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Case No: CO/945/2023
CO/1095/2023

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/08/2023

Before :

MRS JUSTICE LIEVEN

- -

Between :

IAN CALDWELL

First Claimant/Appellant

TIMBERSTORE LIMITED

Second Claimant/Appellant

and

THE SECRETARY OF STATE FOR LEVELLING-UP, HOUSING AND COMMUNITIES

First Defendant/Respondent

and

BUCKINGHAMSHIRE COUNCIL

Second Defendant/Respondent

- -
- -

Mr Douglas Edwards KC (instructed by **Harrison Grant Ring Solicitors**) for the **Claimant/Appellant**
Mr Zack Simons and Mr Nick Grant (instructed by **Government Legal Department**) for the **Defendant/Respondent**

Hearing dates: **27 July 2023**

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Approved Judgment

This judgment was handed down remotely at 10.30am on 7 August 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE LIEVEN

Mrs Justice Lieven DBE :

1. This case concerns two challenges to a decision of the Secretary of State ("SoS") made through one of his Planning Inspectors. There is an appeal pursuant to section 289 of the Town and Country Planning Act 1990 ("TCPA") against a decision to dismiss the Appellant's appeal against the issue of an enforcement notice; and there is an application for statutory review pursuant to section 288 TCPA of the refusal by the same Inspector of an appeal relating to a certificate of lawful use and development sought pursuant to section 191 TCPA.

2. There is one issue in the case, whether the Inspector erred in law in relation to the scope of the power to require the removal of operational development pursuant to the power in section 173(4)(a) TCPA, as explained by the Divisional Court in *Murfitt v Secretary of State for the Environment* [1980] 40 P&CR 254 (*"Murfitt*").

The factual background

3. The site lies adjacent to the A40 in Beaconsfield, within the Green Belt. The Second Claimant operates a timberyard on the opposite side of the road. There is a history of attempts to gain planning permission for a dwelling on the site, which have been refused by the Local Planning Authority ("LPA"), the Second Defendant.

4. In 2013 it now transpires that the construction of a dwelling house was commenced, and this was substantially completed in April 2014. The planning history suggests that the Second Claimant and its staff went to considerable lengths to conceal from the LPA that a dwelling was being constructed on the site. A large timber fence was built around the site and the LPA's officers were refused entry. However, the LPA has not sought to argue "concealment" before the Inspector and therefore this aspect of the history has no relevance to the issues before me.

5. On 23 February 2021 the LPA issued an Enforcement Notice ("EN"). The relevant parts of the EN were as follows:

> *"**3. The breach of planning control alleged***
>
> *Without planning permission, the material change of use of the Land from agricultural use to residential use, and the carrying out of operational development to facilitate the aforesaid unauthorised material change of use comprising of the construction on the Land of a building occupied as a dwelling (in the approximate position shown cross hatched in black on the Plan) and incidental structures (in the approximate position shown hatched in black on the Plan) (the "Unauthorised Development").*
>
> *...*
>
> ***5. What are you required to do***
>
> *5.1 Cease the residential use of the Land;*
>
> *5.2 Demolish or dismantle the building occupied as a dwelling (shown in the approximate position shown cross hatched in black on the Plan);*

5.3 Demolish or dismantle the incidental structures (shown in the approximate position shown hatched in black on the Plan);

5.4 Remove from the Land all paraphernalia that has been brought onto the Land in connection with the unauthorised material change of use; and

5.5 Remove from the Land all debris and materials resulting from compliance with steps 5.1 to 5.3 of this Notice.

6. Time for compliance

6 months from the date on which this notice takes effect."

6. The site covered by the EN included the dwelling, known as the Goose House, and an area of garden with four small buildings or structures within it.

7. The First Claimant appealed the EN and an inquiry was held. In the Statement of Common Ground agreed before the inquiry, it was common ground that the Goose House had been constructed as a dwelling house and had had no other use. It was also common ground that the dwelling house had been substantially completed more than four years before February 2021 and therefore benefited from the immunity provision in s.171B (1) TCPA, but the residential use of the site had not been subsisting for 10 years.

8. The First Claimant's argument at the inquiry was that Goose House, although not its use, was immune from enforcement action.

