghouse consisting of the construction of –
>
> (a) up to two additional storeys, where the existing dwellinghouse consists of two or more storeys; or
>
> (b) one additional storey, where the existing dwellinghouse consists of one storey,
>
> immediately above the topmost storey of the dwellinghouse, together with any engineering operations reasonably necessary for the purpose of that construction."

8. Paragraph AA.1, under the heading "Development not permitted", identifies certain categories of dwelling house, locations, heights and other dimensions, to which the permitted development right under Class AA does not extend. It provides:

> "AA.1. Development is not permitted by Class AA if –
>
> (a) permission to use the dwellinghouse as a dwellinghouse has been granted only by virtue of Class G, M, MA, N, O, P, PA or Q of Part 3 of this Schedule (changes of use);
>
> (b) the dwellinghouse is located on –
>
> (i) article 2(3) land; or

(ii) a site of special scientific interest;

(c) the dwellinghouse was constructed before 1st July 1948 or after 28th October 2018;

(d) the existing dwellinghouse has been enlarged by the addition of one or more storeys above the original dwellinghouse, whether in reliance on the permission granted by Class AA or otherwise;

(e) following the development the height of the highest part of the roof of the dwellinghouse would exceed 18 metres;

(f) following the development the height of the highest part of the roof of the dwellinghouse would exceed the height of the highest part of the roof of the existing dwellinghouse by more than –

(i) 3.5 metres, where the existing dwellinghouse consists of one storey; or

(ii) 7 metres, where the existing dwellinghouse consists of more than one storey;

(g) the dwellinghouse is not detached and following the development the height of the highest part of its roof would exceed by more than 3.5 metres –

(i) in the case of a semi-detached house, the height of the highest part of the roof of the building with which it shares a party wall (or, as the case may be, which has a main wall adjoining its main wall); or

(ii) in the case of a terrace house, the height of the highest part of the roof of every other building in the row in which it is situated;

(h) the floor to ceiling height of any additional storey, measured internally, would exceed the lower of –

(i) 3 metres;

(ii) the floor to ceiling height, measured internally, of any storey of the principal part of the existing dwellinghouse;

(i) any additional storey is constructed other than on the principal part of the dwellinghouse;

(j) the development would include the provision of visible support structures on or attached to the exterior of the dwellinghouse upon completion of the development; or

(k) the development would include any engineering operations other than works within the curtilage of the dwellinghouse to strengthen its existing walls or existing foundations."

9. Under the heading "Conditions", paragraph AA.2 provides:

> "AA.2. – (1) Development is permitted by Class AA subject to the conditions set out in subparagraphs (2) and (3).
>
> (2) The conditions in this sub-paragraph are as follows –
>
> (a) the materials used in any exterior work must be of a similar appearance to those used in the construction of the exterior of the existing dwellinghouse;
>
> (b) the development must not include a window in any wall or roof slope forming a side elevation of the dwelling house;
>
> (c) the roof pitch of the principal part of the dwellinghouse following the development must be the same as the roof pitch of the existing dwellinghouse; and
>
> (d) following the development, the dwellinghouse must be used as a dwellinghouse within the meaning of Class C3 of the Schedule to the Use Classes Order and for no other purpose, except to the extent that the other purpose is ancillary to the primary use as a dwellinghouse.
>
> (3) The conditions in this sub-paragraph are as follows –
>
> (a) before beginning the development, the developer must apply to the local planning authority for prior approval as to –
>
> (i) impact on the amenity of any adjoining premises including overlooking, privacy and the loss of light;
>
> (ii) the external appearance of the dwellinghouse, including the design and architectural features of –
>
> (aa) the principal elevation of the dwellinghouse, and
>
> (bb) any side elevation of the dwellinghouse that fronts a highway;
>
> (iii) air traffic and defence assets of the development, and
>
> (iv) whether, as a result of the siting of the dwellinghouse, the development will impact on a protected view identified in the Directions Relating to Protected Vistas dated 15th March 2012 issued by the Secretary of State;
>
> …".

10. The arrangements for the making and determination of applications for prior approval are provided for in paragraph AA.3, under the heading "Procedure for applications for prior approval":

"AA.3. – (1) The following sub-paragraphs apply where an application to the local planning authority for prior approval is required by paragraph AA.2(3)(a).

(2) The application must be accompanied by –

(a) a written description of the proposed development, including details of any works proposed;

(b) a plan which is drawn to an identified scale and shows the direction of North, indicating the site and showing the proposed development; and

(c) a plan which is drawn to an identified scale and shows –

(i) the existing and proposed elevations of the dwellinghouse, and

(ii) the position and dimensions of the proposed windows,

together with any fee required to be paid.

(3) The local planning authority may refuse an application where, in its opinion –

(a) the proposed development does not comply with, or

(b) the developer has provided insufficient information to enable the authority to establish whether the proposed development complies with,

any conditions, limitations or restrictions specified in paragraphs AA.1 and AA.2.

…

(5) The local planning authority must notify each adjoining owner or occupier about the proposed development by serving on them a notice which –

(a) describes the proposed development, including the maximum height of the proposed additional storeys;

(b) provides the address of the proposed development; and

(c) specifies the date, which must not be less than 21 days from the date the notice is given, by which representations are to be received by the local planning authority.

…

(11) The local planning authority may require the developer to submit such information as the authority may reasonably require in order to determine the application, which may include –

(a) assessments of impacts or risks;

(b) statements setting out how impacts or risks are to be mitigated, having regard to the National Planning Policy Framework issued by the Ministry of Housing, Communities and Local Government in July 2021; and

(c) details of proposed building or other operations.

