Neutral Citation Number: [2024] EWHC 490 (Admin)

Case No: AC-2023-LON-000867 (CO/736/2023)

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 6th March 2024

Before :

THE HONOURABLE MR JUSTICE MOULD

- -

Between :

ESTHER GURVITS AND JOSEPH GURVITS	**Appellants**
- and -	
SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES	**First Respondent**
and –	
LONDON BOROUGH OF BARNET	**Second Respondent**

- -
- -

MELISSA MURPHY KC (instructed by **Sonn Macmillan Walker**) for the **Appellants**
MATT LEWIN (instructed by **Government Legal Department**) for the **First Respondent**
The Second Respondent did not appear and was not represented
Hearing date: Thursday 7th December 2023

- -

Approved Judgment

This judgment was handed down remotely at 4pm on Wednesday 6th March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE MOULD

Mr Justice Mould

The subject matter of these proceedings

1. This is an appeal made under section 289 of the Town and Country Planning Act 1990 **['the Act']** from the decision of an Inspector appointed by the First Respondent to dismiss the Appellants' appeals against an enforcement notice issued by the Second Respondent on 4th October 2021.

2. The enforcement notice **['the Notice']** relates to land at the rear of 46, 48 and 50 Hurstwood Road, London, NW11 0AT as shown edged and hatched black on the plan attached to the Notice **['the appeal site']**. The Notice was directed at the use of an outbuilding which occupies the appeal site. Part 3 of the Notice alleged the following breach of planning control –

> *"Without planning permission, the making of a material change of use of the outbuilding to the rear to use as an office and associated storage".*

3. Part 4 of the Notice stated the Second Respondent's reasons for its issue. It appeared to the Second Respondent that the alleged breach of planning control had occurred within 10 years of the date of the Notice. By reason of its location outside any recognised town centre, use of the outbuilding was contrary to planning policy at local and national level. Use of the outbuilding as an office had resulted in *"an over-intensification of the use of the site"* and a detrimental impact on the living conditions of neighbouring occupiers.

4. Part 5 of the Notice stated the following requirements –

> *'1. Cease the use of the outbuilding as a commercial office and associated storage.*
>
> *2. Permanently remove all kitchen units, sinks, cooking facilities and worktops from the outbuilding.*
>
> *3. Permanently remove all toilets from the outbuilding".*

5. The Notice allowed a period of 5 months from the date on which it takes effect for compliance with these requirements.

6. The Appellants, Mr and Mrs Gurvits, are the registered freehold proprietors of 46, 48 and 50 Hurstwood Road, London, NW11 0AT. They occupy the dwellinghouse at 48 Hurstwood Road as their home. The Appellants exercised their right of appeal against the Notice under section 174 of the Act. Their appeals proceeded on grounds (b), (c), (d) and (f) in section 174(2) of the Act. Mrs Gurvits also pursued her appeal against the EN on ground (a).

7. On 6th and 7th December 2022, the Inspector held a public inquiry into the appeals. On 7th December 2022 he visited the appeal site. On 30th January 2023 the Inspector issued his decisions by letter **['the DL']**. He rejected all the Appellants' grounds of appeal. With the agreement of the parties, he made two minor variations to the wording of the Notice. He also added a fourth requirement to Part 5 of the Notice in the following terms –

"4. Permanently remove the internal doors and seal up the existing openings which link the three component buildings".

8. Subject to those variations, in DL43-DL44 the Inspector dismissed the appeals and upheld the Notice. He refused to grant planning permission on the application deemed to have been made under section 177(5) of the Act.

The grounds of appeal to this court

9. On 27 February 2023 the Appellants applied for permission to appeal from the Inspector's decision to this court under section 289(6) of the Act. Following an oral hearing, on 25th April 2023 HHJ Walden-Smith (sitting as a Judge of the High Court) permitted the Appellants to bring their appeal on three grounds –

Ground 1

(a) The Inspector failed to have regard to a material consideration, namely the First Appellant, Mrs Gurvits' unchallenged evidence as to the use of the land; and/or

(b) The Inspector's finding that each part of the outbuilding was prior to 2017 used solely in connection with one of the three dwellings was irrational as unsupportable on the unchallenged evidence of the First Appellant; and/or

(c) The Inspector failed to give any reasons for not accepting the First Appellant's unchallenged evidence on this point.

Ground 2

The Inspector took into account an immaterial consideration, namely whether or not operational development fell within or without certain permitted development rights.

Ground 4

The amendment to the Notice by the insertion of a new requirement 4 without the removal of requirements 2 and 3 was:

(a) unlawful applying the principle in Mansi v Elstree Rural District Council (1965) 16 P&CR 153 **[*'Mansi'*]**; and/or

(b) irrational; and/or

(c) the Inspector failed to give adequate reasons for this course of action.

10. Ms Melissa Murphy KC appeared before me for the Appellants. Mr Matt Lewin appeared for the First Respondent. I am grateful to them for their clear and helpful skeleton arguments and oral submissions.

Statutory framework and legal principles

11. The relevant statutory framework and legal principles are not controversial.

Town and Country Planning Act 1990

12. Part 3 of the Act provides the legislative framework for the control of development and use of land. By virtue of section 55(1) of the Act, "development" includes both operational development and "the making of any material change in the use of any buildings or land". Planning permission is required for the carrying out of development: section 57(1) of the Act.

13. Section 55(2) of the Act describes a series of operations and uses of land that are not, for the purposes of the Act, to be taken to involve the development of the land. They include –

"(a) the carrying out for the maintenance, improvement or other alteration of any building of works which –

(i) affect only the interior of the building, or

(ii) do not materially affect the external appearance of the building…;"

and

"(d) the use of any buildings or other land within the curtilage of a dwellinghouse for any purpose incidental to the enjoyment of the dwellinghouse as such;".

14. Planning permission may be granted by development order: section 58(1)(a) of the Act. Article 3(1) of the Town and Country Planning (General Permitted Development) (England) Order 2015 (SI 2015 No. 596) **['the GPDO']** grants planning permission for the following class of development as specified in Class E of Part 1 of the Second Schedule to the GPDO (which I shall refer to as *"the Class E permitted development right"*) –

> *"E. The provision within the curtilage of a dwellinghouse of –*
>
> *(a) any building or enclosure, swimming or other pool required for a purpose incidental to the enjoyment of the dwellinghouse as such, or the maintenance, improvement or other alteration of such a building or enclosure;…".*

15. The Class E permitted development right is granted subject to certain limitations and conditions. It is unnecessary to state those limitations and conditions since they are not material to the issues arising for determination in this appeal.

16. The statutory predecessor to the GPDO was the Town and Country Planning (General Permitted Development) Order 1995 (SI 1995 No. 418) **['the GPDO 1995']**. Article 3(1) of and Class E of Part 1 of the Second Schedule to the GPDO 1995 granted planning permission for essentially the same class of development as the Class E permitted development right.

17. Part 7 of the Act provides for the enforcement of planning control.

18. Section 171A of the Act defines expressions used in Part 7 in connection with enforcement. For the purposes of the Act, carrying out development without the required planning permission constitutes *"a breach of planning control"*: section

171A(1)(a) of the Act. The issue of an enforcement notice constitutes *"taking enforcement action"*: section 171A(2)(a) of the Act. Section 171B enacts time limits within which enforcement action may be taken. In the present case, the applicable time limit was a period of ten years beginning with the date of the alleged breach of planning control: section 171B(3) of the Act.

