Neutral Citation Number: [2023] EWCA Civ 601

Case No: CA-2022-001599

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
MR JUSTICE FORDHAM
[2022] EWHC 2031 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 May 2023

Before:

SIR KEITH LINDBLOM
(Senior President of Tribunals)
LORD JUSTICE SINGH
and
LADY JUSTICE ELISABETH LAING

- -

Between:

BARRY DEVINE	**Appellant**
- and -	
SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES	**Respondent**
- and -	
CHESHIRE WEST AND CHESTER COUNCIL	**Interested Party**

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- -

Kate Olley (instructed by **Kingsley Smith Solicitors LLP**) for the **Appellant**
Freddie Humphreys (instructed by the **Treasury Solicitor**) for the **Respondent**
The **Interested Party** did not appear and was not represented

Hearing date: 29 March 2023

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Approved Judgment

This judgment was handed down remotely at 4.45pm on 25 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Sir Keith Lindblom, Senior President of Tribunals:

Introduction

1. The basic question in this case is whether an inspector who dismissed an appeal against an enforcement notice alleging the unauthorised construction of a "new building" in place of an existing barn on a site in the Green Belt erred in law in concluding that, when the notice was issued, the local planning authority could properly take enforcement action against that breach of planning control. The relevant legal principles are well established.

2. With permission granted by Coulson L.J., the appellant, Mr Barry Devine, appeals against the order of Fordham J., dated 29 July 2022, dismissing his appeal under section 289 of the Town and Country Planning Act 1990 against the decision of an inspector appointed by the respondent, the Secretary of State for Levelling Up, Housing and Communities, upholding an enforcement notice issued by the interested party, Cheshire West and Chester Council, under section 172 of the 1990 Act. The notice alleged a breach of planning control at Dones View Farm, Northwich Road, Dutton, Northwich. It was served on Mr Devine on 18 March 2019.

3. The breach of planning control alleged was "[without] planning permission the erection of a new building … and the erection of a boundary wall and fence …". One of the requirements in the notice was the demolition of "the unauthorised building". Mr Devine appealed on grounds (a), (b) and (d) in section 174(2). The inspector held an inquiry into that appeal over three days in July and October 2021, conducting his site visit on the third day. In his decision letter, dated 23 November 2021, he dismissed the appeal on all three grounds. Permission to appeal to the High Court under section 289 was granted, but only on the ground that the inspector had erred in law in dismissing the appeal under section 174(2)(d). Mr Devine's argument was that the inspector was wrong to conclude that the operations in question were not "substantially completed" more than four years before the enforcement notice was issued, and to conclude that the development therefore did not enjoy immunity from enforcement under section 171B. Fordham J. rejected that argument and dismissed the section 289 appeal.

The main issue in the appeal

4. The single ground of appeal to this court is that "[the] learned judge erred in law in finding that it was open to the planning inspector to find that the repair of a roof already in situ meant that the building was not already substantially completed more than [four] years before the service of the enforcement notice". In effect, then, the main issue for us to decide is whether the inspector's approach to the ground (d) appeal was unlawful.

Background

5. Dones View Farm is in the North Cheshire Green Belt. Mr Devine bought the site in 2000. When the unauthorised works began, there was a barn on it, erected in the late 19th century. Over the years Mr Devine undertook various building works, without any grant of planning permission. Between 2001 and 2004 he built a new wing, the "East wing", thus creating a "U"-shaped building. Other work followed. According to Mr

Devine, this was the repair and improvement of the building, including the removal of bricks from the inner wall to replace parts of the outer wall, and the erection of blockwork inside. It was work he could do himself, because he was a builder by trade. In his evidence at the inquiry he said the repair of the roof, the replacement of concrete lintels with metal, the levelling of the floor and the moving of openings were all works of repair to the original building, not its reconstruction. The building was still, he said, the barn erected about 125 years ago. In 2018 he made five applications for planning permission, proposing various works of conversion to the building and its change of use to use as a single dwelling.

Section 55 of the 1990 Act

6. Section 55 of the 1990 Act defines "development" as including "the carrying out of building … operations … on … land" (subsection (1)). It provides that "building operations" include the "demolition of buildings", "rebuilding", "structural alterations of or additions to buildings", and "other operations normally undertaken by a person carrying on business as a builder" (subsection (1A)), but that certain operations "shall not be taken … to involve development of the land", including "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" (subsection (2)(a)).