(12) The local planning authority must, when determining an application –

(a) take into account any representations made to them as a result of any notice given under sub-paragraph (5) … ; and

(b) have regard to the National Planning Policy Framework … , so far as relevant to the subject matter of the prior approval, as if the application were a planning application.

(13) The development must not begin before the receipt by the applicant from the local planning authority of a written notice giving their prior approval.

(14) The development must be carried out in accordance with the details approved by the local planning authority.

(15) The local planning authority may grant prior approval unconditionally or subject to conditions reasonably related to the subject matter of the prior approval."

11. Under the heading "Interpretation of Class AA", paragraph AA4 provides, among others, the following definitions:

"AA4. – (1) For the purposes of Class AA –

…

"detached", in relation to a dwellinghouse, means that the dwellinghouse does not –

(a) share a party wall with another building; or

(b) have a main wall adjoining the main wall of another building;

…

"terrace house" means a dwellinghouse situated in a row of three or more buildings, where –

(a) it shares a party wall with, or has a main wall adjoining the main wall of, the building on either side; or

(b) if it is at the end of a row, it shares a party wall with, or has a main wall adjoining the main wall of, a building which fulfils the requirements of paragraph (a).

…".

Other amendments to the GPDO

12. Other amendments have been made to the GPDO by the introduction of permitted development rights in Part 20 of Schedule 2 – in particular, in Class ZA, for the demolition of a purpose-built block of flats or a detached building within Use Class B1, and its replacement by a single purpose-built block of flats or a detached dwelling-house; in Class A, for the construction of up to two additional storeys of new dwellings immediately above the highest storey of a detached, purpose-built block of flats; in Class AA, for the construction of up to two additional storeys of new dwellings immediately above the highest storey of a detached building in commercial or mixed use (that is Use Classes A1, A2 or A3 or offices), or a mixture of those uses with or without dwellings; in Class AB, for the construction of new dwellings as a single storey above an existing single-storey building, or up to two additional storeys above a building with two or more storeys, where that existing building is terraced and in commercial or mixed use (as defined in Class AA of Part 20); in Class AC, for the same new development as in Class AB, but above a terraced building in use as a single dwelling; and in Class AD, for the same new development as in Class AB, but above a single detached dwelling. These Classes were all introduced at the same time as Class AA in Part 1, or shortly before or shortly afterwards: Class A of Part 20 by S.I. 2020 No. 632, which was made on 23 June 2020 and came into force on 1 August 2020; Classes AA, AB, AC and AD of Part 20 by S.I. 2020 No. 755; and Class ZA of Part 20 by S.I. 2020 No. 756, which was made on 20 July 2020 and came into force at 10 a.m. on 31 August 2020.

The Explanatory Memorandum

13. Section 7 of the Explanatory Memorandum to S.I. 2020 No. 755, "Policy background", explains why the relevant amendments to the GPDO were made. It states (in paragraphs 7.1 to 7.3):

> "7.1 Permitted development rights have an important role to play in the planning system. They provide a more streamlined planning process with greater planning certainty, while at the same time allowing for local consideration of key planning matters through a light-touch prior approval process. Permitted development rights can incentivise certain forms of development by providing developers with a greater level of certainty, within specific planning controls and limitations. They provide for a whole range of development and include measures to incentivise and speed up housing delivery.
>
> 7.2 Following the consultation, *Planning Reform: Supporting the high street and increasing the delivery of new homes* (October 2018) … , legislative changes are being made to introduce new permitted development rights to allow the extension of existing homes and to allow existing buildings to extend upwards to construct additional self-contained homes. These measures will support economic recovery from the Covid-19 outbreak by encouraging development.
>
> 7.3 … The rights introduced by this Order to allow an extension of up to 2 additional storeys on existing homes and commercial buildings will provide

> more certainty for homeowners and developers seeking additional living-space or wanting to create new homes, as well as for local authorities."

14. On the permitted development right to extend existing homes, the Explanatory Memorandum states (in paragraphs 7.5 and 7.12):

> "7.5 Article 3 of this Order introduces a permanent permitted development right … to allow existing houses which are detached, semi-detached or in a terrace to be extended upwards to provide additional living space by constructing additional storeys. This could provide more space for growing families, or to accommodate elderly relatives, without having to move house.
>
> …
>
> 7.12 The right is subject to obtaining prior approval from the local planning authority, which will consider certain matters relating to the proposed construction of additional storeys. These are consideration of the impact on the amenity of neighbouring premises, including overlooking, privacy and overshadowing; the design, including the architectural features of the principal elevation to the house, and of any side elevation which fronts a highway; and the impacts a taller building may have on air traffic and defence assets and on protected vistas in London."

The inspector's decision

15. The dwelling house at 31 Gaywood Avenue is a detached bungalow near the end of the street, which is a cul de sac. There are other bungalows on nearby plots, two-storey terraced houses to the south and east, semi-detached two-storey dwellings to the west, and rows of bungalows to the south and south-west. CAB Housing's application for prior approval under Class AA was refused by the council. CAB Housing appealed. The appeal was determined by the inspector in a decision letter dated 15 June 2021.

16. The inspector observed that paragraph AA.2(3)(a)(ii) in Class AA of Part 1 "… does not preclude consideration of other factors which are relevant to the visual impression that the dwellinghouse makes, such as the design and architectural features of other elevations". In this case "the design and external appearance of the rear elevation" was, he said, "one of the factors relevant to assessment of the external appearance of the dwellinghouse" (paragraph 6 of the decision letter). He also observed that paragraph AA.2(3)(a)(i) "does not preclude consideration of other factors relevant to amenity", which "includes outlook of neighbouring occupiers". In this case, "whether the proposal would have an overbearing effect on the outlook of occupants of neighbouring dwelling No 29 Gaywood Avenue is one of the amenity factors that is relevant to assessment of the proposal's impact on adjoining premises" (paragraph 7). The proposed development would not harm the amenity of adjoining occupiers by overlooking, privacy or loss of light (paragraphs 11 to 13).

