Neutral Citation Number: [2022] EWHC 2031 (Admin)

Case No: CO/4287/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING IN MANCHESTER

29th July 2022

Before:

MR JUSTICE FORDHAM

- -

Between:

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

- -
- -

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

- -

Hearing date: 25.7.22

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM:

Introduction

1. This is an appeal in a planning case. It has arisen as follows. On 18 March 2019 the Interested Party, the local planning authority ("the LPA"), served an Enforcement Notice on the Appellant. That was pursuant to section 172 of the Town and Country Planning Act 1990 ("the 1990 Act"). It alleged a breach of planning control by the Appellant at a site known as Dones View Farm, in greenbelt land, by this "unauthorised development":

> ***Without planning permission the erection of new building … and the erection of boundary wall and fence …***

2. The Appellant lodged an appeal against the Enforcement Notice to the Respondent ("the Secretary of State"), pursuant to section 174 of the 1990 Act. The grounds of appeal raised three issues. One, pursuant to section 174(2)(a), and was that planning permission ought in any event to be granted, in relation to the wall and fence. Another, pursuant to section 174(2)(b), was that operations carried out by the Appellant at the site since he purchased it as a disused barn in 2000 did not involve any "new building" ("the New Building Issue"). The third issue ("the Time Limit Issue"), pursuant to section 174(2)(d), was this. Whether or not any operations carried out by the Appellant at the site did constitute a breach of planning control, in light of the date when the Notice was issued, no enforcement action could be taken in respect of any breach. The Time Limit Issue invokes section 171B of the 1990 Act ("time limits"). Specifically, section 171B(1), which provides

> ***Where there has been a breach of planning control consisting in the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under 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.***

The date four years before the Enforcement Notice – described in this case as "the Relevant Date" was 18 March 2015.

3. The appeal against the Enforcement Notice was considered by an Inspector, acting for the Secretary of State. There was a three day inquiry. Oral evidence was given by eight witnesses on behalf of the Appellant (including the Appellant himself), and two witnesses on behalf of the LPA. Relevant documents were considered. Submissions were made by Counsel for the Appellant and Counsel for the LPA, in writing and orally. The Inspector dismissed the Appellant's appeal on all three issues by a Determination dated 23 November 2021.

4. The Appellant appeals against the Inspector's Determination to this Court. That is an appeal "on a point of law" (section 289(1) of the 1990 Act). The application for permission to appeal to this Court advanced three grounds, reflecting each of the three issues which had been pursued to the Inspector. On 15 March 2022 Tim Smith, sitting as a Deputy High Court Judge, granted permission to appeal on the ground of appeal raising the Time Limit Issue (section 174(2)(d)). He refused permission to appeal on the grounds of appeal raising the New Building Issue (section 174(2)(d)) and the remaining issue (section 174(2)(a)). So, the issue on this appeal is whether the Inspector made a decision erroneous in point of law in concluding that the relevant building operations had not been "substantially completed" before the Relevant Date (18 March 2015).

Sage

5. One of the authorities cited to the Inspector and the only authority cited to me is Sage v Secretary of State for the Environment Transport and the Regions [2003] UKHL 22 [2003] 2 All ER 689. There, the House of Lords was concerned with an appeal invoking section 174(2)(d) and section 171B(1). The inspector in the Sage case had, unassailably, found that "as a matter of fact and degree" the building on which the building operations had taken place was "not an agricultural building" but "a dwelling house in the course of construction" (§15). The appellant in Sage had not done any further building work during the four years prior to the enforcement notice (§12). Regarding whether the relevant building operations were to be regarded as "substantially completed", the High Court and Court of Appeal had each asked this question: whether "the work needed to complete the structure as a dwelling house was such as of itself to require planning permission" (§§17, 21-22). The House of Lords concluded that this was a legally erroneous approach. The legally correct approach was a "holistic" one (§§22-27) which looked at the whole operation and asked whether that operation had been "substantially completed". In Sage it had not been, because the construction of the dwellinghouse was unfinished and further building operations were needed to complete it.

