Neutral Citation Number: [2017] EWHC 357 (Admin)

Case No: CO/941/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/02/2017

Before :

MR JOHN HOWELL QC
Sitting as a Deputy High Court Judge

Between :

SUZANNE WINTERS	**Claimant**
- and -	
SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT (1)	
THE COUNCIL OF THE LONDON BOROUGH OF HAVERING (2)	**Defendants**

Mr Richard Turney (instructed by Kingsley Smith LLP) for the **Claimant**
Mr Zack Simons (instructed by Government Legal Department) for the **Defendants**

Hearing date: 16th February 2017

Approved Judgment

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

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MR JOHN HOWELL QC

Mr John Howell QC :

1. This is an application under section 288 of the Town and Country Planning Act 1990 ("the 1990 Act") to quash a decision by an Inspector who dismissed the Claimant's appeal against the refusal by her local planning authority to grant prior approval under the Town and Country Planning (General Permitted Development) (England) Order 2015 ("the GPDO") for an extension to her house at 138 Wingletye Lane, Hornchurch.

2. On February 16th 2015 the Claimant, Ms Suzanne Winters, applied to the Council of the London Borough of Havering ("the Council") for prior approval of an extension she wished to construct that would extend six metres from the rear wall of her house. The Council subsequently sent a letter dated February 20th 2015 stating that they were required to give notice of their decision to her on that application before March 30th 2015. During that period the Council received an objection to the proposed development from the occupier of an adjoining occupier. On March 27th 2015 the Council decided to refuse prior approval on the basis that the impact of the proposed development on the amenity and outlook of adjoining occupiers would be unacceptable by reason of the extension's scale, bulk and mass and that it would represent an obtrusive and overbearing feature in the rear garden environment. The decision was published online on March 27th. That was a Friday. Notice of the decision was only posted to the Claimant on the following Monday, March 30th. She received it on March 31st.

3. The Claimant appealed against the decision of the Council to refuse prior approval under section 78 of the 1990 Act making the point that she had only been informed of that decision after the period within which it should have been made. On January 12th 2016 the Inspector, Mr Michael Hetherington, who had been appointed by the Secretary of State to determine the appeal, dismissed it.

4. The Inspector found that the Claimant has not been notified in writing or otherwise within the period required for the Council's decision to be notified to her. But he nonetheless dismissed her appeal as he found that her proposed development had been begun before her application had been made to the Council. As he put it in his decision letter:

> "16. It is a requirement of condition (2) of GPDO paragraph A.4 that relevant information contained in the prior approval application is provided to the local planning authority before beginning development. Prior approval cannot be granted in respect of works that have already commenced.....
>
> 17. For the reasons set out above, and irrespective of my finding in respect of the Council's failure to notify the appellant as is required by condition (10) of paragraph A.4, I consider that the application does not comply with condition (2) of paragraph A.4 of Class A, Part 1, Schedule 2 of the GPDO. The proposal does not therefore amount to permitted development. This is not a matter that can be remedied though the appeal process and, as such, the question of whether, on its merits, prior approval should be given for the proposal does not arise. I therefore conclude that the appeal must be dismissed."

5. On behalf of the Claimant, Mr Richard Turney contended that the Inspector's decision dismissing the appeal is flawed on three grounds. Even assuming that the development had been begun before the Claimant's application was submitted to the Council, he submitted (i) that an appeal against the refusal of prior approval cannot be dismissed on the ground that condition (2) has been breached and (ii) that the appeal should have been allowed in any event given the Inspector's conclusion that the Council had not notified the Claimant of the decision within the permitted 42 day period. He further submitted that in any event (iii) the Inspector's conclusion that the development had been begun before the Claimant made her application to the Council is flawed as a matter of law.