Sections 171B(1) and 174(2)

7. Section 171B(1) of the 1990 Act provides:

> "(1) Where there has been a breach of planning control consisting in the carrying out without planning permission of building … operations … on … land, no enforcement action may be taken after the end of the period of four years beginning with the date on which the operations were substantially completed."

8. Section 174(1) provides that "[a] person having an interest in the land to which an enforcement notice relates … may appeal to the Secretary of State against the notice …". Subsection (2) provides:

> "(2) An appeal may be brought on any of the following grounds –
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> (a) that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted …;
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> (b) that those matters have not occurred;
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> …
>
> (d) that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters;

…".

9. Much of the argument before us drew on the decision of the House of Lords in *Sage v Secretary of State for the Environment, Transport and the Regions* [2003] 1 W.L.R. 983 – in particular the speech of Lord Hobhouse of Woodborough, with which Lord Nicholls of Birkenhead, Lord Hope of Craighead, Lord Scott of Foscote and Lord Rodger of Earlsferry all agreed.

10. On the question of substantial completion, Lord Hobhouse said (in paragraphs 13 and 14):

> "13. The inspector started by considering Mr Sage's contention that it was an agricultural structure and therefore he had never needed any planning permission to erect it. He considered how it was constructed and concluded that it was constructed with domestic not agricultural features, as a dwelling not as a building to be used for agricultural purposes. … He applied the test of physical layout and appearance … .
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> 14. The inspector rightly did not investigate the intentions of Mr Sage at various stages in the history nor the uses he had made of the structure from time to time. The character and purpose of a structure falls to be assessed by examining its physical and design features. The relevance of the assessment is to determine whether or not the building operation is one requiring planning permission. The actual use made of the building does not alter the answer to be given. Keeping a pig in the sitting-room or hens in the kitchen does not turn a dwelling house into an agricultural building even if the humans move out. Permission for a change of use may have to be applied for but that would be a separate question. The starting point for considering the permitted use of a new structure is the character of the building for which permission has been given or does not require to be given (section 75(3)): "… the permission shall be construed as including permission to use the building for the purposes for which it is designed."".

The inspector had concluded that, "[as] a matter of fact and degree, … having regard to its layout and appearance, [this building] is not an agricultural building and was not designed as such", but "is best described as a dwelling house that is in course of construction" (paragraph 15).

11. On the remaining work to the exterior of the building, Lord Hobhouse said this (in paragraph 19):

> "19. It would be a question of fact whether the external work still to be done would have had a material effect on the building's appearance. But that question would only become significant if the work was carried out "for the maintenance, improvement or other alteration" of the building. Work carried out by way of completing an incomplete structure would not come within exception (a) [in section 55(2)]. So, once it has to be accepted, in accordance with the inspector's finding, that the structure was a dwelling house in the course of construction, it follows that the work would be properly described as work carried out in the

> course of completing the construction of the building. Exception (a) clearly contemplates and involves a completed building which is to be maintained, improved or altered. …".

12. Lord Hobhouse referred to the "holistic approach" implicit in what an enforcement notice relating to a single operation may require. So "[where] a lesser operation might have been carried out without planning permission or where an operation was started outside the four-year period but not substantially completed outside that period, the notice may nevertheless require the removal of all the works including ancillary works" (see *Ewen Developments Ltd. v Secretary of State for the Environment* [1980] J.P.L. 404, *Howes v Secretary of State for the Environment* [1984] J.P.L. 439 and *Somak Travel Ltd. v Secretary of State for the Environment* [1987] J.P.L. 630) (paragraph 24). The inspector's decision was therefore "correct". The enforcement notice had not been served after the end of the period of four years beginning with the date on which the building operations were substantially completed (paragraph 27).

13. Lord Hope dealt with the potential relevance of the developer's "intention" in this way (in paragraphs 7 and 8):

> "7. … [If] it is shown that he has stopped short of what he contemplated and intended when he began the development, the building as it stands can properly be treated as an uncompleted building against which the four-year period has not yet begun to run.
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> 8. It must be emphasised that it is not for the inspector to substitute his own view as to what a building is intended to be for that which was intended by the developer. But that was not what the inspector did in this case. It was not just that the building looked to him like a dwelling house that was in the course of construction. His conclusion was supported, in his view, by an application which Mr Sage had made in 1994 to use the building for tourist accommodation and by his finding that that remained Mr Sage's stated intention. These matters were relevant to the question which he had to decide, and in my opinion he was entitled on the facts which he found to reach the conclusion he did."