6. Both Counsel emphasised the authoritative wisdom expressed in this passage from the speech of Lord Hobhouse, with whom the rest of the Court agreed (Sage §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.***

It was common ground that "character and purpose" are assessed by reference to "physical and design features", objectively, and not through an investigation of subjective intentions. It was also common ground that Lord Hope's observations in Sage at §6 (about contemplation and intention, being derived from sources especially physical features and design) were consistent with, and cannot detract from, this.

Reasoning on the Time Limit Issue

7. The Inspector's essential reasoning on the Time Limit Issue was as follows:

> ***37. To succeed on this ground 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), 4 years before the date on which the notice was issued.***
>
> ***The new building***
>
> ***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.***

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.

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.

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 (CD 7.1) 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.

43. For these reasons it has not been demonstrated that the new building was substantially completed on or before the Relevant Date.

Essence of the Appellant’s arguments

8. The essence of the arguments advanced on behalf the Appellant by Ms Olley, as I see it, were as follows. The Inspector’s decision on the Time Limit Issue is flawed in public law terms. The adverse conclusion which the Inspector reached: failed to take relevant considerations into account; or took irrelevant considerations into account; or was unreasonable in a public law sense; or did not contain legally adequate reasons; or any combination of these overlapping vitiating flaws.

9. The Inspector looked at the case through an inapt prism, which saw this – and was looking for this – as an “unfinished dwelling” in the course of construction. The Inspector was quite right to say that the building could not be used as a dwelling. The building could not be regarded as a finished dwelling. It was not fit for human habitation. But the Inspector proceeded from “not a finished building” to “an unfinished dwelling”. That was an impermissible and unjustified step. It did not follow. The Inspector should have seen that this was “not a finished dwelling” because it was “a finished non-dwelling”. Even if there was a post-2000 New Building – which the Appellant did not and does not accept but cannot impugn within the scope of this appeal – that New Building was still an agricultural/storage building. The Enforcement Notice did not portray this as an “unfinished dwelling”, but merely as a New Building which replaced the building that previously stood in this location on site. The Enforcement Notice referred to a planning application which the Appellant had made in 2018 in which it had been confirmed by him “that the building was a barn 17 years ago but has since then been used for storage”.

So, this was an agriculture/storage building. As the LPA's witness Ms Logue accepted in cross-examination, when she went on a site visit in 2018 in conjunction with one of the Appellant's planning applications, "she was looking at the building through the lens of an application for its residential use rather than simply a building which had been there for 125 years". After the Enforcement Notice what came into the case was a fixation on this as a dwelling, on residential use, and on the fact that the building was not yet fit for human habitation. That was the wrong, and an unwarranted, way of looking at the case. True, the Appellant made planning applications in 2018 for permission to convert the building into a "dwelling". But that was seeking a permission to do something in the future. Seeking planning permission to turn a barn into a dwelling does not make it an unfinished dwelling. The Appellant candidly accepted that he would very much like to have permission to convert the building to a dwelling. That was not new in 2018. But it did not mean the building was already an unfinished dwelling. This was a 125 year old barn. It was an agricultural/storage building. Accepting (it being beyond the scope of this appeal) that this had become a New Building, it was a new agriculture/storage building.

10. The Inspector erroneously failed to appreciate that the replacement of the roof in 2015-2017 was an operation of "repair". Buildings have roofs. Roofs need to be replaced. This building was no exception. That is all that happened when the roof was replaced in 2015-2017. The Appellant's pithily-expressed case in his Closing Argument was that, whatever the conclusion in relation to New Building, "the roof was simply a matter of repair". On that basis, the appeal must succeed on the Time Limit Issue, whatever the Inspector's conclusion on the New Building Issue.