19. Where it appears to a local planning authority that there has been a breach of planning control and that it is expedient to do so, having regard to the provisions of the development plan and to any other material considerations, they may issue an enforcement notice: section 172(1) of the Act. A copy of the enforcement notice must be served on the owner and on the occupier of the land to which it relates: section 172(2)(a) of the Act.

20. Section 173 of the Act provides for the content and effect of an enforcement notice. It is necessary to refer to the requirements stated in sections 173(1)(a), (3) and (4) of the Act –

"*(1) An enforcement notice shall state—*

(a) the matters which appear to the local planning authority to constitute the breach of planning control; …

(3) An enforcement notice shall specify the steps which the authority require to be taken, or the activities which the authority require to cease, in order to achieve, wholly or partly, any of the following purposes.

(4) Those purposes are—

(a) remedying the breach by making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land, by discontinuing any use of the land or by restoring the land to its condition before the breach took place; or

(b) remedying any injury to amenity which has been caused by the breach".

21. A person interested in the land to which an enforcement notice relates may appeal against the notice to the Secretary of State: section 174(1) of the Act. Section 174(2) states the statutory grounds on which an appeal may be made. For the purposes of the present appeal, it is necessary to refer to grounds (a), (b), (c), (d) and (f) –

"(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 or, as the case may be, the condition or limitation concerned ought to be discharged;

(b) that those matters have not occurred;

(c) that those matters (if they occurred) do not constitute a breach of planning control;

(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;

…

(f) that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach;

…".

22. By virtue of section 176(1)(b) of the Act, on an appeal against an enforcement notice the Secretary of State is empowered to vary the terms of the enforcement notice, if he is satisfied that the correction or variation will not cause injustice to the appellant or to the local planning authority.

23. Where, as in the present case, the appeal against the enforcement notice is heard by an Inspector at a public inquiry, the proceedings are governed by the Town and Country Planning (Enforcement) (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2002 (SI 2002 No. 2685). Rule 20(1) requires the Inspector to notify the parties in writing both of his decision on the appeal and of his reasons for that decision.

24. Section 179(1) and (2) of the Act provides –

"(1) Where, at any time after the end of the period for compliance with an enforcement notice, any step required by the notice to be taken has not been taken or any activity required by the notice to cease is being carried on, the person who is then the owner of the land is in breach of the notice.

(2) Where the owner of the land is in breach of an enforcement notice he shall be guilty of an offence".

25. Compliance with an enforcement notice does not discharge the notice; and subsequently to resume the unauthorised use of land which the notice requires to be discontinued is a contravention of the enforcement notice. Section 181(1) and (2) of the Act provides -

"(1) Compliance with an enforcement notice, whether in respect of—

(a) the completion, removal or alteration of any buildings or works;

(b) the discontinuance of any use of land; or

(c) any other requirements contained in the notice,

shall not discharge the notice.

(2) Without prejudice to subsection (1), any provision of an enforcement notice requiring a use of land to be discontinued shall operate as a requirement that it shall be discontinued permanently, to the extent that it is in contravention of Part III; and accordingly the resumption of that use at any time after it has been discontinued in compliance with the enforcement notice shall to that extent be in contravention of the enforcement notice".

26. Section 181(3) of the Act provides that if any development is carried out on land by way of reinstating or restoring buildings or works which have been removed or altered in compliance with an enforcement notice, the notice shall (notwithstanding that its

terms are not apt for the purpose) be deemed to apply in relation to the buildings or works as reinstated or restored as it applied in relation to the buildings or works before they were removed or altered. By virtue of section 181(5) of the Act, it is an offence, without planning permission, for a person to carry out any development on land by way of reinstating or restoring buildings or works which have been removed or altered in compliance with an enforcement notice.

27. Section 289(1) of the Act gives the appellant a right of appeal to the High Court from the decision of the Secretary of State in proceedings on an appeal against an enforcement notice under section 174 of the Act. That right of appeal is on a point of law. The leave of the court is required to bring such an appeal.

Legal principles

28. The purpose and practical application of subsection 55(2)(d) of the Act was explained by Sir Duncan Ouseley (sitting as a Judge of the High Court) in *Sage v Secretary of State for Housing, Local Government and Communities and another* [2021] EWHC 2885 (Admin) at [6]. There are two questions to be asked –

(1) Has there been a material change of use; if so

(2) Was that change for a purpose incidental to the use of the dwellinghouse as a dwellinghouse?

He continued -

> *"It does not follow that all such incidental purposes involve a material change of use, but [subsection 55(2)(d)] provides certainty that where they otherwise would do, planning permission is nonetheless not required….In practice…the two questions overlap to such an extent that the answer to the one will frequently follow from the answer to the other. If the purpose is not incidental to the use of the dwellinghouse as a dwellinghouse, there will usually have been a material change in its use, and vice versa…."*.

29. The question whether a material change of use has occurred is often judged by consideration of the appropriate *"planning unit"*. The classic explanation of the concept of the planning unit is to be found in *Burdle v Secretary of State for the Environment* [1972] 1 WLR 1207, 1212D-1213A. The *"broad criteria"* were recently summarised in *R(Ocado Retail Limited) v London Borough of Islington* [2021] PTSR 1833 [2021] EWHC 1509 (Admin) at [176] (Holgate J) –

(1) A useful working rule is to assume that the unit of occupation is the appropriate planning unit, unless and until some smaller unit can be identified;

(2) Where the whole unit of occupation is used by the occupier for a single main purpose to which secondary activities are incidental or ancillary, that should be treated as the planning unit;

(3) When a single unit of occupation is used for a mixture of activities and it is not possible to say that one is incidental or ancillary to another (a mixed or composite use), that whole area is a single planning unit. In such a case the

component activities may fluctuate in their intensity from time to time, but the different activities are not confined to separate and physically distinct areas of land;

(4) Where within a single unit of occupation two or more physically separate and distinct areas are occupied for substantially different and unrelated purposes, each area used for a different main purpose (together with its incidental and ancillary activities) is a separate planning unit;

(5) The application of these criteria, like the question of material change of use, is a matter of fact and degree;

(6) Activities which were once incidental to another use or formed part of a composite use, may be so intensified in scale and physically concentrated in a recognisably separate area that they produce a new planning unit, the use of which is materially changed.

30. It is well established that intensification of an existing use of land is capable of constituting a material change of use, in a case in which the increased intensity has resulted in a change in the definable character of the use of the land: see *Hertfordshire County Council v Secretary of State for Communities and Local Government* [2012] EWCA 1473 at [9].

31. The steps required to be taken by an enforcement notice may extend to requiring the removal of works which are intrinsically part of the breach of planning control alleged in the notice. In *Kestrel Hydro v Secretary of State for Communities and Local Government* [2016] EWCA Civ 784 at [53] Lindblom LJ said –

> *"…there was no legal requirement for [the Inspector] to consider the possibility of the works that have been caried out on the site in association with the unlawful change of use being used in the future in association with lawful use. The simple question for him under section 174(2)(f) was whether the steps required by the notice exceeded what was necessary to remedy the breach constituted by the matters stated in the enforcement notice".*

32. The principle established in *Mansi* is that an enforcement notice should nevertheless not be drafted in such a way as to impose requirements which abrogate existing lawful or permitted use rights. In *Mansi* itself, the land had been in use as a plant nursery with a long established, subsidiary use of part for the sale of nursery produce. The material change of use enforced against was the subsequent intensification of that subsidiary retail activity until the land became primarily used as a shop. The Minister upheld an enforcement notice which required the discontinuance of all sale of goods from the land. The Divisional Court held that he was wrong to have omitted to amend the enforcement notice so as to protect the long established, subsidiary use: see *Mansi* at p.161 (Widgery J). The matter was sent back to the Minister with a direction that he amend the enforcement notice so as to safeguard the appellant's established use rights.