14. As Lord Scott pointed out, the issue in that case was whether the building was an agricultural structure, as Mr Sage said it was, or an uncompleted dwelling house, as the local planning authority contended. The inspector had "made the important finding that as a matter of fact and degree … having regard to its layout and appearance, [it was] not an agricultural building and was not designed as such". And this finding had not been challenged (paragraph 34). Lord Hobhouse had concluded that the inspector was right to find the building operations had not been substantially completed "[on] the premise that [he] was faced with an uncompleted dwelling house" (paragraph 35). As for the premise itself, Lord Scott said he had "no doubt at all that the inspector was right in concluding that what had been designed by Mr Sage and what he had been building was a structure intended for use as a dwelling house". He also emphasised that "the change in the appropriate classification of the building, from agricultural barn to dwelling house, would not depend on whether planning permission had been obtained". It "would be a question of fact" (paragraph 36).

The inspector's decision letter

15. In the decision letter here the inspector said the appeal on ground (b) related only to "the alleged erection of a new building". Mr Devine had said "the building [was] not new, and [had] not been rebuilt, but [had] been repaired over time, as needed or to improve it". To succeed on this ground "it [was] necessary for him to show, as a matter of fact and degree, that a new building [had] not been erected" (paragraph 8). He had "carried out many of the works to the building in an incremental manner, in his own time and over several years". The "burden of proof" was "on him to show that those works [had] not, cumulatively, resulted in a new building" (paragraph 9).

16. The inspector recorded the various works carried out by Mr Devine since 2000 – under the headings "The eastern wing" (paragraph 10), "The northern and western wings – the base and floor" (paragraph 11), "The northern and western wings – the walls" (paragraphs 12 to 19) and "The northern and western wings – the roof" (paragraphs 20 to 23). He then came to the question "Whether these changes constitute a new building" (in paragraphs 24 to 32):

> "24. The courts have held that, in principle, the retention of fabric from an original building does not preclude it being found, as a matter of fact and degree, that a new building has been formed and that the original building has ceased to exist [Here a footnote refers to the Court of Appeal's decision in *Oates v Secretary of State for Communities and Local Government and Canterbury City Council* [2018] EWCA Civ 2229; [2019] JPL 251.]. Whether that has occurred is a matter to be determined according to the facts of each case.
>
> 25. It is not known what works the appellant contemplated and intended to carry out when he bought the building, although he began using it for his building and joinery business after making the roof watertight. Nevertheless, the 5 applications he made in 2018, after he had retired, confirm it was then his intention that the building should become a dwelling.
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> 26. The elevations and floor plans from those applications are marked 'existing + proposed', indicating that any structural or elevational changes the appellant deemed necessary for residential use had already been carried out. Except for a porch, since removed, and the insertion of doors and windows, the drawings show the building as it is now. It would require a substantial leap of imagination to view this repurposing of the building as an unplanned consequence of nothing more than repairs and improvements.
>
> 27. However, it is necessary to determine whether, and if so to what extent, the original building has survived or whether what the appellant describes as repair and improvement has resulted in a new building. It is the building that existed when the notice was issued, taking account of the cumulative effect of the works since 2000, that must be considered.
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> 28. The entire eastern wing is a new building. The appellant's annotated plan indicates it is a significant proportion, possibly a third of the total fabric. The walls of the northern and western wings have been greatly altered, particularly in the western wing, where the southern gable is rebuilt, with an inner skin added, and an entire section of wall has been replaced in the west elevation. The

> collective evidence indicates, as a matter of fact and degree, that the entire roof structure of these wings, including the slates, is new.
>
> 29. Everything that can be seen from inside the northern and western wings, including the walls, the floor, and the roof structure, is new fabric. The appellant contends that most of the original outer brickwork of these wings remains in place and he estimates that approximately a quarter of the brickwork in these wings is new or re-used. While that estimate was made in good faith, it is not supported by other evidence and its credibility is undermined by ambiguities exposed in cross-examination.
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> 30. As a matter of fact and degree, only an indeterminate, but nevertheless small, proportion of the building's original fabric may have survived in the walls of the northern and western wings. This, and the corresponding far greater proportion of new fabric, mean that the original building no longer exists as a recognisable structure.
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> 31. There is no doubt that the original base of the northern and western wings supports the building above it. Neither can it be doubted that the remaining original fabric in the outer skin of the external walls of the northern and western wings contributes in some way to the structural integrity of the building. However, the proportion of original brickwork is not quantified and, consequently, the degree of support it may provide to the building is uncertain. It has therefore not been demonstrated that the remaining original fabric provides anything more than modest support to the building now existing.
>
> 32. Although the building works undertaken between 2000 and 2018 have been presented as apparently unconnected repairs and improvements, the outcome is a unified building. While the northern and western wings broadly follow the form and mass of the original building, they are significantly different in terms of their fabric. When the elevational changes to those wings and the construction of the entire eastern wing are also considered, there can be no doubt that a different, and therefore new, building now exists. What fabric remains from the original building is fully incorporated in this new building."

