Neutral Citation Number: [2020] EWHC 3077 (Admin)

Case No: CO/1113/2020 & CO/1285/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 November 2020

**Before** :

**MRS JUSTICE LANG DBE**

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**Between :**

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| **RSBS DEVELOPMENTS LIMITED** | **Claimant** |
| **- and -** | |
| **(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT** | **Defendants** |
| **(2) LONDON BOROUGH OF BRENT** | |

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**Richard Turney** (instructed by **Asserson**) for the Claimant
**Robert Williams** (instructed by the **Government Legal Department**) for the **First Defendant**
**Ashley Bowes** (instructed by **Prospect Law**) for the **Second Defendant**

Hearing date: 28 October 2020

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# Approved Judgment

**Mrs Justice Lang:**

1. The Claimant brings two challenges to decisions dated 20 February 2020, made by an Inspector appointed by the First Defendant, in respect of former office premises known as Mercury House, 7 Heather Park Drive, Wembley HA0 1SS (hereinafter "the premises") which the Claimant has converted into flats for residential use. To avoid duplication, I shall refer to the parties throughout as Claimant and Defendants, rather than Appellant and Respondents.

2. Claim CO/1113/2020 is an appeal, under section 289 of the Town and Country Planning Act 1990 ("TCPA 1990"), against the Inspector's decision to uphold the enforcement notice in respect of an alleged breach of planning control which was issued on 29 March 2019 by the Second Defendant (hereinafter "the Council"), and to dismiss the Claimant's appeal against it (identified as Appeal A in the Inspector's Decision Letter ("DL").

3. Claim CO/1285/2020 is an application for statutory review, under section 288 TCPA 1990, of the Inspector's decision to dismiss two further appeals by the Claimant, identified by the Inspector as Appeal B and Appeal C in the DL. Appeal B, which was made under section 195 TCPA 1990, was against the Council's decision to refuse the Claimant's application for a certificate of lawful use or development in respect of the residential use of some of the flats at the premises. Appeal C, which was made under section 78 TCPA 1990, was against the Council's refusal to grant planning permission for external alterations to the premises.

4. The issue is whether the Inspector erred in her interpretation and application of Article 3(5) of the Town and Country Planning (General Permitted Development) (England) Order 2015 ("GPDO"), which led to the conclusion that the grant of prior approval could not apply to the material change of use in 2016.

## Planning history

5. In June 2015, the Claimant applied to the Council for a determination as to whether its prior approval would be required for the change of use of the premises from office use to 16 residential flats. The application was accompanied by, among other things, a set of layout plans showing the footprint of each of the 16 proposed flats within the floorspace of the office building as it then existed (DL 10), and proposed car parking spaces.

6. On 14 August 2015, the Council issued a Decision Notice confirming that prior approval was required for the 16 one bedroom flats, and approval was granted, by reference to the plans submitted by the Claimant.

7. The Claimant commenced works in September 2015.

8. On 23 November 2015, the Claimant applied for and was granted planning permission for a first floor extension to the existing single storey extension at the rear of the building. The accompanying informative stated that the additional space could only be used for office use, and the permission could not be implemented in conjunction with the works in the prior approval application.

9. Contrary to the terms of the permission and the informative, between December 2015 and February 2016, the existing single storey extension was demolished and a new two storey extension was constructed in its place, with a larger footprint. The overall size of the building was increased by 4%.

10. After considering detailed factual evidence, the Inspector concluded, on the balance of probabilities, that the change of use from office use to residential use took place between mid-February 2016 and 18 June 2016. The flats have been leased and occupied.

11. The Claimant's conversion of the premises differed from the layout plans submitted with the prior approval application, and referred to in the Decision Notice, as two of the flats incorporated floor space provided by the new two storey extension. Flat 3 on the ground floor had a larger bedroom and kitchen/dining room, and the floor area of Flat 11 on the first floor was increased by at least 50%.

12. Following concerns raised by the Council, the Claimant reduced the size of the new extension. In December 2016, the Claimant removed the second storey. In June/July 2017, the Claimant reduced the size of the ground floor to approximately its original size. The Claimant did not have planning permission for any of these works.

13. On 24 July 2017, the Claimant applied for retrospective planning permission in respect of the extension, and for other alterations to window and door openings. The Council refused permission on 27 October 2017.

14. On 27 November 2017, the Claimant applied for a certificate of lawfulness for existing residential use of flats 1, 2, 9 and 10. On 2 February 2018, the Council refused the application, stating in its Decision Notice that the use was not lawful.

15. On 29 March 2019, the Council issued an enforcement notice alleging a breach of planning control, namely, an unauthorised change of use of the premises from office use to 16 dwellings. The notice required the Claimant to cease the use of premises as dwellings, and remove all fittings and fixtures associated with the use of the premises as dwellings.

## The Inspector's decision

16. The Inspector (Jessica Graham BA (Hons) PgDipL) dismissed Appeal A, save for a variation of the time for compliance under ground (g). The Inspector also dismissed Appeals B and C.