THE RELEVANT STATUTORY PROVISIONS

6. The general rule in the 1990 Act is that planning permission is required for the carrying out of any development of land: see section 57(1) of the 1990 Act. There are a number of ways in which any planning permission required may be granted. It may be granted, for example, "(a) by a development order" made by the Secretary of State or "(b) by the local planning authority … on an application to the authority … in accordance with a development order": see sections 58(1). Thus a development order "may itself grant planning permission for development specified in the order or for any class specified": see section 59(1)(a) of the 1990 Act.

7. At the relevant time, section 60 of the 1990 Act provided in relation to permission granted by a development order inter alia that:

> "(1) Planning permission granted by a development order may be granted either unconditionally or subject to such conditions or limitations as may be specified in the order.
>
> (2) Without prejudice to the generality of subsection (1), where planning permission is granted by a development order for the erection, extension or alteration of any buildings, the order may require the approval of the local planning authority to be obtained with respect to the design or external appearance of the buildings.
>
> (2B) Without prejudice to the generality of subsection (1), a development order may include provision for ensuring-
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> (a) that, before a person in reliance on planning permission granted by the order carries out development of land in England that is a dwelling house or is within the curtilage of a dwelling house-
>
> (i) a written description, and a plan, of the proposed development are given to the local planning authority,
>
> (ii) notice of the proposed development, and of the period during which representations about it may be made to the local planning

authority, is served by the local planning authority on the owner or occupier of any adjoining premises, and

(iii) that period has ended, and

(b) that, where within that period an owner or occupier of any adjoining premises objects to the proposed development, it may be carried out in reliance on the permission only if the local planning authority consider that it would not have an unacceptable impact on the amenity of adjoining premises."

8. It may be noted that section 60(2B) of the 1990 Act does not itself permit a development order to include a provision that the proposed development may be carried out (if there is a relevant objection) on the expiry of the period during which representations it may be made about to the local planning authority had ended if no decision by the authority has been notified to the applicant.

9. Article 3 of the 2015 Order provides inter alia that:

"(1) Subject to the provisions of this Order....., planning permission is hereby granted for the classes of development described as permitted development in Schedule 2 .

(2) Any permission granted by paragraph (1) is subject to any relevant exception, limitation or condition specified in Schedule 2 ."

10. Planning permission is granted under Class A in Part 1 of Schedule 2 to the GPDO for "the enlargement, improvement or other alteration of a dwelling house". However, by virtue of condition A.1, such development is not permitted inter alia if-

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

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

(ii) exceed 4 metres in height;

(g) until 30th May 2019.....the enlarged part of the dwellinghouse would have a single storey and-

(i) extend beyond the rear wall of the original dwellinghouse by more than 8 metres in the case of a detached dwellinghouse, or 6 metres in the case of any other dwellinghouse, or

(ii) exceed 4 metres in height".

11. 138 Wingletye Lane, Hornchurch is not a detached dwelling house. Accordingly a proposal to extend 6 metres beyond the rear wall of the original house would exceed the limits in paragraph A.1(f) but be allowed by paragraph A.1(g) (assuming the height restriction was complied with).

12. Condition A.4(1) provides that a number of conditions apply to development permitted by Class A which exceeds the limits in paragraph A.1(f) but is allowed by paragraph A.1(g). These conditions include the following:

> "(2) Before beginning the development the developer must provide the following information to the local planning authority-
>
> (a) a written description of the proposed development including-
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> (i) how far the enlarged part of the dwellinghouse extends beyond the rear wall of the original dwellinghouse;
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> (ii) the maximum height of the enlarged part of the dwellinghouse; and
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> (iii) the height of the eaves of the enlarged part of the dwellinghouse;
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> (b) a plan indicating the site and showing the proposed development;
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> (c) the addresses of any adjoining premises;
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> (d) the developer's contact address; and
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> (e) the developer's email address if the developer is content to receive communications electronically.
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> (3) The local planning authority may refuse an application where, in the opinion of the authority-
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> (a) the proposed development does not comply with, or
>
> (b) the developer has provided insufficient information to enable the authority to establish whether the proposed development complies with,
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> the conditions, limitations or restrictions applicable to development permitted by Class A which exceeds the limits in paragraph A.1(f) but is allowed by paragraph A.1(g).
>
> (4) Sub-paragraphs (5) to (7) and (9) do not apply where a local planning authority refuses an application under sub-paragraph (3) and for the purposes of section 78 (appeals)

of the Act such a refusal is to be treated as a refusal of an application for approval.

