FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2023] CSIH 45
XA12/23

Lord President
Lord Pentland
Lord Boyd of Duncansby

OPINION OF THE COURT

delivered by LORD BOYD OF DUNCANSBY

in the appeal under section 239 of the Town and Country Planning (Scotland) Act 1997

by

PATRICK EDWARDSON

Appellant

against

THE SCOTTISH MINISTERS

Respondents

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Appellant: J de C Findlay KC, K Young; Brodies LLP
Respondents: Crawford KC, Way; Scottish Government Legal Directorate

19 December 2023

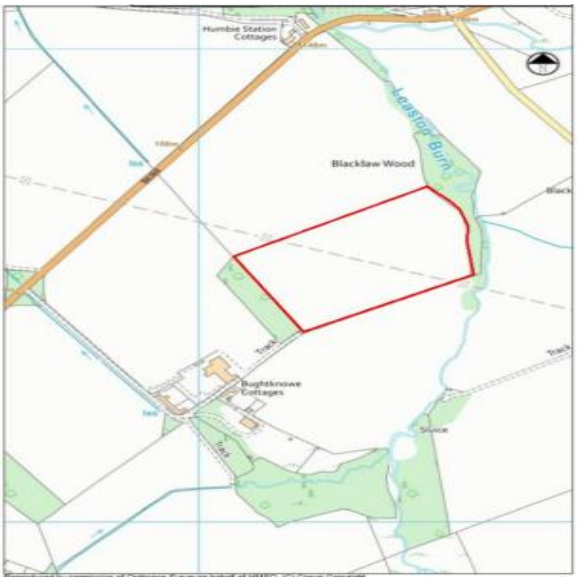
Introduction

[1] This appeal concerns an enforcement notice served by East Lothian Council on the

owners of the Humbie Motocross Track at Bughtknowe Farm, Humbie, East Lothian requiring them to cease using the land as a racetrack and to remove the track and associated fencing, signage and other structures. The owners appealed to the Scottish Ministers. At issue was whether or not the notice was served within the time limits in section 124 of the Town and Country Planning (Scotland) Act 1997. The reporter found that it was not and allowed the appeal. He quashed the notice meaning that the owners did not have to remove the track and fencing. The appellant contends that the reporter was wrong to do so. He asks the court to quash the reporter's decision.

Background

[2] The Humbie Motocross track was built by James Nisbet, who is one of the owners and occupiers of land at Bughtknowe Farm, Humbie, East Lothian. On 14 October 2022, East Lothian Council served an enforcement notice on the owners. The notice alleged that the Nisbets had breached planning control by (i) developing the racetrack and (ii) changing the use of the land from agricultural to commercial use, without the grant of necessary planning permission. The notice instructed the Nisbets to demolish the racetrack and any fencing and signage for it and to cease using the land as a racetrack, permanently. A plan of the land to which the notice related was appended to the notice:



[3] An aerial view of the track with the fencing delineated in red was provided to the court:

[4] James Nisbet appealed the notice to the Scottish Ministers under section 130 of the 1997 Act. He asserted that construction of the racetrack had been substantially completed on 13 October 2018 (four years and one day before the enforcement notice was served). He argued that, since enforcement action may only be taken against an unauthorised development within four years of the date of substantial completion, the notice had been issued out of time. In any event, it was not intended to use the land as a racetrack for more than 28 days in a year, and the land would revert to agricultural use between motocross events. Accordingly there was no change of use and the racetrack was therefore a permitted development under the Town and Country Planning (General Permitted Development) (Scotland) Order 1992 (GDPO). The reporter appointed by the Scottish Ministers agreed with Mr Nisbet. He found that the notice was served out of time and that there was no change of use. The land remained agricultural land. By a decision notice dated 9 February 2023 the reporter allowed the appeal and quashed the notice.

[5] The appellant, Mr Patrick Edwardson, is a neighbour of the land at Bughtknowe Farm. He appeals the Scottish Ministers' decision. He argues that the racetrack was not substantially completed by 13 October 2018 because integral parts of the track, namely its fencing and access road, were not completed by then. Since the date of substantial completion was later than alleged by the Nisbets, the notice was served in time. He contends that the reporter failed to consider evidence before him which demonstrated that the land did not revert to agricultural use for significant periods of time, if at all. He asks the court to quash the decision.