17. In summary, the Inspector's findings were as follows:

    i) Planning permission for the change of use crystallised in August 2015 when the Council issued its decision notice that prior approval was granted (DL 18).

    ii) The Claimant contended that the question was whether the permission was lost by reason of subsequent events. But even if it were not lost, it might never have been implemented (DL 19).

iii) The layout plans formed part of the details approved by the Council when granting prior approval. By operation of Paragraph W(12)(a) of the GPDO, the development was required to be carried out in accordance with those approved details unless the Council and the development agreed otherwise in writing. No such agreement was made (DL 16).

iv) On the balance of probabilities, the change of use from office to residential use took place between mid-February 2016 and 18 June 2016 (DL 25).

v) Thus the change of use took place after the unauthorised two storey extension had been constructed (DL 26).

vi) The extension was constructed at the same time as the premises were converted to residential use, and its purpose was to provide additional residential accommodation for flats 3 and 11 (DL 26).

vii) The deviation from the approved plans was not *de minimis.* It amounted to considerably more than a minor alteration and resulted in a significant increase in the size of flat 11 (DL 28).

viii) The differences between what was approved and what was built were considerably more than trifling, and the resulting development was substantially different to that permitted by the prior approval. On that basis the Inspector concluded that the breach of planning control amounted to development without permission (DL 35).

ix) Since the change of use was not carried out in accordance with the approved layout plans, the deviation was more than trifling, and the breach of planning control amounted to development without permission, the material change of use which took place between mid-February 2016 and 18 June 2016 did not implement the crystallised grant of planning permission (DL 37).

x) Article 3(5)(a) GPDO, which provides that the permission granted by Schedule 2 does not apply if "in the case of permission granted in connection with an existing building, the building operations involved in the construction of that building are unlawful" was engaged on the facts of this case. The planning permission which crystallised with the grant of the 2015 prior approval was not lost, but it could not apply to the material change of use that took place in 2016 (DL 38-49).

xi) The unauthorised works carried out in 2016 and 2017 to reduce the size of the extension could not either implement the permission which crystallised with the 2015 prior approval, or retrospectively render the change of use permitted development (DL 51).

xii) On 4 August 2017, the Council introduced an Article 4 GPDO direction which removed permitted development rights for the conversion of office buildings to residential use. The Claimant acknowledged that there are policies in the Development Plan that would prevent such a conversion (DL 70).

18. It is helpful to set out the Inspector's reasoning on the application of Article 3(5) in full.

> "38. The Council contends that since the residential use that took place did not benefit from the 2015 Approval and was not lawful, and the construction of the two-storey extension and its subsequent demolition and alteration constituted a series of unlawful building operations, the effect of Article 3(5) of the GPDO is that the permission granted by Schedule 2 does not apply. The Appellant disputes this, on the basis that since Article 3 of the GPDO is not a retrospective provision which could undermine a "crystallised" permission, it is not here engaged.
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> 39. The provisions of Article 3(5) are as follows:
>
> > *The permission granted by Schedule 2 does not apply if –*
> >
> > *(a) in the case of permission granted in connection with an existing building, the building operations involved in the construction of that building are unlawful;*
> >
> > *(b) in the case of permission granted in connection with an existing use, that use is unlawful.*
>
> 40. The Interpretation section of the GPDO, at Article 2(1), provides that:
>
> > *"building"… includes any structure or erection and… includes any part of a building*
> >
> > *and*
> >
> > *"existing", in relation to any building or any plant or machinery or any use, means… existing immediately before the carrying out, in relation to that building, plant, machinery or use, of development described in this Order.*
>
> 41. It is also worth noting that Article 3(1) of the GPDO grants planning permission for the classes of development described in Schedule 2 "subject to the provisions of this Order".
>
> 42. With this in mind, it seems to me that whether the LPA has issued a notice granting its prior approval, or whether it has determined that its prior approval is not required (or whether an application for prior approval was duly made, but not decided by the LPA within the relevant time period, such that the development may proceed without it) it must still be necessary – as in cases where prior approval is not required at all – for the

development to accord with the terms of the GPDO when it is subsequently carried out. For certain classes of Permitted Development the GPDO imposes a pre-commencement condition requiring an application for a determination as to whether the prior approval of the LPA will be required as to certain specified matters. But in determining that application, the LPA is confined to deciding the issue of prior approval; it is not required, or empowered, to issue a definitive determination as to whether the proposal constitutes "Permitted Development" in the terms of the GPDO.

43. That being the case, the existence of a notice of grant of Prior Approval satisfies the pre-commencement condition and "crystallises" the permission but does not, in my view, serve to override the need to assess whether the development that has been carried out accords with the other provisions of the GPDO. If events subsequent to the grant of Prior Approval resulted in the circumstances set out at (a) or (b) of Article 3(5) at the time the development was carried out, the "crystallised" permission would not apply.

