Case No: CO/2364/2017

Neutral Citation Number: [2018] EWHC 226 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 February 2018

Before :

MRS JUSTICE LANG DBE

- -

Between :

	THE QUEEN **on the application of** **GLYNN HOWARD MARSHALL**	**Claimant**
	- and -	
	EAST DORSET DISTRICT COUNCIL	**Defendant**
	BRIAN PITMAN	**Interested Party**

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- -

Daniel Stedman Jones (instructed by **Coles Miller Solicitors LLP**) for the **Claimant**
Philippa Jackson (instructed by **Legal and Democratic Services**) for the **Defendant**
The **Interested Party** appeared in person

Hearing date: 1 February 2018

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Judgment**Mrs Justice Lang :**

1. The Claimant seeks judicial review of the Defendant's decision notice, dated 13 February 2017, issued in response to the Interested Party's ("IP") application for prior approval in

respect of the proposed erection of an agricultural building ("the Building"), on land east of Pound Farm, at Hinton Martell, Wimborne, Dorset BH21 7HP ("the Site"), pursuant to schedule 2, Part 6, Class A of the Town and Country Planning (General Permitted Development)(England) Order 2015 ("the GPDO").

2. The Claimant resides at Pound Farm and will be affected by the proposed building, which the IP wishes to erect on a parcel of land which he owns. The Defendant is the local planning authority.

3. Gilbart J. granted permission to apply for judicial review on 3 October 2017. He ordered that "if the IP seeks to oppose the application for judicial review, he must file an Acknowledgment of Service, accompanied by his Grounds of Resistance, verified by a Statement of Truth within 14 days of this order. Any further witness evidence filed by him must be filed within 21 days of this order." Gilbart J also ordered the Defendant to file and serve detailed grounds for contesting the claim and any written evidence within 21 days of the order.

4. At the commencement of the hearing, I refused the Defendant permission to rely upon a witness statement from Mr Lucas which had been filed and served on 1 November 2017. It comprised hearsay evidence of a telephone conversation with the IP on 25 October 2017, in which the IP added to and altered the information which he provided at the time of his application. I also refused the IP permission to rely upon a written "response" and documents relating to his ownership of the land which, in breach of Gilbart J's directions, he filed and served a few days before the hearing, giving the Claimant insufficient time to consider and respond to it. This added to and altered the information he provided at the time of his application. Regrettably none of the evidence he provided was verified by a statement of truth and he never filed an acknowledgment of service or grounds of resistance, verified by a statement of truth, as ordered by Gilbart J. I concluded that the IP's late material and Mr Lucas' witness statement were impermissible *ex post facto* evidence, which ought not to be taken into account by the Court, applying the principles helpfully set out by Green J. in *Timmins & Ors v Gedling BC* [2014] EWHC 654 (Admin), at [109] – [113].

5. Exceptionally, since the IP attended at the hearing, I allowed him to make oral submissions, despite not having filed an Acknowledgment of Service.

Facts

6. On 5 December 2016, the IP made an application to the Council for prior notification of agricultural development under Schedule 2, Part 6 of the GPDO on the standard form. He was assisted by a planning consultant.

7. In response to the question asking for "Site Address Details", he stated "Pound Farm, Lane from Hill House Access to Junction with C24, Hinton Martell". This was incorrect, as Pound Farm was the Claimant's home. The Site was more accurately described and shown on the accompanying plan and drawings as "Land opposite Pound Farm, Uppington, Wimborne BH21 7HP".

8. The IP stated that the total area of the "proposed agricultural unit" was 11.4 hectares and the "parcel of land where the development is to be located" was "1 or more hectares".

9. In response to the question "Would the proposed building be used to house livestock, slurry or sewage sludge?", the IP said "no". But in response to the question "Is the proposed building reasonably necessary for the purposes of agriculture", the IP stated "yes" and added:

> "The building is to be used a) to winter house 45 ewes and their lambs through the winter period and b) the storage of approximately 10 tonnes of potatoes which are grown on the adjoining land."

10. The proposed use of the building to "winter house 45 ewes and their lambs through the winter period" contradicted the earlier response that the proposed building would not be used to house livestock.

11. The application form was accompanied by drawings showing the proposed layout and elevations of the Building. These drawings described the proposed development as a "General purpose barn".

12. By virtue of Schedule 2, Part 6, Class A.2(d)(iii), the Defendant was required to make a determination as to whether prior approval was required within 28 days of the date on which the above application was received. This 28 day period expired on 8 January 2017.