11. It is true that in some places, the Determination refers to the replacement of the roof as being one of the features informing the Inspector's conclusion that there was a New Building. But that is not fatal. The strands of reasoning on the Time Limit Issue were intimately interlinked and interwoven. There were no distinct, parallel lines of reasoning. The consideration of the issues ran together as a whole. The inapt characterisation of an "unfinished dwelling" infected the Inspector's reasoning. The Inspector began this part of the Determination with a point about an "unfinished dwelling" (at §38: "[t]he building lacks heating and sanitation, electric work is incomplete, and doors and windows have yet to be inserted"), and points relating to supposed "objective of creating a building suitable for residential use" are unmistakeable later (at §§39-40). It was there that the Inspector emphasised an "intention … repeatedly stated in the 5 applications made in 2018" (§40). The Inspector reasoned (at §41) that by 2018 "any structural and elevational changes to the eastern wing that the Appellant deemed necessary for future residential use had been carried out". These are all clear references to the characterisation of the building as being an unfinished dwelling. It is quite impossible to disentangle freestanding strands from the Inspector's merged reasons. The inapt characterisation of an "unfinished dwelling" is clear and pervasive. Indeed, the fact that the Inspector decided the New Building Issue adversely to the Appellant is a "red herring". Test it this way. Suppose the Appellant had accepted that there was a New Building. Suppose he had not advanced any argument under section 174(2)(b). He would still have been perfectly entitled to advance an argument based on the Time Limit Issue, unconstrained and in full. In particular, he would have been able to argue that any New Building was "substantially complete" by the Relevant Date. He would have been entitled to argue that the replacement roof, although an operation carried out within the last four years, was a "repair". It would be nothing to the point that there was accepted to be a New Building, subsequent to purchase in 2000. The replacement roof could not, and should not, have

been regarded as being an essential feature of any New Building. The existing barn had an existing roof. It had previously been repaired. The Appellant had added a new roof to the western wing in around 2007, as the Inspector recorded earlier in the Determination.

12. It was quite wrong for the Inspector to have regard to the "intention" which was "stated" in the Appellant's 2018 applications for planning permission. Those were applications for prospective, future permission to convert the premises into a dwelling. That would be future actions, with permission. They were an entirely legitimate intention, entirely consistent with there being an agricultural/storage building which – even if it was a New Building – was "substantially completed" prior to March 2015. Subjective intentions are, moreover, irrelevant and the assessment needed to be of the "character and purpose" of the structure at the site, based on "examining its physical and design features": Sage §14 (§6 above). Moreover, evidence of the Appellant's intentions (after March 2015) "was not presented" (see Determination §39). There was no oral evidence and cross-examination in relation to the Appellant's intentions. What mattered was the character and purpose of the structure by reference to its physical and design features. Viewed in that way, the Inspector should and would have characterised the structure site as being an agricultural/storage building. In identifying it as a New Building, the Inspector should have characterised it as being a new agricultural/storage building. Any New Building was clearly substantially completed prior to March 2015 and the Inspector's conclusion to the contrary was flawed in public law terms. The Inspector failed to appreciate that the replacement of the roof, seen in that way and not in the quest for an unfinished dwelling, was an exercise in "repair". Leaving aside the repair by replacing the roof, the LPA – as it recorded- had no evidence to counter the Appellant's evidence as to the nature of the works which he had carried out at the site or the timing of those works.

13. The Inspector failed to look at the case from the perspective of a 125 year old barn. He failed to take account of the Appellant's case, namely: that he had carried out a restoration of an agricultural building; that this was an agricultural/storage building which the appellant had restored, as a hobby and a project; that if had he really wished to take steps to convert it into a dwelling he had the skills, time and resources to do so, and would have done so, but he had conspicuously not done so; that he would very much want to have permission to convert it into a dwelling; but that was a contingent hope, if permission could be acquired. The Inspector's reasoning was flawed: because of the absence of any adequate explanation, dealing with the key points being advanced on behalf of the Appellant; because of the Inspector's failure to address the case being made on behalf the Appellant, that this was the restoration of an agricultural/storage building. The outcome in this case is that the Appellant will have to demolish the entire building which is punitive, disproportionate and absurd and which illustrates that the Inspector's approach and conclusion are unjustified and unsustainable in public law terms.

14. Those are the Appellant's arguments, in essence.

Reasoning on the New Building Issue

15. In my judgment, the starting point in considering the Appellant's arguments has to be a recognition of the Inspector's reasoned conclusion on the New Building Issue. That conclusion cannot be impugned on this appeal. But it sets the scene. This was the Inspector's key reasoning on the New Building Issue

8. The appeal on this ground only relates to the alleged erection of a new building. The appellant states the building is not new, and has not been rebuilt, but has been repaired over time, as needed or to improve it. However, to succeed on this ground, it is necessary for him to show, as a matter of fact and degree, that a new building has not been erected.