33. In *R v Harfield* [1993] 2 PLR 23, the Court of Appeal (Criminal Division) allowed an appeal against conviction for using land in contravention of an enforcement notice in which the defendant had been denied the opportunity to lead evidence that the unlawful

activity alleged against him had in truth been a lawful ancillary use of the land. Latham J said (at p.30) –

> *"It is accepted by counsel for the respondent that any use which is ancillary to a permitted primary use is itself permitted without the need for any separate planning permission….No enforcement notice can take away these legally permitted rights: this has been referred to before us as the Mansi doctrine. More important, the authorities clearly establish the proposition that any enforcement notice will be construed so as to retain any such right…".*

34. In *Duguid v Secretary of State for the Environment, Transport and the Regions* (2001) 82 P&CR 6, the Court of Appeal held that it was unnecessary for an enforcement notice to be amended expressly to preserve the occupier's lawful use rights under the GPDO in relation to the land. At [27], Ward LJ said –

> *"A breach of planning control is constituted by carrying out development of the land without the required planning permission: section 171A(1)(a). If he were to act within the scope of the GPDO, the appellant would act within, not without, permitted planning permission: sections 58 and 59. Because use within the GPDO is permitted use, it is lawful use and we are back to Mansi and Harfield. The enforcement notice cannot take away legally permitted rights of use".*

35. Having observed that in *Mansi* the decision was sent back to the Minister with a direction to amend the enforcement notice, at [28] Ward LJ explained why that course of action was unnecessary in the appeal before him –

> *"In [Mansi] it made obvious good sense to do so. Having found what use was to be treated as established use, 'twere well that the Minister define it to avoid any future argument as to the extent of that which he found. There is, by contrast, absolutely no need at all to refer to the GPDO because it operates as a matter of law within parameters that are certain, being those defined by the order itself".*

36. An appeal from the decision of an Inspector on an appeal against an enforcement notice is on a point of law alone. As a general rule, the substantive grounds for the court's intervention on such an appeal are identical to the traditional judicial review grounds of excess of power, irrationality and procedural irregularity: see the discussion in *E v Secretary for State for the Home Department* [2004] QB 1044 [2004] EWCA Civ 49 at [40]-[42] (Carnwath LJ).

37. Both parties also referred me to the principles to be applied by the court in determining applications under section 288 of the Act, as summarised by Lindblom LJ in *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643 [2018] PTSR 746 at [6]-[7]. I accept that those principles are of general application to appeals under section 289, although not all will be relevant to an appeal such as in the present case, in which there is no challenge to the legality of the Inspector's determination of the ground (a) appeal and the deemed application for planning permission. Nevertheless, the following principles are relevant to my consideration of the grounds raised by the appellant in the present appeal –

(1) Decisions of the Secretary of State and his Inspectors in planning appeals are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An Inspector does not need to rehearse every argument relating to each matter in every paragraph.

(2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the *"principal important controversial issues"*. An Inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration: *South Bucks District Council and another v Porter (No. 2)* [2004] 1 WLR 1953,1964B-G).

38. I was referred to *Grafton Group (UK) plc v Secretary of State for Transport* [2017] 1 WLR 373 [2016] EWCA Civ 561 at [30] for the well-known principle that a planning judgment which lacks any foundation in the evidence before the decision maker will be amenable to challenge on the ground of irrationality.

The factual background

39. The outbuilding to which the Notice relates is a low lying structure which has been erected in three stages across the rear gardens of the residential premises at 46, 48 and 50 Hurstwood Road.

40. The Appellants completed the purchase of 48 Hurstwood Road on 17th December 1990 and thereafter occupied the dwellinghouse at that property as their family home.

41. In 1988, the Appellants had established a property management company specialising in the management of long leasehold flats, known as Eagerstates Limited **['the Company']**. Following the purchase of 48 Hurstwood Road in late 1990, the Appellants began to run the Company's business from one of the bedrooms in their home. That arrangement continued until the late 1990s, by which date the business of the Company had grown to the extent that it could no longer be undertaken effectively from within the Appellants' home.

42. In 1998, therefore, the Appellants erected a low-lying, brick building to the rear of the garden at 48 Hurstwood Road, on the site of an old bomb shelter. The purpose of that building was to enable the First Appellant, Mrs Gurvits, to continue to carry on the business of the Company from home, whilst also raising a growing family. Access to the building was either through the dwellinghouse itself or, for visitors and contractors, via a locked gate between 48 Hurstwood Road and 50 Hurstwood Road. Following its completion, the Appellants began to use the brick building to the rear of 48 Hurstwood Road as an office and for the storage of files.

43. In February 1999, the Appellants purchased the neighbouring property at 50 Hurstwood Road.

44. In July 2013, the Appellants purchased the neighbouring property at 46 Hurstwood Road.

45. Following the purchase of 46 Hurstwood Road, in 2013 the Appellants erected a low-lying, brick building in the rear garden of that property, adjoining the existing building to the rear of 46 Hurstwood Road. The Appellants used the building to the rear of 46 Hurstwood Road as general household storage space and to accommodate filing storage to serve the office in the building to the rear of 48 Hurstwood Road.

46. Between 2016 and 2017, the Appellants erected a third building in the rear garden of 50 Hurstwood Road, again adjoining the existing building to the rear of 48 Hurstwood Road. In paragraph 18 of her written proof of her evidence given at the public inquiry, Mrs Gurvits says –

> *"As two of my children were now working with me and the business continued to grow, we needed additional staff to control and serve the leaseholders, via emails and telephone calls so we decided to build on the third level of our daughter's garden to increase the office and family space we needed to accommodate us, the staff and the filing that was needed for the office and the children".*

47. The outbuilding which is the subject matter of the Notice comprises of the three buildings erected by the Appellants to the rear of 48 Hurstwood Road in 1999, to the rear of 46 Hurstwood Road in 2013 and to the rear of 50 Hurstwood Road in 2017. Although constructed in three distinct stages, the outbuilding is internally connected so that it is possible to pass freely through the interior between each of the three component elements of the outbuilding.

48. On 14th July 2021, the Second Respondent's appointed enforcement officer visited the outbuilding. In paragraph 6.7 of his written proof of evidence to the public inquiry, the enforcement officer describes the outbuilding as it was found to be on that date –

> *"…the outbuilding comprised three linked main sections, one to the rear of each of the three dwellings. The main section of the outbuilding, which is the newest part at the rear of No 50, had a main room with a bank of 4 desks, what appeared to be a reception desk, a full-size photocopier/printer, and a kitchenette with microwave. Off the main room were three private office rooms, each with a desk, and both male and female toilets. The other two sections of the outbuilding, at the rear of No's 46 and 48, appeared to be used mainly for the storage of files. Photographs taken during a site visit on 14 July 2021 are included…".*

49. Photographs of the interior of the outbuilding taken on 14th July 2021 were before the court. The photographs illustrate the layout and contents of the three sections of the outbuilding as described by the enforcement officer in his written evidence to the public inquiry.