17. He went on to state these conclusions (in paragraphs 14 to 18):

> "14. … [The] proposed heightened bulk of the building, in combination with its substantial width of around 19.3m close to No 29's side boundary would appear over dominant, viewed from the rear, from neighbouring garden space to the north. Moreover, the extent of the row of five obscure-glazed windows at first-floor level in the rear elevation would stand out discordantly within the residential suburban scene. This would draw further attention to the bulk of the proposed and enlarged building, and contribute to its visually jarring impact.
>
> 15. The above adverse impacts would largely be contained to views of the proposed rear elevation from neighbouring premises, and so would be relatively localised. Nevertheless, given the substantial width of the proposed building mass and its close proximity to No 29, the impact would be substantially discordant in terms of both appearance and outlook, viewed from neighbouring premises.
>
> 16. Therefore, the proposal would result in development that would have an adverse impact on the amenity of adjoining premises and the external appearance of the dwellinghouse. The use of exterior materials matching the existing building would not negate the adverse impacts of the enlarged mass.
>
> …
>
> 18. In conclusion, the proposal would not be permitted development under Schedule 2, Part 1, Class AA of the [GPDO], with specific regard to criteria (i) and (ii) of condition AA.2.(3)(a)."

18. The inspector therefore dismissed CAB Housing's appeal.

Holgate J.'s main conclusions

19. Having addressed each part of the argument presented to him on behalf of CAB Housing, Holgate J. concluded at the end of his judgment (in paragraph 102):

> "102. I summarise the court's main conclusions on the interpretation of Class AA of Part 1 of Schedule 2 to the GPDO 2015:
>
> (i) Where an application is made for prior approval under Class AA of Part 1 of Schedule 2 to the GPDO 2015, the scale of the development proposed can be controlled within the ambit of paragraph AA.2(3)(1);
>
> (ii) In paragraph AA.2(3)(a)(i) of Part 1, "impact on amenity" is not limited to overlooking, privacy or loss of light. It means what it says;
>
> (iii) The phrase "adjoining premises" in that paragraph includes neighbouring premises and is not limited to premises contiguous with the subject property;
>
> (iv) In paragraph AA.2(3)(a)(ii) of Part 1, the "external appearance" of the dwelling house is not limited to its principal elevation and any side

elevation fronting a highway, or to the design and architectural features of those elevations;

(v) Instead, the prior approval controls for Class AA of Part 1 include the "external appearance" of the dwelling house;

(vi) The control of the external appearance of the dwelling house is not limited to impact on the subject property itself, but also includes impact on neighbouring premises and the locality."

The first main issue: scale and the principle of development

20. For CAB Housing, Mr Charles Streeten submitted that the judge's interpretation of Class AA reduced to a "vanishing point" the value of the permitted development rights for which it provides. He had held that "Class AA does not grant a permission for any particular "scale" of development and scale can be controlled under the prior approval provisions" (paragraph 79 of the judgment), and that "the decision-maker may decide that the scale of the proposal (or some aspect of that scale) is too great, acting within the ambit of the prior approval controls in paragraph A.2(3)(a)" (paragraph 80). He had failed to recognise that the principle of development, including its scale, is established by the grant of planning permission under Class AA. His approach was inconsistent with the structure and language of Class AA, in particular the limitations provided in paragraph AA.1, which would have been otiose if scale were to be considered at the prior approval stage. Contrary to his conclusion, the scale of the development is settled through the grant of planning permission under Class AA. The situation here, Mr Streeten argued, is similar to a grant of outline planning permission, which does not leave a decision-maker free at the reserved matters stage to revisit matters of principle settled by the grant itself (see the judgment of Richards L.J. in *Murrell v Secretary of State for Communities and Local Government* [2010] EWCA Civ 1367; [2011] 1 P. & C.R. 132, at paragraphs 44 to 50). In the context of reserved matters approvals, "scale" and "appearance" are distinct concepts (see the judgment of Simon J., as he then was, in *MMF (UK) Ltd. v Secretary of State for Communities and Local Government* [2010] EWHC 3686 (Admin); [2011] J.P.L. 1067, at paragraphs 8 and 11 to 15, approved by this court in *Crystal Property (London) Ltd. v Secretary of State for Communities and Local Government* [2016] EWCA Civ 1264). This difference, submitted Mr Streeten, is reflected in Class AA, which establishes the "scale" of the development but leaves within the scope of the prior approval process the "external appearance" of the extension. Mr Streeten argued that this understanding of the legislative provisions accords with the purposes of Class AA: to create "a more streamlined planning process with greater planning certainty", to assist in the meeting of housing need and to support economic recovery after the Covid-19 pandemic (paragraphs 7.1 to 7.3 and 7.5 of the Explanatory Memorandum), and to "give greater certainty and speed" for the upward extension of dwellinghouses (paragraph 3 of the Government's consultation response document of May 2019).

21. I cannot accept Mr Streeten's argument. In my view the judge's reasoning and conclusions on this issue are sound.

22. The approach we should take to interpreting the provisions of Class AA of Part 1 is not controversial. Construing elements of the legislation for planning is not, in essence, a

different exercise from the interpretation of other statutes and statutory instruments. The court's essential function is to ascertain the meaning of the words in the legislation having regard to the purpose of the provisions in question (see the recent judgment of this court in *Tidal Lagoon (Swansea Bay) Plc v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWCA Civ 1579, at paragraphs 30 and 31, and the leading judgment in *R. (on the application of Mawbey) v Lewisham London Borough Council* [2020] PTSR 164, at paragraph 20).