Relevant statutory provisions

[6] Section 124 of The Town and Country Planning (Scotland) Act 1997 provides the

following time limits for the taking of enforcement action in respect of a breach of planning control:

> "Time limits
>
> (1) Where there has been a breach of planning control consisting in the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land, no enforcement action may be taken after the end of the period of 4 years beginning with the date on which the operations were substantially completed.
> …
> (3) In the case of any other breach of planning control, no enforcement action may be taken after the end of the period of 10 years beginning with the date of the breach."

[7] Section 130 of the Act provides for a right of appeal to Scottish Ministers against the making of an enforcement notice. The relevant parts are as follows:

> "(1) A person on whom an enforcement notice is served or any other person having an interest in the land may, at any time before the date specified in the notice as the date on which it is to take effect, appeal to the [Scottish Ministers] against the notice on any of the following grounds – ….
>
> …
> (d) that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters;
> …
> (f) that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach;".

[8] The Town and Country Planning (General Permitted Development) (Scotland) Order 1992, article 3, grants planning permission for the classes of development specified in Schedule 1 to the Order. Classes 7 and 15 are relevant to the present case:

> "PART 2 - SUNDRY MINOR OPERATIONS
>
> Class 7.- (1) The erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure.
> …
> PART 4 – TEMPORARY BUILDINGS AND USES

…
Class 15. The use of land (other than a building or land within the curtilage of a building) for any purpose, except as a caravan site, on not more than 28 days in total in any calendar year, and the erection or placing of moveable structures on the land for the purposes of that use."

The enforcement notice

[9] The notice alleged breaches of planning control by the Nisbets as follows:

"Unauthorised 'development' on the Land as defined in Section 26 of the '1997 Act, consisting of both a material change of use and operational development (including building operations, engineering and other operations) without the grant of necessary planning permission, comprises of the following:

a. The unauthorised formation of a racetrack and associated bumps and jumps (i.e. earth mounds); and,
b. The unauthorised use of land as a racetrack for motorised vehicles/cycles and as a venue for commercial race day events for motorised vehicles/cycles."

[10] The action required to comply with the notice is:

"i. Permanently cease from using the Land as a racetrack and cease from holding any future commercial racetrack events on the Land;
ii Demolish/permanently remove the racetrack and associated jumps and bumps from the Land; and
iii. Permanently remove any fencing, signage or temporary structures on the Land that are associated with the unauthorised change of use of Land."

[11] The reason given for the notice was that the development was contrary to the East Lothian Local Development Plan 2018 in that it: (i) resulted in loss of 6.4 hectares of prime agricultural land (Policy NH7 of the LDP); (ii) generated unacceptable levels of noise in what was a relatively quiet countryside setting (Policy NH13); and (iii) adversely impacted on the Blacklaw Wood (SM5756) Scheduled Ancient Monument (Policy CH4). No material considerations outweighed these conflicts with the LDP.

The reporter's decision

[12] The reporter held that for Mr Nisbet to succeed it had to be demonstrated that the

notice was issued outside of two statutory limits: first, the four year limit for raising enforcement action against operational development (s 124(1) of the 1997 Act); and second, the ten year limit on taking action against material change of use (s 124(3)). On the balance of probabilities, the operations were substantially completed four years prior to the enforcement action being taken. The operational development to create the racetrack was therefore lawful. The evidence relied upon by the Council, which comprised social media posts taken from Facebook and YouTube, did not provide firm evidence that the track was not substantially completed by 13 October 2018. The Facebook posts were dated 1 November 2018. They demonstrated that a new track had been completed and fully tested at some point during the previous month. The YouTube video indicated that the track was still under construction in October, but no specific date was identified. Mr Nisbet had produced a sworn statement that the construction began on 8 October and was substantially completed by 13 October 2018. It was not unreasonable that earthworks of the scale involved could be completed in a five day period.

[13] On the other hand, Mr Nisbet did not demonstrate that material change of use had occurred more than ten years prior to the service of the notice. He had stated that racetracks had been constructed and used on the land for more than twenty years across three separate locations, but the evidence showed that neither of the two previous tracks had been located on the same land which was the subject of the enforcement notice.