(5) The local planning authority must notify each adjoining owner or occupier about the proposed development by serving on them a notice which [contains certain specified information including (c)] the date when the information referred to in sub-paragraph (2) was received by the local planning authority and the date when the period referred to in sub-paragraph (10)(c) would expire; and (d) specifies the date (being not less than 21 days from the date of the notice) by which representations are to be received by the local planning authority.

(6) The local planning authority must send a copy of the notice referred to in sub-paragraph (5) to the developer.

(7) Where any owner or occupier of any adjoining premises objects to the proposed development, the prior approval of the local planning authority is required as to the impact of the proposed development on the amenity of any adjoining premises.

(8) The local planning authority may require the developer to submit such further information regarding the proposed development as the authority may reasonably require in order to determine the application.

(9) The local planning authority must, when considering the impact referred to in sub-paragraph (7)-

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

(b) consider the amenity of all adjoining premises, not just adjoining premises which are the subject of representations.

(10) The development must not begin before the occurrence of one of the following-

(a) the receipt by the developer from the local planning authority of a written notice that their prior approval is not required;

(b) the receipt by the developer from the local planning authority of a written notice giving their prior approval; or

(c) the expiry of 42 days following the date on which the information referred to in sub-paragraph (2) was received by the local planning authority without the

local planning authority notifying the developer as to whether prior approval is given or refused.

(11) The development must be carried out-

(a) where prior approval is required, in accordance with the details approved by the local planning authority;

(b) where prior approval is not required, or where sub-paragraph (10)(c) applies, in accordance with the information provided under sub-paragraph (2),

unless the local planning authority and the developer agree otherwise in writing.

(12) The local planning authority may grant prior approval unconditionally or subject to conditions reasonably related to the impact of the proposed development on the amenity of any adjoining premises.

(13) The development must be completed on or before 30th May 2019."

13. Were section 60(2B) of the 1990 Act the only vires for these provisions, the provision permitting the proposed development to be carried out upon the expiry of 42 days following the date on which the information referred to in sub-paragraph (2) was received by the local planning authority without the local planning authority notifying the developer as to whether prior approval is given or refused would plainly be ultra vires. Neither party made any submission that it was. It may well be the case, however, that the provision is intra vires as section 60(2B) is without prejudice to the generality of the powers conferred by section 60(1) of the 1990 Act. I shall assume that it is authorised by that sub-section.

14. When a local planning authority refuse an application for prior approval or grant it subject to conditions, the applicant may appeal to the Secretary of State under section 78 of the 1990 Act: see section 78(1); *Pressland v Hammersmith and Fulham LBC* [2016] EWHC 1763 (Admin) ("Pressland") at [38]. Such an appeal can be made even if the application that leads to the appeal is invalid: see *R v Secretary of State for the Environment, Transport and the Regions ex p Bath and North East Somerset District Council* [1999] 1 WLR 1759. On such an appeal the Secretary of State may (a) allow or dismiss the appeal or (b) reverse or vary any part of the authority's decision (whether the appeal relates to that part or not) and may deal with the application as if it had been made to him in the first instance: see section 79 of the 1990 Act. Those powers include the power to allow an appeal against any decision by the authority on the basis that it was of no legal effect as the 42 day period had elapsed: cf *Murrell v Secretary of State for Communities and Local Government* [2010] EWCA Civ 1367, [2011] 1 P&CR 6, ("Murrell") per Richards LJ at [28] and [40].