9. The appellant carried out many of the works to the building in an incremental manner, in his own time and over several years. It is therefore understandable that few records were kept, making it harder for him to recall details. However, that does not remove the burden of proof on him to show that those works have not, cumulatively, resulted in a new building.

The eastern wing

10. The building was 'L' shaped when the appellant bought it and he states that he built the eastern wing, giving the building a square 'U' shape, between 2001 and 2004. The eastern wing is therefore a new building.

The northern and western wings - the base and floor

11. A new concrete floor and damp-proof course were laid over the original base. This floor is deeper in a part formerly occupied by milking pens, where drainage channels were filled to create a level floor. This operation introduced new fabric and while filling the drainage channels may have been an improvement that allowed more flexible use, there is no evidence that the original base needed repair.

The northern and western wings - the walls

12. The southern gable of the western wing, described as the pig pen, was originally constructed of single skin brickwork. This gable was rebuilt, and a new roof added in or around 2007. Subsequent elevational changes, including large openings, are recorded in photograph 1 of CD 5.1.

13. All internal walls in these wings are in new blockwork. While they may follow the layout of previous partitions, they have replaced original fabric throughout. The elevations of both wings have changed considerably since 2000, including the removal of areas of render and alterations to door and window openings. Some openings had been bricked up prior to 2000, recorded in photographs' mostly taken in 2000 and 2001. The appellant confirms he reinstated as many as a dozen old openings, made one or two new ones, and blocked others up but had not recorded those changes. Variations in brickwork visible in several photographs in CDs 5.2, 5.3 and 5.4 that are no longer apparent indicate that numerous openings that existed in 2000 have since been altered or bricked up,

14. The appellant states that bricks reclaimed from the original inner skin of the external walls were used to replace those in poor condition in the outer skin, including areas previously beneath render, between 2001 and 2010. However, in cross-examination he affirmed he had sourced bricks from elsewhere to use alongside re-used bricks in the works he carried out between 2001 and 2003. Furthermore, his Schedule of Works' states that original inner brickwork was replaced in 2007 or 2008. This is corroborated by the statement of Andrew Devine, one of the appellant's witnesses, who affirmed in cross-examination that the inner skin of the external walls was replaced in 2007.

15. There is ambiguity in the evidence presented. This is because it is unclear as to whether existing bricks had been available for re-use in any of the alterations to door and window openings the appellant made before 2007. When the appellant was questioned on this in cross-examination, he referred to paragraph 11 of his witness statement (CD 3), but that only states the works were carried out before 15 July 2015.

16. Some 5,000 bricks were brought onto site and the appellant affirmed these were used to build the eastern wing. A Council witness saw white patches in the western elevation of the western wing in March 20183. She considered this to be efflorescence, which is generally found in new

brickwork, although the appellant suggests it could have been frost. No other signs of frost are apparent in any of the Council's 14 photographs taken that day.

17. It is difficult to gauge the proportion of new outer brickwork in these wings by observation. There are no visual clues as to which bricks have been there all along, which were previously inside the building and which were purchased by the appellant. Nor was there any sign of efflorescence when I visited the site. The brickwork looks new, although the appellant explained how he used his skills to clean original and re-used bricks chemically. Roughly half of the bricks in the original inner skin were rendered unusable during removal and only the best ones, approximately 20% of the total, were re-used in the outer skin. Overall, the appellant estimates that a quarter of the external brickwork in the northern and western elevations was replaced. However, the ambiguity in his evidence regarding when the inner skin was replaced means that caution must be exercised when estimating the proportion of re-used original bricks in the outer skin.

18. The appellant's evidence shows that in some areas, the changes he made were significant. When questioned in cross-examination about the large area of render that had been on the western elevation of the western wing, he affirmed that he had eventually knocked the entire wall down. There was also significant change to the eastern elevation of the same wing. The 'before' and 'after' images in photograph 60 (CD 5.6) show that there were 3 doors, a larger opening, and one window where there are now 5 window openings. Annotated drawings` give further indication of the scale of change in this part of the building. This evidence suggests that, even if none of the remaining original brickwork in that part of the building had been replaced, it would be a small proportion of what is there now. It is therefore apparent that, as a matter of fact and degree, only a small amount of original fabric remains in the walls in this part of the building.