23. As Holgate J. explained (in paragraph 31 of his judgment), the grant of the "permitted development" right under Class AA of Part 1 is brought about by the operation of article 3(1) and the relevant provisions of Class AA itself (see the leading judgment in *Keenan v Woking Borough Council* [2018] PTSR 697, at paragraphs 33 to 42, and the leading judgment in *R. (on the application of Rights: Community: Action) v Secretary of State for Housing and Local Government* [2021] EWCA Civ 1954, at paragraphs 25 to 27). The planning permission only accrues – or crystallises – upon the grant of prior approval (see *Rights: Community: Action*, at paragraph 28). The grant of permission by the GPDO together with the grant of prior approval comprise the development consent. The process for prior approval is embedded in that consent. It forms an inextricable part of the permitted development right. Until prior approval is granted for the proposal, the developer's ability to implement the planning permission remains latent (see *Rights: Community: Action*, paragraphs 64 and 68).

24. The permitted development right in Class AA of Part 1 sets the maximum limits for development within the Class. It is also subject, in paragraph AA.1, to the exclusion of certain locations, categories and dimensions of development to which the right does not extend. Paragraph AA.2 imposes specific restrictions by way of conditions on the grant, including, under paragraph AA.2(3), the requirement for and lawful scope of an application for prior approval. And the arrangements for the determination of such applications are set out in paragraph AA.3. Those arrangements include, in paragraph AA.3(3)(a), provision for the refusal of prior approval if, in the opinion of the local planning authority, the proposed development does not comply with any conditions or limitations specified in paragraphs AA.1 and AA.2.

25. There is nothing inconsistent with this court's reasoning in *Murrell* in recognising that the permitted development right in Class AA of Part 1 is subject, in each individual case, to the requirement for prior approval to be applied for and obtained under paragraphs AA.2(3) and AA.3. I agree with Holgate J. (in paragraph 72 of his judgment) that it would not be enough to say, without more, that the grant of permitted development rights in the GPDO "establishes the principle" of the development concerned. As the judge aptly put it, having cited both *Murrell* and *Rights: Community: Action*, both "the right, and the principle it recognises, is contingent upon the grant of prior approval for a specific proposal". To assert merely that such permitted development rights "establish a principle of development" would be to disregard the role of the prior approval process to which, in each Class where that process is provided for, the right itself is subject.

26. In the description of "Permitted development" in Class AA provision is made for the maximum number of additional storeys in the upward enlargement of dwelling houses. In paragraph AA.1, "Development not permitted", provision is made, among other things, for the outer parameters applicable to the Class as a whole, including maximum heights. But these provisions must be read together with those for conditions in

paragraph AA.2, including, crucially, the condition in paragraph AA.2(3)(a) requiring, in every case, an application to be submitted for prior approval for the particular development proposed. It would be a basic misconception, therefore, to suppose that the generic parameters in paragraph AA.1 override the prior approval process requisite in each case or dictate its outcome, or, for example, that there is an automatic entitlement under Class AA to build to the maximum heights provided in paragraph AA.1. It is open to the local planning authority, in determining the application for the prior approval for a particular development complying with the generic parameters in paragraph AA.1, to decide whether such approval should be granted or refused. The authority must address the matters of fact and judgment identified in paragraph AA.2(3). In assessing the effects of the development on the considerations identified in paragraph AA.2(3)(a), it is both permitted and required to exercise its own planning judgment.

27. Provision is made, in sub-paragraph (3)(a)(i), for an assessment of the "impact on the amenity of any adjoining premises" and, in sub-paragraph (3)(a)(ii), for consideration of "the external appearance of the dwellinghouse". The other two provisions, in sub-paragraphs (3)(a)(iii) and (iv), require, where it is relevant, the consideration of "air traffic and defence assets" (sub-paragraph (3)(a)(iii)) and whether, as a result of the siting of the dwelling house, the development would "impact on a protected view" (sub-paragraph (3)(a)(iv)).

28. In my view, as was submitted by Ms Thea Osmund-Smith on behalf of the Secretary of State, the "scale" of the proposed development is a matter of potential relevance to each of those four considerations, and may be essential to a proper and sufficient assessment in the prior approval process. As for the two provisions of particular relevance to the arguments presented to us in this case, which are sub-paragraphs (3)(a)(i) and (ii), it seems clear that the development's "scale" may affect each of the three possible impacts upon, or elements of, the "amenity" of adjoining premises specifically included in sub-paragraph (3)(a)(i) – namely "overlooking", "privacy" and "the loss of light" – and is also potentially relevant to each of the attributes of the "external appearance" of a dwelling house identified in sub-paragraph (3)(a)(ii) – namely the "design" and "architectural features" of the elevations specified in sub-paragraph (3)(a)(ii)(aa) and (bb).

29. If one accepts, as may be obvious, that the height, bulk and mass of a building once extended could give rise to a legitimate refusal of prior approval under paragraph AA.2(3)(a)(i) – because, in the particular case, each or all of those attributes of the extended building would bring about unacceptable "overlooking", loss of "privacy" or "loss of light" – or under paragraph AA.2(3)(a)(ii) – because the "external appearance" of the building would consequently be unacceptable – it seems to me that the same could be the result of inappropriate "scale". And this may also be said of the effects on air traffic and defence assets and on protected vistas under sub-paragraphs (3)(a)(iii) and (iv) respectively.

30. None of this negates the "principle" of the permitted development right under Class AA or the generic parameters set by paragraph AA.1. In the judge's words (in paragraph 76), it involves no "impermissible questioning of the development right granted by Class AA of Part 1 or the "principle" of that right".