50. On 12th August 2021, the Appellants' planning consultant responded to a planning contravention notice issued by the Second Respondent on 2nd August 2021. Those responses include the following information –

> *"1) Please state IN FULL whether or not the outbuilding to the rear is being used or has been used as an office and associated storage.*
>
> ***Building constructed and used as office and storage ancillary to residential use.***

2) Please give any information you hold as to any planning permission for the use of the outbuilding as an office and associated storage or any reason for planning permission not being required for such use.

Outbuilding constructed under Permitted Development ancillary to residential use in three stages the first circa 1990 rear of 48, the rear of 46 circa August 2013 and the final area rear of 50 circa May 2017.

…

4) Please state/describe:

a) The operating hours of the office. ***There are no fixed hours but generally the telephone line service to the public is stated as 09:30 to 17:30…***

b) The nature of the business operating from the outbuilding. ***Property Management Company***

c) The total number of people that work in the outbuilding. ***4-6***

d) The number of people, on average, that work in the outbuilding each day. ***4-6 (but not necessarily all at the same time)***

e) The number of people that work in the outbuilding and do not reside on the land. ***2***

…".

51. On 4th October 2021 the Second Respondent issued the Notice. Part 2 of the Notice and the plan attached to the Notice identified the footprint of the outbuilding to the rear of 46-50 Hurstwood Road as the land to which the Notice relates. Part 3 of the Notice stated the following as the alleged breach of planning control –

"Without planning permission, the making of a material change of use of the outbuilding to the rear to use as an office and associated storage".

52. Part 4 of the Notice stated that it appeared to the Second Respondent that the above-stated breach of planning control had occurred with the last ten years.

53. The Appellants' statement of case in their appeals against the Notice set out their case in support of their appeals on grounds (d), (b) and (c) of section 174(2) of the Act –

*"**GROUND (d)***

7.1.1 The appellant will submit that the use has existed on site since 1991. The appellant will refer to documents showing the use, whether incidental to or separate to the residential use has existed since 1991. The appellant will explain that the office use began as a bedroom, relocated to the basement as the family grew and moved to the outbuilding in 1998.

…

> ***GROUNDS (b) and (c)***
>
> *…*
>
> *7.2.2 The appellant will submit that there has not been a change of use as the properties are all private residences in the same ownership and shared by the same family, and that the various members of the business are residents at 46, 48 and 50 Hurstwood Road. The appellant will submit that the key test is whether the overall character of the dwelling has changed as a result of the business use, which it has not.*
>
> *7.2.3 In the alternative the use of the outbuildings are incidental to the residential use of the properties and is permitted development".*

54. At the public inquiry, the Appellants' evidence in support of their appeals on grounds (b), (c) and (d) was principally that given by the First Appellant both in her written proof of evidence and orally in answer to questions put to her in chief and in cross examination. At the public inquiry, both the Appellants and the Second Respondent were represented by Counsel. Counsel for both parties made closing submissions to the Inspector in writing, copies of which are before the court. In the course of their written closing submissions, both Counsel referred to and relied upon evidence given orally both by the First Appellant and other witnesses during the inquiry proceedings. It will be necessary to refer to that oral evidence when addressing the Appellants' grounds of challenge later in this judgment.

The Inspector's decision

55. In the DL the Inspector set out his reasons for dismissing the Appellants' appeals against the Notice. Before he turned to address each of the statutory grounds of appeal advanced by the Appellants, in DL2-DL4 the Inspector provided a brief description of the appeal site and of the background to the appeals before him. DL3 and DL4 stated -

> *"3. It is my understanding that before a material change of use to office with associated storage occurred the appeal site was used as three separate outbuildings by the appellants and their family. Each of the component units was constructed under permitted development provisions pursuant to Class E, Part 1, Schedule 2 to the Town and Country Planning (General Permitted Development)(England) Order 2015 (the GPDO). Each outbuilding was used for purposes incidental to the enjoyment of the associated dwellinghouses Nos 46 to 50 Hurstwood Road.*
>
> *4. According to the Council's submissions, some time after 2017 the appellant's property business expanded and as a consequence, the outbuildings were connected to form a single larger office with associated storage. Therefore, the office space became no longer incidental to the dwellinghouses, but rather a material change of use had occurred for which planning permission was required".*

56. The Appellants' complaint under Ground 1 is directed at the Inspector's reasoning in DL3.

57. In DL5 to DL8 the Inspector turned to consider the ground (b) appeal. At DL5, he observed that –

> *"In order to succeed on this ground it would need to be demonstrated that a material change of the outbuilding to use as an office and associated storage has not occurred as a matter of fact".*

58. In DL6 the Inspector recorded the Appellants' case in support of their appeal on ground (b) –

> *"The appellant's case is quite simply that the matters alleged in the Notice have not occurred as a matter of fact because the constituent parts of the building were all built specifically for either office or storage purposes. In other words, the building the subject of the Notice which has existed in its current form since the completion of the part to the rear of No 50 Hurstwood Road is and has only ever been used as office and storage space".*

59. In DL7 the Inspector stated his findings and conclusions on the Appellants' ground (b) appeal –

> *"7. However, it is a fact that the three buildings were built separately. The evidence before me indicates that before 2017 the separate units were used for purposes incidental to the enjoyment of the dwellinghouses, including some work space and storage. Nevertheless they were incidental until the units were subsequently joined together; firstly in 2013 and then again in 2017. Only when they were amalgamated in 2017 can the change to an office and associated storage occur rather than use for office space and storage space incidental to the enjoyment of the dwellinghouses have occurred.*
>
> *8. Therefore a change of use of the building as an office and associated storage has occurred as a matter of fact and the appeals on ground (b) do not succeed".*

60. The Inspector considered the Appellants' appeal on ground (c) in DL9 to DL18. In DL18, he concluded that the appeal on ground (c) must fail.

61. In DL9 the Inspector summarised the Appellants' case in support of the ground (c) appeal –

> *"The ground of appeal is that the matter alleged does not constitute a breach of planning control. The appellant's case is that if the material change of use did occur it does not constitute a breach of planning control because it does not involve development pursuant to s55(2)(d) of the 1990 Act which provides that "the use of any building or other land within the curtilage of a dwellinghouse for any purpose incidental to the enjoyment of the dwellinghouse as such" is not development".*

62. In DL10, the Inspector referred to the two questions identified in *Sage* (see paragraph 28 above) and said –

> *"I have already determined under ground (b) that the making of a material change of the outbuilding to the rear to use as an office and associated storage has occurred as a matter of fact and therefore under ground (c) the key question is*

whether such change amounts to a material change of use for which planning permission is required".

The Inspector continued –

"The evidence before me points to three key arguments that need to be determined in order to test whether or not a material change of use of the outbuilding has occurred on the premise that the character of its use has materially changed".

63. In DL11 to DL 13, the Inspector considered the first of those key arguments, which was whether the evidence indicated a change in the character of the use of the appeal site following the amalgamation of the three separate units to the rear of the dwellinghouses into a single outbuilding in 2017 –

"11. Firstly, it seems to me that the amalgamation of the component parts of the outbuilding have altered the way the site is used that has resulted in there being a change in the character of the use. The appellant argues that the outbuilding has retained some residential use; namely babysitting and residential storage, for example. Photographic evidence does not clearly show that the outbuilding is regularly used for childcare purposes, but instead it has a wide range of office furniture and equipment and there is little evidence of children's toys, books or other furniture or paraphernalia. Furthermore, there is little physical space for children to do homework or play when the office desks are fully occupied. It may be that children visit the outbuilding but not to the extent that it could be defined as being in any particular use for childcare associated with the dwellinghouses or otherwise.