13. The Officer's Report ("OR") was dated 10 February 2017. It noted that the Building would "lie within 400m of the curtilage of a number of dwellings including Pound Farm and Uppington Cottage to the west and Broadview, Berjon, Ivy Cottage and Lichens to the south which are protected buildings".

14. The report set out the relevant provisions of paragraphs A.1(i), A.2(1)(a) and paragraph D1.3 of the GPDO, prohibiting and restricting the accommodation of livestock in buildings within 400m of protected buildings. It noted that:

> "The application form states that the building will not be used for

the keeping of livestock but then notes the use of the building to winter house ewes and their lambs."

"The applicant's agent has confirmed, when this matter was queried, that the use of the building for ewes and lambs would be restricted so as to meet this condition."

15. In the 'conclusions' section, the report stated:

"The Council failed to respond to the Prior Notification application within the 28 day timeframe from the receipt of information necessary to validate the application so no further details can be required. The proposal will only meet the permitted development criteria if the use by livestock is limited to the activities identified in Class D1.3."

16. The Defendant sent the IP a decision notice dated 13 February 2017. It provided as follows:

"**Town and Country Planning Act 1990**
Town and Country Planning (General Permitted Development)(England) Order 2015 (as amended)

Application Reference no: **3/16/2816/PNFAG**
Applicant's Name: **Mr Brian Pitman**
Location: **Pound Farm, Lane from Hill House with Access to Junction C24, Hinton Martell, Wimborne, Dorset, BH21 7HP**
Proposal: **Erection of a new agricultural building**

East Dorset District Council has considered this application and has determined that **prior approval is not required** in relation to the siting and appearance of the development, as described above, and in accordance with the submitted plans and other supportive documents.

The development, therefore, constitutes permitted development in accordance with the provisions of Part 6 of the Town and Country Planning Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) as is subject to the standard conditions:

The following informative notes are drawn to the applicant's

attention:

> The 28 days within which the Local Planning Authority can request the submission of details of the siting, design and external appearance of the building for Prior Approval under Part 6 Class A2(2)(i) has expired.
>
> The applicant is advised that as the building would be siting within 400m of a number of protected buildings its use for the keeping of livestock, other than in accordance with Schedule 2, Part 6, Class A (A.1(i) of the Town and Country Planning (General Permitted Development) Order 2015 as amended and planning consent would be required."

17. The IP carried out some preparatory work on construction of the Building, but ceased in the light of this judicial review challenge.

Statutory framework

18. By section 57(1) of the Town and Country Planning Act 1990 ("TCPA 1990"), planning permission is required for the carrying out of development. By section 58(1)(a), planning permission may be granted by a development order made by the Secretary of State. By section 60, 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, including conditions as to prior approval.

19. Article 3(1) of the GPDO provides that planning permission is granted for the classes of development described as permitted development in schedule 2. By article 3(2), any permission granted by paragraph (1) is subject to any relevant exception, limitation or condition specified in schedule 2.

20. Part 6 of schedule 2 relates to agriculture and forestry.

21. Class A grants permission for the following development:

> "**A Permitted development**
>
> The carrying out on agricultural land comprised in an agricultural unit of 5 hectares or more in area of—
>
> (a) works for the erection, extension or alteration of a building; or

(b) any excavation or engineering operations,

which are reasonably necessary for the purposes of agriculture within that unit."

22. However, the scope of the permission is limited by paragraph A.1. which provides, so far as material:

"**A.1. Development not permitted**

Development is not permitted by Class A if –

……

it would consist of, or include, the erection or construction of, or the carrying out of any works to, a building, structure or an excavation used or to be used for the accommodation of livestock or for the storage of slurry or sewage sludge where the building, structure or excavation is, or would be, within 400 metres of the curtilage of a protected building;"

23. Paragraph D.1(1) defines a "protected building" as "any permanent building which is normally occupied by people or would be so occupied, if it were in use for purposes for which it is designed; but does not include (a) a building within the agricultural unit; or (b) a dwelling or other building on another agricultural unit which is used for or in connection with agriculture".

24. It was common ground that the proposed building was within 400 metres of several dwellings (including the Claimant's home) which were "protected buildings" as defined.

25. Paragraph A.2 sets out the "conditions" to which development permitted by Class A is subject. It provides, so far as is material:

"(1) Development is permitted by Class A subject to the following conditions—
(a) where development is carried out within 400 metres of the curtilage of a protected building, any building, structure, excavation or works resulting from the development are not used for the accommodation of livestock except in the circumstances described in paragraph D.1(3) of this Part.

…..