44. Looking firstly at 3(5)(b), the use of the building in this case, at the time the 2015 Approval was granted, was as an office. That use was lawful, and did not change between the grant of Prior Approval and the carrying out of the development here at issue (that is, the material change of use to residential which, I have established above, took place between mid-February 2016 and 18 June 2016). So the use of the building immediately prior to the carrying out of the development was lawful, and Article 3(5)(b) would not prevent the "crystallised" permission from applying.

45. Turning then to 3(5)(a), I note the Appellant's contention that this should not apply because the grant of permission relied on is "in connection with an existing use". However, the permission is also "in connection with an existing building"; the particulars and status of that building are relevant to the terms of Permitted Development within Class O, so I consider Article 3(5)(a) to be relevant here.

46. There is no dispute that the building as it stood on the date of the 2015 Approval was constructed lawfully. But on the evidence discussed above, the unauthorised two-storey extension (in "shell" form) was in place before the material change of use from office to residential took place. The building operations involved in the construction of that part of the building were unlawful, so Article 3(5)(a) is engaged and the "crystallised" planning permission that flows from Article 3(1) does not apply. This accords with Evans, where it was held that if the building operations involved in the construction of any part of the building are unlawful, the permitted

> development rights granted in connection with the existing building do not apply.
>
> 47. I do not think that this interpretation is at odds with the judgment in Orange. There, the issue for the Court of Appeal was whether the developer had an accrued right to develop the site in accordance with the details submitted in the application at least from the date of issue of the Prior Approval Notice, so that the right to develop was unaffected by the subsequent designation of the land as a Conservation Area. In reaching the conclusion that in a prior approval case, the planning permission accrues or crystallises upon the developer's receipt of a favourable response from the LPA to his application, Laws LJ observed that it would surely be unjust if the developer's reliance on the grant of prior approval could be defeated by the "adventitious fact" of a conservation area designation. He also observed that an express grant of planning permission by the LPA, once made, cannot ordinarily be undermined by a later change in the status of the land.
>
> 48. Here, there is no dispute that the developer had an accrued right to develop the site in accordance with the details submitted in the application from the date of the 2015 Approval Notice. But in this case the potential disruptor of that right is not an adventitious event over which the developer had no control; rather, it is the developer's own action in undertaking unauthorised additional works that engaged Article 3(5). A parallel here with an express grant of planning permission might be where the development that has been carried out conflicts with the terms of the permission. In such cases, while the grant of permission is not itself undermined, it may well be held not to have been implemented at all.
>
> 49. In my view, that is the effect of Article 3(5)(a) in the current case. The planning permission that crystallised with the grant of the 2015 Approval was not undermined, or lost, but it could not apply to the material change of use that took place in 2016."

## Permission hearing

19. The Claimant's pleaded grounds were the same in both claims, namely:

> **Ground 1**: the Inspector erred in finding that the change of use occurred after the unlawful operational development, between mid-February 2016 and 18 June 2016.
>
> **Ground 2:** the Inspector erred in finding that the effect of the breach of planning control was development wholly without planning permission, rather than a breach of a limitation on the grant of planning permission.

**Ground 3**: the Inspector erred in concluding that the planning permission had not been implemented.

**Ground 4:** the Inspector erred in finding that the benefit of the prior approval permission was lost by operation of Article 3(5) GPDO.

20. Permission was granted by Thornton J. at an oral hearing, on ground 4 only. Permission was refused on grounds 1,2 and 3.

## Grounds of challenge

21. The Claimant submitted that the Inspector erred in her interpretation and application of Article 3(5) of the GPDO, as follows:

    i) **Ground 1.** Article 3(5) only applies before, not after, the crystallisation of the permission by the grant of prior approval;

    ii) **Ground 2.** Class O of the GPDO as Class O is a permission granted in connection with an existing use, not operational development, and therefore paragraph (b) of Article 3(5) applies, not paragraph (a). They are mutually exclusive. Alternatively, paragraph (a) of Article 3(5) did not apply because the main premises in connection with which the permission was granted had a lawful office use.

    iii) **Ground 3.** Once the Article 3(5) objection had been addressed, by reducing the size of the extension and applying for planning permission, the Claimant should have been given the opportunity to regularise the position, and obtain the benefit of the permitted development rights, which had been suspended but not lost.

22. The Defendants submitted that the Inspector's interpretation and application of Article 3(5) of the GPDO was correct in law. She was entitled to find that Article 3(5) was engaged on the facts.

23. In the alternative, even if the Inspector erred in her interpretation and application of Article 3(5) of the GPDO, her decision would have been the same. In addition to applying Article 3(5), the Inspector also found that the change of use was unlawful because the development undertaken was substantially different to that permitted, such that the 2015 prior approval had not been implemented.

## Statutory framework

24. Under section 55 TCPA 1990 "development" means the "carrying out of building, engineering or other operations in, on, over or under land" or "the making of any material change in the use of any building or other land".