17. It followed that "the allegation set out in the notice, the erection of a new building, is correct and the appeal on ground (b) must fail" (paragraph 36).

18. On the ground (d) appeal Mr Devine's contention was that the relevant works were merely repairs, completed more than four years before the enforcement notice was issued, and therefore immune from enforcement. He urged the inspector to keep in mind the distinction between repair and rebuilding. Changes to the brickwork were, he said, works of repair. They had not resulted in the loss of the original building, which had remained intact throughout. The new openings in the walls had all been completed more than four years before the notice was served. In closing submissions his counsel argued that "the building is extremely longstanding and cannot be enforced against", and "[the] roof was simply a matter of repair".

19. Those assertions were not accepted by the council. Relying on photographs and on what officers had seen on visits to the site, it maintained that most of the works had taken place after June 2016. When the enforcement notice was issued in March 2019 it was

not too late to enforce. Substantial work had been carried out after the "relevant date" – four years before the notice was issued. And the "purpose" of the building – its use as a dwelling house – was relevant to the question of substantial completion. In closing, the council referred to the evidence of "significant rebuilding and reconstruction of the building within the relevant four-year period". The inspector should approach the question of substantial completion as the House of Lords had indicated in *Sage*.

20. The inspector acknowledged that "[to] succeed on [ground (d)] the appellant needs to show, on the balance of probability, that the building operations comprising the erection of the building and/or the boundary wall and fence were substantially completed on or before 18 March 2015 (the Relevant Date) …" (paragraph 37).

21. He then said (in paragraphs 38 to 43):

> "38. The building lacks heating and sanitation, electric work is incomplete, and doors and windows have yet to be inserted. The appellant has documented building operations that were undertaken after the Relevant Date, the most significant being the entire roof over the northern and western wings. Other works undertaken after the Relevant Date include the final restoration of bricked up windows, alterations to the south gables of the eastern and western wings, and the replacement, re-pointing, and cleaning of brickwork throughout. While the appellant states these works did not continue beyond 2017, another statement indicates that building works were still being undertaken in 2019. The author of that statement was not called as a witness, so it was not possible to test this ambiguity, and greater weight must be afforded to the evidence that was affirmed.
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> 39. Nevertheless, significant building operations that were part of the erection of the new building were undertaken after the Relevant Date. Evidence of the appellant's intentions for the building at that time was not presented. However, he affirmed that his retirement in 2015, the year of the Relevant Date, had given him more time to devote to 'the project'. A precise retirement date was not given, and the nature of 'the project' was not explained. However, in the context of the appellant ending his business use of the building, it is reasonable to assume the project was concerned with its future use.
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> 40. The possibility that the changes to the structure deemed necessary for residential occupation, which were part of the erection of the new building, had been achieved without forethought is too slight to be given significant weight. In contrast, the building operations carried out from 2015 to 2017 would be consistent with an objective of creating a building suitable for residential use. That intention was repeatedly stated in the 5 applications made in 2018, after those works had been completed.
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> 41. The construction of the eastern wing in its original form was substantially completed before the Relevant Date. While there is little or no evidence of that original form to compare with what existed when the notice was issued, the appellant's Hearing Plan … indicates that significant elevational changes were undertaken. Nevertheless, by 2018, and like the rest of the building, any structural and elevational changes to the eastern wing that the appellant deemed

> necessary for future residential use had been carried out. This must be assumed to include the replacement of roof tiles with slates.
>
> 42. The building works that resulted in the northern and western wings becoming a new building were not substantially completed on or before the Relevant Date. As a matter of fact and degree, and considering the changes made to it from 2015 onward, the eastern wing is not an extension to a building that no longer exists as a recognisable structure. Rather, it is part of the new building.
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> 43. For these reasons it has not been demonstrated that the new building was substantially completed on or before the Relevant Date."