(2) Subject to sub-paragraph (3), development consisting of—

(a) the erection, extension or alteration of a building;
…..
is permitted by Class A subject to the following conditions—

(i) the developer must, before beginning the development, apply to the local planning authority for a determination as to whether the prior approval of the authority will be required as to the siting, design and external appearance of the building, the siting and means of construction of the private way, the siting of the excavation or deposit or the siting and appearance of the tank, as the case may be;

(ii) the application must be accompanied by a written description of the proposed development and of the materials to be used and a plan indicating the site together with any fee required to be paid;

(iii) the development must not begin before the occurrence of one of the following—

(aa) the receipt by the applicant from the local planning authority of a written notice of their determination that such prior approval is not required;
(bb) where the local planning authority give the applicant notice within 28 days following the date of receiving the applicant's application of their determination that such prior approval is required, the giving of such approval; or
(cc) the expiry of 28 days following the date on which the application under sub-paragraph (2)(ii) was received by the local planning authority without the local planning authority making any determination as to whether such approval is required or notifying the applicant of their determination.

……

(v) the development must, except to the extent that the local planning authority otherwise agree in writing, be carried out –
(aa) where prior approval is required, in accordance with the details approved;
(bb) where prior approval is not required, in accordance with the details submitted with the application; ….."

26. Paragraph D.1(3) provides:

> "(3) The circumstances referred to in paragraphs A.2(1)(a) and B. 5(1) of this Part are—
>
> (a) that no other suitable building or structure, 400 metres or more from the curtilage of a protected building, is available to accommodate the livestock; and
>
> (b)
>
> (i) that the need to accommodate the livestock arises from quarantine requirements, or an emergency due to another building or structure in which the livestock could otherwise be accommodated being unavailable because it has been damaged or destroyed by fire, flood or storm; or
>
> (ii) in the case of animals normally kept out of doors, they require temporary accommodation in a building or other structure because they are sick or giving birth or newly born, or to provide shelter against extreme weather conditions."

Grounds for judicial review

27. The Claimant's first and main ground for judicial review was that the Defendant's decision notice was unlawful because the proposed use of the Building, as set out in the IP's application, was "to winter house 45 ewes and their lambs through the winter period". This constituted "accommodation of livestock", within the meaning of paragraph A.1(i) of Part 6 of schedule 2 to the GPDO, and therefore it was one of the types of "Development not permitted" under Class A. The use described in the application would also be in breach of the condition in paragraph A.2(1)(a), as it fell outside the terms of the exception in paragraph D.1(3).

28. In the alternative, and only if Ground 1 did not succeed, the Claimant relied on two further grounds:

i) Ground 2 - the application was invalid because it did not accurately describe the proposed development, the Site or its location.

ii) Ground 3 - in its assessment that prior approval was not needed, the Council failed to take into account a material consideration, namely, the potential impact of the proposed development on a nearby Grade II listed heritage asset,

Uppington Cottage.

29. In response, the Defendant submitted as follows:

i) Ground 1. The only determination made by the Defendant was that prior approval could not be required for any development falling within Class A of Part 6 because the 28 day statutory time limit for determining the application had expired. It did not make any other decision. It did not have power to make a determination on whether the proposed development fell within the scope of Class A of Part 6; its powers were limited to the issue of prior approval of site, design, and external appearance. Alternatively, it had a discretionary power to make a determination on whether the proposed development fell within the scope of Class A of Part 6, and its decision could only be impugned on *Wednesbury* grounds which the Claimant could not establish in this case.

ii) Ground 2. The application satisfied the statutory requirements for an application for prior approval and therefore it was valid.

iii) Ground 3. The Council was time-barred from requesting any further details on siting, design and external appearance, or making any determination upon them.

30. The IP explained that he owns and farms at the Site, though he resides some 5 miles away in Colehill. The proposed Building was intended as a store for agricultural products and machinery, and as a "maternity unit" for ewes and lambs during the winter lambing period, which lasted at least 2 months, as he only has one ram. The sheep would not be accommodated all winter in the Building: there was insufficient space for his flock of 55 ewes and, in any event, sheep were healthier when living outdoors, because there was less risk of infection. In the past he has used barns which were part of his parents' farm, but the farm is now to be sold, and he has no other barn available to him.

31. The IP said that, before he made the application for prior approval for the erection of the Building, he was well aware that he could either apply for planning permission or rely upon the GPDO. He had considered paragraph D1(3) of the GPDO and decided that the exception which permitted temporary accommodation of livestock for, inter alia, giving birth or when newly born would be sufficient for his purposes, as he did not intend to accommodate the sheep in the Building full-time.