25. Section 56 TCPA 1990 makes provision for the time when development begins, for the purposes of the TCPA 1990.

26. Section 57 TCPA 1990 provides that planning permission is required for development.

27. Section 58 TCPA 1990 sets out the different ways in which planning permission may be granted, including by a development order.

28. Section 59 TCPA 1990 provides for the Secretary of State to make a development order which may either (a) itself grant planning permission for development specified in the order, or (b) provide for the grant of planning permission by the local planning authority.

29. Section 60 TCPA 1990 provides, so far as is material:

> "(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.
>
> …
>
> (2A) Without prejudice to the generality of subsection (1), where planning permission is granted by a development order for development consisting of a change in the use of land in England, the order may require the approval of the local planning authority, or of the Secretary of State, to be obtained—
>
> (a) for the use of the land for the new use;
>
> (b) with respect to matters that relate to the new use and are specified in the order."

30. Article 3 of the GPDO provides, so far as is material:

> "(1) Subject to the provisions of this Order and [regulations 75 to 78 of the Conservation of Habitats and Species Regulations 2017] (general development orders), 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.
>
> (3) References in this Order to permission granted by Schedule 2 or by any Part, Class or paragraph of that Schedule are references to the permission granted by this article in relation to development described in that Schedule or that provision of that Schedule.
>
> (4) Nothing in this Order permits development contrary to any condition imposed by any planning permission granted or

> deemed to be granted under Part 3 of the Act otherwise than by this Order.
>
> (5) The permission granted by Schedule 2 does not apply if—
>
> > (a) in the case of permission granted in connection with an existing building, the building operations involved in the construction of that building are unlawful;
> >
> > (b) in the case of permission granted in connection with an existing use, that use is unlawful."

31. The category of permitted development relevant to this case is Class O in Part 3 of Schedule 2 to the GPDO which grants permission for:

> "**O. Permitted development**
>
> Development consisting of a change of use of a building and any land within its curtilage from a use falling within Class B1(a) (offices) of the Schedule to the Use Classes Order, to a use falling within Class C3 (dwellinghouses) of that Schedule."

32. Paragraph O.1 sets out the circumstances in which development is not permitted.

33. Paragraph O.2 imposes conditions on the grant of development under Class O:

> "**O.2 Conditions**
>
> Development under Class O is permitted subject to the condition that before beginning the development the developer must apply to the local planning authority for a determination as to whether the prior approval of the authority will be required as to –
>
> a) transport and highway impacts of the development;
>
> b) contamination risks on the site; and
>
> c) Flooding risks on the site,
>
> and the provisions of paragraph W (prior approval) apply in relation to that application."

34. Paragraph W of Part 3 of Schedule 2 sets out the procedure for applications for prior approval under Part 3. Sub-paragraph 12(a) provides:

> "The development must be carried out –
>
> (a)where prior approval is required, in accordance with the details approved by the local planning authority;

> Unless the local planning authority and the developer agree otherwise in writing."

## Conclusions

### Ground 1

35. The Claimant submitted that Article 3(5) of the GPDO enshrined a principle established in the case law that permitted development rights could not arise from unlawful "host" developments. Mr Turney referred me to the helpful commentary in the *Encyclopedia of Planning Law and Practice* which states:

> "**Lawful and unlawful uses:**
>
> 3B-1004.5
>
> The general exclusion of unlawful uses was introduced in 1988 …. Its purpose was clear. It was an attempt to deny permitted development rights where the qualifying use of land was unlawful. …. It had long been unclear how far permitted development rights were available where the base use, or the works of construction of the building, were themselves unlawful. There was no difficulty where enforcement action was still possible against the original illegality, because further works or use changes could acquire no greater legitimacy. But where the starting use was immune from enforcement action, whether under the four-year rule, or as a pre-1964 established use, the position was unclear until amendments were made to the principal Act by the Planning and Compensation Act 1991, which now confer "lawfulness" on all immune uses.
>
> … [I]n *Young v Secretary of State for the Environment [1983] 2 A.C. 662*, the Court of Appeal accepted that the Order could not be applied at all unless its provisions hinged upon a lawful use of land. …. In *Asghar v Secretary of State for the Environment [1988] J.P.L. 476*, the question arose in the context of operational development under Class I of the First Schedule to the 1977 Order (householder development). The court held that the reference in that Class to development within the curtilage of a dwelling house had to be construed as applying only to land which was lawfully within the curtilage, and did not extend to land which had been added to the curtilage without planning permission.
>
> But neither the pre-existing law, nor the new provisions of this article, touched on the case where it was an existing building, rather than a use, which was unlawful. Where a dwelling-house had been erected without planning permission, for example, or erected purportedly under a permission but with sufficient deviation from the approved plans so as to take it altogether