31. The reasoning in *MMF* and *Crystal Property* does not help Mr Streeten's argument. Those cases concerned the meaning of "scale" in the legislative scheme for the grant of outline planning permission and the approval of reserved matters, in particular the separate definitions of the concepts of "scale" and "appearance" in the Town and Country Planning (Development Management Procedure) (England) Order 2015 (S.I. 2015 No. 595). The relevant definition of "scale" referred to the "height, width and length [of a building] in relation to its surroundings". The definition of "appearance" referred to "the aspects of a building … which determine the visual impression the building … makes, including the external built form of the development, its architecture, materials, decoration, lighting, colour and texture". In the outline planning permission granted in *MMF* the "scale" of the building had already been approved and was not within the scope of the reserved matters, but the building's "appearance" was still to be considered and approved as a reserved matter in itself. Simon J. distinguished between the two concepts on the basis that height was not a constituent of "appearance" where it bore on the relationship of the building with its surroundings (paragraph 8 of the judgment). In a passage of his judgment approved by this court in *Crystal Property*, he pointed out that "Scale and Appearance (as defined) are concerned with two different aspects of a building". Using the metaphor of a box to represent the building, he said that "the size of the box and importantly its relationship with other buildings, is a question of Scale", whereas the question of "[how] the box is designed within that overall shape is its Appearance". That distinction, in that particular statutory context, was appropriate and necessary.

32. But that is not so in Class AA of Part 1. One does not see there the same dichotomy between "scale" and "appearance" as in the statutory provisions applying in *MMF* and *Crystal Property*. There is no need for it. And "scale" is not excluded as a relevant consideration in the prior approval process under paragraph AA.2(3)(a). That is not the effect of the parameters, including the maximum height provisions, set out in paragraph AA.1, nor of any of the provisions for conditions in paragraph AA.2. Nor is it implicit in the scope of the prior approval process itself. A meaningful assessment of the likely impacts of a development on "amenity" under sub-paragraph (3)(a)(i), or on "external appearance" under sub-paragraph (3)(a)(ii), will in many cases, if not all, require consideration of its scale.

33. In my view therefore, in agreement with the judge (in paragraph 79 of his judgment), "scale" is subject to the local planning authority's control under the provisions for prior approval in paragraphs AA.2 and AA.3.

The second main issue: "adjoining premises"

34. Mr Streeten submitted that in the phrase "any adjoining premises" in paragraph AA.2(3)(a)(i) the word "adjoining" should be given what he contended was its natural and ordinary meaning, which, according to the Shorter Oxford English Dictionary, is "contiguous to" (see, for example, in the context of "land", *Re Ecclesiastical Commissioners for England's Conveyance* [1936] Ch. 430, at pp. 440 and 441, and in the interpretation of planning legislation, *MacDonald v Glasgow Corporation* 1960 S.L.T. (Sh. Ct.) 21) – rather than its broader, secondary sense, which this court preferred when construing a development plan policy containing the expression "immediately adjoining" (see *Corbett v Cornwall Council* [2022] EWCA Civ 1069). Holgate J.

observed that "[the] normal meaning of the word "adjoining" includes "adjacent" or "neighbouring"" (in paragraph 82 of his judgment). But, submitted Mr Streeten, the etymology of the words "adjoining" and "adjacent" – in Latin – was different, and in this legislative context it was a mistake to elide their meaning. Both are used, with different meanings, in the GPDO, as they were in its predecessor, the Town and Country Planning General Development Order 1963 (see *English Clays Lovering Pochin & Co. Ltd. v Plymouth Corporation* [1974] 1 W.L.R. 742). The use of the word "neighbouring" in Classes ZA, A and AA to AD of Part 20 indicates a different meaning for the word "adjoining" in Class AA of Part 1, corresponding to the definitions of the terms "detached" and "terrace house" in paragraph AA.4(1), and that of "adjoining premises" in section 60 of the 1990 Act, where it connotes contiguity. The use of the word "adjoining" in its narrow sense in paragraphs AA.2(3)(a)(i) and AA.3(5) in Class AA promotes certainty, consistent with the purpose expressed in paragraph 7.1 of the Explanatory Memorandum. In many of its provisions the GPDO requires owners and occupiers of "adjoining premises" to be consulted on applications for prior approval (see, for example, Class A of Part 1, paragraph A.1(2)(c)). This, said Mr Streeten, would be impracticable and uncertain if the construction adopted by Holgate J. were right.

35. I do not consider that argument correct. In my view the judge reached the right conclusion on this issue, essentially for the right reasons (in paragraphs 81 to 85 of his judgment). As he recognised, an approach to the construction of the phrase "any adjoining premises" in paragraph AA.2(3)(a)(i) which focuses unduly on the linguistic origins of the word "adjoining" would be inappropriate. In modern usage, the meaning of the word "adjoining" is not restricted to the sense of being contiguous to, or touching. It extends to the concept of something lying close to something else. Thus, for example, in the New Shorter Oxford English Dictionary the meanings given for the verb "adjoin" include "Lie close to each other" and "Lie close or be contiguous to". Where the context requires or justifies that alternative or wider meaning it should not be rejected in favour of the narrower or "primary" sense which Mr Streeten urged us to accept.

36. By contrast, for example, with *Corbett*, the subject matter here is not planning policy, but legislation which operates as part of the statutory code for the control of development. Broadly, it is the regime for permitted development rights under the GPDO. More precisely, it is the process of prior approval for development under Class AA of Part 1 of Schedule 2, and in particular, the provision in paragraph AA.2(3)(a)(i) which describes one of the things that an application for prior approval under this Class must deal with. In *Corbett* the court had to interpret a development plan policy supportive of proposals for development "immediately adjoining" a "settlement" (see paragraphs 24 to 32 of the leading judgment) – plainly a somewhat different concept from the one that arises in paragraph AA.2(3)(a)(i), for a prior approval decision, which is the "impact on the amenity of any adjoining premises including overlooking, privacy and the loss of light".