Conclusions

Ground 1

(1) Permitted development under Part 6 Class A of Schedule 2 to the GPDO

32. The correct approach to the interpretation of the GPDO was recently addressed in the case of *Evans v Secretary of State for Communities and Local Government* [2014] EWHC 4111 (Admin), where Neil Cameron QC (sitting as a Deputy High Court Judge) said:

> "17 Both parties are agreed as to the approach to be taken in construing the GPDO. The ordinary meaning of the language used is to be ascertained when construing the development order in a broad or common sense manner. The authority for that proposition is the judgment of Goulding J in *English Clays Lovering Pochin & Co. Ltd. v. Plymouth Corporation* [1973] 2 All ER 730 at page 735 …."

33. In my judgment, on a proper interpretation, the scope of permitted development under Class A of Part 6 is to be ascertained by reading the description under "A. Permitted Development" subject to the exceptions in "A.1 Development not Permitted". Thus, the exceptions in paragraph A1 form part of the definition of the development, and cannot be severed from it. They are clearly distinguishable from the conditions to which the permitted development is subject, which are expressly stated to commence at "A.2 Conditions". In reaching this conclusion, I have drawn upon the analysis of the Divisional Court and Court of Appeal in Garland v Minister of Housing and Local Government (1969) 20 P & CR 93, in which an enforcement order requiring demolition of an entire extension which exceeded the limits in the General Development Order was upheld. Bridge J. said, at 98:

> "If development is carried out which, as in this case, exceeds the permitted maximum under Class I, paragraph 1, of the First Schedule, then, in my judgment, the proper view is that it is not permitted development at all; in other words, the maxima imposed in the paragraph are an essential part of the definition of the development which the paragraph is permitting."

34. Paragraph A.1(i) provides that development is not permitted development within Class A if it includes the erection of a building to be used for the accommodation of livestock, slurry or sewage sludge within 400 metres of the curtilage of a protected building. I agree with the observation in *Moore and Purdue: Planning Law* (13th ed.) that the "purpose of this provision is to maintain a 'cordon sanitaire' between livestock and livestock slurry and nearby residential accommodation".

35. Condition A.2(1)(a) provides that development is permitted by Class A subject to the condition that, where development is carried out within 400 metres of the curtilage of a protected building, any building resulting from the development is "not used for the accommodation of livestock, except in the circumstances described in paragraph D. 1(3)".

36. Paragraph D.1(3) permits temporary accommodation of livestock in a building where (a) no other building which is further away from the protected buildings is available and (b) (i) either an emergency has arisen or (ii) "in the case of animals normally kept out of doors, they require temporary accommodation in a building or other structure because they are sick or giving birth or newly born, or to provide shelter against extreme weather conditions".

37. I do not accept the Defendant's submission that paragraph D.1(3) should be read into paragraph A.1(i), so that it is subject to the same exception as condition A2(1)(a). In my view, this would amount to an impermissible re-writing of the GPDO. I do not consider that it was a drafting error (I note that Class B of Part 6 adopts the same distinction). I accept the Claimant's submission that the two provisions are intended to address different circumstances, although both are directed at protecting nearby residences from unacceptable environmental and health hazards. Paragraph A.1(i) excludes from the scope of permitted development a proposed development ("the erection or construction of, or the carrying out of any works to, a building, structure or an excavation") which is used or to be used for the accommodation of livestock i.e. where accommodation of livestock is the purpose of the development. This is likely to be an intended permanent use, whether full-time or part-time. In those circumstances, a blanket prohibition may well be a rational policy choice. In contrast, condition A.2(1)(a) imposes a condition which controls the use of a development which has already been carried out. It prevents the use of any building, structure etc. which has resulted from a development (whatever its original intended use) to be used as accommodation for livestock. This prevents a change to, or adoption of, an unacceptable use, either because of a change of circumstances or deliberate avoidance of paragraph A.1(i). However, it recognises that there may be circumstances where use of a building, structure etc. as temporary livestock accommodation would be legitimate, where no other more suitable building is available, and so it provides for the exception in paragraph D.1(3).

38. Turning to the Defendant's decision notice of 13 February 2017, I am satisfied from its wording that the Defendant did indeed decide that:

> "The development, therefore, constitutes permitted development in accordance with the provisions of Part 6 of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) as is subject to the standard conditions."

