Neutral Citation Number: [2019] EWHC 1987 (Admin)

Case No: CO/257/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2019

Before :

MR C M G OCKELTON, VICE PRESIDENT OF THE UPPER TRIBUNAL

- -

Between :

Rabbi M Meisels and Mr D Meisels	**Claimant**
- and -	
The Secretary of State for Housing Communities and Local Government	**1st Defendant**
-and -	
The London Borough of Hackney	**Interested Party**

- -
- -

Ms P Jackson (instructed by **Asserson Law Offices**) for the **Claimants**
Mr L Glenister (instructed by **Government Legal Department**) for the **1st Defendant**
No appearance or representation for the **2nd Defendant**

Hearing date: 2 May 2019

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Approved Judgment

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

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MR C M G OCKELTON, VICE PRESIDENT OF THE UPPER TRIBUNAL

C. M. G. Ockelton :

Introduction

1. Upper Clapton Road, Hackney, consists, in the part with which I am concerned, of Victorian terrace houses. Numbers 145-147, the former being on the corner of Filey Road, have for some years been in use as a Synagogue. In 2005 there was an application for planning permission for extensive building works. There was to be a four-storey rear extension to no 145, extending into a single storey extension to no 147, providing two two-bedroom flats and two four-bedroom flats; and there was to be a three-storey extension to the side and rear of no 145 to provide further space for the synagogue and its ancillary offices. There were also to be other alterations to the elevations.

2. Planning permission was granted on 24 February 2006 for development to take place in accordance with the plans submitted with the application. There were conditions. The first was in the usual form that development had to begin within three years, that is to say before 24 February 2009. Amongst the other conditions were the following:

> "2. Full details, with samples, of the materials to be used on the external surfaces of the buildings, including glazing, shall be submitted to and approved by the Local Planning Authority in writing before any work on the site is commenced. This development shall not be carried out other than in accordance with the details thus approved.
>
> REASON: To ensure that the external appearance of the building is satisfactory and does not detract from the character and visual amenity of the area.
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> 4. Full particulars and details of provisions for soundproofing between the synagogue and surrounding occupiers shall be submitted to and approved by the Local Planning Authority, in writing, before the commencement of the works on site, and subsequently installed in the building in a satisfactory manner, before the development is first occupied/use commenced.
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> REASON: In order to minimise the transmission of noise and vibration between and within units in the interests of providing satisfactory accommodation.
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> 6. The window(s) shown in the north elevation of the building shown as obscured glazing… shall be permanently glazed in obscured glass and shall be fitted with a top opening vent only and retained in perpetuity.
>
> REASON: To safeguard against overlooking of adjoining sites and premises."

3. Development has taken place, apparently over some years. On 14 June 2017 the London Borough of Hackney ("Hackney") issued an enforcement notice alleging a breach of planning control as follows:

> "Without benefit of planning permission the erection of a wraparound extension to the property on the front and side and rear elevations, comprising a four storey rear extension fronting onto Filey Avenue; the excavation of a basement and a two story front and side extension."

The notice required the appellants (who are the developers) within six months to remove the two extensions, fill the basement, and return the site to its state before the development began.

The appeals to the Inspector

4. The appellants each appealed. The two appeals were considered together, and in the documentation, including the Inspector's decision, the appellants are sometimes called "the appellant". The original appeals were on grounds (a), (c) and (f) of those set out in s 174(2) of the Town and Country Planning Act 1990 (as amended). A Planning Inspector, Mr Stephen Brown, held a site visit on 3 May 2018, called for the as-built plans, and held a further site visit on 3 July. In his decision, dated 18 November 2018, he dismissed the appeals. In respect of ground (a), that planning permission should be granted, the conclusion was, after some dispute not before the Inspector, that the fee had not been paid, so the Inspector did not deal with that ground. No complaint is now raised about that.

5. The Inspector set out at paras 8-14 of his decision a summary of the development for which permission had been granted and a description of what he found on his site visits:

> "8. Prior to development there was a single storey extension at the back of no.145 Upper Clapton Road. This has been demolished, as proposed in the approved scheme. The proposal was then to build a mainly four-storey extension at the rear, set back from the Filey Road frontage, and with a garden in that set-back. The lower ground floor of the extension would have been approximately half a storey below the general ground level, and the top storey would have been within a Mansard roof set behind a parapet. Within this extension a total of four flats were proposed – 4-bedroom flats on each of the lower-ground and ground floors, a 2-bedroom flat on the first floor, and a 2-bedroom flat on the second floor. Each flat would have generously sized living and kitchen/dining rooms, as well as service rooms. Those on the first and second floors are shown with balconies onto Filey Road.
>
> 9. The front and side of the original building would have been extensively altered and extended, and the existing full basement extended beneath the extensions. This part of the building would principally have contained the synagogue with

associated office and service rooms on the ground floor, reading rooms and offices on the second and attic floors, and a reading room in the basement. Building works on this section are still very much in progress. The side extension and alterations to the front of the building are mostly complete, but there has been little work on internal alterations to form the large spaces of the synagogue and reading rooms. The external envelope of this part of the building so far constructed appears to be reasonably in line with the proposed scheme.