37. Here, however, the court must apply itself to an exercise of statutory interpretation, in the relevant context. As the judgments in this court in *McGaw v Welsh Ministers* [2021] EWCA Civ 976 demonstrate, also in the realm of permitted development under the GPDO, this may call for suitable pragmatism – without straying from the principles governing the interpretation of statutes and statutory instruments (see the judgment of Sir Timothy Lloyd, at paragraphs 14 to 17, 39 and 40). That case concerned the provisions of Class E of Part 1 of Schedule 2 to the Town and Country Planning

(General Permitted Development) Order 1995 applicable in Wales, requiring "the height of any part of the building" in question to be "measured from the surface of the ground immediately adjacent to that part". Sir Timothy Lloyd accepted (at paragraph 40) that it was "legitimate to read Class E as allowing a conclusion that the ground immediately adjacent to the part of the building which abuts the boundary wall is the ground lying on the other side of the boundary wall". Lewison L.J. (at paragraphs 46 and 47) and Asplin L.J. (in paragraph 43) agreed, endorsing Sir Timothy's "pragmatic" approach.

38. What then is the true meaning of the word "adjoining" in paragraph AA.2(3)(a)(i), viewed in its own legislative context, and keeping in mind the evident purpose of the provision in which it sits? Does it bear the wider sense suggested, or the narrower?

39. Two points strongly suggest the wider meaning. First, an assessment of the likely effects of Class AA development on "amenity … including overlooking, privacy and the loss of light", will frequently, if not in every case, require consideration of the effects on the "amenity" not merely of contiguous or abutting buildings, but also of other premises lying close to the site of the proposed development, whose amenity may be equally or more significantly affected by it. Such effects will often occur not merely on the premises directly beside the building being extended, but also, for example, on premises on the other side of the street or on the same side but two or three doors away. There is, therefore, a good practical reason for understanding the word "adjoining" in this provision as having its wider meaning. To do so would avoid an artificially narrow assessment of the impact on "amenity", in which the effects of overlooking, loss of privacy and loss of light on premises very close to the proposed development, perhaps separated from it only by the width of a street or even closer to it than a building on the site next door, are disregarded. Construing paragraph AA.2(3)(a)(i) in this way is consistent with the pragmatic approach adopted in *McGaw*.

40. Secondly, as the judge said (in paragraph 84 of his judgment), paragraph AA.3(5) requires the local planning authority to "notify each adjoining owner or occupier about the proposed development", and paragraph AA.3(12)(a) requires it, when determining the application, to take into account any representations made to it as a result of that notification. The definition of an "adjoining owner or occupier", given in article 2(1), is "any owner or occupier of any premises or land adjoining the site". Similar obligations are imposed by the provisions for the prior approval process under Classes ZA and AA to AD of Part 20. The notification requirement for those Classes in Part 20 is in paragraph B(12). The requirement there is to notify the owners and occupiers of "adjoining" premises – as defined in article 2(1). In those Classes in Part 20, however, the provisions parallel to paragraph AA.2(3)(a)(i) in Class AA of Part 1 use the word "neighbouring", not "adjoining", in referring to the relevant premises. For example, Class ZA requires, in paragraph ZA.2(g), the local planning authority to consider, in the prior approval process, the "impact of the development on the amenity of the new building and of neighbouring premises, including overlooking, privacy and light". It seems reasonable to say, as the judge did, that there would have been no sense in requiring the authority to assess the likely effects of a development on the amenity of "neighbouring" premises having consulted only a smaller cohort of neighbours – the owners and occupiers of premises contiguous with the site of the development. This, in my view, is a powerful indication that the words "neighbouring" and "adjoining" were employed interchangeably in these provisions, as if they were synonymous (cf. the use

of the phrase "immediately adjoining" in paragraph N.2 of Part 17). Support for this conclusion may also be found in the Explanatory Memorandum, which states in paragraph 7.12 that the matters to which consideration will be given in the prior approval process in this Class are "the impact on the amenity of neighbouring premises, including overlooking, privacy and overshadowing; … [etc.]".

41. Neither of those two points offends the purposes of the amendments to the GPDO brought in by S.I. 2020 No. 755, stated in paragraphs 7.1 to 7.3 of the Explanatory Memorandum – in particular, the "more streamlined planning process with greater planning certainty, while at the same time allowing for local consideration of key planning matters through a light-touch prior approval process" (paragraph 7.1), and the emphasis on "providing developers with a greater level of certainty …" (in the same paragraph) and "more certainty for homeowners and developers …" (paragraph 7.3). Such certainty was evidently not seen as incompatible with a prior approval process in which the local planning authority has to assess for itself the likely impact of the development on the amenity of "any adjoining premises" (paragraph AA.2(3)(a)(i) in Class AA) having notified "each adjoining owner or occupier" (paragraph AA.3(5)) and taking into account "any representations" made to it as a result of such notification (paragraph AA.3(12)). It is telling that the Explanatory Memorandum itself, in paragraph 7.12, speaks of the authority considering, in the prior approval process, "the impact on the amenity of neighbouring premises …". That reference to "neighbouring premises" is consistent with the wider meaning of the word "adjoining" in paragraph AA.2(3)(a)(i). And it is a convincing answer to the suggestion that the purpose of "greater planning certainty" demands the narrower meaning.

42. In agreement with the judge, I do not consider that any of the other provisions in the GPDO relied upon by Mr Streeten compels the conclusion that in the provision we are concerned with here, read in its own context, the narrower meaning is right.