39. Understandably, the IP relies upon this decision in support of his contention that the Building is permitted development. However, the decision was legally flawed as the Defendant did not apply the interpretation of Class A which I have set out above, either in the decision notice, including the "Informative Notes", or in the officer's report. The Defendant wrongly assumed that the IP could take advantage of the exception in paragraph D.1(3). However, it appears that the IP's proposal was caught by the blanket prohibition on the erection of a building to be used for the accommodation of livestock in paragraph A.1(i), which formed part of the description of Class A.

(2) Prior approval of a development proposal

40. In *Keenan v Woking Borough Council & Anor* [2017] EWCA Civ 438, Lindblom LJ helpfully described the way in which the prior approval provisions operate, in the following passages of his judgment:

> "32 The true analysis, in my view, is this. Under the GPDO 1995, and now under the Town and Country Planning (General Permitted Development) (England) Order 2015, various kinds of development have been authorized as "permitted development". Some, though not all, of the classes of development described as "permitted development" in Schedule 2 to the GPDO 1995 were subject to particular conditions, specified class by class. This was expressly contemplated in article 3(2). So too was the provision, again class by class, of any relevant exceptions and limitations. We are concerned in this case with two classes of "permitted development", Class A of Part 6, and Class A of Part 7, and in particular with development consisting of "the formation … of a private way", neither of which was unconditional. Both were subject to relevant conditions.
>
> 33 Crucially, the grant of planning permission itself came about not through the procedure to be followed under article 3(2) and the specific provisions for "Conditions" in either class, but through the operation of article 3(1) and the provisions for "Permitted development" in that class. To be "permitted development" in the first place, the development in question had to come fully within the relevant description of the "Permitted development" provided for within each class. If it did not, the provisions for "Conditions" applicable specifically and only to "permitted development" as thus defined could not relate to it. The operation of the provisions for "Conditions" did not, and could not, apply to other forms of development outside that particular class of "Permitted development". Nor did they, or could they, have the effect of enlarging that class. The conditions

applied only to development belonging to the class, and not, in any circumstances, to development of whatever kind outside it.

34 If taken out of its proper context, the provision in paragraph A. 2(1) in Class A of Part 6 – mirrored in paragraph A.2(1) in Class A of Part 7 – stating that "[development] is permitted by Class A subject to the following conditions …" might be construed, wrongly, as embodying a grant of permission under Class A. But when read in its context, it clearly does not do that. Its meaning, and relevant effect here, is simply that development which is permitted development under Class A, and within the scope of paragraph A.2(2), is subject to the specified conditions.

35 It follows that for the provisions relating to conditions in paragraph A.2(2)(i) in Class A of Part 6, or those in paragraph A. 2(1)(a) to (f) in Class A of Part 7, to come into play, the development proposed had to fall squarely within the description of "Permitted development", in the relevant class.

36 The condition in paragraph A.2(2)(i), which required the developer, before beginning the development, to apply to the local planning authority for a determination as to whether its "prior approval" would be required to the "siting and means of construction" of the "private way", did not impose on the authority a duty to decide whether or not the development in question was, in fact, permitted development under Class A – albeit that the guidance in paragraph E14 of Annex E to PPS7 might have been read as encouraging it to do so. Nor did it confer upon the authority a power to grant planning permission for development outside the defined class of permitted development. The sole and limited function of this provision was to enable the local planning authority to determine whether its own "prior approval" would be required for those specified details of that "permitted development". If the authority were to decide that its "prior approval" was not required, the condition would effectively have been discharged and the developer could proceed with the "permitted development" – though not of course with any development that was not "permitted development". If, however, the authority failed to make a determination within the 28-day period, again the developer could proceed with the "permitted development", but again not with any development that was not "permitted development". The developer would not at any stage have planning permission for development that was not, in fact, "permitted development".

37 The first condition imposed – by paragraph A.2(2)(i) in Class A of Part 6, and by paragraph A.2(1)(a) in Class A of Part 7 –

simply prevents the "permitted development" in question being begun. By the condition in paragraph A.2(2)(v) in Class A of Part 6, and the corresponding condition in A.2(1)(e) in Class A of Part 7, if "prior approval" is required, the development must then be carried out in accordance with the details approved, or if "prior approval" is not required, in accordance with the details submitted with the application. But even that condition is, and can only be, a stipulation attached to the planning permission granted by article 3(1) and the "Permitted development" provisions of the relevant class.