22. Having also concluded that the ground (a) appeal should not succeed, the inspector dismissed the appeal, upheld the enforcement notice, and refused the deemed application for planning permission (paragraph 61).

Fordham J.'s judgment

23. As Fordham J. said, the inspector's conclusion that a "new building" had come into existence could not be impugned, as permission had not been given to do so (paragraph 15 of the judgment). Two things had led the inspector to that conclusion: the replacement of the "entire roof structure, incorporating new timbers and steels, […] during 2016 and 2017", and his rejection of the claim that the various operations were "repairs and improvements, including the replacement of the "entire roof structure"" (paragraph 19). The fact that the works to the roof had taken place during the relevant four-year period was fatal to the appeal on ground (d). The question was "not whether there was already a [new building] prior to March 2015". It was "whether there was a new building, as the "outcome" of the building works between 2000 and 2018, as a "unified building"". This was what the inspector had found, "in an assessment which involved no public law error". The question, said the judge, was "whether <u>that</u> New Building had been substantially completed prior to March 2015". And "[it] could not have been". The "building works 2015-2018, specifically the significant replacement of the "entire roof structure" during 2016 and 2017, had not by then taken place" (paragraph 23).

24. The inspector had not failed to address the contention that the building remained the same 125-year old building, on which a series of repairs had been undertaken. He had recorded Mr Devine's argument that the building "has not been rebuilt, but … repaired over time, as needed to improve it". And he had seen the need to determine "whether, and if so to what extent, the original building has survived [or whether] what [Mr Devine] described as repair and improvement has resulted in a new building". The building works undertaken between 2000 and 2018 had been "presented" as "apparently unconnected repairs and improvements" (paragraph 24).

25. In the judge's view the inspector had adopted the approach endorsed by the House of Lords in *Sage* (paragraph 29). Mr Devine had been unsuccessful "in two distinct respects, each of which was free from public law error". The first was that "a key feature of the building operations which led to there being a New Building had taken place

during the four years and therefore the operations were not "substantially completed" before the Relevant Date". The second was that "this was a case involving building operations which were structural changes necessary for residential occupation, with an objective of creating a building suitable for residential use, but where the project was unfinished". These were "distinct points", and "[each] of them [was] unassailable in public law terms". They were the inspector's "reasons" for concluding that Mr Devine had not demonstrated that the operations involved in the construction of the new building were "substantially completed on or before the relevant date". Either of them would be "fatal". The submission that it was "punitive, disproportionate and absurd that the building should now be lost" had "no freestanding purchase, absent the identification of a viable public law flaw, given the holistic approach taken in planning law" – as Lord Hobhouse put it in *Sage*. The section 289 appeal was therefore dismissed (paragraph 30).

Was the inspector's approach to the ground (d) appeal unlawful?

26. For Mr Devine, Ms Kate Olley reminded us that the enforcement of planning control is intended to be "remedial" rather than "punitive" (see the judgment of Carnwath L.J., as he then was, in *Tapecrown Ltd. v First Secretary of State* [2006] EWCA Civ 1744, at paragraph 46).

27. Ms Olley conceded, rightly, that because permission had not been given to pursue the challenge to the inspector's approach to the ground (b) appeal, she could not seek to persuade the judge in the court below, or us, that the inspector had erred on that ground. As she accepted, it was not open to her to dispute the inspector's conclusion, in the light of his findings of fact, that the building on the site when the enforcement notice was issued was indeed a "new building". She also confirmed that she did not seek to attack any of the inspector's findings of fact.

28. But Ms Olley argued nonetheless that the inspector had made two significant errors. First, he had pursued an "impermissible line of enquiry" or, in effect, had taken into account an immaterial consideration: Mr Devine's subjective "intention" in carrying out the works, and not simply the "purpose" of the building itself (see Lord Hobhouse's speech in *Sage*, at paragraph 14). Secondly, he made the basic mistake of regarding the building as a dwelling house and asking himself whether its construction as a dwelling house had been "substantially completed". The allegation in the enforcement notice was not the creation of a "dwelling house". It referred only to a "new building". The inspector had judged the building against the standard of a completed residential building rather than what it was – a barn. Mr Devine had acknowledged that he wanted to use it as a dwelling if the council ever granted planning permission for that use. However, the inspector was wrong to consider only whether the structure was ready for residential occupation, and ignore the crucial question of whether its construction as a building had been "substantially completed". Even if there was a "new building", it was the building formed by the barn Mr Devine had acquired in 2000 and the east wing he went on to build. It was still a barn, a new barn, and its construction had been "substantially completed" by the "relevant date". The roof had had to be fully replaced**,** but this was merely an act of repair. It did not change the building's "form and mass". Section 55(2)(a) of the 1990 Act relates to buildings whose construction has already been completed (see Lord Hobhouse's speech in *Sage*, at paragraphs 19 to 23, and the