[14] Regardless, no material change of use had occurred. The racetrack was a Class 15 GDPO permitted development. The land was not used as a racetrack for more than 28 days in a calendar year and it remained active in agricultural use, for silage production and sheep grazing, outside of that period. There was no evidence to dispute Mr Nisbet's assertion to that effect. Any intensification of the use of the racetrack beyond that 28 day limit would

represent a material change of use for which planning permission would still be required. The fences marking the track limits were a Class 7 permitted development. All matters raised had been taken into account. None led to a different conclusion.

The appellant's submissions

[15] The reporter failed to engage meaningfully with the appellant's representations, his evidence, and the evidence of a fellow neighbour. He erred in deeming the fencing a Class 7 permitted development. Specifically, he had not turned his mind to whether the fences provided any form of enclosure. There was a distinction to be drawn between fences which provided enclosure and those which were freestanding. Class 7 did not extend to freestanding walls or fences (*Prengate Properties Ltd* v *Secretary of State* (1973) 25 P&CR 311, Lord Widgery CJ at 314). Photographs of the racetrack showed that the fences simply formed short lines as markers or safety barriers for the track. It could not be implied into the reporter's decision that he had given any thought as to whether the fencing provided an enclosure. His observation that they marked track limits ran contrary to such a conclusion; the fencing provided demarcation for sporting and safety purposes. That was not sufficient for Class 7 to apply.

[16] The reporter had also failed to consider whether the fencing formed an integral part of the racetrack, having regard to the totality of the works, in a holistic manner (*Sage* v *Environment Secretary* [2003] 1 WLR 983, per Lord Hobhouse at paragraphs [23]–[25], and Lord Hope at [6]). Failure to have regard to the totality could lead to reduction of a decision (*R (Dennis)* v *Sevenoaks DC* [2005] 2 P&CR 4 paras 46 – 49). The purpose of the development was not just to have a racetrack, but to have a racetrack suitable for public sporting motorised events. The fences were a permanent part of the racetrack. The reporter had to

consider the context and purpose of the racetrack (*Devine* v *Secretary of State for Levelling Up, Housing and Communities* [2023] EWCA Civ 601 at para 38). The purpose of the development was a racetrack suitable for commercial race day events. It required fences. The fences were essential physical and design features. They marked the track. They had been put in to bring the racetrack up to the MC Federation's safety standard. Mr Nisbet could not gain the necessary MCF licence for holding public events without it. The development was not substantially completed until construction of the fences and attainment of the certificate. Facebook posts by Humbie MX Track dated 3 November 2018 and 1 February 2019 demonstrated the essential nature of the fencing to the racetrack. The reporter had provided no rational basis for concluding otherwise. The reporter had not considered the 1 February 2019 post.

[17] As a result the reporter erred in concluding that the enforcement notice was served more than four years after the date of substantial completion. The fencing was completed on a date after 13 October 2018. Furthermore, the access road was not completed until February 2019. The reporter failed to consider whether these were parts of the totality of the operations. The previous access road had been inadequate. The racetrack could not have been put to its intended use without the road and fencing. The operation had to stand or fall as a whole. It was not open to the reporter to dissect it (*Prengate* at 315).

[18] The reporter had reversed the onus of proof. It was not for the Council to establish that the enforcement action had been taken in good time. It was for Mr Nisbet to establish why he ought to succeed (*Nelsovil Ltd* v *Minister of Housing and Local Government* [1962] 1 WLR 404, Widgery J at 409).

[19] The reporter failed to take into account material considerations, or, if he did take them into account, he failed to give proper, adequate or intelligible reasons for preferring

Mr Nisbet's evidence. There was no analysis by him of the affidavit of Mr Edwardson, which contradicted the evidence of Mr Nisbet regarding the date of completion. He failed to assess the meaning of the Facebook post by Humbie MX Track dated 1 November 2018 which suggested that testing was still ongoing by that date. The carrying out of this testing suggested that completion had not yet been reached. Another post by Terraforma MX Circuit Design also dated 1 November 2018 indicated that the layout still required the "odd tweak". Again, the meaning of this was not assessed or discussed.