38 The provisions relating to conditions in Class A of Part 6 and Class A of Part 7 effectively define the ambit of the local planning authority's jurisdiction in respect of the several kinds of "permitted development" within the relevant class. They do not expressly, or implicitly, engage any other question, such as whether the development is "reasonably necessary", respectively, for the purposes of agriculture within the agricultural unit or for the purposes of forestry. The local planning authority does not have the power, under the provisions for conditions in either of these two classes, to vary the terms of the "permitted development" rights within the relevant class. Those provisions do not empower an authority to consider whether permission should be granted for development which is not of the specified type and description: for example, in the case of agricultural buildings and operations, development on an agricultural unit smaller than the specified minimum size of five hectares. The fact that the question of whether development is "reasonably necessary" for the relevant purposes is not merely an objective matter, but involves an element of judgment, does not displace that principle.

39 This analysis, in my view, sits perfectly well with previous relevant authority in this court. It is not inconsistent with Richards L.J.'s judgment in *Murrell*. In that case, as Richards L.J. observed (in paragraph 1 of his judgment), the proposed development, a cattle shelter on a farm, "was permitted by Class A of Pt 6 of Sch.2 to the [the GPDO 1995], subject, so far as material, to the conditions in para.A2(2) of Pt 6". The local planning authority, having insisted on the application being made on a particular form, decided that "prior approval" was required and refused that approval on the basis that the proposed development did not comply with a number of development plan policies referred to in the determination. Richards L.J. concluded that, in the circumstances, permission for the development had "accrued" under the GPDO 1995 (paragraph 28 of the judgment).

The application had "complied with the requirements of [the GPDO 1995] and was a valid application" (paragraph 33). Where a "prior approval" application had been "duly made" but there had been no notification of determination within the 28-day period, "planning permission … accrues or crystallises on the expiry of the 28-day period" (paragraph 42).

40 None of those conclusions is at odds with the basic principle that development which is not "permitted development" within Class A of Part 6, or Class A of Part 7, cannot become "permitted development", by default, when the local planning authority does not make a determination within the relevant 28-day period. As Richards L.J. said (in paragraph 45 of his judgment):

> "The question of prior approval under para.A2(2) can only arise in respect of "permitted development" within Class A (i.e. development falling within the terms of Class A) and not excluded by para.A1). Such development is permitted subject to the conditions in para.A2, including the condition relating to prior approval, but those conditions do not affect the principle of development. In recognition of the importance of agriculture and its operational needs, the GPDO has already taken a position on the issue of principle. Thus, as the guidance in Annex E spells out, if [the GPDO 1995] requirements are met, "the principle of whether the development should be permitted is not for consideration" in the prior approval procedure (para.E15)."

41 I do not accept that the analysis I believe to be correct is inimical to certainty and efficiency in the regime for "permitted development". On the contrary, it seems to me to be entirely compatible with certainty and efficiency. The alternative analysis, in which development that does not fall within Class A of Part 6 or Class A of Part 7 may gain planning permission by default through the operation of the provisions for conditions in those two classes, is not only unsound as a matter of the proper construction of those provisions in their context; it is also wrong in principle. It envisages development outside the range of "permitted development" rights conferred by the GPDO 1995 being deemed to have been granted planning permission simply because the local planning authority had not responded within 28 days to an application for a determination as to whether its "prior approval" of certain details would be required. That would vitiate this part of the statutory scheme.

> 42 In my view, therefore, the judge was right to reject Mr Keenan's appeal under section 289. The inspector's conclusion on the ground (c) appeal was lawful.
>
> 43 I should add that I agree with the inspector's observation (in paragraph 21 of her decision letter) that "it would have assisted if a timely explanation from the Council as to why [Mr Keenan's] application could not be entertained could have been provided …". But in view of the planning history of the site it is perhaps not surprising that no such explanation was given, and the fact that it was not given cannot make any difference to the true position in law."

41. It was confirmed in *Keenan*, at [35], that the 'prior approval' conditions do not even come into play unless the proposed development falls "squarely within the description of "Permitted development", in the relevant class". However, *Keenan* also decided that the local planning authority, when deciding a prior approval application under the terms of the GPDO, is not empowered, either expressly or implicitly, to decide whether or not the proposed development comes within the description of the relevant class in the GPDO: see per Lindblom LJ at [36] – [38].

42. A failure by the local planning authority to make a determination on a prior approval application within the 28 day period enables the developer to proceed with the proposed development, under paragraph A.2(2)(iii)(cc), but he does not thereby gain planning permission by default and so he does not have planning permission for development that is not "permitted development": see per Lindblom LJ at [36] and [41].