9. The Inspector dealt with this argument at DL15-20:

"15. Ground (d) is that at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters. It is common ground however that the material change of use to residential use has not occurred for sufficient time, 10 years, to have become immune. This ground is pleaded in relation to the operational development comprising the erection of the Goose House and the utility/services cabinet (building E), which were substantially completed more than 4 years before the notice was issued and hence would, in their own right, be immune from enforcement by virtue of section 171B(1) of the 1990 Act. It is well established that where there has been a material change of use of land, structures which may, viewed in isolation, have become immune from enforcement may nonetheless be required to be removed in order to restore the land to the condition it was in before the breach of planning control occurred. The question this ground raises, along with the appeal on ground (f), is whether, in the circumstances, the two structures can be required to be removed. In ground (f) terms, it is claimed that their removal would exceed what is necessary to remedy the breach.

16. Both parties refer to the judgment in Kestrel Hydro as the most recent consideration of relevant case law, including that in Murfitt, Somak Travel Ltd., Bowring and the Court of Appeal and Supreme Court

decisions in Welwyn Hatfield. It sets out the principle that an enforcement notice directed at a breach of planning control by the making of an unauthorized material change of use may lawfully require the land or building in question to be restored to its condition before that change of use took place, by the removal of associated works as well as the cessation of the use itself, provided that the works concerned are integral to or part and parcel of the unauthorized use and are not works previously undertaken for some other lawful use of the land. It does not embrace operational development of a nature and scale exceeding that which is truly integral to a material change of use as the alleged breach of planning control, nor does it override the regime of different time limits for different types of development in section 171B.

17. Kestrel Hydro was concerned with development that was subsequent to the unauthorised material change of use enforced against. In this case it is argued that the operational development comprising the construction of the Goose House preceded the change of use of the land to residential use, and that the erection of the dwelling was not merely incidental to, ancillary or supportive of the material change of use, rather it was operational development in its own right. While the operational development must undoubtedly be supportive of the change of use, I find nothing in the cases cited to indicate that the development must necessarily be capable of being described as ancillary or incidental, having regard to the qualification in Kestrel Hydro of the use of the word 'ancillary' in Murfitt, it is sufficient that it is part and parcel of, and integral to the change of use. Neither is it the case that works carried out before the change of use was clearly effected, as appears to have been the case in Somak Travel Ltd and Bowring, and possibly Murfitt, could not be integral to and part and parcel of the change.

18. In the circumstances I consider that the operational development and the making of the material change of use should not be viewed as entirely separate developments. Mr Caldwell's evidence is that the purpose of erecting the building was, from the outset, to provide a dwelling as more suitable accommodation for one of his employees who might otherwise leave, and whose presence would ensure security of the site. The construction of the Goose House was clearly for the purposes of making a material change of use of the land to use for residential purposes, and it was integral to, and part and parcel of, that change. The operational development comprised in the erection of the dwelling, a modest single storey building, was not of a nature and scale that would take it beyond what could be considered to be integral to the material change of use.

19. I consider, in the particular circumstances of this case, that the principal form of development was the making of the material change of use of the land, and that the construction of the building can reasonably be regarded as associated works. Since the purpose of the notice is clearly to remedy the breach of planning control by returning the land to the condition it was in before the breach took place, it is not excessive to require the removal of the building.

> *20. In coming to this view I have noted the doubt expressed by Richards L.J. in Welwyn Hatfield that an enforcement notice directed to a material change of use could require the removal of the building itself in that case, but that was not a point that he ultimately had to decide. Nor do I consider that the fact that the Council was aware of the building while it was being erected, describing it as a "brick outbuilding", precludes it from taking enforcement action subsequently against the material change of use of the land which it was integral to, and part and parcel of, and requiring its removal."*

The legislative scheme

10. Planning permission is required for the carrying out of "development". "Development" comprises "the carrying out of building, engineering, mining and other operations ..on .. land" and "the making of any material change of use of any buildings or other land" (s.55(1) TCPA).

11. Where development is carried out without planning permission, this amounts to a breach of control (s.171A(1) TCPA) in respect of which a local planning authority may, if expedient to do so, issue an enforcement notice (s.172 TCPA).