43. Finally, I do not accept that the narrower meaning of the word "adjoining" in this particular context finds any support in subsections (2B) and (2C) of section 60 of the 1990 Act. Like the judge (in paragraph 85 of his judgment), I do not see the reference to the "boundary of [the] curtilage" of the dwelling house in the definition of "adjoining premises" in subsection (2C) as detracting at all from the wider construction of the word "adjoining" in the expression "adjoining premises" in paragraph AA.2(3)(a)(i) in Class AA of Part 1.

44. In my view therefore, in the specific context of paragraph AA.2(3)(a)(i) in Class AA of Part 1, the true meaning of the word "adjoining" in the concept of "adjoining premises" is the wider sense – that is, lying close or contiguous to – and not the narrower – which is merely contiguous to.

The third main issue: "amenity" and "external appearance"

45. This issue divides into two parts: first, the meaning and scope of the word "amenity" in paragraph AA.2(3)(a)(i), and second, the meaning and scope of the concept of "external appearance" in paragraph AA.2(3)(a)(ii). Mr Streeten submitted that the judge had erred in his conclusions on both (in paragraphs 86 to 98 of his judgment).

46. As for "amenity", Mr Streeten submitted that the range of the local planning authority's assessment is limited to "overlooking, privacy and loss of light". Those matters had been specified because the intention was to confine the decision-maker's consideration to them, in accordance with the principle that to say one thing is to exclude another (the canon of construction "expressio unius est exclusio alterius"). In this legislative context, both in the provisions relating to "amenity" and in those relating to "external appearance", the use of the word "including" has the sense of excluding that which is not included (see the judgment of the Privy Council, delivered by Lord Watson, in *Dilworth v Commissioner of Stamps* [1894] A.C. 94, at pp.105 and 106). Its effect is that matters such as the "outlook" from dwellings nearby are excluded. This understanding of the provision, submitted Mr Streeten, reflects the purposes of the prior approval process, in particular the aim to provide certainty and simplicity. Otherwise, the word "amenity", which potentially has a wide scope – as the Court of Appeal recognised in *Miaris v Secretary of State for Communities and Local Government* [2016] EWCA Civ 75 (at paragraph 41 of the leading judgment) – would introduce imprecision. If one looks at Class AA of Part 1, and together with the parallel provisions for other permitted development rights in the GPDO, one sees, for example, that where noise impacts are to be considered in the prior approval process for development within Class AA of Part 1 and Class J of Part 3, express provision is made (respectively in paragraph AA.2(3)(b)) and in paragraph J.2(1)(a)). And where the legislature intended "views" to be considered, it took care to provide for this to be done – specifically for "Protected Vistas" (in paragraph AA.2(3)(a)(iv)).

47. As for "external appearance", Mr Streeten submitted that paragraph AA.2(3)(a)(ii) confines the decision-maker's assessment of the impact of the proposed development on the design and architectural features of the dwelling house to its effects on the principal elevation of the building and any side elevation fronting the highway. The drafting here, as in the provision relating to "amenity", is intended to restrict consideration to the matters specifically mentioned. These are the elevations visible from places accessible by the public, and which form part of the streetscape. Under the "ejusdem generis" principle, Mr Streeten submitted that this was the "genus" to which the provisions are directed. He pointed to provisions introduced by other amendments to the GPDO made in 2020, in Classes A and ZA of Part 20, which do not refer to the external appearance of specified elevations, but simply to "external appearance". Given the timing of these changes to the legislation for permitted development, this difference in the drafting must be seen as deliberate. The intention in Class AA of Part 1 was plainly to restrict assessment of impact on "external appearance" to the elevations specified. The reason, Mr Streeten suggested, is clear. An individual dwelling house is often less visible from public places than a block of flats, and this justifies a different provision for "external appearance".

48. These arguments are not persuasive. I do not accept that the use of the word "including" here, both in sub-paragraph (3)(a)(i) and in sub-paragraph (3)(a)(ii), has the effect of restricting the authority's assessment in the way Mr Streeten suggested. It does not exclude other factors which are necessary for a meaningful consideration of impact on "amenity" and "external appearance". Such factors will of course vary from case to case. But they are not in every case confined to the matters actually mentioned in these two sub-paragraphs. Had the intention been to impose such a restriction, it would have been straightforward to do so without using the word "including" to refer to specific considerations and instead using some other formulation, stipulating expressly and

exhaustively the only matters which the local planning authority could lawfully take into account. That, however, was not done.

49. Mr Streeten's suggested understanding of the word "including" in this context does not gain credence from the Privy Council's judgment in *Dilworth*. In the relevant passage Lord Watson said this:

> "… The word "include" is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the Statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word "include" is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to "mean and include", and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions."

50. Here, those who drafted the contentious provisions did so by providing examples of the matters that would fall within the concepts of "the amenity of any adjoining premises" and "the external appearance of the dwellinghouse". The deliberate use of the word "including" to introduce the examples given was simply inclusive, and not also exclusive. Their intention seems perfectly clear: to state, by way of example, matters included in the concept referred to. They did not seek to limit either concept only to the examples given, as envisaged in the second of the alternatives referred to by Lord Watson in *Dilworth*. In each provision the word "including" means nothing more, and nothing less, than "including". It does not mean "including, but only including". An interpretation which effectively renders its use redundant by construing it with that gloss is, in my view, false. I agree with the judge's reasoning to the same effect (in paragraphs 87 and 88 of his judgment).