> outside the permission, the provisions of Pt 1(householder development) could only be disapplied by inserting the word "lawful" in front of "dwellinghouse" wherever it appeared. The problem was eventually resolved in 1992 when what is now art.3(5) was inserted, excluding all permitted development rights under Sch.2 in relation to buildings whose construction was illegal, and in relation to unlawful uses, for so long as enforcement action may still be taken in respect of the breach.
>
> **Lawful and unlawful uses under the 2015 Order**
>
> 3B-1004.6
>
> The position now is that:
>
> 1. permitted development rights which are attached to specified uses of land can be relied upon only where that use is a lawful use. A use whose initiation was unlawful will become a lawful use once enforcement action can no longer be taken in respect of it (1990 Act, s.191(2)), which is 10 years from the date of the breach (s.171B(3)), or four years in the case of change of use to use as a single dwellinghouse (s.171B(2)).
>
> 2. permitted development rights under Sch.2 which attach to buildings are not available where the building operations involved in the construction of that building are unlawful. Operations which were undertaken unlawfully will nonetheless become lawful operations once no enforcement action can be taken in respect of them (1990 Act, s.191(2)), which is four years from the time of the substantial completion of the operations (s.171B(1)).

36. The Claimant submitted that Article 3(5) of the GPDO was a prospective provision only. It could not apply once the permission was "crystallised" by the grant of prior approval in August 2015. Subsequent unlawful building operations were not capable of engaging Article 3(5).

37. In support of this submission, the Claimant relied in particular upon *R (Orange PCS) v Islington LBC* [2006] EWCA Civ 157; [2006] JPL 1309. In that case, the claimants sought a determination whether prior approval for the installation of telephone communications equipment was required. The local planning authority said that it was not required. The claimants were at fault in not installing the equipment in accordance with the approved plans. The local planning authority issued enforcement notices requiring their removal, which were later varied to require their alteration to accord with the submitted plans. However, before the alteration works were completed, the land was designated as a conservation area to which the permitted development rights did not apply. The Council then withdrew its amended enforcement notice on the basis that, following the designation of the land as a conservation area, the permitted development rights did not apply. Upon a judicial review, Crane J. quashed the withdrawal of the enforcement notices.

38. The Court of Appeal upheld the Judge's order, finding that once the planning authority had communicated that prior approval was not required for the plans, the planning permission to undertake the approved works crystallised and the subsequent "adventitious fact" of the conservation area designation could not operate to remove rights which had crystallised before its designation. It followed that the claimants retained the permission to undertake the works in accordance with the submitted plans.

39. Laws LJ (with whom Jonathan Parker and Richards LJJ agreed) said:

> "18. It seems to me that if we contemplate the notional case of a prospective developer who has not yet taken any steps to carry forward his development – whether by seeking prior approval commencing work or otherwise – and who, on a particular date, asks the question "Does he have an approved right to install telecommunications apparatus on a particular site?" the answer will be "Yes, unless on the facts then prevailing any of the exceptions including para A.1(h) apply". So much is consistent with the concession made by Mr Katkowki that in a "non-prior approval" case no right to develop accrued until the work had begun…
>
> 19. It seems to me that in a non-prior approval case once the work has been done the advent of conservation area status cannot condemn the development as unlawful. The planning permission has been implemented; work has been done and expense incurred on the faith of it.
>
> 20….The matter is, no doubt, inevitably rough and ready, but a point has to be fixed somewhere for the crystallization of the benefits given by the planning permission; and it seems to me that the start of works provides at least a desirable degree of certainty.
>
> 21….. It seems to me, as Mr Katkowski submits, that in a prior approval case the analogue to the commencement of work in a non-prior approval case is the application for prior approval and receipt of and reliance on the planning authority's response. In making the application the developer must have committed resources to assembling the required materials.
>
> 22. In a case where, in response the planning authority grants prior approval, unlike this one where the response was that approval was not required, it would surely be unjust if the developers' inevitable reliance on the grant could be defeated by the adventitious fact of a conservation area designation. Cases like the present where no approval is required cannot be in a different category.

> 23. I would not fix the date at which the planning permission crystallises or its benefits accrue in a [prior][1] approval case at the moment of commencement of the work but at the time when the favourable response of the local planning authority is received.
>
> ……
>
> 28. In a prior approval case the planning permission accrues or crystallises upon the developers' receipt of a favourable response to his application. I acknowledge the court …has had to deploy ideas such as accrual and crystallization which do not appear on the face of the legislation…."

40. In my judgment, in interpreting Article 3(5) of the GPDO, the correct starting point is to ascertain the natural and ordinary meaning of the words used, in their statutory context.

41. Under the legislative scheme, the Class O planning permission is granted by the development order made by the Secretary of State, not by the grant of prior approval by the local planning authority, as is "plain from the terms of section 59(2)(a) and 60(1) of the 1990 Act and Article 3(1) of the 2015 Order" (per John Howell QC, sitting as a Deputy High Court Judge, in *Pressland v London Borough of Hammersmith & Fulham* [2016] EWHC 1763, (at [41])).

42. The planning permission which is granted by Article 3(1) of the GPDO for the classes of development in Schedule 2 is expressly said to be "subject to the provisions of this Order". There can be no doubt therefore that the grant is subject to Article 3(5) which provides that the "permission granted by Schedule 2 does not apply" in the circumstances set out in sub-paragraphs (a) or (b).