19. These are major elevational changes from what existed in 2000 that have unified the brickwork throughout. They incorporate a significant amount of material that was previously elsewhere, either within the building or off-site.

The northern and western wings - the roof

20. The appellant decided in 2015 that the original roof trusses were "in places unsafe"' but this is not explained in detail. While those words may suggest only partial repairs were necessary, the entire roof structure, incorporating new timbers and steels, was replaced during 2016 and 2017.

21. Evidence as to whether, or how many, original slates were re-used in that building operation is contradictory. The appellant states in writing that he re-used all the original slates. When questioned on this in cross-examination, he made a significant change, affirming that he had re-used those that were serviceable, estimating they form about a quarter of the slates now present.

22. In contrast, the statement of Andrew Devine said 'almost new' slates had been sourced. He affirmed in cross-examination that the slates now on the roof are not original. His account has not changed, and it tallies with the evidence of a letter from the roofing contractor engaged in the work, which states the appellant had agreed it would "supply and fit all batons and slates".

23. It has thus not been demonstrated that the slates placed on the roof in 2016 and 2017 were re-used originals. It is more likely they were new to the site.

Whether these changes constitute a new building

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 exist6. 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 20187, after he had retired, confirm it was then his intention that the building should become a dwelling.

> ***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.***
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> ***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 plans 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.***
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> ***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.***
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> ***…***
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> ***36. For these reasons, the allegation set out in the notice, the erection of a new building, is correct and the appeal on ground (b) must fail.***

16. I have set out the Inspector’s reasons on the New Building Issue. I will summarise the position. The Appellant had strongly submitted that there was no “new building”; that this was simply a 125 year old barn with various steps taken to restore it and to repair it; and that one of those steps was the replacement of the roof. The Inspector’s analysis arrived at the conclusion (§32) that “there can be no doubt that a different, and therefore

new, building now exists". As can be seen, that conclusion was the culmination of an analysis which began with (i) the Appellant's argument (§8), and then discussed (ii) the eastern wing (§10), (iii) the northern and western wings (base and floor) (§11), (iv) the northern and western wings (walls) (§§12-19), (v) the northern and western wings (roof) (§§20-23), and finally (vi) the question "whether these changes constitute a new building" (§§24-36).

17. Starting with (i) the Appellant's argument (§8), the Inspector recorded that the Appellant "states the building is not new, and has not been rebuilt, but has been repaired over time, as needed or to improve it". The Inspector observed that it was a matter of "fact and degree" whether "a new building had been erected" and identified the question whether the works carried out "cumulatively" had "resulted in a new building" (§9). After discussing (ii) the eastern wing, (iii) the northern and western wings (base and floor) and (iv) the northern and western wings (walls), the Inspector then turned to (v) the northern and western wings (roof) (§§20-23). On that topic, the Inspector described "the entire roof structure incorporating new timbers and steels" as having been "replaced … during 2016 and 2017" (§20), concluding that the slates on the replacement roof were not "reused originals" but "new to the site" (§23). The Inspector then turned to ask (vi) "whether these changes constitute a new building". The Inspector began this discussion with three observations (§§25-26). First (§25), that it was "not known" what works the Appellant "contemplated and intended to carry out" when he bought the building (in 2000). Secondly (§25), that the planning applications which the Appellant later made in 2018 confirm that it was "then his intention" that the building should "become a dwelling". Thirdly (§26), that having examined "floor plans" from those 2018 planning applications and drawings, since "any structural or elevational changes the appellant deemed necessary for residential use had already been carried out", "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".

18. The Inspector went on to explain his conclusion that, as a matter of "fact and degree" (§30), a "different and … new building" (§32) now existed. In support of that conclusion the Inspector emphasised the following: the new eastern wing (§28); the "greatly altered" walls of the northern and western wings (where an "entire section of wall" had been replaced) (§28); the "entire roof structure" of the northern and western wings including new slates (§28); and the "new fabric" (such that "everything seen from inside the northern and western wings including walls, floors and roof structure" was "new fabric" (§29); and that although the "original base" of the northern and western wings "support[ed] the building above it" (§31), and although the remaining original fabric in the outer skin of the external walls of the northern and western wings "contributed in some way to the building's structural integrity" (§31), the remaining original fabric "did not provide anything more than modest support to the building now existing" (§31)). The Inspector's ultimate conclusion (§32) was that: "Although the building works undertaken between 2000 and 2018 have been presented as apparently unconnected repairs and improvements, the outcome is a unified building".