12. In addition, the space to the rear of No 46 is primarily used for the storage of files and other documents as well as some items such as mattresses, floor tiles, furniture DVDs and videos. It is not clear whether or not these other items are related to the business or residential dwellinghouses.

13. It is very clear to me that the outbuilding is being used far more intensively [than] would be expected for a home office, including a number of employees, amount of document storage, office layout with an open plan area as well as individual offices, reception desk, separate male and female toilets and overall levels of activity. There are clearly planning consequences that have arisen from the increased intensity in use of the site as identified in the Notice".

64. In DL14 to DL16, the Inspector considered the second key argument, which was whether the outbuilding was now to be regarded as comprising a planning unit in its own right, as distinct from any of the three dwellinghouses to the rear of which it was situated –

"14….Nos 46 to 50 Hurstwood Road are not used as a single dwellinghouse, but they form multiple dwellinghouses in separate occupation. Each part of the appeal outbuilding was erected as incidental to the enjoyment of their respective dwellinghouses, but the connection of them has taken the three parts which were comprised within separate dwellinghouses and combined them to form a single planning unit for office and storage purposes.

> *15.The subdivision of a planning unit can itself constitute development. Indeed, the courts have held that a material change of use does not occur automatically upon subdivision but it may have the effect of changing the character of the use and may have planning consequences which indicate that a material change of use has occurred. As set out above there are a number of planning consequences arising from the subdivision that has happened in this case. Therefore the use of the outbuilding as alleged in the enforcement notice cannot be ancillary to the dwellinghouses or incidental to the enjoyment of the dwellinghouses because it now forms its own separate planning unit.*
>
> *16. Sage also holds that a material change of use can be made without there being any adverse environmental impact. The crucial test is whether there has been a change in the character of the use and treating impact as a crucial issue in establishing whether a material change of use has occurred, or a purpose is reasonably incidental is not consistent with established planning law. However, environmental impact can be an indicator of whether or not a material change of use has occurred because a use of new character may give rise to environmental impacts".*

65. The third key argument is addressed in DL17 –

> *"17. Finally, as set out above the different parts of the outbuilding were constructed separately under Class E, Part 1 of the GPDO which relates to the erection of a building which is "incidental to the enjoyment of a dwellinghouse". Each part of the outbuilding was constructed as incidental to the enjoyment of the different dwellinghouses in whose garden they are situated. The dwellinghouses known as 46, 48 and 50 Hurstwood Road are not in use as a dwellinghouse, by* [sic] *rather multiple dwellinghouses. The joining of the three different parts of the outbuilding to form a single office with storage has taken the development outside the scope of permitted development granted by virtue of the provisions of Class E".*

66. The Inspector's reasoning in DL17 is the focus of the Appellants' complaint under Ground 2.

67. The Inspector considered the Appellants' appeal on ground (d) in DL19 to DL24, concluding that this ground of appeal also did not succeed. In DL19 the Inspector summarised the parties' cases –

> *"19. The ground of appeal is that at the date when the Notice was issued, no enforcement action could be taken. The appellant argues that there is abundant and unchallenged evidence of continuous use from a structure in the rear of the appeal properties since approximately 1998 whereas the Council's case is that the use is not immune as a consequence of the passage of time because the use is occurring in buildings which have been erected within the past 10 years. There is no dispute that the building structures cannot be enforced against".*

68. The Inspector's reasoning in addressing those issues is stated in DL20-DL23. It is necessary to refer to the following passages –

> *"21. The appellant holds that the office use in the rear garden of the properties has taken place continuously for a period in excess of 10 years prior to the date of the*

enforcement notice. There is no dispute with the Council that part of the land to the rear of 48 Hurstwood Road has been used as a home office incidental to the enjoyment of the dwellinghouse since before 4 October 2011, but that does not prove that a material change of use of the appeal site as identified in the enforcement notice to a single joined office space with associated storage separate from the dwellinghouses occurred on or before that date.

22. The appellant argues that enforcement action cannot be taken against the alleged breach of planning control because the buildings are being used for the same purpose that began in 1998. However, that cannot be the case since the buildings, and therefore the site identified in the enforcement notice, were not all in existence at that time. The alleged breach can only have occurred since the buildings were completed.

23.The appellant has submitted evidence that a single employee was employed by the business from 2007, but there is no documentation to support that evidence. Furthermore, even if that employee did work from the outbuilding before 2011 there is insufficient evidence that the use at that time was beyond what may be described as ancillary to the dwellinghouse or that any severance of the planning unit at No 48 has occurred at No 48 as a result of the use of the outbuilding".

69. Having determined at DL38 that the Appellants' ground (a) appeal should fail, in DL39-DL41 the Inspector turned finally to the appeal under ground (f). Having mentioned the two statutory purposes of an enforcement notice in sections 173(4)(a) and (b) respectively of the Act, at DL39 the Inspector said –

"39. …Since in this case the Notice requires the complete cessation of the use of the building as an office and associated storage and the permanent removal of items and facilities associated with that use, the purpose is clearly remedy the breach. Allowing any part of the outbuilding to be used as an office with associated storage would not achieve that purpose. In the respect, the appeals on ground (f) must fail".

70. In DL40-DL41 the Inspector addressed the Appellants' argument that it was excessive to require removal of the kitchen facilities and toilets from the outbuilding and their suggested alternative requirement to close off the internal connections between the three component elements of the outbuilding –

"40. There are kitchen facilities in the office space and also male and female toilets. The appellant argues that their removal exceed what is necessary to remedy the breach. However, it is a well-established legal principle that an enforcement notice may require the removal of works that are 'part and parcel' of a change of use and are 'integral to it'. The toilets and kitchen facilities facilitated the conversion of the outbuildings to a single office with storage space. Consequently, it is appropriate for their removal to be required by the Notice.

41. The appellant has also suggested the lesser step of separating the units into their original three parts as a means of remedying the breach of planning control. I agree that the additional requirement to remove the doors linking the three component parts of the outbuilding is another appropriate means of remedying the breach, but only in concert with the other requirements of the Notice. Rather than

> *causing injustice to the appellants this additional requirement would ensure that the outbuilding is not left with a nil-use building. Instead, the existing outbuilding would be returned to its original three lawful outbuildings which could be used lawfully for purposes incidental to the enjoyment of the dwellinghouses".*

71. The Appellants' complaint under Ground 4 is directed at the Inspector's reasoning in DL39-DL41.

Ground 1

Submissions

72. Ms Murphy KC's submissions in support of Ground 1 focused upon the Inspector's finding in the final sentence of DL3 that –

> *"Each of the outbuildings was used for purposes incidental to the enjoyment of the associated dwellinghouses".*

73. Ms Murphy submitted that this finding had been fundamental to the Inspector's determination of the ground (b), (c) and (d) appeals. In DL7, the Inspector said that before 2017, the separate units *"were used for purposes incidental to the enjoyment of the dwellinghouses"*, that they were *"incidental until the units were subsequently joined together"* and that it was the amalgamation of the three buildings in 2017 that resulted in the occurrence of the material change in the use of the outbuilding on the appeal site. In DL11, the Inspector found that it was that *"amalgamation of the component parts of the outbuilding"* which had resulted in a change in the character of the use of the outbuilding on the appeal site. In DL21 the Inspector had rejected the Appellants' case on their ground (d) appeal on the basis that the evidence did not prove that the change in the use of the appeal site to *"a single joined office space with associated storage separate from the dwellinghouses"* had occurred on or before 4th October 2011.