[20] The reporter failed to take into account Mr Edwardson's evidence, and that of a fellow neighbour, which contradicted his finding that the land remained in active agricultural use. That evidence confirmed that grazing was not taking place on the site. The site had not reverted to agricultural use for a significant time. There had been no agricultural use for over two years; therefore the land had not reverted to its former use in between race events. Without reversion, Class 15 did not apply. The land had been de-registered for agricultural subsidy purposes. That certainly merited greater consideration. The reporter did not set out his treatment of that important evidence. He had relied on the fact that silage was being produced on the site, but silage was simply grass that had been cut. It could be produced in a wide range of non-agricultural purposes. The reporter's decision failed to meet the standard expected (*West Lothian Council* v *Scottish Ministers* 2023 SLT 175 at [24]). Whilst he was entitled to deal with matters succinctly, he had to recognise a dispute in the evidence and provide his reasoning as to how he determined that dispute. It was within the reporter's discretion to hold an oral hearing on the evidence, but instead he resolved matters solely on paper.

The respondents' submissions

[21] The reporter lawfully and rationally concluded that the fencing was a Class 7 permitted development. The reporter's conclusion was that the placing of fences was a separate permitted development, distinct from the development of the racetrack itself. At no time did the appellant argue before the reporter that the fences did not provide some function of enclosure. It was not open to him to attempt to advance this point in this appeal (cf *Taylor* v *Scottish Ministers (No. 2)* 2019 SLT 681 at [34]-[35]). In any event, the reporter had visited the site and concluded that fencing did provide some function of enclosure. It enclosed the track from the wider land and separated spectators from riders.

[22] It had to be borne in mind that there were two breaches of planning control alleged. The first was the unauthorised formation of a racetrack with associated bumps and jumps. The second was authorised use of the land as a racetrack for motorised vehicles as a commercial venture. The question of what formed the racetrack could only be answered by referring back to the terms of the enforcement notice; the development comprised a racetrack with associated bumps and jumps. The fencing did not facilitate the unlawful development. It was connected to the use of the land for commercial purposes, not the development itself. Therefore the reporter did not err by failure to consider the fences as part of the development. It was implicit from his conclusion that they were a Class 7 permitted development that they were a sundry minor operation, and thus not an integral part of the racetrack. An integral feature was one that was necessary for the proper functioning of the racetrack; the evidence before the reporter showed the track being used without fences. The decision in *R (Dennis)* v *Sevenoaks DC*, *supra* was fact specific and distinguishable from the present circumstances. The reporter addressed himself to the correct question regarding substantial completion. He was not obliged to address every

minor issue raised by the parties. It was sufficient that he gave a succinct and intelligible decision on the key issues. He came to a conclusion that was open to him on the basis of the evidence and submissions advanced. The determination of the date of substantial completion was a matter of fact and degree. It was squarely a matter for the reporter's judgement as primary fact-finder. The access road fell outside of the area of the enforcement notice. It was not relevant. In any event, it was not integral to the racetrack. Access to the site had already existed. There was no suggestion that the racetrack was incapable of use without this access road. What weight, if any, to apply to works on the access road was a matter for the reporter. The decision in *Sage*, *supra* was fact specific and of no assistance to the appellant.

[23] The challenge to the adequacy of the reporter's reasons ought to fail. It was never suggested to the reporter that the fences did not have some function of enclosure. He did not require to state explicitly that they did. Similarly, the reporter was not required to state that he did not consider that the fences were an integral part of the racetrack. This point was, at best, tangentially advanced to him. His answer was in any event made clear by his conclusion that they were a sundry minor operation. Reading the decision fairly and as a whole, the reporter did analyse the social media evidence which was relied upon by the Council and the appellant. Even if the reporter had failed to give adequate reasons, the appellant was not genuinely substantially prejudiced by such purported failure (*South Bucks DC* v *Porter (No. 2)* [2004] 1 WLR 1953 at [36]).

[24] The reporter did not err by reversing the burden of proof. His task was to consider the evidence before him and determine the date of substantial completion. That was an exercise of judgement, not reliant upon a burden on a particular party. *Esto* there was a burden of proof on Mr Nisbet, the reporter did not reverse it. The reporter had a sworn and

notarised statement from Mr Nisbet. He considered whether there was any cogent or convincing evidence which would countervail the weight to be afforded to, or cast doubt upon the credibility or reliability he ought to attach to, that statement. He did not consider that there was such evidence. He was entitled to place less weight on the affidavit of Mr Edwardson, having assessed the basis of Mr Edwardson's belief that the racetrack was not substantially completed more than four years before the date of the enforcement notice. The reporter was not obliged to have a hearing on the factual dispute. A great number of planning appeals concerned disputes on facts. Most were dealt with on paper. The court should be slow to hold that the reporter ought to have held an oral hearing.