12. There are time limits for the taking of enforcement action, which are set out in s.171B TCPA.

13. By s.171B(1), where there has been a breach of planning control consisting of the carrying without planning permission of, inter alia, a building operation, no enforcement action may be taken after the end of the period of four years beginning with the date on which the building operation was substantially completed.

14. By s.171B(3), in respect of a material change of use of land or a building (other than a change of use to a single dwellinghouse), no enforcement action may be taken after the end of the ten years beginning with the date of the material change of use.

15. Provision for the contents and the effect of an enforcement notice are set out in s.173 TCPA. By s.173(3) an enforcement notice may include a requirement the purpose of which is to "restore the land to its condition before the breach took place" (s.173(3),(4)(a) TCPA). This is the critical provision for the purposes of this case.

16. The grounds on which an appeal may be made against the issue of an enforcement notice are set out at s.174(2) TCPA. These grounds include that, on the date that the enforcement notice was issued, it was too late to take enforcement action against a breach of planning control alleged in the notice (ground d; s.174(2)(d)) and/or that the steps required to be taken by the notice exceed what is necessary to remedy the breach of planning control (ground f; s.174(2)(f)).

17. Provision is made for an individual to seek a certificate of lawful existing development by an application made pursuant to s.191 TCPA. An existing building is lawful if, inter alia, no enforcement action may be taken in respect of its by reason of the time periods for enforcement action set out s.171B having expired (s.191(2) TCPA).

The caselaw

18. At the heart of this case lies a series of earlier authorities which deal with the scope, or interpretation, of the power in s.173(4)(a) for an EN to include a requirement the purpose of which is to "restore the land to its condition before the breach took place"; and how that relates to s.171B(1), by which enforcement action cannot be taken against operational development after the end of four years from the substantial completion of the building operation. When considering the relevant authorities, it is necessary to consider not merely what each of the judges said, but the factual case that they were dealing with.

19. The origin of the power to require the removal of operational development under s.173(4)(a) or its predecessor (s.87 TCPA 1971) is *Murfitt v SoSE*. That case concerned an unlawful change of use to a haulage yard. The EN required the removal of hardcore on the site, on which the HGVs were parked. It appears from the facts that the hardcore had been in place before the change of use occurred.

20. Stephen Brown J said at p.259:

> *"Section 87(6)(b) of the Act of 1971 requires that an enforcement notice shall specify, first, the matters alleged to constitute a breach of planning control, and secondly, the steps required by the authority to be in taken in order to remedy the breach – that is to say, steps for restoring the land to its condition before the development took place. This is, of course, a mandatory duty that is placed on a local authority, and it would make a nonsense of planning control, in my judgment, if it were to be considered in the instant case that an enforcement notice requiring discontinuance of the use of the site in question for the parking of heavy goods vehicles should not also require the restoration of the land, as a physical matter, to its previous condition, that requirement, of necessity, being the removal of the hardcore."*

21. Waller LJ said more about the parameters or limits of the powers at p. 260:

> *"If one wishes to see some logic in the distinction between the two types of breach – that is, a breach where the variation has existed for four years or more and a breach where that which is described as a variation is something ancillary to the use – as it seems to me, the former case is one where something is done that, on the whole, would be obvious – that, on the whole, would be permanent by the mere fact that it is done and, therefore, something that should be dealt with within a period of four years, whereas in the second case, where it is [a question of] an ancillary purpose, the planning matter [sic] might leave land, as in this case, in a useless condition for any purpose, and, therefore, it is logical that, when the use that has no planning permission is enforced against, the land should be restored to the condition in which it was before that use started."*

22. This passage is somewhat difficult to understand and I note that Stuart-Smith J in *Somak v SoSE* [1988] 55 P&CR 250 at p.255 described it as "delphic" and suggested that there may have been a transcription error. I am wary of the use of the term "ancillary" because

of the complex caselaw on ancillary uses within one planning unit. However, Waller LJ appears to have been contemplating a distinction between operational development that might be considered the main development on the site, and what in the later caselaw is described as "associated development".