THE SIGNIFICANCE OF A DEVELOPMENT HAVING BEEN BEGUN

i. Submissions

15. Mr Turney contended that the fact that the development may have been begun before an application is made to the local planning authority, or before it is determined by the local planning authority or the expiry of the 42 day period, provides no basis for treating the application as invalid or for the refusal of prior approval. What may be done may be unlawful as being carried out in breach of the conditions in sub-paragraphs (2) and (10) of Condition A4.1, but it does not follow that the application is invalid or that there is no power to decide whether or not to grant prior approval.

16. Mr Turney submitted that sub-paragraph (2) of Condition A.4 only serves to help establish the time after which the permission granted by the GPDO itself may be capable of being relied on. The local planning authority has a discretion whether or not to refuse the application under sub-paragraph (3) if the development has been begun before the application is made or if the information supplied does not meet the requirements of sub-paragraph (2). But, if it does not refuse the application on that basis, any part of the development carried out before the application is made under sub-paragraph (2), or before the authority reaches a decision or fails to do so within 42 days, is unlawful as being in breach of condition and in principle could be made the subject of enforcement action as being unlawful. But, once a decision granting prior approval is made or the 42 day period for reaching a decision expires, permission exists to carry out the development in accordance with the details submitted or approved. That permission does not authorise what may already have been done. Any approval thus remains a prior approval.

17. Any alternative construction, so Mr Turney submitted, would produce absurd results. Once begun, for example by digging a trench, the extension could never lawfully be completed under these provisions. The scheme should not be construed so as to impose such a penalty: cf *Tapecrown v First Secretary of State* [2007] 2 P&CR 7.

18. This approach is supported, so Mr Turney submitted, by analogy with the law on "conditions precedent" imposed on planning permissions granted on an application. In such cases development is regarded as having been lawfully begun notwithstanding the absence of prior approval under such a condition. After such approval is given, the works cannot be the subject of enforcement action: cf *Whitley & Sons Co Ltd v Secretary of State for Wales* (1992) 64 P&CR 296 ("Whitley") at pp305-307; *Greyfort Properties v Secretary of State for Communities and Local Government* (2012) JPL 39 ("Greyfort") at [8].

19. On behalf of the Secretary of State Mr Zack Simons emphasised that sub-paragraph (2) of Condition A.4 requires the applicant to provide certain information to the local planning authority "before beginning the development" and that condition (10) is that "the development must not be begun before" one of the specified events. It follows, so he submitted, that any works carried out before the application is made are unlawful and that there would be no proper application under condition (2). The provisions in question are unambiguous. Accordingly, so he submitted, the Inspector was right to find that prior approval cannot be granted in respect of works that have already been begun. The analogy that the Claimant seeks with Whitley and Greyfort is misconceived: the question in this case is not whether a conditional planning permission has been lawfully implemented. Until prior approval is received or the 42

day period expires, the GPDO permission has not crystallised: see *R (OrangePCS Ltd) v Islington LBC* [2006] JPL 1309. The result of beginning the development before the application for prior approval is made is not that the extension may not be built: it is merely that an application for the grant of planning permission must be made for the proposed extension which may include (as section 73A of the 1990 Act provides) an application for permission for the development carried out before the date of the application. That does not impose any penalty: it merely requires compliance with the unambiguous statutory provisions.

ii. Consideration

20. The Class A permission is one granted by the GPDO itself, even if it cannot be relied on to authorise the carrying out of any development until an application has been made which satisfies sub-paragraph (2) of Condition A.4 and one of the events specified in sub-paragraph (10) has occurred: see sections 58(1)(a), 59(2)(a) and 60(1) of the 1990 Act and article 3(1) of the 2015 Order; *Pressland* supra at [41] and [48].

21. In my judgment what the application to the local planning authority, and any approval or refusal given, under condition A.4 is concerned with is a "proposed development" that Class A is capable of authorising, not a development that has already been begun or one which is partially or wholly completed.