43. Article 3(3) provides that "References in this Order to permission granted by Schedule 2…. are references to the permission granted by this article in relation to development described in that Schedule or that provision of that Schedule."

44. The use of the word "granted" in Article 3(5) envisages that the permission may already have been granted. Furthermore, there is no express provision that Article 3(5) of the GPDO does not apply to permitted development for which prior approval has already been granted.

45. Mr Williams drew my attention to Article 4(1) of the GPDO which empowers the Secretary of State or the local planning authority to make a direction that "the permission granted by Article 3 does not apply" to the specified development. He pointed out that the effect of an Article 4 direction is described in similar terms to those in Article 3(5), by disapplying the permission granted. He relied in particular upon the operation of Article 4, which was to disapply permitted development rights even though they had already crystallised on grant of prior approval. Article 4 was amended in 2015 to reverse this position. Article 4(2)(a) now provides:

[1] It was common ground before me that the judgment erroneously referred to a "non-prior" approval case, where the context indicated that the reference was intended to be to a prior approval case.

> "(2) A direction under paragraph (1) does not affect the carrying out of—
>
> > (a) development permitted by any Class in Schedule 2 which is expressed to be subject to prior approval where, in relation to that development, the prior approval date occurs before the date on which the direction comes into force and the development is completed within a period of 3 years starting with the prior approval date;… "

A similar amendment could have been made to exclude the operation of Article 3(5) where prior approval had already been given, but that opportunity was not taken by the Secretary of State.

46. The Claimant submits that the Court should nonetheless imply a time limitation to the operation of Article 3(5), so that it is only operative prior to any grant of prior approval (or commencement of works in a non-prior approval case), applying the reasoning of the Court of Appeal in *Orange PCS*.

47. In my judgment, *Orange PCS* is distinguishable from this case. There the Court was concerned with "the adventitious fact of a conservation area designation" which changed the status of the land by removing it from the scope of the permitted development rights which had previously applied. The change occurred after the claimants had committed to the development, in reliance upon their permitted development rights. The designation was entirely outside the control of the developers and it was not anticipated by them. The application of the provision in Schedule 2 to the GPDO, which excluded conservation areas from the scope of permitted development rights, was not retrospective in operation.

48. In contrast, in this case, the principle of the disapplication of permitted development rights under Article 3(5) of the GPDO was not an unexpected change to the law or the status of the land. The requirement that existing building operations or use had to be lawful in order for permitted development rights to be enjoyed was in existence long before the Claimant commenced this development, and the Claimant or its advisers ought to have been aware of it.

49. Moreover, the unlawful building operations which triggered the operation of Article 3(5) were not unknown to the Claimant or outside of its control, unlike the designation of the conservation area. On 23 November 2015, the Claimant applied for and was granted planning permission for a first floor extension to the existing single storey extension at the rear of the building. The accompanying informative stated that the additional space could only be used for office use, and the permission could not be implemented in conjunction with the works in the prior approval application. Contrary to the terms of the permission and the informative, between December 2015 and February 2016, the existing single storey extension was demolished and a new two storey extension was constructed in its place, with a larger footprint, which was incorporated into the residential use which was the subject of the prior approval application. Although the Claimant demolished the second storey in December 2016, it did not reduce the extension back to its original size until June/July 2017, under pressure from the Council. This was, on any view, a flagrant breach of planning controls.

50. In my judgment, it would be contrary to the legislative purpose of Article 3(5) to prevent its operation after the grant of prior approval. The extract from the *Encyclopedia of Planning Law and Practice* demonstrates that the principle of excluding permitted development rights where the "host" development is unlawful is well-established, both in the case law and in earlier Orders. The absence of lawful planning permission for the "host" development is a matter of real significance. It may not come to light before the grant of prior approval, either because it pre-dates the applicant's ownership of the land, or because the applicant has withheld relevant information from the local planning authority. Moreover, the statutory function of a local planning authority when considering a prior approval application is a limited one, namely, to determine the specific issues identified in paragraph O.2. It does not determine whether or not the relevant provisions of the development order are met.

51. Although the authors of the *Encyclopedia* do not address the point which I have to decide, it is significant that they describe Article 3(5) as continuing to operate "for so long as enforcement action may still be taken in respect of the breach". A use whose initiation was unlawful will become a lawful use once enforcement action can no longer be taken in respect of it (section 191(2) TCPA 1990), which is 10 years from the date of the breach (section 171B(3) TCPA 1990), or four years in the case of change of use to use as a single dwelling house (section 171B(2) TCPA 1990). Operations which were undertaken unlawfully will become lawful operations once no enforcement action can be taken in respect of them (section 191(2) TCPA 1990), which is four years from the time of the substantial completion of the operations (section 171B(1)). In my judgment, this interpretation of Article 3(5), which is consistent with the wider statutory scheme, is sound.