judgment of Lord Sales and Lord Leggatt in *Hillside Parks Ltd. v Snowdonia National Park Authority* [2022] UKSC 30; [2022] 1 W.L.R. 5077, at paragraphs 62, 64 and 66). Unlike the building in *Sage* the barn in this case was not an "incomplete" structure. Its construction had been "substantially completed" before the "relevant date", and it was later altered and improved. It was therefore immune from enforcement.

29. The inspector's errors, Ms Olley submitted, had been repeated by the judge. The logic of his analysis was that a building whose construction had been "substantially completed" could become incomplete again, only to be made complete once more after its roof had been replaced. This, said Ms Olley, would be a nonsense. It had led here to a "punitive" and "disproportionate" result. Mr Devine would have to demolish the building. In place of the barn he had bought in 2000 there would now be an empty site.

30. For the Secretary of State, Mr Freddie Humphreys submitted that the judge's conclusions were right. The lawfulness of the inspector's findings and conclusion on the ground (b) appeal, which informed his consideration of the appeal on ground (d), was not in issue, and could not be. And his approach on ground (d) was also correct.

31. Mr Humphreys submitted that it was for the inspector to establish whether particular works were merely works of repair or for the construction of a new building. He did not accept that the works to the roof of the northern and western wings were merely repairs. In his conclusions on the ground (b) appeal he explained why he considered they were part of the work resulting in the creation of a "new building". When dealing with the ground (d) appeal he referred in paragraph 38 of the decision letter to the construction of the roof over the northern and western wings as the "most significant" of the building operations undertaken after the "relevant date". But this was not the only work carried out in that period. The inspector also referred to "[other] works undertaken after the Relevant Date", including "the final restoration of bricked up windows, alterations to the south gables of the eastern and western wings, and the replacement, re-pointing, and cleaning of brickwork throughout". As he found in paragraph 39, "significant building operations that were part of the erection of the new building were undertaken after the Relevant Date"; and in paragraph 42, "[the] building works that resulted in the northern and western wings becoming a new building were not substantially completed on or before the Relevant Date", and "[as] a matter of fact and degree, and considering the changes made to it from 2015 onward, the eastern wing is not an extension to a building that no longer exists as a recognisable structure", but "is part of the new building".

32. It was clear from the speech of Lord Hobhouse in *Sage*, Mr Humphreys submitted, that the inspector was entitled to take into account the purpose of the building when considering whether its construction had been "substantially completed". His conclusion, as a matter of evaluative judgment, that the building had been designed as a dwelling was based on secure findings of fact. He had ample evidence to sustain those findings. And the conclusion he reached in the light of them was reasonable and lawful.

33. Carefully presented as they were, I cannot accept Ms Olley's submissions. In my view Mr Humphreys' are sound. The inspector's decision letter must be read fairly and as a whole. His findings of fact and conclusions on the ground (d) appeal go together with those on ground (b). On both grounds his approach was correct. He did not commit either of the errors of which Ms Olley complained. He made clear and comprehensive findings on the evidence before him, with the benefit of his site visit. Each of them was

for him to make, as a matter of fact and degree, in the particular circumstances of this case (see the judgment of Lord Parker C.J. in *Sainty v Minister of Housing and Local Government* 15 P. & C.R. 482, at p.484, and the leading judgment in *Oates*, at paragraphs 32 to 38). In forming the conclusions he based upon them he exercised his own evaluative judgment, and he did so lawfully. I therefore think the judge was right to decide as he did, and essentially for the reasons he gave.

34. When one looks at what the inspector said on the ground (b) and ground (d) appeals in its totality, three main conclusions stand out. First, a new building had been constructed in place of the original building, using some of the fabric of that original building but with the effect of creating a new and "unified" structure. Second, the new building was, unmistakeably, a dwelling house in the course of construction. And third, the operations involved in its construction were not "substantially completed" before the "relevant date", and it was therefore not immune from enforcement.

35. The inspector's approach to the crucial question in the ground (d) appeal – whether the operations in question had been "substantially completed" before the "relevant date" – is, in my view, legally impeccable. It was the approach on which the House of Lords agreed in *Sage*.