22. Thus the information that has to be provided to the local planning authority under sub-paragraph (2) of Condition A.4 includes a written description of "the proposed development" and a plan indicating the site and showing "the proposed development". That has to be provided by the developer, as sub-paragraph (2) states, "before beginning the development". Each adjoining owner or occupier must be notified (under sub-paragraph (5)) of "the proposed development" by a notice describing "the proposed development" and the address of "the proposed development". If any owner or occupier objects to "the proposed development", then, under sub-paragraph (7), the "prior approval" of the local planning authority is required as to the impact of "the proposed development" on the amenity of any adjoining premises. Thus, when it is provided (in subparagraph (10)) that "the development" must not begin before notice that prior approval is not required or has been given or, if such a notice is not given, the expiry of 42 days from the date when the information referred to in sub-paragraph (2) was received and (in sub-paragraph (11)) that "the development must be carried out" either in accordance with the details approved or the information provided under sub-paragraph (2), "the development" being referred to is the developer's "proposed development". That is what such information and any prior approval relate to.

23. Mr Turney's construction of Condition A.4 accordingly makes no sense of this legislative scheme. If the development has been completed before information is submitted about it under sub-paragraph (2), there is no "proposed development". If the development has been begun but not completed before information is submitted about it under sub-paragraph (2), the "proposed development" to be described can only be that part of it which remains to be carried out. It is only that part in respect of which any "prior approval" could be given. Similarly, even if it is not begun before an application is made under sub-paragraph (2) but it is completed before any objection falls to be considered, it is evidently not something for which "prior approval" could be given. Unlike section 73A of the 1990 Act, Condition A.4 does not contemplate an application, or provide for any approval to be given retrospectively, for any part of any development that has been carried out or carried

out in breach of condition (for example that imposed by sub-paragraph (2)). In my judgment it would plainly be absurd for the question whether or not "prior approval" as to the impact of "the proposed development" on the amenity of any adjoining premises should be considered merely by reference to what is still remains to be done and for only that to receive prior approval. What needs to be considered and approved is the whole development. That is why information about "the proposed development" must be provided by the developer to the local authority under sub-paragraph (2) "before beginning the development".

24. Mr Turney's construction of Condition A.4 also gives no effect whatever to an important part of sub-paragraph (2). He contends that sub-paragraph (2) of Condition A.4 only serves to help establish the time after which the permission granted by the GPDO may be capable of being relied on. On this basis it merely serves to start the clock running for the purpose of sub-paragraph (10). As Mr Turney candidly accepted, sub-paragraph (2) would still serve this function (given the terms of sub-paragraph (10)) if the words "before beginning the development" were omitted from it. Accordingly his construction fails to give any effect to an important part of the obligation imposed by that sub-paragraph on the developer, namely the time before which information about his or her proposed development must be provided to the local authority.

25. Mr Turney contended that it cannot be the case that an application to the local authority is to be regarded as invalid if it does not comply with the requirements imposed by sub-paragraph (2) given sub-paragraph (3). He submitted that a failure to comply with the condition imposed by sub-paragraph (2) is a ground upon which the local planning authority has a power under sub-paragraph (3) (but is under no duty) to refuse the application. If it chooses not to refuse the application on that basis, it must be the case that the application must be regarded as valid.

26. The local planning authority's power to refuse an application under sub-paragraph (3) only arises when "in the opinion of the authority" "the proposed development" does not comply with any "conditions, limitations or restrictions" to which the proposed development is subject or insufficient information has been provided by the developer to enable the authority to establish whether or not it does.