10. As built, the envelope of the part 2-storey and part 4-storey back extension is also very much as the proposed scheme, and it can be seen from the level of the lower ground floor windows in relation to the ground level, and the level of the Mansard in relation to the side extension, that it has been built with the lower ground floor at much the same level as proposed.

11. On the lower ground floor of the rear extension is a single large space – labelled on the as-built drawings as "storage" – and a small area with 2 WC compartments and washing facilities. On the ground floor are two self-contained flats. On the northern side is a 1-bedroom flat and on the southern, Filey Road side a 2-bedroom flat. On the first floor there are again two self-contained flats – a 2-bedroom flat on the Filey Road side, with a balcony, and a 1-bedroom flat at the back. On the second floor is a single 3-bedroom flat, also with a balcony on the Filey Road side. As a result, the total accommodation in the rear extension is storage on the lower ground floor, with five flats on the floors above.

12. As to fenestration of the rear extension, on the Filey Road side the size and position of windows are very much as shown on the approved drawings. Similarly, those to the rear – facing towards the gardens and yards of Upper Clapton Road houses to the north – appear much as proposed, but they are clear glazed rather than obscure glazed as shown on approved drawings and required by condition. Similarly, on the flank elevation, the arrangement is much as originally proposed.

13. The area outside the rear extension and fronting onto Filey Avenue, is indicated as 'garden' on the approved drawings, but is now largely occupied by a concrete stair and a ramp.

14. I noticed a few slight differences, in that the double French doors proposed for the lower ground floor flat have become a single door, and a bathroom window in the flank elevation on the second floor has become a slightly larger bedroom window. Furthermore, the windows indicated on the approved scheme appeared to be sash windows, whereas those installed are a

> mixture of top hung vents over fixed lights, and side hung casements, all in uPVC."

6. In respect of ground (c) there were essentially three interlocking issues. The first related to conditions 2 and 4 in the planning permission. Hackney's position was that they were conditions precedent to the commencement of any development, so that development before they had been fulfilled was development not in accordance with the permission. The Inspector decided that although the arrangements made necessary by condition 4 could arguably be made later, during the process of construction, condition 2 "clearly fundamentally controls the final appearance of the building and its relationship to its surroundings [and] should be considered as going to the heart of the planning permission" (para 16). The inspector referred to R (Hart Aggregates Ltd) v Hartlepool BC [2005] EWHC 840 (Admin) and concluded at para 17 that as the condition had not been fulfilled before development began, the development was not an implementation of the approved scheme.

7. The second issue was whether any development had begun by 24 February 2009. The Inspector set out the evidence and his reasons and conclusions on this issue as follows:

> "18. A letter from London Building Control Ltd (LBC Ltd) – an approved inspection organisation – dated 2 May 2012 states that an initial notice for Building Regulations purposes was issued on 30 January 2009. It goes on to cancel that initial notice on the basis that works had not commenced on expiration of the 3 year period after the notice date.
>
> 19. A recent e-mail dated 19 March 2018 from the Inspector who carried out the first inspection, but no longer works for LBC Ltd, says that he recalls carrying out that [sic: it had not previously been mentioned in the decision] inspection on 19 February 2009, and was happy that the works had commenced. He denies authorship of the May 2012 letter, but acknowledges that any cancellation would have been under the jurisdiction of the directors of LBC Ltd. However, the letter does not purport to have been written by the Inspector who claims to have made the February 2009 inspection. The cancellation was made by the approved firm, no contemporaneous documentary evidence is submitted of site inspections, or the works then observed. In the absence of such evidence I can give little weight to the view that the cancellation letter was not valid. I am not persuaded, on the balance of probabilities, that the works were started on or before 24 February 2009."

8. The third issue was whether the development as built out was too different from that for which permission had been granted to amount to an implementation of the permission. The Inspector's conclusions on this immediately follow the passage just cited:

> "19 … Be that as it may [i.e. even if the development was begun before the expiry of the permission], the building embarked on was so significantly different from that approved, that it must be regarded as implementation of a quite different scheme for which planning permission had not been granted.
>
> 20. While the internal layout of a scheme may not be subject to planning control in some circumstances, in this case the number of flats as built, is greater than as proposed in the 2006 planning permission, and the future intentions for the ground floor are by no means apparent. This is significantly different from the approved scheme in planning terms, and I consider as a matter of fact and degree the scheme in the process of construction does not accord with the approved scheme."