36. There was nothing unlawful in the inspector's consideration of the purpose of the building Mr Devine had constructed. That purpose was plain in the physical layout and appearance of the structure he saw on the site. He was in no doubt that this was a building designed for residential use, not agricultural; it was a dwelling house, not a barn. And Mr Devine's "intentions" when carrying out the works were reflected in the physical and design features of the structure itself.

37. It would be, I think, a misreading of Lord Hobhouse's speech in *Sage* to take from it the proposition that the "intentions" of the developer or landowner must be studiously ignored by an inspector when assessing the "character and purpose" of the structure against which a local planning authority has taken enforcement action. Lord Hobhouse made it clear that "[the] character and purpose of a structure falls to be assessed by examining its physical and design features" (paragraph 14 of his speech). He cautioned against an investigation of the intentions of the developer at intervals in the relevant planning history, and undue reliance on the actual use to which the structure in question has been put from time to time. An inspector must always focus on the "physical layout and appearance" of the building itself. What is required, as Lord Hobhouse stressed, is an examination of the building's "physical and design features". But the intentions of a developer, whether self-declared or revealed by his own actions, were not said to be an "immaterial consideration" – a consideration to which an inspector may not lawfully have regard.

38. In this context "purpose" and "intention" are not the same thing. Lord Hobhouse distinguished between these two concepts – one objective, the other subjective. The general context here is the inspector's task of establishing what the structure in question really is. The specific context is the task of establishing, on all relevant evidence, whether the operations in question were "substantially completed" by a particular date. "Purpose" is the objective concept. It goes to the question of whether, given its physical and design features, a building is, for example, a dwelling house or an agricultural building. "Intention" is different. It is – in this example – the subjective aim or wish of the developer to construct and use the building as a dwelling or to construct and use it

for agriculture. Of course, "purpose" and "intention" are not usually at odds. Normally they will coincide. As in *Sage*, the developer's intention to build a dwelling house will generally result in his designing the building to have the physical features of a dwelling house, not those of a barn. The purpose of the building will correspond to his intentions in constructing it as he does.

39. The emphasis Lord Hobhouse gave to the distinction between "purpose" and "intention" was not, I think, prompted by the idea that an inspector must disregard any evidence of the developer's subjective "intention", but by the need to ensure that such evidence does not override or obscure the objective purpose of the structure itself, manifested in its own physical and design features. If an inspector is satisfied that the structure in question has the physical and design features of a dwelling house, one would not normally expect him to conclude that it is, nevertheless, an agricultural building merely because the developer has stated his intention to use it as such or has already begun to do so. Evidence of a developer's intention which contradicts the objective reality of what he has in fact built will not, generally at least, negate that objective reality. But if he has in fact erected a structure with the physical and design features of a dwelling house and there is also evidence that he truly intended to do just that – if, for example, he has proposed such development in an application for planning permission – it must be open to the inspector to treat that evidence as consistent with the conclusion that a dwelling house has indeed been constructed. This will always be a matter for the inspector to consider, taking the developer's stated intention at face value – as Lord Hope said in *Sage* (at paragraphs 7 and 8) – but forming his own view on what has actually been built.

40. On that understanding of what Lord Hobhouse said in *Sage*, I cannot fault what the inspector did here. He cannot be criticised for taking into account evidence of Mr Devine's intentions as work on the site went ahead, including what he said when he made his applications for planning permission in 2018 (paragraphs 39 and 40 of the decision letter).

41. Having done that, he saw no reason to doubt the objective reality of what Mr Devine had actually built on the site. It was, in truth, a new building. It was a dwelling house, not a barn. And the operations had not been "substantially completed" at the "relevant date". On each of these three things the inspector's conclusion, on all the evidence before him but with a focus on the physical and design features of the building itself, was clear. Like the inspector in *Sage*, he concluded that this was a dwelling house in the course of construction.

42. On a fair reading of the relevant passages in the decision letter the inspector's assessment is clear, and in my view entirely lawful. It does not depart from the approach commended by the House of Lords in *Sage*. It does not suffer from the defects to which Lord Hobhouse referred in that case. It concentrates on the structural work carried out by Mr Devine, whose effect, the inspector found, was to create a new building, and it deals appropriately with the building's purpose. The inspector considered the physical nature of the structure and the features of its design, and was satisfied that this was a building designed for residential use. He did not subordinate that conclusion to a contrary view of the developer's subjective intentions. He recognised that Mr Devine's evident intention to build a dwelling house was consistent with his own view that the structure itself had the physical and design features of a dwelling house. That is neither surprising nor in any way unlawful.