[25] The reporter did not fail to consider the evidence before him in respect of agricultural use. It was a matter for him as to what weight to attach to the evidence. He was entitled to find that this was a field on which there was a racetrack, not a racetrack on which there was a field. The appellant's argument about this was simply an assertion of disagreement with the reporter's lawful exercise of his function. The reporter's conclusions were not perverse, unreasonable or irrational. He did not act outwith his powers. His decision ought not to be quashed.

Decision

[26] Where an appellant against an enforcement notice contends that it has been served out of time the burden is on the appellant to establish the facts that support that case; *Nelsovil Ltd* v *Minister of Housing and Local Government*, [1962] 1 WLR 404,at 408 and 409. As Widgery J (as he then was) commented there is no hardship in imposing the burden on the appellant as the appellant will know precisely when the development occurred.

[27] The task for the reporter faced with such an appeal is to weigh up all of the evidence from whatever source, bearing in mind that the onus is on the appellant to prove his case. The reporter must take into account all relevant considerations and not take into account an irrelevant one (*Wordie Property Co Ltd* v *Secretary of State for Scotland*, LP (Emslie) at 1984 SLT 345, pp.347–348). The decision letter must identify the live issues and it must be framed in a manner which leaves the reader in no doubt as to the reasons for the decision and what considerations were taken into account; *West Lothian Council* v *Scottish Ministers* 2023 SLT 175, per LP (Carloway) at [24].

[28] The reporter appears not to have appreciated that it was for Mr Nisbet, as the appellant, to demonstrate that the development was substantially completed more than four years before the service of the enforcement notice. At paragraph 7 he states:

> "Overall, I find that the evidence presented by the planning authority and other parties fails to demonstrate that the operational development to create the racetrack was not substantially completed 4 years prior to the enforcement action being taken."

[29] It was not for the planning authority to demonstrate that the racetrack was not substantially completed 4 years prior to enforcement action being taken but for Mr Nisbet to demonstrate it was completed more than 4 years before. This erroneous approach is evident also from an earlier passage (para 4) in which the reporter uses a double negative to express his finding:

> "Overall, the full body of evidence before me does not demonstrate that the racetrack was not substantially completed by 13 October 2018."

[30] The reporter appears to have taken at face value Mr Nisbet's assertion that the racetrack was completed by 13 October 2018 without any supporting evidence or subjecting it to critical analysis in the light of all the other evidence. He has made no finding in fact as to when the development was substantially completed. That was a critical issue in this case

because on Mr Nisbet's own evidence work only commenced on the track on 8 October 2018. Given that the notice was served on 14 October 2022 it was essential to establish the exact date in October when the development was substantially completed. In fact there was evidence that substantial completion took place after October 2018.

[31] There were two critical issues. First, when was the development substantially completed? What is meant by "substantially completed"? Guidance can be found in Annex A to the Scottish Government Planning Circular 10/2009: Planning Enforcement at paragraph 6:

> "… What is substantially complete must always be a matter of fact and degree and of the prevailing circumstances in any case. Therefore, it is not possible to define precisely what is meant by the term 'substantially completed'. In the case of a single operation, such as the building of a house, the 4-year period generally would not begin until the entire operation was substantially complete."

[32] Where the development consists of a single operation a holistic approach is required; *Sage* v *Environment Secretary*, per Lord Hobhouse at paragraphs [22] and [23]. At paragraph [24] Lord Hobhouse explained the application of the holistic approach in enforcement notices:

> "24. The same holistic approach is implicit in the decisions on what an enforcement notice relating to a single operation may require. Where a lesser operation might have been carried out without permission or where an operation was started outside the four-year period but not substantially completed outside that period, the notice may nevertheless require the removal of all the works including ancillary works: *Ewen Developments Ltd* v *Secretary of State for the Environment* [1980] JPL 404 ; *Howes* v *Secretary of State for the Environmen*t [1984] JPL 439, Hodgson J; *Somak Travel Ltd* v *Secretary of State for the Environment* [1987] JPL 630, Stuart-Smith J. The first of these upheld a requirement that the whole of an embankment be removed. In the second the inspector had directed himself that the removal of a hedge and the creation of an access was "a continuous operation and each step in the work prolong[ed] the period for serving the enforcement notice as regards every earlier step of the development": the judge upheld the notice. The third case involved an unauthorised change of use case from residential to commercial use. The notice not only required the cessation of the commercial use but also the removal of an internal staircase which had been put in to facilitate that use though in itself the staircase had not required permission."