19. Two things are clear. First, it is clear from the Inspector's reasoned determination on the New Building Issue that a key component of the "changes", which gave rise to his conclusion that those "changes constitute a new building", was the replacement of the "entire roof structure, incorporating new timbers and steels" during 2016 and 2017.

Secondly, it is clear that the Inspector was rejecting the claim that the various operations were repairs and improvements, including the replacement of the "entire roof structure".

Discussion

20. I turn then to the Time Limit Issue, which is the issue on which permission to appeal was granted. I have set out the Inspector's Key Reasons (§7 above) and the essence of the Appellant's arguments (§§8-13 above). I cannot accept that there is a public law error which vitiates the Inspector's Determination on the Time Limit Issue, in the reasons which I have set out (§7 above). In my judgment, the Appellant's arguments are, on analysis, disagreements about evaluative decisions on matters of appreciation and judgment, falling well within the ambit of reasonableness and for which legally adequate reasons were given after taking account of relevant considerations. As has been seen, the Inspector posed the question: whether "the building operations comprising the erection of the building… were substantially completed on or before 18 March 2015 (the Relevant Date), four years before the date on which the notice was issued" (§37). In circumstances where the Inspector had answered the New Building Issue adversely to the Appellant, that was the legally correct question, and the contrary has not been suggested.

The Replacement Roof was a Significant Constitutive Part of the New Building

21. The Inspector gave the "reasons" why it had not been "demonstrated that the new building was substantially completed on or before the Relevant Date" (§43). In my judgment, there is no getting away from the fact that those reasons included this. I have set out the passage in its entirety (§7 above) so that a fair contextual appreciation can be gained of what I here extract (emphasis added):

> ***38. … 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…***
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> ***39. … [S]ignificant building operations that were part of the erection of the new building were undertaken after the Relevant Date…***
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> ***…***
>
> ***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…***

22. The difficulty which this poses for the Appellant, in my judgment, is as follows. Where a finding has been made that X is one of the significant building operations on the land constituting the New Building, it follows (as a matter of legal logic) that that New Building was not "substantially completed" until X had taken place. In this case, X was the replacement of the roof. The Inspector described the Appellant as having documented building operations undertaken after the Relevant Date, "the most significant being the entire roof over the northern and western wings". As I have explained (§§16-19 above), the Inspector had earlier given reasoned conclusions that the replacement of the "entire roof structure during 2016 and 2017" was one of the 'changes constituting a new building' (the heading at §24). The Inspector straightforwardly reasoned that "significant building operations that were part of the erection of the new building were undertaken after the relevant date" (§39); so 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" (§42).

23. In my judgment, this is fatal to the appeal. The logic and reasoning are unimpeachable. Ms Olley accepts, as she must, that there is a finding by the Inspector of a New Building; and that she cannot impugn that finding on this appeal. Permission to appeal was refused on that ground. In my judgment, she therefore has to say that the only New Building which could – consistently with public law principles – be found to have existed was one which was substantially completed before 2015. She would have to say that the replacement of the "entire roof structure" during 2016 and 2017 was not a feature constituting a New Building. I will assume in her favour that this contention is open to her in circumstances where permission to appeal has been granted on the Time Limit point, but not on the New Building point. The Appellant's difficulty is that there is no discernible error of public law, in my judgment, in the Inspector's conclusion that the replacement of the "entire roof structure" during 2016 and 2017 was a "change" which was significant in constituting this a New Building. Even if Ms Olley could identify in the pre-March 2015 factual picture a scenario which would, of itself, already constitute a New Building, Mr Humphreys is right in his response. The question is not whether there was already a New Building prior to March 2015. The question remains whether there was a new building, as the "outcome" of the building works between 2000 and 2018, as a "unified building". That is what the Inspector found, in an assessment which involved no public law error. The question was whether that New Building had been substantially completed prior to March 2015. 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.