43. I also reject the submission that the inspector made the mistake of starting from a fixed assumption that the new building had been, from the outset, a dwelling house in the course of construction, and judging whether the operations involved in its construction had been "substantially completed" by the "relevant date" against that assumption. That is not what he did. In dealing with the ground (b) appeal he began (in paragraph 8 of the decision letter) by reminding himself that the appeal on that ground related only to "the alleged erection of a new building", and that Mr Devine had to demonstrate "that a new building has not been erected" (my emphasis). He went on in the following 15 paragraphs to consider each element of the work Mr Devine had carried out, referring to the structure simply as "the building". He then (in paragraph 24) turned to the crucial question: "Whether these changes constitute a new building" (my emphasis again). In the next 13 paragraphs he answered that question. What emerged was the clear conclusion that this was indeed a "new building". But there was another conclusion too. This was that, as a consequence of the "repurposing" to which the inspector referred (in paragraph 26), the new building was a dwelling house. That conclusion came out of his assessment on the ground (b) appeal. It was not an assumption he made as a starting point.

44. The inspector's consideration of the appeal on ground (d) proceeded from his findings and conclusions on ground (b) – again, not the mere assumption that the new building was a dwelling house. As one would expect, he took his assessment on the ground (b) appeal as the basis for considering whether the works for the erection of the new building were "substantially completed" before the "relevant date".

45. He found (in paragraph 38) that "the building [lacked] heating and sanitation", that the "electric work [was] incomplete" and that "doors and windows [had] yet to be inserted". He found that Mr Devine had himself "documented building operations … undertaken after the Relevant Date", the "most significant" of which was "the entire roof over the northern and western wings". And he also referred to evidence that "[other] works undertaken after the Relevant Date [included] the final restoration of bricked up windows, alterations to the south gables of the eastern and western wings, and the replacement, re-pointing, and cleaning of brickwork throughout". In spite of the doubt over the dates on which those works were done he found (in paragraph 39) that "significant building operations that were part of the erection of the new building were undertaken after the Relevant Date". He went on to find (in paragraph 40) that "the building operations carried out from 2015 to 2017 would be consistent with an objective of creating a new building suitable for residential use" – an objective one could see in the "intention … repeatedly stated" in Mr Devine's five applications for planning permission in 2018; that "by 2018, and like the rest of the building, any structural and elevational changes to the eastern wing that [Mr Devine] deemed necessary for future residential use had been carried out" (paragraph 41); that "[the] building works that resulted in the northern and western wings becoming a new building were not substantially completed on or before the Relevant Date" (paragraph 42); and that in view of "the changes made to it from 2015 onward the eastern wing … is part of the new building" (also paragraph 42). There is no legal flaw in that assessment.

46. I agree with the judge's conclusion (in paragraph 30 of his judgment) that Mr Devine's appeal on ground (d) failed in two ways. First, the inspector reached the conclusion that building operations which had resulted in a "new building" coming into existence had not been "substantially completed" before the "relevant date". And secondly, he also

concluded that those building operations had brought about structural changes necessary for residential occupation of the "new building", though the project to create a new dwelling house on the site was still unfinished. Those two conclusions were, as the judge said, the inspector's "reasons" for concluding Mr Devine had not demonstrated that the operations involved in the construction of the "new building" were "substantially completed" before the "relevant date". Both of them are reasonable and lawful conclusions. Both were underpinned by lawful findings of fact. Both are legally impregnable.

47. I do not find this result uncomfortable, in the sense that the dismissal of Mr Devine's section 174 appeal will lead to the removal of the "new building" against which the council took enforcement action. The reality here, in the light of the inspector's assessment, is that instead of applying first for planning permission Mr Devine went ahead with the erection of a "new building" in place of the one he had acquired when he bought the site. He continued with his unauthorised building work for many years. No planning permission for it was granted. And as the council was entitled to do, it ultimately enforced, and its enforcement notice was lawfully upheld. That is, I accept, unfortunate for Mr Devine. But in my view it is not an outcome that could be considered "punitive" or "disproportionate", or otherwise unjust.

Conclusion

48. For the reasons I have given, I would dismiss the appeal.

Lord Justice Singh:

49. I agree.

Lady Justice Elisabeth Laing:

50. I also agree.