[33] The fact that part of the development can be completed as permitted development does not affect the holistic approach to be taken to determining when a development has been substantially completed.

[34] Ms Crawford, for the respondents, submits that it is implicit in the reporter's conclusion that the fencing was permitted development and that he did not consider it to be integral to the racetrack. That may be so; the question is whether he was entitled to come to that conclusion. The purpose of the racetrack is to stage commercial race day events. Accordingly, the date on which the development was substantially completed has to be judged against its avowed purpose as a commercial racetrack.

[35] The reporter found the fences mark the track limits. They are there to ensure that spectators know the limits beyond which they should not stray and are an important, and perhaps vital, safety feature of the track. This was recognised in the Humbie MX Track Facebook post of 1 February 2019 which referred to the double post and rope being put in "for the safety of people who come to ride or enjoy watching the track." This would bring the track up to standards for a MCF track certificate which would allow them to run "mx/solo practice days". The MCF certificate was clearly essential for the commercial operation of the racetrack.

[36] The Facebook post of 1 February 2019 also states that Humbie MX Track was working on a new access road. The reporter makes only passing reference to this in his decision letter and it appears not to have figured in his assessment as to whether the racetrack was substantially completed. Access to the racetrack is an important element in its operation as a commercial venture.

[37] No mention is made of the 1 February 2019 post in the reporter's decision letter. Whilst not every piece of evidence needs to be referred to in a decision letter the reporter's apparent failure to have regard to a substantial piece of evidence which cast serious doubt on the evidence provided by Mr Nisbet was an error.

[38] For all these reasons it is clear that the reporter misdirected himself when he considered whether the development had been substantially completed before 13 October 2018. He failed to take into account the fact that the fencing was an integral part of the racetrack. The fact that the fencing might be erected at some point after the other components of the development without permission does not alter that fact. He further failed to consider whether in this case it was a necessary part of the commercial development that a new access road was being constructed. He failed to take into account material evidence in the form of the Facebook post of 1 February 2019.

[39] Given our finding that the fencing was an integral part of the racetrack it is not necessary for us to determine whether the fences were a form of enclosure and thus permitted development.

[40] The second critical issue was whether or not there had been a change of use. Mr Nisbet failed to show that the land had been in continuous use as a racetrack for more than 10 years. The reporter found however that Mr Nisbet had demonstrated that the land remained in active agricultural use through the production of silage and sheep grazing when not in use as a racetrack.

[41] It is difficult to understand how the reporter reached this conclusion. First, what is now in place is a racetrack, not a field or other agricultural use. The racetrack is not dismantled at the end of every race. It remains in place. Secondly, the facts that sheep might graze there from time to time, or that the grass is cut and used for silage, are incidental to its

primary purpose as a racetrack. Since the area around the track is grass it has to be either grazed or cut to maintain it. That does not turn the racetrack into a field. Thirdly, the reporter has failed to have regard to the evidence from Mr Edwardson and another neighbour to the effect that sheep had not grazed in the area of the racetrack for three out of the last four years.

[42] Ms Crawford pointed out that the enforcement notice specified two breaches of planning control. The first was, reading short, the unauthorised formation of a racetrack and secondly the unauthorised use of the land as a commercial racetrack. The actions required in the notice linked the removal of the fencing to the unauthorised use of the land, not the development. Accordingly the fencing was not part of the development and should not form part of the consideration of substantial completion.

[43] We are not persuaded that this is a tenable approach. The question for the reporter was, or should have been, on what date was the commercial racetrack substantially completed? If, as we have found, the fencing was an integral part of the development then it does not matter that the Council have worded the requirement to remove the fencing as associated with an unauthorised change of use, rather than the racetrack development. The enforcement notice is clear on what actions are required of the recipients.

[44] For these reasons we will allow the appeal, quash the decision notice of 9 February 2023 and remit to the Scottish Ministers for the appeal to be reconsidered by a different reporter.