There are no Errors of Approach

24. I cannot accept that the Inspector failed to have regard to the Appellant's case: that this was 125 year old barn, which he had simply refurbished, as a hobby including as a continuing "project" after his retirement in 2015, using his time and skills (which he could have used to complete a conversion to a dwelling); that this was no more than the continual restoration of a very old building; and that the replacement of the roof was simply a "repair". The Inspector was well aware of all of this. He was well aware that the building was originally an old agricultural building: he spoke of the part "formerly occupied by milking hens"; he spoke of the part "described as the pigpen". He was also well aware of the use as storage: he described the appellant as having begun using it for his building and joinery business after making the roof watertight; he referred to that as having been "business use of the building". The Inspector was well aware of the argument that this was no more than restoration and repair. He earlier recorded the appellant's argument as being that the building "has not been rebuilt, but has been repaired over time, as needed to improve it". He also identified the need to determine "whether, and if so to what extent, the original building has survived the weather what the appellant described as repair and improvement has resulted in a new building'. And he described the Appellant as having "presented" the building works undertaken between 2000 to 2018 as "apparently unconnected repairs and improvements". The Inspector referred to the fact that the Appellant had carried out many of the works to the building in his own time, that he was in the building and joinery business, and that he had more time to devote to the "project" after his 2015 retirement. The Inspector considered, and clearly rejected, the contention that the replacement of the entire roof structure during

2016 and 2017 was merely an act of "repair". There is, in my judgment, no basis characterising that finding as unreasonable or unsupported by evidence or legally inadequately reasoned or vitiated by reference to any other public law error.

25. I cannot accept that the reasoning relating to the New Building Issue is a "red herring" from the perspective of the Time Limit Issue. Ms Olley posited situation where there was no challenge to the finding on New Building, and therefore no need to reason out a determination on that issue. But taking that scenario, at her invitation, the position in my judgment must be this. In a case where it is accepted that there is a New Building, and the question then comes to be asked whether the relevant building operations were "substantially completed" before the four-year relevant date, it would be necessary at that stage to address what it is in the building operations that leads to the accepted New Building. In those circumstances it would be necessary – and at least open – to an inspector to consider the question why it is right (albeit that it has been accepted) that there is a New Building. Put another way, an adverse conclusion on time limits could not be avoided by the owner of the building making a concession on the New Building Issue, seeking to avoid an analysis of what steps it was that lead to there being a New Building. The logic of the constituent elements leading to a New Building cannot be avoided.

This project is an unfinished dwelling

26. I turn to consider the aspect of the Inspector's reasoning which related to a dwelling and an unfinished dwelling. Again, I have set out the passage in its entirety (§7 above), so that again a fair appreciation can be gained as to the content that I extract here:

> ***38. The building lacks heating and sanitation, electric work is incomplete, and doors and windows have yet to be inserted…***
>
> ***39. … 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.***
>
> ***41. … 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…***

27. Ms Olley makes the fair point that this is all intertwined within the same passages (§7 above) as dealt with building operations constitutive of the New Building being undertaken after the relevant date (§21 above). However, I do not accept that the reasoning became 'merged' with or 'interdependent' on the points made about the post-March 2015 building operation constitutive of the New Building. The closest it gets is the point (in Determination §41) about "the replacement of roof tiles with slates" as being

a change "necessary for future residential use". But all that means is that the replacement roof was two things. First, it was a building operation which was a significant constitutive part of the outcome which had produced a New Building. Secondly, it was a structural change deemed necessary for a future residential use.