43. As Lindblom LJ mentioned at [36], the previous guidance in Annex E to PPS7 encouraged local planning authorities to "verify that the intended development does benefit from permitted development rights …. A local planning authority will therefore need to take a view during the initial stage as to whether Part 6 rights apply" (paragraph E14). Annex E to PPS7 was revoked when the Planning Practice Guidance ("PPG") was issued on 6 March 2014. In contrast to Annex E, the PPG provides minimal guidance but it does state at paragraph 026:

> "**What is prior approval?**
>
> Prior approval means that a developer has to seek approval from the local planning authority that specified elements of the development are acceptable before work can proceed. The matters for prior approval vary depending on the type of development and these are set out in full in the relevant Parts in Schedule 2 ….. A local planning authority cannot consider any other matters when determining a prior approval

application." (emphasis added)

Thus, the up-to-date guidance in the PPG is consistent with the decision in *Keenan* that local planning authorities are confined to deciding the issue of prior approval.

44. Following *Keenan*, I conclude that the Defendant is correct to submit that a local planning authority does not have power under the prior approval provisions of the GPDO, or indeed any other provision of the GPDO, to determine whether or not the proposed development comes within the description of the relevant class in the GPDO. The Defendant submitted that the appropriate time for the local planning authority to consider this issue is in response to an application for a certificate of lawfulness of existing use or development under section 191 TCPA 1990 or proposed use or development under section 192 TCPA 1990 or an application for planning permission. If no such applications are made, the Defendant has power to consider whether a development is within permitted development rights in the context of enforcement proceedings.

45. It follows from the Defendant's analysis, which I accept, that the Defendant exceeded its powers, and therefore acted unlawfully, when purporting to decide, on 13 February 2017, that the IP's proposed Building constitutes permitted development in accordance with the provisions of Part 6 GPDO, in response to the IP's application for prior approval.

46. In my view, it is permissible for a local planning authority to advise an applicant of its views as to whether the proposed development is likely to constitute permitted development, provided it does not purport to decide the matter.

47. For the reasons set out above, Ground 1 succeeds.

Ground 2

48. The Claimant submitted that the IP's application for prior approval was invalid because it provided inaccurate information, as follows:

i) It misstated the address of the Site of the proposed development; and

ii) It wrongly stated the area of the agricultural unit was 11.4 hectares. The Claimant contended that the IP's agricultural unit comprised less than 5 hectares, and so fell outside the description of Class A.

49. The requirements for a valid application for prior approval are set out in paragraph A. 2(2)(ii). The applicant must provide a written description of the proposed development and the materials to be used together with a plan indicating the site and any fee to be paid.

50. In *Murrell v Secretary of State for Communities and Local Government* [2010] EWCA Civ 1367, Richards LJ said, at [29]:

> "29 The prior approval procedure for Class A permitted development, as set out in para.A2(2) itself and explained in Annex E to PPG7, is attended by the minimum of formalities and should be simple to operate. The application for determination as to whether prior approval is required does not need to be in any particular form and does not need to be accompanied by anything more than a written description of the proposed development and of the materials to be used and a plan indicating the site, together with the required fee (see para.A2(2)(i) and (ii)). In practice it will be advisable to use an up-to-date standard form and to provide the information referred to in the standard form, because that will facilitate the council's consideration of whether prior approval is needed and, if so, whether it should be given, and will minimise the need for the provision of further information at a later stage. It is not, however, mandatory to use the standard form or to provide any information beyond that specified in para.A2(2)(ii)."

51. In my judgment, the Defendant was entitled to conclude that the IP's application was valid and that it complied with the requirements in paragraph A.2(2)(ii).

52. Provision of the Site address was not an entirely straightforward exercise as neither the Site nor the road in which it is situated had names. The acknowledged error in respect of the "house name" was mitigated by the fact that the "street address" was accurate and the Site address was correctly stated on the accompanying plan and drawings. The Defendant was aware that Pound Farm was occupied by someone else, as can be seen from the reference in the Officer's Report to Pound Farm as a protected building.

53. The Defendant was entitled to accept the IP's representations as to the size of the agricultural unit as stated on the form, without requiring proof. As I have already explained, the Defendant was not empowered to decide whether or not the proposed development came within the description for Class A. At the hearing before me, the size of the unit was disputed between the Claimant and the IP, and I was not in a position to resolve that dispute. If indeed the unit is less than 5 hectares, the application would not come within the description of Class A, and the IP would be liable to enforcement

proceedings.

54. For these reasons, Ground 2 does not succeed.

Ground 3

55. The Claimant submitted that the Defendant decided that prior approval was not required in its decision of 13 September 2017 without having regard to a material consideration, namely, the heritage impact on a Grade II listed building (Uppington Cottage) lying within approximately 81m of the proposed Building.