52. I acknowledge that it was an unusual feature of this case that the unlawful building operations, which triggered the operation of Article 3(5) of the GPDO, post-dated the commencement of the permitted development works and the grant of prior approval. However, the Claimant's submission that subsequent unlawful building operations are not capable of engaging Article 3(5) is not supported by the natural and ordinary meaning of the words used in Article 3(5). Moreover, the word "existing," which is used in respect of both a building and a use, is defined very widely in Article 2(1), and extends to the time immediately before the carrying out of the permitted development, not the earlier date at which prior approval is sought. The definition provides as follows:

> ""existing", in relation to any building or… or any use, means (except in the definition of "original") existing immediately before the carrying out, in relation to that building, …or use, of development described in this Order;"

Therefore, I cannot accept that the terms of the Order exclude the unlawful building operations which post-dated the grant of prior approval in this case.

**Ground 2**

53. The Claimant submitted that sub-paragraph (a) of Article 3(5) of the GPDO did not apply in this case because it was concerned with buildings, whereas the permitted

development was concerned with use. The two limbs of Article 3(5) are mutually exclusive.

54. The Inspector found, at DL 44, that the existing office use of the building was a lawful office use, and therefore Article 3(5)(b) was not engaged. She went on to find, at DL 46, that the unauthorised two storey extension was constructed before the material change of use from office to residential took place. As the building operations involved in the construction of that part of the building were unlawful, Article 3(5)(a) was engaged.

55. The Inspector rejected the Claimant's submission that Article 3(5)(a) did not apply in this case. She said, at DL 45:

> "….the grant of permission relied upon is also "in connection with a building"; the particulars and status of that building are relevant to the terms of Permitted Development within Class O, so I consider Article 3(5)(a) to be relevant here."

56. In my judgment, the Inspector's reasoning was correct. The phrase "in connection with a building" is broad in its scope and could include permission for a change of use which was in connection with a building. Class O expressly states that it applies to a proposed change of use "of an existing building", together with any land within the curtilage of "that building". It would not, for instance, apply to a change of use of land on which there was no building.

57. The Inspector went on to apply the case of *Evans v Secretary of State for Communities and Local Government* [2015] JPL 589, which concerned the existence of permitted development rights to extend a dwelling house where there were a number of unlawful alterations and extensions. Neil Cameron QC, sitting as a Deputy High Court Judge, held at [37]:

> "….if the building operations involved in the construction of any part of that building are unlawful, the permitted development rights granted in connection with the existing building do not apply".

58. In my judgment, the principle established in *Evans* also applied in this case. It is not confined to situations where the issue is the lawfulness of the building itself, or where the unlawful works are the same as the permitted development sought.

59. I consider that the Claimant's submission that the two sub-paragraphs of Article 3(5) are mutually exclusive is inconsistent with the natural and ordinary meaning of the words used. The two sub-paragraphs are not expressed to be mutually exclusive - the word "or" is not found between the two limbs.

60. For these reasons, I conclude that the Inspector was entitled to find that Article 3(5)(a) applied.

## Ground 3

61. The Claimant submitted that since the Article 3(5) objection had been addressed, by reducing the size of the extension and applying for planning permission for the remaining deviations, the permission granted under the GPDO, and crystallised by the 2015 prior approval, should be retrospectively implemented. The benefit of the permitted development rights had been suspended but not lost.

62. The Inspector rejected the Claimant's submission for the reasons set out at DL 50 to 56:

> "*The subsequent alterations to the unauthorised extension*
>
> 50. Following the change of use of the premises, the SoCG records that in December 2016 the second storey of the unauthorised extension was demolished and then in June-July 2017, works were undertaken to the remaining single-storey extension to make it the same size as the original ground-floor extension. Planning permission was not sought or granted for these works. The Appellant considers that the building as a whole now accords very closely with what was shown in the layout plan approved in 2015, subject to very minor variations, such that the "crystallised" permission granted by the 2015 Approval has now been implemented.
>
> 51. However, I am not persuaded that the works carried out in 2016 and July 2017 could either implement the permission which crystallised with the 2015 Approval, or retrospectively render the material change of use of the premises Permitted Development.
>
> 52. The making of a material change in the use of land, like the carrying out of operational development, involves a sequence of events which has a beginning and an end. For the reasons set out above I have been unable to be precise about when the change of use from office to residential occurred here, but have concluded that it had taken place by 18 June 2016 at the latest. The time to assess whether or not this act of development constituted Permitted Development was when it took place; if it did not qualify as Permitted Development at that time, there is no provision for subsequent works to retrospectively bring about that qualification. It is not argued that there has, since 18 June 2016, been a reversion to office use then subsequent material change to residential use which might have implemented the crystallised permission.
>
> 53. In Evans (supra) the Court considered the contention that the effect of Article 3(5) of the GPDO is not to suspend or terminate all permitted development rights which might pertain to a building simply because some part of the building has been erected without planning permission, and disagreed. It held:

> *…if unlawful works have been carried out, such as the cladding referred to by Mr Pike in his example, it would be open to the dwelling owner (or some other person) to apply for planning permission to retain the extension with cladding, or to carry out works to remove the cladding, or to obtain planning permission for the flue. Once planning permission had been granted, or the cladding had been removed, permitted development rights would, once again, apply.*
>
> 54. The important point is that if steps are taken to ensure that any unlawful building operations involved in the construction of any part of the building are made lawful (by obtaining planning permission for them, or reversing them) permitted development rights will then (but not until then) apply once more. In other words, once the "unlawful" status of any existing works has been remedied, future development has the potential to qualify as permitted development. This is not at all the same as saying that any putative works of "Permitted Development" carried out while (to use the example in Evans) the cladding or the flue were unlawful would, at the point when they became lawful, retrospectively acquire Permitted Development status.
>
> 55. Applying this to the present case, the building operations involved in the demolition of the first-floor extension and re-modelling of the ground-floor extension were (and to date remain) unauthorised development. That being the case, Article 3(5)(a) would still have been engaged even if these works had resulted in the building conforming precisely with the details shown in the layout plan of the 2015 Approval.
>
> 56. Further, even if I were to grant planning permission for the development which is the subject of Appeal C – which would mean that there was no longer any part of the building of which it could be said that the building operations involved in its construction were unlawful – that would not have the effect of implementing the permission that crystallised with the 2015 Approval, and nor would it retrospectively legitimise the unauthorised material change of use that took place in 2016. It would simply mean that Permitted Development rights could subsequently apply; that is, any future development proposals that would benefit from permission granted by Article 3(1) and Schedule 2 of the GPDO would no longer have that permission disapplied by Article 3(5)(a)."

63. In my judgment, the Inspector's analysis was sound, and does not disclose any error of law.

64. It is correct to say that, once unauthorised works are removed and/or regularised, Article 3(5)(a) is no longer engaged and permitted development rights would, once again, be capable of applying (see *Evans v Secretary of State for Communities and*

*Local Government* [2014] EWHC 4111, per Neil Cameron QC, sitting as a Deputy High Court Judge, at [38]). However, it does not follow from this proposition that the remedial works on the back extension had the effect of retrospectively implementing the 2015 prior approval for the material change of use of the premises from office to residential. Clearly, the works did not themselves constitute a material change of use of the premises. Moreover, by the time that those works were undertaken, in December 2016 and June to July 2017, the material change of use to residential use had already occurred. The change of use under the 2015 prior approval was required to have been completed by 30 May 2016, and the Inspector found it took place between mid February and 18 June 2016.

65. Where a permission is granted for a material change in the use of a building or land (whether by Development Order or otherwise), it is a permission for making the change, rather than for continuing with that use in the future: *Cynon Valley Borough Council v Secretary of State for Wales* [1987] 53 P & CR 68.

66. As the Inspector explained, a grant of planning permission for the works on the back extension would mean that Article 3(5)(a) would no longer be engaged, and permitted development rights could subsequently apply. Planning permission was not given under Appeal C because the Claimant's application was made on the erroneous basis that the residential conversion of the premises had been lawfully carried out, and permission was simply required for the external alterations to the building. In the light of the Inspector's finding that the conversion to residential use was not authorised, and amounted to development without permission, retrospective planning permission could not be granted in the terms of the Claimant's application (DL 83 – 87).

**Would the Inspector's decision necessarily have been the same, if Article 3(5) of the GPDO did not apply?**

67. The Inspector concluded that the material change of use was not carried out in accordance with the approved plans, contrary to paragraph W(12)(a) of Part 3, Schedule 2 GPDO. Applying the principles in *Garland v Minister of Housing and Local Government* (1969) 20 P & CR 93, per Lord Denning MR at 101/102; Widgery LJ at 104, and *Pressland v London Borough of Hammersmith & Fulham* [2016] EWHC 1763, per John Howell QC, sitting as a Deputy High Court Judge, at [39], the Inspector went on to find that the differences between what was approved, and what was built, were considerably more than trifling, and the resulting development was substantially different to that permitted by the prior approval. The Inspector concluded that the breach of planning control amounted to development without permission (DL 29-35).

68. For this reason, the material change of use from office use to residential use was unlawful. Therefore, even if the Inspector had not found that Article 3(5) of the GPDO was engaged, she would still have dismissed the appeals under section 174(2)(c) TCPA 1990. The outcome would necessarily have been the same: *Simplex GE (Holdings) Ltd v Secretary of State for the Environment* [2017] PTSR 1041, per Purchas LJ at 1060C.

69. For the reasons set out above, both the appeal and the application for statutory review are dismissed. The Claimant is ordered to pay the First Defendant's costs, as summarily assessed, including the costs of the permission hearing, as a permission hearing is required in an appeal under section 289 TCPA 1990: see *R v Secretary of State for Wales ex parte Rohzon* 91 LGR 667; *Elghanian v Secretary of State for Housing, Communities and Local Government* [2018] EWHC 4073 (Admin).