28. Moreover, and in any event, I cannot accept that there is anything in the Inspector's analysis of the "unfinished dwelling" aspect of the present case which is flawed in public law terms. The Inspector did not "investigate the intentions" of the Appellant "at various stages in the history" (Sage §14: §6 above). He had earlier (§25) recorded that it was "not known what works the Appellant contemplated and intended to carry out when he bought the building" in 2000. He recorded (§39) that "evidence of the Appellant's intentions for the building" at the time after the Relevant Date in March 2015 "was not presented". The Inspector focused on objective considerations. He had earlier (§26) explained that he had regard to "floor plans" and "drawings" from 2018 planning applications. His observation, in that context, that 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" was an objectively-based evaluation, derived from materials from which he concluded that "structural or elevational changes" deemed necessary for residential use had already been carried out by 2018. Similarly the Inspector looked (at §39) at what the "project" was, as at the Appellant's retirement in 2015, which enabled the Appellant to devote more time to that "project". The Inspector posited (at §40) the question of the "possibility that changes to the structure deemed necessary for residential occupation, which were part of the erection of the new building, had been achieved without forethought" and rejected that as "too slight to be given significant weight". He focused (at §40) on "the building operations carried out from 2015 to 2017" and characterised those as "consistent with an objective of creating a building suitable for residential use". He also derived (at §40) from the 5 planning applications in 2018, the "intention" as at 2018 to create a building suitable for residential use. He had earlier described that as an "intention" that the building should "become" a dwelling (§25). But these were an assessment of "character and purpose of [the] structure" by examining "physical and design features" (Sage §14), "having regard especially to the building's physical features and its design" (Sage §6). That was the context and those were the circumstances in which the Inspector was observing (at §38) that "the building lacks heating and sanitation, electric work is incomplete, and doors and windows have yet to be inserted".

29. It is clear from the Inspector's reasoning that he did think this was an unfinished dwelling. That appears as a distinct logic within his reasoning, reading the Determination fairly and as a whole. Mr Humphreys fairly points out that the LPA's Closing Submissions themselves contained these distinct strands. The LPA contended, as a matter of fact and degree, that there was overwhelming evidence that the building was not substantially completed before the Relevant Date in light of the significant rebuilding and reconstruction during that period, including the rebuilding of the roof. The LPA also contended, as a distinct topic: that "if the intended use of the building is for residential purposes, the building would have to be fit for human habitation"; that the 2018 planning applications indicate "that the intended use of the building is as a dwelling house"; and that the lack of sanitation, lack of electricity, lack of heating and lack of weather tightness meant that this was an unfinished dwelling house which could not be said to be substantially completed, just as in the Sage case. I cannot accept that it was not reasonably open to the Inspector to accept that "unfinished dwelling", on the evidence in

the present case. I cannot accept that the Inspector made any public law error in reasoning: that structural and elevational changes "necessary for residential use" had been carried out; that the building operations carried out from 2015 to 2017 were consistent with an objective of creating a building suitable for residential use; that the changes to the structure necessary for residential accommodation which were part of the erection of the new building were achieved with forethought; and that it was material that the building lacked heating and sanitation, electric work was incomplete, and doors and windows had yet to be inserted. I cannot accept that the Inspector was not acting unreasonably or without evidence. In my judgment the inspector was faithfully considering character and purpose of the structure, assessed by an examination of physical and design features (Sage §14).

Conclusion

30. It follows from this that the Appellant was unsuccessful before the Inspector 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. Each of them is unassailable in public law terms. It follows, that even in so far as they are linked, there could be no infection vitiating one by reference to the other. They were the Inspector's "reasons" (§43) as to why the Appellant had not "demonstrated that the new building was substantially completed on or before the relevant date". Either one of them would be fatal. As to the submission that it is punitive, disproportionate and absurd that the building should now be lost, that point has no freestanding purchase, absent the identification of a viable public law flaw, given the holistic approach taken in planning law (see Sage at §§24-25). In the circumstances and for these reasons appeal failed and will be dismissed.

Consequentials

31. Having circulated this judgment as a confidential draft, I am able to deal here with consequential matters. The appropriate costs order, in light of earlier orders and this Judgment, was agreed: the Appellant is to pay the Respondent's costs in the agreed sum of £5,000. Ms Olley has applied to permission to appeal, in essence on the grounds: that the roof works were "repair" and "only a repair" as a matter of law, especially when "at no stage was there no building in existence"; and that it was wrong as a matter of law to approach substantial completion by reference to a dwelling, especially when the Enforcement Notice alleged a "new building" not an unfinished dwelling. She submits that there is "an important point of principle" with "profound" implications for the public. In my judgment, this is a classic case – which has failed on two points, either of which would be fatal – turning on an inspector's evaluative judgment; where established principles have been applied to a fact-specific, reasoned determination. I am not able to see a realistic prospect of success on further appeal and will refuse permission.