27. This existence of this power provides no reason to conclude that any application must be treated as valid if the authority does not refuse it under sub-paragraph (3)(a). The authority's opinion may be mistaken about such matters. Moreover the conferral of a power, rather than the imposition of a duty, is not decisive. If the information provided by the developer under sub-paragraph (2) is insufficient, for example, the authority may decide to require the developer to provide further information, rather than refusing the application on that basis. Whether there are any circumstances in which a local planning authority could reasonably decide to give its prior approval for a proposed development which in its opinion did not comply with any conditions, limitations or restrictions that are applicable to it is a question which it is unnecessary to answer. The power of refusal given in sub-paragraph (3)(a) relates only to an application made in respect of a "proposed development". For the reasons I have already given a developer cannot lawfully make an application under sub-paragraph (2) in respect of any development that has already been begun or has been partially or wholly completed. The fact that such an application is not one to which the power conferred by sub-paragraph (3) is applicable is thus unsurprising.

28. Mr Turney contends that, if his construction of Condition A.4 is rejected, the result would be absurd and involve imposing a penalty on the developer. I disagree. The GPDO dispenses with the requirement which would otherwise exist for an application to be made to the local planning authority for the grant of planning permission for development of this Class but only if the developer complies with any conditions or limitations which the GPDO imposes on the planning permission it grants. In my judgment the need to make an application for planning permission to authorise a development that does not comply with such conditions and limitations, including an application to authorise development that has been unlawfully carried out, imposes no penalty on the developer. It is merely what the legislative scheme entails. Mr Turney would no doubt say that in some cases this may not be a practical approach. But, whether or not such a claim can be made good, as Richards LJ stated in *Murrell* supra at [38], "practicality cannot displace the legal effect of the GPDO."

29. Cases such as *Whitley* and *Greyfort*, on which Mr Turney sought to rely, address a different question, namely whether development has been lawfully begun (so as to satisfy the time-limits on implementing a planning permission granted on an application) when a condition requires the local planning authority's approval to something and, although that approval is sought before the expiry of the time limit for beginning the development, that approval is only obtained after the development has been begun. In such a case it has been held that the development has been lawfully begun in time. Although Mr Turney prayed these cases in support of his submission by analogy, in my judgment they do not do so. For, as he accepts, even on his own case, any development that has been carried out before one of the events mentioned in sub-paragraph (10) remains unlawful (as being in breach of condition) and any prior approval does not render it lawful. Moreover, unlike cases such as *Whitley* and *Greyfort*, in a case in which the 42 day period expires, there will in fact have been no approval of anything by the local planning authority. It would not be obviously irrational for the local planning authority to issue an enforcement notice in such a case, therefore, if the period had expired without a decision when one should have been made refusing prior approval. In such a case enforcement might be in the public interest to protect the amenities of adjoining premises.

30. For these reasons in my judgment an application cannot be made under sub-paragraph(2) of Condition A.4 in respect of a development that has already begun.

THE SIGNIFICANCE OF THE INSPECTOR'S FINDING THAT NOTICE OF THE GRANT OR REFUSAL OF PRIOR APPROVAL HAD NOT BEEN GIVEN WITHIN 42 DAYS

31. Mr Turney submitted that the effect of the failure to give the notice of refusal of prior consent within the 42 day period meant that there was then permission to construct the extension and that the Inspector erred in law in considering whether there was some alternate basis on which the appeal could be dismissed had the Council made a timely decision. The Inspector had no power, therefore, to seek to dismiss the appeal on the ground that he did.

32. In my judgment, once the 42 day period has expired without receipt by the developer of written notice that prior approval is not required or has been granted, the developer's proposed development can be carried out in accordance with the information provided by the developer under sub-paragraph (2) of Condition A.4 before the development began with the benefit of the planning permission granted by

Class A. But, for the reasons already given, the planning permission granted by Class A does not authorise the carrying out of any development any part of which was begun before an application was made to the local planning authority under sub-paragraph (2).

33. Accordingly the Inspector was not obliged to allow the Claimant's appeal if works to provide the extension had begun before she submitted her application to the Council.