51. This understanding of the word "including" seems realistic in the context of the effects with which paragraph AA.2(3)(a) is concerned. Potential impacts of development within Class AA of Part 1 on "the amenity of any adjoining premises", under sub-paragraph (3)(a)(i), are not limited merely to "overlooking, privacy and the loss of light" for the occupiers of those premises. Other effects on "amenity" are also possible, and may be significant, such as changes to the living conditions of neighbours through increases in noise and activity, overshadowing or changes to outlook. Likewise, the possible effects on the "external appearance of the dwellinghouse" under sub-paragraph (3)(a)(ii) will not necessarily be limited to the changes to its principal elevation or to any side elevation fronting a highway. It seems unreal to contemplate that the assessment of such effects on "amenity" and "external appearance" would have been excluded from the prior approval procedure without explicit language to do so.

52. Holgate J. found useful a comparison between the provision relating to "external appearance" in Class A of Part 20 and the parallel provisions in Classes AA to AD of Part 20. In Class A of Part 20 the term used is simply "external appearance". In the other provisions that expression has words of inclusion added to it, referring to the same matters as are referred to in paragraph AA.2(3)(a)(ii) in Class AA of Part 1. But as the

judge pointed out (in paragraph 89 of his judgment), Classes AA to AD of Part 20, like Class A of Part 20, all concern the creation of one or more dwellings on top of existing buildings, some of which – in particular those to which Classes A, AA and AB relate – may be large. It would make no sense for the GPDO to enable local planning authorities to control everything to do with "external appearance" when the upward extension is to a block of flats, but to confine that consideration to the principal elevation and any side elevation fronting a highway when the building to be extended is a detached or terraced commercial or mixed use building. As the judge said (in paragraph 90), there would have been no sensible basis for differentiating between the assessment of effects on the "external appearance" of a commercial or mixed use building and the assessment of such effects on a block of flats, making the latter a broader assessment than the former. Either building may be free-standing. Either may be visible on all sides. And in either case the development under consideration, an upward extension, is of the same kind.

53. Further support for the construction of paragraph AA.2(3)(a) favoured by the judge is to be seen in the requirement in paragraph AA.3(2) – as in the equivalent provisions in Classes AA to AD of Part 20 – that an application for prior approval must be accompanied by a drawing, to an identified scale, showing "(i) the existing and proposed elevations of the dwellinghouse" and "(ii) the position and dimensions of the proposed windows", and the requirement in paragraph AA.3(14) that the development "must be carried out in accordance with the details approved by the local planning authority". It is significant, in my view, that the requirement in paragraph AA.3(2) is not limited to the elevations expressly referred to in paragraph AA.2(3)(a)(ii).

54. I also share the judge's conclusions on the "ejusdem generis" principle, for the reasons he gave (in paragraphs 94 to 97 of his judgment). Like him, I cannot accept that the provision in paragraph AA.2(3)(a)(i) is limited by its language to effects of a kind – a "genus" – which concerns only the living conditions of residents of the relevant dwellings. Nor can I accept that the provision in paragraph AA.2(3)(a)(i) is limited to effects of a kind relating only to elevations visible from public places. In the first place, the principle would not normally be engaged where, as here, a general concept is stated at the outset and then amplified by more specific words (see "Bennion, Bailey and Norbury on Statutory Interpretation" (eighth edition), at sections 23.5 and 23.7). Secondly, there is no clear indication, either in paragraph AA.2(3)(a)(i) or in paragraph AA.2(3)(a)(ii), of the category said to be the "genus". The general concept of the "impact on amenity" in sub-paragraph (3)(a)(i) does not expressly or necessarily relate only to residential premises or to the owners or occupiers of such premises. And the general concept of "external appearance" in sub-paragraph (3)(a)(ii) does not expressly or necessarily relate only to elevations visible from public places. Thirdly, no plausible reason has been given for resorting to the "ejusdem generis" principle to restrict the meaning of those two concepts to the sense contended for by CAB Housing. And fourthly, the principle would in any event seem to work against Mr Streeten's main argument, because, for example, it would admit the assessment of effects on residents' living conditions which are not specified in paragraph AA.2(3)(a)(i) – such as effects on outlook.

55. It would also be wrong, in my view, to suppose that the local planning authority's assessment of the likely effect of the proposed development on "external appearance" is implicitly confined to effects on the dwelling house which is to be extended, and that effects on the surrounding area must be ignored. Sub-paragraph (3)(a)(ii) does not state

that the authority may only consider the effects of the "external appearance" of the dwelling house upon the dwelling house itself. To read this qualification into sub-paragraph (3)(a)(ii) would be unwarranted and incorrect.

56. Lastly, to address the overarching submission made by Mr Streeten, I see no force in the suggestion that the judge's analysis diminishes the difference between the prior approval process for permitted development under Class AA of Part 1 and the process for a grant of planning permission. The procedure itself, as with other permitted development rights in Schedule 2, is simple (see the judgment of Richards L.J. in *Murrell*, at paragraph 29). For this Class the prior approval process engages, in the local planning authority's consideration of impacts on "amenity" and "external appearance", the employment of its own planning judgment. But the extent of the necessary exercise of planning judgment is limited by the legislation, as properly construed. And the process as a whole is a considerably less demanding one than that involved in the determination of an application for planning permission under section 70 of the 1990 Act and section 38(6) of the Planning and Compulsory Purchase Act 2004 (see the judgment of Hickinbottom L.J. in *New World Payphones v Westminster City Council* [2019] EWCA Civ 2250, at paragraphs 18, 19 and 37).

Conclusion

57. For the reasons I have given, I conclude that the inspector's decision on CAB Housing's appeal is not flawed by the errors of law alleged, and that the judge was right to reject the challenge to it. I would therefore dismiss the appeal.

Lady Justice Andrews:

58. I agree.

Lady Justice Whipple:

59. I also agree.