56. The Defendant submitted that, as the 28 day time limit for making a decision on the application for prior approval had expired, it could not, and did not, consider whether or not prior approval of the "siting, design and external appearance of the building" was required, under paragraph A.2(2)(i).

57. However, that was not what the Defendant stated in its decision notice. Instead it stated that it had "considered the application" and "determined that **prior approval is not required**". This would have been the appropriate wording to use for a decision made within time under paragraph A.2(2)(iii)(aa), where a local planning authority has considered the proposed development and decided that it does not need to give prior approval to the details of the siting, design, and external appearance of the building. In my view, the decision notice was misleading. It should instead have stated as its decision, not merely as an 'Informative Note', that the time limit within which it could request the submission of details of the siting, design and external appearance of the building for prior approval had expired and therefore no decision had been made.

58. The Defendant submitted that, even if it had been considering the issue of prior approval within the time limit, it was not required to consider issues of heritage impact because there was no legislative basis upon which to do so. In my judgment, issues of "siting, design and external appearance of the building" could properly include the impact on neighbouring properties, and construction of a barn within only 81 metres of a Grade II Listed building would, in principle, be a relevant consideration for the Defendant to take into account, in the exercise of its discretion and its planning judgment. An express legislative basis for doing so was not required.

59. However, the point is academic since the opportunity for the Defendant to request details for prior approval, and then assess the siting, design and external appearance of the Building and its heritage impact, was lost because the 28 day time limit had expired. Under the GPDO, the IP was entitled to commence his development, as proposed in the

application, without prior approval.

60. For these reasons, Ground 3 does not succeed.

Remedies

61. The Claimant applied in section 7 of the claim form for (1) the quashing of the decision notice dated 13 February 2017, and (2) a declaration as to the planning status of the Site. In submissions, the Claimant invited me to make declarations that the Defendant's decision was unlawful and that the IP's proposed development, as set out in his application form, fell outside the scope of Class A.

62. I am satisfied that the decision notice dated 13 February 2017 ought to be quashed, because of the errors of law identified under Ground 1. It is misleading and has been wrongly relied upon. However, since I have found that the application was valid, and that the IP was entitled, under paragraph A.2(2)(iii) GPDO, to commence the development because the Defendant did not make a determination within 28 days, there is no point in ordering the Defendant to re-make its decision, as there is nothing for it to decide.

63. In *R (Hammerton) v London Underground Ltd* [2002] EWHC 2307 (Admin) Ouseley J. considered the limited circumstances in which it would be appropriate for the Court to grant a declaration that development is a breach of planning control and therefore unlawful. The court must not usurp the functions and powers of the local planning authority, by making planning judgments involving matters of fact and degree: see per Ouseley J. at [157], [161], [163], [187] and [197].

64. My judgment determines the issues which were in dispute before me, and can be relied upon by the parties without any need for a declaration. Since the size of the IP's agricultural unit and the details of his proposed use of the Barn for accommodating livestock are disputed and unclear, I do not consider it would be appropriate for me to make a declaration on the IP's permitted development rights. I consider that the statutory planning scheme affords several alternatives routes for resolving the impasse.

65. The IP cannot rely upon Class A if his agricultural holding is less than 5 hectares. If the IP occupies an agricultural unit of 5 hectares or more, and proceeds with the proposed development, as set out in his application, he is at risk of enforcement proceedings by the Defendant, on the basis that it is prohibited by paragraph A.1(i). The IP may wish to consider whether he can amend his proposal (e.g. by re-locating his proposed Building more than 400m from residential buildings, or by not using it to accommodate livestock). He would then have to make a fresh application for prior approval to reflect

the changes. The Defendant should do its best to determine any fresh application for prior approval within 28 days, taking account of the heritage impact on the Grade II Listed building. The IP can ascertain the lawfulness of any proposed development by applying for a certificate of lawfulness of proposed use or development under section 192 TCPA 1990.

66. Alternatively, if the IP cannot rely upon Class A permitted development rights, or prefers not to do so, he is at liberty to apply for planning permission for his proposed development.

Conclusion

67. The claim for judicial review succeeds, on Ground 1 only, and the Defendant's decision of 13 February 2017 is quashed.

68. Costs ought to follow the event, and the Claimant has succeeded on Ground 1, his primary ground. However, he was unsuccessful on Grounds 2 and 3 and in his application for a declaration. Therefore his award of costs ought to be reduced to 75%, to reflect preparation and court time spent on those issues.