74. Leading counsel submitted that the Inspector had made a finding of fact that, prior to their amalgamation in 2017, each component part of the outbuilding on the appeal site was used solely in connection with the single dwellinghouse to the rear of which it was situated. That factual finding had in turn been the foundation of the Inspector's determination of the grounds (b), (c) and (d) appeals. It was submitted, however, that the finding was unsupported by the evidence before the Inspector. In particular, it was unsupported by and in conflict with the unchallenged evidence given by the First Appellant in her witness statement. The First Appellant's unchallenged evidence was said to have established that –

(1) Following its erection in 1998 the initial component of the outbuilding to the rear of 48 Hurstwood Road had been used as an office by the First Appellant in connection with her occupation of that dwellinghouse.

(2) Following its erection in 2013 the second component of the outbuilding to the rear of 46 Hurstwood Road was also used by the First Appellant in connection with her occupation of 48 Hurstwood Road, as well as by the occupier of 46 Hurstwood Road and later by the occupier of 50 Hurstwood Road (both of whom were employed by the Company).

(3) Following its erection in 2017, the final component of the outbuilding to the rear of 50 Hurstwood Road was used by the occupiers of all three properties (i.e. Nos. 46, 48 and 50 Hurstwood Road) for the same common purposes, namely *"to accommodate us, the staff and the filing that was needed for the office and the children"* (paragraph 18 of the First Appellant's proof of evidence to the public inquiry).

75. Given the First Appellant's unchallenged evidence on these matters of fact, it was submitted, the Inspector was not in a position reasonably to conclude that each component part of the outbuilding at the appeal site had, prior to 2017, been solely used in connection with the individual dwellinghouse in the rear garden of which it had been erected. Either, therefore, the Inspector had failed to take the First Appellant's unchallenged evidence into account or, if he had taken that evidence into account, his said conclusion in DL3 was irrational. In the further alternative, the Inspector had failed to give proper, intelligible or adequate reasons that conclusion, a conclusion upon which he had founded his determination of the ground (b), (c) and (d) appeals.

76. In short, it was submitted, the Inspector had determined each of the factual grounds of appeal against the Notice upon a finding which was simply at odds with the evidence before him. There was nothing in the First Appellant's evidence upon which the Inspector could reasonably have concluded that, prior to their amalgamation in 2017, each component element of the outbuilding constructed on the appeal site had been solely used in connection with and for purposes incidental to each individual dwelling to the rear of which it was located.

Conclusions

77. I am unable to accept these submissions. They take too narrow a view both of the First Appellant's evidence before the public inquiry and of the Inspector's reasoning in support of his conclusions on the factual grounds of appeal against the Notice, that is to say, grounds (b), (c) and (d).

78. The First Appellant's proof of evidence provided the basis for her evidence before the Inspector. It was not, however, her entire evidence. The First Appellant gave oral evidence at the public inquiry and was cross examined on her proof of evidence by counsel for the Second Respondent.

79. There is no transcript of the First Appellant's oral evidence before the court. However, the court does have before it the closing submissions made by counsel in writing to the Inspector at the public inquiry. The closing submissions of counsel to the Second Respondent, Ms Flora Curtis, helpfully summarised the factual history of the development and use of the three Hurstwood Road properties and the appeal site, drawing not only upon the written evidence but also evidence given orally at the public inquiry by the First Appellant.

80. During the hearing of this appeal, I stated that I intended to accept counsel's written closing submissions as an accurate account of the witnesses' oral evidence given at the public inquiry, unless the accuracy of that account was challenged by either party before me. As I understood their respective submissions, neither Ms Murphy KC nor Mr Lewin did challenge the accuracy of counsel's record in written closing submissions of the oral evidence given at the public inquiry.

81. The First Appellant's oral evidence provided a rather more detailed account of the history of development and use of the outbuilding at the appeal site and its component parts than had been given in her proof of evidence.

82. The First Appellant explained that the outbuilding to the rear of 48 Hurstwood Road had been originally constructed and used for storage purposes in connection with her family's occupation of the dwellinghouse at that property. Within six months of its construction in 1998, she had begun to use that outbuilding as a place in which to work. The outbuilding remained the only such building to the rear of 46, 48 and 50 Hurstwood Road until 2013.

83. Having purchased 46 Hurstwood Road in 2013, the Appellants built a shed to the rear of that property. It was a separate structure to the outbuilding to the rear of 48 Hurstwood Road. It had its own entrance. At the time of its construction, the Appellants had considered letting the shed along with the dwellinghouse at 46 Hurstwood Road. Within three months, however, the First Appellant had decided to use the shed as additional storage space and installed a connecting door between the shed and the outbuilding to the rear of 46 Hurstwood Road.

84. The Appellants constructed the outbuilding to the rear of 50 Hurstwood Road in around 2017. In his evidence to the public inquiry, the enforcement officer produced an email received in October 2021 from an agent acting on behalf of the First Appellant, a Mr Joel Stern, which stated that this building had *"started out as Mrs Gurvits' personal space, and slowly the rest of the staff moved over to that part of the building, leaving the old space as storage etc".* In her oral evidence to the public inquiry, the First Appellant accepted Mr Stern's statement as accurate and that the conversion of the outbuilding to the rear of 50 Hurstwood Road into office space and the movement of staff into that space had occurred later.

85. It is in the light of this more detailed account of the history of development and use of the outbuilding and its component parts in the years since 1998 that the Inspector's findings DL3 are to be judged. It was this more detailed evidence, rather than simply the evidence set out in the First Appellant's proof of evidence, which provided the proper evidential basis for the Inspector's consideration of the factual grounds of appeal before him.

86. I return on that basis to the actual findings made by the Inspector in DL3. In that paragraph, the Inspector stated his understanding that the appeal site had formerly been used as three separate outbuildings by the appellants and their family; and that each outbuilding had been used for purposes incidental to the enjoyment of the associated dwellinghouses at 46, 48 and 50 Hurstwood Road. Those findings were indeed supported by the evidence before the Inspector.

87. It was the First Appellant's evidence that following its construction in 1998, the outbuilding to the rear of 48 Hurstwood Road had been used for a number of years for storage purposes and as a home office in connection with her and her family's occupation of the dwellinghouse at that property. It was the First Appellant's evidence that the shed to the rear of 46 Hurstwood Road had been constructed in 2013 as a separate building. It had been intended initially for use in connection with occupation of that property. Shortly after its construction, the First Appellant had begun to use it as additional storage space and installed a connecting door to link it to the existing

outbuilding to the rear of 46 Hurstwood Road. Finally, following construction of the building to the rear of 50 Hurstwood Road in 2017, in her oral evidence the First Appellant accepted that she had initially used that building as her personal space; it was later that it began to be used as the office as described by the enforcement officer following his inspection of the appeal site on 14th July 2021.

88. In my view, the Inspector's findings in DL3 accurately respond to and reflect that evidence of former use of the appeal site. Prior to their amalgamation into a single outbuilding in 2017, the three component elements of the appeal site had indeed been used as three separate outbuildings by the Appellants and their family. Each element had been used for purposes incidental to the enjoyment of the associated dwellinghouses at 46-50 Hurstwood Road. As the Inspector also noted, each of the component units had been constructed under the Class E permitted development right, a fact which had been attested to by the Appellants' planning consultant in his written response to the planning contravention notice on 12th August 2021. The Class E permitted development right contemplates a building constructed within the curtilage of a dwellinghouse which is *"required for a purpose incidental to the enjoyment of the dwellinghouse as such"*.