WHETHER THE DEVELOPMENT HAD IN FACT BEEN BEGUN

34. Mr Turney contended that the construction of a wall in the wrong location cannot amount to the construction of any part of the proposed extension: cf *Handoll and Suddick v Warner Goodman and Streat* (1995) 70 P&CR 627. The Inspector had thus failed in his investigative duty: cf *Dyanson v Secretary of State for the Environment* (1998) 75 P&CR 506. Had he complied with it, he would have found that the wall had been constructed 4.2 metres (not 6 metres) from the original rear wall of the dwelling. That was plainly a material consideration. The question for the court, as Lord Diplock put it in *Secretary of State for Education and Science* [1977] AC 1014 at p1065, is "did [he] ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?" In this case, so Mr Turney submitted, he did not. Had he investigated he would have found that the wall was in the wrong place.

35. It is for the decision maker to decide on the manner and intensity of any inquiry required subject to Wednesbury review: see eg *R (Khatun) v Newham LBC* [2004] EWCA Civ 55, [2005] QB 37, per Laws LJ at [35]; *R (Khatib) Secretary of State for Justice* [2015] EWHC 606 (Admin) per Elias LJ at [51]-[52]; *R (Law Society) v the Lord Chancellor* [2015] EWCA Civ 230, [2016] 3 All ER 296, at [15]; *Naylor v Essex County Council* [2014] EWHC 2560 (Admin), [2015] JPL 217, at [63]; *Hayes v Wychavon DC and Payne* [2014] EWHC 1987 (Admin), [2015] JPL 62, per Lang J at [31].

36. It is important when considering whether the Inspector acted unreasonably in considering this issue to appreciate how it emerged and what the parties' case on it was. When carrying out his site visit the Inspector observed that brick footings that appeared to him to be the footings of a rear extension. The Planning Inspectorate invited the parties to confirm, therefore, whether or not this is the extension which was the subject of the appeal. The Claimant replied that what the Inspector had seen was the retaining wall put back for the existing patio. The Council subsequently informed the Planning Inspectorate that officers from its building control department had visited the site on January 27th and 29th 2015 and February 5th 2015. They stated that "the contemporaneous file notes taken by the Building Control Officer who visited the site state that the builder acknowledged that the rear extension was under construction. The notes state that the rear extension was the width of the building and 6m in depth. A photograph was also taken during one of the inspections by BC officer shows the works." The documents and the photograph were provided to the Inspectorate. The Claimant subsequently replied disputing the content of the conversation, saying that the builder was in fact her husband, and the nature of the works that the Building Control Officer had seen. But she did not deny that the depth of the works was, as was in fact 6 metres (as recorded in the Officer's notes).

37. In his decision letter the Inspector noted that "when carrying out the site visit, I observed that brick footings had been put in place in the approximate position of the intended rear extension" and that he had sought to clarify this in an exchange of correspondence with the main parties. The Inspector noted that the Claimant and the Council disagreed about the nature of the works that were being carried out before the application had been made. He summarised their respective contentions as follows:

> "11. The appellant states that the works involve the replacement of retaining walls and the laying of a patio, together with steps and a slope to the garden. She advises that the retaining wall had been damaged when an extension was constructed next door (at no. 136) and the front of the retaining wall facing the garden, which is at a lower level than the dwelling, was 'perished'. She adds that the existing steps were considered to be dangerous.
>
> 12. These matters are disputed by the Council, which has submitted notes from a site visit made by a Building Control officer on 29 January 2015. These state that a rear extension was being constructed and that the officer was informed by the 'builder' that such work was being undertaken under permitted development rights. The officer subsequently consulted with Planning staff and then advised that work should stop until relevant approvals had been sought.
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> 13. The appellant does not accept the Council's record of that site visit: she says that the person to whom the Council officer spoke (who was her partner not the builder) advised at the time that the works related to reinstating the retaining walls and a set of steps and a ramp for her disabled father."