23. The caselaw was analysed by Lindblom LJ in *Kestrel Hydro v SoSCLG* [2016] EWCA Civ 784 ("*Kestrel*"). That case concerned a change of use from a dwelling house to a mixed use with an "adult members club", the EN required the removal of hardstanding and outbuildings. Ms Kabir-Sheikh, who appeared for the Appellant, made a root and branch attack on *Murfitt*, arguing that it did not accord with the statutory scheme, see [21]-[23]. At [23] Lindblom LJ said:

> *"I cannot accept those submissions. The straightforward answer to them, in my view, is that the decisions in Murfitt and Somak Trave Ltd. are good law and support the course adopted by the council in this case. As I read those decisions, they do not purport in any way to modify the statutory scheme. They do not ignore the distinction between operational development and material changes of use, now in section 55(1) of the 1990 Act, or sanction any disregard of time limits for enforcement now in section 171B, or enlarge the remedial provisions now in section 173(3) and (4). They represent the statutory scheme being lawfully applied, as in every case of planning enforcement it must be, to the particular facts and circumstances of the case in hand – which is what happened here."*

24. At [27]–[30] Lindblom LJ said:

> *"27. The principle at work here is, I think, unsurprising. And, contrary to Ms Sheikh's submission, the "juridical basis" for it is not obscure. It has been recognized in jurisprudence extending back at least to the Divisional Court's decision in Murfitt , and has been consistently applied by the courts since that decision. It corresponds to the provision in section 173(4)(a) of the 1990 Act – previously section 87(6)(b) of the 1971 Act – which enables a local planning authority to issue an enforcement notice specifying steps to be taken to remedy the breach of planning control by "restoring the land to its condition before the breach took place". It does not, and cannot, distort the operation of the time limits in section 171B , or widen the reach of the requirements provided for in section 173(3) and (4) beyond the bounds set for them in those provisions. Of course, its breadth must not be over-stated. It operates within the statutory scheme, not as an extension of it. This, as Holgate J. acknowledged (in paragraph 37 of his judgment), is the effect of the relevant case law.*
>
> *28. What then is the principle? It is that an enforcement notice directed at a breach of planning control by the making of an unauthorized material change of use may lawfully require the land or building in question to be restored to its condition before that change of use took place, by the removal of associated works as well as the cessation of the use itself – provided that the works concerned are integral to or part and parcel of the unauthorized use. It does not apply to works previously undertaken for some other, lawful use of the land in question, and capable of being employed for that or some other lawful use once the unlawful use has*

ceased. But it can extend to unauthorized changes of use where the associated works, if viewed on their own, would have become immune from enforcement under the four-year rule in section 171B(1) (as in Murfitt) or would be outside the scope of planning control (as in Somak Travel Ltd.). In every case in which it may potentially apply, therefore, it will generate questions of fact and degree for the decision-maker. Whether it does apply in a particular case will depend on the particular circumstances of that case.

29. This was recognized by Stuart-Smith J. in Somak Travel Ltd., in his observation (at p.256) that the application of the principle – or "test" – in Murfitt "must, of course, be a question of fact in each case". The cases show the principle being applied in a variety of circumstances. So, for example, in Shephard and Love v Secretary of State for the Environment [1992] J.P.L. 827 Sir Graham Eyre Q.C., sitting as a deputy judge of the High Court, upheld an inspector's decision to reject an appeal against an enforcement notice under ground (d), in which the appellant challenged a requirement in the notice to remove a hut or huts erected in association with a material change of use of land to a "leisure plot". In Newbury District Council v Secretary of State for the Environment and Mallaburn [1995] J.P.L. 329 Mr Roy Vandermeer Q.C., sitting as a deputy judge of the High Court, held that an inspector had been entitled to find on the material before him that the construction of a tennis court had involved development consisting of "engineering and building operations of substantial scale", which was not merely incidental to a material change of use of land from agriculture to mixed use for agriculture and residential purposes and was therefore protected from enforcement by the four-year rule (see the deputy judge's analysis at pp.333 to 337, and also Ball v Secretary of State for the Environment, Transport and the Regions [2000] P.L.C.R. 299 , at p.312). In Cash v Secretary of State for Communities and Local Government [2012] EWHC 2908 (Admin) Ms Belinda Bucknall Q.C., sitting as a deputy judge of the High Court, rejected a challenge to an inspector's decision upholding a requirement in an enforcement notice for the removal of fencing around a site whose unauthorized use for the stationing of caravans was the target of the enforcement action.