89. It is unsurprising that in the present case, each of the three outbuildings erected under the Class E permitted development right should have been put to use, at least for an initial period following their construction, for such a purpose or purposes. The First Appellant's evidence to the public inquiry established that had indeed been the case.

90. It was submitted that the First Appellant's evidence in her written proof of evidence had been unchallenged at the public inquiry. That may be a fair way of characterising the position, in the narrow sense that it appears not to have been put to the First Appellant that her evidence was wrong or untrue in some material respect. However, it is clear that the First Appellant's written proof by no means represented the entirety of her evidence to the public inquiry. On the contrary, through the process of cross-questioning she gave a more detailed and precise account of the history of development and use of the appeal site. The Inspector was entitled to rely on that more detailed and precise evidence as the factual foundation for his findings in DL3. In my judgment, those findings were properly based on the evidence before him and were a reasonable response to that evidence.

91. Ms Murphy KC's submission was that in DL3 the Inspector had made a finding that each component part of the outbuilding at the appeal site had, prior to 2017, been used solely in connection with the particular dwellinghouse at the rear of which it was located. She submitted that, even allowing for the more detailed evidence which the First Appellant was recorded as having given orally at the public inquiry, there was no basis for that finding. In particular, she argued that there had been no evidence of the use of the shed to the rear of 46 Hurstwood Road, or of the outbuilding to the rear of 50 Hurstwood Road, solely in connection with the dwellinghouses at those respective properties.

92. I do not consider that the Inspector's findings in DL3 are to be read as narrowly as Ms Murphy submitted they should be. In my view, on a fair reading of DL3, the Inspector did not find that the outbuildings to the rear of 46 Hurstwood Road and 50 Hurstwood Road had been used solely in connection with the dwellinghouse to the rear of which they were located.

93. To the contrary, the Inspector accepted that there had been a degree of overlap, in the sense that the First Appellant in particular, as occupier of 48 Hurstwood Road had used not only the outbuilding to the rear of that property, but also those to the rear of 46 and 50 Hurstwood Road respectively for her own purposes. However, the common and significant aspect of that former use was that in each case, prior to their amalgamation in 2017, each separate building had been used for purposes which were incidental to occupation and enjoyment of the dwellinghouses.

94. It was the fact of that former incidental use of each of the three buildings (for several years in the case of those to the rear of 46 and 48 Hurstwood Road, for a very much shorter period in the case of that to the rear of 50 Hurstwood Road), which was elicited from the First Appellant in her oral evidence. It was that fact which in turn was of significance to the Inspector's consideration of the appeals on grounds (b), (c) and (d), since it was that former use which was in contrast to the use of the appeal site as an office with associated storage, following the amalgamation of the three separate components into a single outbuilding later in 2017.

95. That contrast between the former use of each of the three outbuildings for purposes incidental to occupation of the dwellinghouses and the subsequent creation of a distinct unit of occupation for an office with associated storage is clearly articulated in DL7 as the basis for the conclusion that the change of use alleged in the Notice had occurred. Thereafter, it provides the foundation for the Inspector's conclusion that there had indeed been a change in the character of the use of the appeal site (in DL 10ff.), a material change which had occurred only following amalgamation of the three separate buildings into a single unit of occupation in 2017 (in DL21ff.).

96. For these reasons I do not accept that the Inspector's findings in DL3 are inadequately explained. Nor do I accept that those findings betray any ignorance or misunderstanding on his part of the evidence before him from the First Appellant. On the contrary, in my judgment, the findings in that paragraph are properly and clearly founded upon that evidence. The Inspector was entitled to make those findings and to rely on them, as he did, in his determination of the appeals on grounds (b), (c) and (d) in section 174(2) of the Act. Ground 1 accordingly fails.

Ground 2

Submissions

97. The focus of the Appellants' complaint under this ground was the Inspector's reasoning in DL17. In that paragraph, the Inspector dealt with the third of the *"three key arguments"* which, in DL10, he had identified as requiring to be determined in order to test, in the context of the ground (c) appeal, whether the character of the use of the outbuilding at the appeal site had materially changed.

98. I have set out DL17 in paragraph 65 of this judgment. Ms Murphy KC submitted that the question whether the erection of the outbuilding fell within the scope of the Class E permitted development right was immaterial to the issue which the Inspector was called upon to determine under ground (c). The Notice was concerned with an allegation of an unauthorised material change in the use of the appeal site. It was not alleged that the erection of the outbuilding, or of its three constituent parts which had been joined together in 2017, was unauthorised operational development.

99. In the final sentence of DL17, leading counsel submitted, the Inspector had treated the building operations carried out in 2017 in order to join together the three component parts of the outbuilding as axiomatically resulting in a material change in the use of the whole outbuilding. That was to confuse the operational development which had resulted in the creation of the outbuilding at the appeal site with the quite different issue raised by the Notice, which was whether the alleged material change of use had taken place.

100. Finally, it was submitted, DL17 was explicitly concerned with one of three key arguments to be addressed in determining the ground (c) appeal. The Inspector's error could not sensibly be characterised as peripheral to that determination. It could not properly be said that had he not taken account of the immaterial question of the lawfulness of the outbuilding itself, he would nevertheless have decided to dismiss the ground (c) appeal.

Conclusions

101. In my view, the Appellants' argument under ground 2 is based upon a misunderstanding of the Inspector's reasoning in DL17. In that paragraph, the Inspector did not set out to decide whether or not the operational development involved in the erection of the outbuilding or its constituent parts had been within the scope of the Class E permitted development right.

102. As Ms Murphy submitted, it would have been surprising had the Inspector set out to address that question, given both that the Notice was concerned with the lawfulness of the use of the appeal site and that it was not suggested that the erection of the outbuilding was itself amenable to enforcement action. I note that in DL19 the Inspector recorded that there had been no dispute that the building structures themselves could not be enforced against.

103. The issue considered by the Inspector in DL17 was quite different: it was whether following the amalgamation of the three buildings constructed under the Class E permitted development right into a single unit of occupation, the use of the outbuilding as a single office with associated storage remained within the scope of the use or uses contemplated for a building erected in reliance on the Class E permitted development right.

104. That was, in my view, a question which was capable of being relevant to the Inspector's decision on the ground (c) appeal in this case. It is important to have in mind that the Class E permitted development right gives planning permission for operational development comprising of a range of structures and facilities whose common element is that they are *"required for a purpose incidental to a dwellinghouse as such"*. It was the Appellants' case that the outbuilding at the appeal site had come into being as a result of the joining together of three structures, each of which had originally been erected in reliance on the Class E permitted development right. It was, therefore, reasonable for the Inspector to proceed on the basis that each of those three structures had been erected in contemplation of being required for a purpose or purposes incidental to the enjoyment of a dwellinghouse as such. That being the case, the question whether the use of the conjoined building remained within the scope of the Class E permitted development right – in other words, continued to be used for a purpose or purposes incidental to the enjoyment of a dwellinghouse as such – was at least capable of being relevant to his determination of the ground (c) appeal.

105. It was for the Inspector to decide whether that was material to his consideration of the ground (c) appeal; and, if so, the weight which he gave to that factor in arriving at his overall conclusion as to whether the use of the amalgamated outbuilding at the appeal site as an office with associated storage involved a material change for planning purposes. In my judgment, the Inspector did not err in law in taking into account the issue which he addresses in DL17.