38. Against that background the Inspector stated that:

> "14....My assessment is as follows. The photograph that accompanies the Council's site visit notes shows that the existing patio had been substantially removed and new concrete foundations were being put in place in the vicinity of no. 136. At the time of my visit, new brick walls had been erected on three sides of the structure. The side walls had been built up to a height just below the apparent floor level of the main dwelling while the wall facing towards the garden was somewhat lower. The work appeared unfinished and there was no evidence of new steps or a ramp having been constructed.
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> 15. The removal of the main patio structure and the erection of new walls on three sides seem to me to markedly exceed the work that would be needed to remedy the damage that the appellant has described. For example, a new wall has been built on the side of the structure that is furthest away from no. 136. The works are however consistent with the Council's view that the erection of a rear extension had commenced. Applying the balance of probability, it seems to me that these

works are likely to relate to the development that is the subject of the present appeal."

39. In my judgment it cannot be said that the Inspector failed in his investigative duty. Having seen on his site visit that work on what appeared to be the rear extension had begun, he invited representations from the parties. Having received those from the Council apparently confirming that the extension had started and that it was 6 metres in depth, he considered the Claimant's further representations on the issue. These disputed the nature of the works but not their depth from the house. Accordingly on the basis of the parties' representations the issue for him, and which he identified and discussed in his decision letter, was what the nature of the works was, not where they were. The Inspector was plainly entitled to conclude that the nature of the works was consistent with the Council's view that the erection of a rear extension had begun, rather than works to remedy any damage to the patio. In my judgment, therefore, it cannot be said that the Inspector failed to ask himself the right question or unreasonably failed to take any steps to acquire the information necessary to answer it. Nor can his conclusion be regarded as irrational on the basis of the information available to him. Any Wednesbury challenge is accordingly unsustainable.

40. Although the challenge was not put by Mr Turney on this basis, I have considered whether or not this could be regarded as a case in which a material error of fact (if there was one) could provide a ground on which to contend that the Inspector's decision was "not within the powers of this Act" for the purpose of section 288 of the 1990 Act.

41. Although there is no precise code for determining when an error of fact may constitute an error of law, as the Court of Appeal found in *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] QB 1044 at [66], there must have been a mistake as to an existing fact; the mistake must be established, in the sense that it is uncontentious and objectively verifiable; the Claimant or her advisers must not have been responsible for the mistake; and the mistake must have been material to the reasoning: see also *R (Patel) v Secretary of State for Communities and Local Government* [2016] EWHC 3354 per Ouseley J at [22].

42. In this case, the evidence on which the Claimant relies consists of her own witness statements filed in support of this application. In her first statement she stated that the wall was approximately 3.3 metres from the rear wall of the house. In her second she states instead that the correct measurement is 4.2 metres. Whatever may be the true position in fact, however, if a mistake was made by the Inspector, in my judgment the Claimant was responsible for it by failing to take issue with the Council's statement that the depth was in fact 6 metres as recorded by one of their Building Control officers. The Inspector was entitled to expect that the Claimant would dispute that contention if it had in fact been mistaken. Had the point been disputed, the Inspector might have made a further site visit to resolve the issue, given that it appeared on his site visit that work on what appeared to be the rear extension had begun in the approximate position of the intended rear extension. But, given the lack of any assertion that the depth of the wall from the house that the Building Control Officer had noted on site was wrong, he was entitled to act on the basis that there was no issue on the location of the wall (as opposed to the nature of the works of which it formed part). Accordingly I do not consider that the Inspector made a material error of fact which provides a ground on which to find that the Inspector's decision was "not within the powers of this Act" for the purpose of section 288 of the 1990 Act.

43. The challenge to the Inspector's conclusion, that works on constructing the extension had begun before the Claimant applied to the Council, therefore, fails.

CONCLUSION

44. For the reasons given above, therefore, this application must be dismissed.