30. The cases demonstrate that the principle acknowledged and applied in Murfitt does not embrace operational development of a nature and scale exceeding that which is truly integral to a material change of use as the alleged breach of planning control. It seems clear that this is what Waller L.J. had in mind when he used the word "ancillary" in the passage I have cited from his judgment in Murfitt (at p.260). This is not to refine the principle, or to recast it. It is to recognize two things about it: first, that it is, in truth, a reflection of the remedial power, in section 173(4)(a) , to require the restoration of the land to its condition before the breach of planning control took place; and secondly, that it does not – indeed, cannot – override the regime of different time limits for different types of development in section 171B(1), (2) and (3) ." [emphasis added]

25. Lindblom LJ then went on to make reference to the Court of Appeal and Supreme Court decisions in *Welwyn Hatfield Council v SoSCLG* [2010] EWCA Civ 26. In that case, planning permission had been granted for an agricultural barn, but once completed it was covertly used as a residential dwelling. The use continued undetected for more than four years. The owner (Mr Beesley) applied for a lawful development certificate ("LDC") for a residential dwelling under s.171B(2), which the LPA refused on the basis that the building was not a dwelling house. The Secretary of State (through an Inspector) allowed the appeal. The Court of Appeal supported the Secretary of State (and Mr Beesley's) case that he was entitled to the LDC.

26. Richards LJ went on, in a passage which is agreed by both parties to be obiter, to reject the LPA's reliance on s.171B(3) that the building could be required to be removed. He said at [31]- [32]:

> *"31. I wish, however, to say a little more about the case advanced by the council under section 171B(3) . I have explained that the case depended upon the proposition that use of the building as a dwelling did not constitute a change of use of the building but did constitute a material change of use of the land. Mr Beglan submitted that this provided a basis upon which the council could enforce against the use of the building, which would be sufficient to disentitle Mr Beesley to the certificate for which he applied. But Mr Beglan's argument went further than that. He submitted, in reliance on Murfitt v Secretary of State for the Environment (1980) 40 P&CR 254 , that an enforcement notice based on a material change of use of the land could require not only the cessation of the residential use of the building but also the removal of the building itself, even though the construction of the building was immune from direct enforcement action by virtue of section 171B(1) .*
>
> *32. I am very doubtful about that elaboration of the council's argument. Murfitt was a very different case, in which there had been a material change of use of land to use for the parking of heavy goods vehicles in connection with a haulage business, and the enforcement notice required the cessation of that use and the removal of hardcore that had been placed on site for the purpose of parking the vehicles. In rejecting a submission that the placing of the hardcore was operational development immune from enforcement action by reason of the four year time limit, the Court of Appeal plainly accepted that the hardcore was so integral to the use of the site for the parking of vehicles that it could not be considered separately from the use, or that it was properly to be regarded as ancillary to the use being enforced against. I do not think that similar reasoning can be applied to the building in question here, and I would be reluctant in any event to accept that an enforcement notice directed against use of the land could properly require removal of a building that enjoys an immunity from enforcement by virtue of section 171B(1) . But it is unnecessary for me to say anything more on the point, both because of my finding that the council's basic case under section 171B(3) must fail and because Mr Beglan made clear that the council would wish to enforce against the residential use of the building even if it could not secure removal of the building itself."* [emphasis added]

27. The case then went to the Supreme Court [2011] 2 AC 304. In *Kestrel* at [33]-[34] Lindblom LJ gave a succinct analysis of the position:

> *"33. The Supreme Court allowed the local planning authority's appeal in that case, holding that there had been not been a "change of use" within the meaning of section 171B(2) , and that the authority had been entitled to take the enforcement action it did (see the judgment of Lord Mance, with which Lord Phillips, Lord Walker, Baroness Hale and Lord Clarke agreed, at paragraph 58, and the judgment of Lord Brown at paragraph 68). In reaching that decision, the Supreme Court did not find it necessary to consider the potential relevance of the Murfitt principle to the breach of planning control with which the case was concerned. Indeed, it seems that Murfitt and the related authorities did not feature in argument at all. Nevertheless, as I have said, Ms Sheikh sought to draw support for her argument from observations made by Lord Mance in paragraphs 16 to 18 of his judgment in that case. Lord Mance emphasized (in paragraph 16) the "basic distinction between the types of development dealt with under these two subsections [section 171B(1) and (2)], … buttressed by section 336(1) where use in relation to land is defined as not including the use of land for the carrying out of building or other operations on it". He went on to say (in paragraph 17):*
>
> > *"Protection from enforcement in respect of a building and its use are thus potentially very different matters. Mr Beesley could have applied for a certificate under subsection (1) in respect of the building as soon as July 2006 was over, but he has not done so. He has focused on the use of the building for four years, in respect of which, he submits, he must now be entitled to protection by reference to roughly, though not precisely, the same four-year period. If the right analysis were that there has been no change of use within subsection (2), the only alternative analysis must, he points out, be that use of the building as a dwelling house, which is either impermissible or positively prohibited under the relevant planning permission, can be the subject of an enforcement notice at any time within a ten-year period under subsection (3). I agree that that would, on its face, seem surprising. However, it becomes less so, once one appreciates that an exactly parallel situation involving different time periods applies to the construction without permission and the use of a factory or any building other than a single dwelling house. The building attracts a four-year period for enforcement under subsection (1), while its use attracts, at any rate in theory, a ten-year period for enforcement under subsection (3). I say in theory because there is a potential answer to this apparent anomaly, one which would apply as much to a dwelling house as to any other building. It is that, once a planning authority has allowed the four-year period for enforcement against the building to pass, principles of fairness and good governance could, in appropriate circumstances, preclude it from*

> *subsequently taking enforcement steps to render the building useless."*
>
> *Lord Mance referred (in paragraph 18) to the comment made in the Carnwath report (at paragraph 3.2 in chapter 7) that the "governing considerations" in the differential time limits for enforcement, with the provision for a shorter time limit relating to changes of use to use as a single dwelling-house, "were the relative ease of detection, the potential costs involved in reinstating the land, and the need to provide certainty for potential purchasers" (see also paragraph 68 of Lord Brown's judgment).*
>
> *34. I do not think any of that reasoning can be said to displace the principle applied by the Divisional Court in Murfitt , and subsequently recognized in the cases to which I have referred. It does not, in my view, cast doubt on the proposition that when a local planning authority is properly enforcing against a material change of use of premises where that change of use has entailed subsequent physical works to facilitate and support it, and those works are thus integral to the unauthorized use, the statutory scheme allows the enforcement notice to require the removal of such works as well as the cessation of the use itself. That is what was done in this case. The circumstances here were quite different from those in Welwyn Hatfield Borough Council . In that case the appellant had constructed a substantial building on his land and, having done so, proceeded to use it as a dwelling-house, contrary to a condition on the planning permission precluding such use. In this case, by contrast, a material change of use of the premises from its lawful residential use to an unlawful mixed use resulted in the erection of several structures to serve that unlawful use."* [emphasis added]

28. Mr Edwards refers me to a number of other cases where the principle in ***Murfitt*** has been applied, but in circumstances where the operational development which has been required to be removed under the enforcement notice, could sensibly be described as secondary, associated or not fundamental to the use which is the subject of the enforcement notice. These cases include an internal staircase (*Somak Travel Ltd. v SoSE*), fencing around land used unlawfully to site caravans (*Case v SoSCLG* [2012] EWHC 2909 (Admin)), huts used ancillary to use of leisure plots (*Shephard v SoSE* [1992] JPL 827), a marquee, sheds, a covered walkway and some hardstanding associated with a change of use of a dwellinghouse to an "adult private members club" (*Kestrel*), kitchen fittings (*Bowring v SoSCLG* [2013] EWHC 1115 (Admin)) and hardcore placed on land used to park HGVs (*Murfitt*).

29. Mr Edwards submits that the Inspector erred in law in finding that the EN could require the removal of the dwelling house, and not merely the cessation of its use. In essence, he submits that the principle in ***Murfitt*** is limited to "associated" works and does not extend to the very building in which the unlawful use is taking place and which generates that use. He relies on the analysis of Roy Vandermeer QC (sitting as a Deputy High Court Judge in Newbury) at p.333 and the dicta of Richards LJ in Welwyn Hatfield.