106. Even if I had accepted the Claimant's argument under ground 2, I would not have concluded that his error was material for the purposes of his overall determination of the ground (c) appeal. I accept the First Respondent's submission that the Inspector's careful consideration in DL10-DL16 of the question whether the character of the use of the outbuilding had materially changed, and his findings in those paragraphs, would clearly have led him to the same conclusion that the ground (c) appeal should fail: *Simplex GE (Holdings) Limited v Secretary of State for the Environment* [2017] PTSR 1041, 1060B-F. The Claimants do not contend that the Inspector misdirected himself in DL 10; nor do they seek to impugn his assessment of the evidence in DL11-16.

107. For these reasons, I reject ground 2.

Ground 4

Submissions

108. Ms Murphy KC submitted that the Inspector's decision to retain the second and third requirements in the Notice was in breach of the *Mansi* principle. The outbuilding was a lawful structure. The requirement proposed on appeal by the Appellants, which the Inspector had included as an additional fourth requirement, would on being complied with result in the practical separation of the outbuilding into three distinct units, each capable of being used lawfully for purposes incidental to the enjoyment of the dwellinghouse to the rear of which it was situated: see section 55(2)(d) of the Act. However, by retaining the second and third requirements in the Notice the Inspector had cut down or interfered with the Appellants' rights under section 55(2)(d) of the Act. The Appellants could not risk installing a toilet or kitchen facilities in any of the three outbuildings, since to do so would on the face of it, contravene the second and third requirements of the Notice and so place the Appellants at risk of prosecution under section 179(1) and (2) or section 181(3) and (5) of the Act.

109. Ms Murphy emphasised that the Notice required the permanent removal of both the toilets and the kitchen and cooking facilities within the outbuilding.

110. It was submitted that the effect of retaining the second and third requirements in the Notice was to produce unsatisfactory and prejudicial uncertainty as to the extent to which the Notice affected the Appellants' enjoyment of their existing use rights in relation to the appeal site and the properties at 46, 48 and 50 Hurstwood Road. The Appellants' purpose in proposing the fourth requirement in substitution for the second and third requirements had been to avoid that uncertainty, whilst providing a practical remedy for the breach of planning control alleged in the Notice. In following the course that he did in DL40-DL41, the Inspector had acted in breach of the *Mansi* principle, irrationally and failed to explain adequately why he did not accept the Appellants' proposed solution.

Conclusions

111. I did not understand Ms Murphy KC to question the validity of the Inspector's conclusion in DL40, that neither the requirement to remove the existing male and female toilets nor the requirement to remove the existing kitchen facilities from the outbuilding were excessive, in the circumstances of this case. In my judgment, she was correct not to do so. As the Inspector himself mentioned in DL40, it is well established that the steps required to be taken by an enforcement notice can include the removal of works that are integral to the unauthorised change of use: see *Kestrel Hydro* at [53] *supra.* paragraph 31. In this case, the Inspector was able reasonably to find that the male and female toilets and the kitchen facilities had been installed in the outbuilding as part and parcel of the breach of planning control enforced against by the Notice.

112. Leading counsel's submission had a more precise focus. It was that the stated requirement permanently to remove all toilets and kitchen facilities from the outbuilding created unacceptable uncertainty and risk: i.e. that the future installation of a toilet or some limited kitchen facilities for the innocent purpose of using one of the three outbuildings incidentally to residential occupation, perhaps as part of a home office or a playroom, would nevertheless fall foul of the Notice and expose the Appellants to criminal sanction for its breach.

113. I can see some force in the argument that it was unnecessary, on reflection, for the second and third requirements to have been expressed as requiring the removal *"permanently"* of kitchen facilities and toilets from the outbuilding. It would have been sufficient simply to have required their removal, which would have achieved the intended objective as the Inspector saw it, as he indicated in the penultimate and final sentence of DL40.

114. It does not, however, follow that the requirement for permanent removal of the toilets and kitchen facilities results in a breach of the *Mansi* principle.

115. The Appellants' concern, as expressed through the submissions advanced on their behalf, was as follows. If in future they take steps to install a toilet or some kitchen facilities in one or other of the now separated outbuildings in the exercise of their rights under section 55(2)(d) of the Act, they will be exposed to the risk of prosecution for breach of the Notice under either section 179 or section 181 of the Act. The same concern might be expressed by reference to section 55(2)(a) of the Act, since it seems unlikely that the installation of a toilet or some modest kitchen facilities in one of the outbuildings would materially affect the external appearance of that building.

116. In my view, that expressed concern must be considered against the context of and in the light of the clear statement of principle by the Court of Appeal in *R v Harfield* at p.30, *supra.* paragraph 33. That was a criminal case, in which Mr Harfield faced prosecution for breach of an enforcement notice. Latham J stated the effect of the *Mansi* principle as being that no enforcement notice may take away legally permitted rights and that the authorities clearly establish *"the proposition that any enforcement notice will be construed so as to retain"* legally permitted rights. The same proposition was stated by Ward LJ at [27] in *Duguid*, *supra.* paragraph 34.

117. Applying that proposition to the present case, the substantive position is clear. The outbuilding is a lawful building. Its separation into its three former constituent elements

in accordance with the fourth requirement of the Notice will result in practice in three lawful outbuildings, each of which will in future be able to be used for purposes incidental to the dwellinghouses to the rear of which they are situated. The right to use each of the three outbuildings for such purposes is a statutory right, defined as such by section 55(2)(d) of the Act. The right to carry out internal works for the improvement or other alteration of a building is also a statutory right, defined as such by section 55(2)(a) of the Act. Both are legally permitted rights which cannot be taken away by the Notice. As a matter of established legal principle, in any future criminal proceedings, the Notice must be construed so as to retain those rights.

118. That analysis leaves only the question posed by Ward LJ at [28] in *Duguid*, as to whether those legally permitted rights needed to be expressly identified and preserved in the Notice itself, in order to avoid future argument as to their extent. In my judgment, it is clear that the Inspector was under no such obligation in the present case. As was found to be the position in *Duguid*, this appeal is plainly one in which there was absolutely no need at all to refer to the statutory rights enjoyed by the Appellants under sections 55(2)(a) and 55(2)(d) of the Act, because each of those statutory enactments operate as a matter of law within parameters that are certain, being those defined by section 55(2) of the Act itself.

119. In my judgment, the Inspector's reasoning in DL41 is consistent with and founds upon these established principles. As he said, the additional requirement to remove the linking doors would ensure that the outbuildings are not left without a lawful use. Instead, returning the outbuilding to its three constituent elements would enable those three buildings to be used lawfully for purposes incidental to the enjoyment of the three respective dwellinghouses. In other words, the fourth requirement had a proper and reasonable purpose in addition to the proper and reasonable purpose served by the second and third requirements. Fulfilment of the second, third and fourth requirements would restore the position before the breach of planning control took place. The fourth requirement had the additional benefit of enabling a beneficial future use for each of the three outbuildings, one that would enable the Appellants to enjoy their legally permitted rights under sections 55(2)(a) and 55(2)(d) of the Act.

120. In my judgment, for these reasons the retention of the second and third requirements has not resulted in a breach of the *Mansi* principle. The Inspector did not act irrationally in concluding as he did in DL40-DL41 that those requirements should be retained. Nor is his conclusion that they should remain as requirements of the Notice alongside the additional, fourth requirement lacking in adequate reasoning. Ground 4 must be rejected.

Disposal

121. For the reasons which I have given, this appeal is dismissed.