30. Mr Simons submits that the issue of whether Murfitt applies is one of fact and degree for the decision maker. He relies on well known principles governing challenges to decision letters set out by Lindblom LJ in *St Modwen Developments v Secretary of State for the Environment* [2018] PTSR 746 at [6]-[7].

31. He refers in particular to *Kestrel Hydro* at [24]; to focus on the true nature of the breach and the scope of the steps required to restore the land to its condition before the breach took place, see s.173. He submits that the approach is as set out at [28] of *Kestrel Hydro* "In every case in which it [the *Murfitt* approach] may potentially apply, therefore, it will generate questions of fact and degree for the decision maker". The only limitations are that the operational development cannot be of a nature and scale exceeding what is truly integral to or part and parcel of the material change of use, *Kestrel Hydro* at [28] and [30] and the EN cannot require the removal of works previously used for or capable of being used for a lawful use of the land.

Conclusions

32. In my view Mr Edwards' submissions are correct. The issue is what are the limits or parameters of the power to require the restoration of the land under s.172(3). The starting point must be the statutory scheme. Section 173(3) allows the LPA to require the restoration of the land to its condition before the breach took place, but the statute in s.171B gives operational development, including the erection of dwelling houses, immunity from enforcement action four years after substantial completion.

33. The caselaw, starting with Murfitt, clearly establishes that the power to require restoration can include the removal of operational development, which could not be enforced against on its own, because of s.171B. That principle has been endorsed in numerous subsequent cases, including in the Court of Appeal in *Kestrel Hydro*.

34. However, it is also clear that the *Murfitt* principle is subject to limitations. Most importantly, as has been frequently stated, it cannot override or extend the statutory scheme, see *Kestrel Hydro* at [27].

35. It is helpful to consider the factual context of the various cases where *Murfitt* has been applied. In all those cases, including *Kestrel Hydro* itself, the works have been secondary, ancillary or "associated with" the change of use. They have not been fundamental to or causative of the change of use. One can use a variety of different words to describe this relationship, and various judges have described it in different ways, but the list above, makes the point very clearly. Lindblom LJ in *Kestrel Hydro* comes close to describe the concept at [34] where he refers to the change of use entailing subsequent "physical works to facilitate and support it". I do not think the works have to be "subsequent", that will depend on the facts of the case, but they are facilitative only.

36. I agree with Richards LJ in Welwyn Hatfield and Mr Vandermeer QC in Newbury that to go further and allow the *Murfitt* principle to extend to the operational development which gives rise to the change of use, is a step too far.

37. The case that comes the closest to the present on the facts is *Welwyn Hatfield*. The comments of Richards LJ (and Lord Mance) are undoubtedly obiter, but the reservation expressed by Richards LJ is precisely the same reservation as arises here. An attempt

to use an EN limited to material change of use, by reason of the fact that the operational development can no longer be directly enforced against, to achieve removal of the principal operational development (here the dwelling house) is in my view going contrary to the statutory scheme.

38. I agree with Lindblom LJ that Lord Mance's reservation at [17] in the Supreme Court, did not undermine the Murfitt principle or its application in ***Kestrel Hydro***. They do however have relevance to the present case where the LPA, and the Inspector, rely on an EN against a material change of use to require the removal of the dwelling house. Lord Mance analysed the scheme of the Act as drawing a clear distinction between enforcement against the physical building, entailing a four year limitation period, and against change of use, involving a ten year limitation period. I do note however, that the Supreme Court (though not the Court of Appeal) was not taken to ***Murfitt*** and Lord Brown, who was counsel in ***Murfitt***, made no reference to it.

39. In my view both the statute itself and the caselaw point to a limitation on the power described in ***Murfitt***, where the operational development is itself the source of or fundamental to the change of use. Whether that limitation is reached is a matter of fact and degree. However, the Inspector here erred in not appreciating that there was such a limitation, and that to require the removal of the dwelling house, was clearly going beyond the statutory power.

40. It is not necessary to deal with Mr Edwards' alternative argument that the Inspector's decision was irrational, because on Ground One he made an error of law.

41. I therefore quash the decision and remit the matter to the Secretary of State for re-determination.