9. Thus the Inspector found against the appellants on each one of the three issues, and dismissed the ground (c) appeal.

10. In relation to ground (f), that the action required by the notice exceeded what was necessary to remedy any breach of planning control or to make the development comply with the permission, the Inspector noted that the appellant's case was that amendments to the built form would 'clearly remedy the breach'. The Inspector said at para 23 that he concurred with the view that the extension "could possibly be adapted", given that the 'overall form' of what had been constructed is similar to that of the approved scheme. But he continued as follows:

> "23. … However, this would probably be a substantially different scheme as compared with what has already been built, and compared with the original approved scheme. The differences in layout are significant, and I am not at all confident that the originally approved scheme could still be implemented. Furthermore, the appellant has not put forward any obvious alternative, and it is not for me to attempt to prescribe one. In my view the proper way forward would be for the appellant to submit a planning application for a new scheme, which could be subject to a full consultation.
>
> 24. I consider no sufficiently detailed lesser steps have been put forward that would overcome the Council's objections. The appeal on ground (f) therefore fails."

11. There had been no appeal on ground (g), that the compliance period was too short, but the Inspector pointed out Hackney's power to extend the period under s 173A(1)(b), remarking at para 25 that:

> "Provided that the appellant acts in good faith, and in good time, seeks to discuss matters with the Council at an early stage, and makes any necessary planning application, I see no good reason why an extension should not be granted if appropriate."

The appeal under s 289

12. The appellants now appeal against that decision, with time extended and permission granted by Lieven J. I summarise the grounds as follows. Ground 1 is that the Inspector's decision that condition 2 was a condition precedent (but condition 4 was not) is irrational or inadequately reasoned. Ground 2 is that the Inspector's finding that development had not begun before 24 February 2009 is irrational or inadequately reasoned. Ground 3 is that in relation to the third issue under ground (c), the Inspector failed to have regard to material considerations or failed properly to balance the similarities to the approved scheme against the differences. Ground 4 is that the decision on the ground (f) appeal is irrational or inadequately reasoned. As Mr Glenister points out, each of the four conclusions that are the subject of the grounds would have been, independently, a reason for the Inspector to dismiss the appeal before him; so the appellants must now succeed on every one of the four grounds in order for the Court to think that the decision might have been other than it was.

Ground 1

13. The wording of condition 2 is clear: "before any work on the site is commenced". Does that mean that if there is any work on the site before the condition is fulfilled, that work cannot be in accordance with the permission? Hackney's case was that that question demands an affirmative answer. The Inspector's reference to Hart Aggregates, and his conclusion that condition 4, with its essentially identical wording, did not have that effect, shows that he was aware that the position is more complex, and has been the subject of decided cases. Ms Jackson submits that the Inspector misapplied the law.

14. I do not need to go through the earlier cases, from Whitley & Sons Ltd v Secretary of State for Wales (1992) 64 P & CR 296 onwards, in detail because of the extensive analysis undertaken by Ouseley J in R (Hammerton) v London Underground Limited [2002] EWHC 2307 (Admin), and his summary of the principles derived from the authorities at [122]-[133]. The starting point, which in the Hammerton case occupied the learned judge at [58] ff, is to consider what is meant by the words of the condition. The primacy of this factor is emphasised, if emphasis were necessary, by the structure of the decision of Sullivan J in Hart Aggregates, finding first that there had on its true construction been no breach of the relevant condition. In the present case it is not contended that the words used should bear any meaning other than that development was not to begin before compliance with the condition. In this sense the description 'condition precedent' is clearly accurate.

15. The next task is to determine what are the consequences of the breach of the condition. The phrase used by the Inspector is the one favoured by Sullivan J in Hart Aggregates and approved by the Court of Appeal in Greyfort Properties Ltd v SSCLG [2011] EWCA Civ 908, leading to the question whether the condition "goes to the heart of the planning permission". The reason for asking the question is, as I see it, as follows.

16. The starting-point is that development in breach of conditions is unlawful, and it follows that, if there is a condition that has to be fulfilled before development commences, and development commences without the condition being fulfilled, the

development has been commenced unlawfully. This is 'the Whitley principle'. In those circumstances, if a question arises about whether the development commenced within the three-year period after the grant of permission, the work done in breach of the condition will not count, and the result may be that the permission expired before the commencement of any work authorised by the permission.

17. But that starting-point has to be applied in the context of the statutory regime as a whole, which draws a clear distinction in s 171A(1) of the 1990 Act between (a) carrying out development without planning permission and (b) failing to comply with a condition subject to which planning permission was granted. It follows that not every breach of condition can have the result that the development has been carried out without planning permission.

18. Nevertheless, when an authority has clearly made a condition requiring some further act before the commencement of work, there must be scope for saying that the intended function of the condition was to prevent the commencement of work (or render it unlawful) before the condition had been fulfilled. That will be the case if the condition 'goes to the heart of the planning permission': if it does, it is a condition going beyond the detail of a matter that is agreed in principle: it is, instead, something without which the authority would not be content to permit the development at all. It is this distinction which in my view underlies the difference between the admittedly widely-contrasting scenarios suggested by Sullivan J in Hart Aggregates at [65]: on the one hand where there is permission only in principle because there are no details at all, and on the other hand the case where the failure is limited to a single aspect of the development.

19. The question whether a condition "goes to the heart of the planning permission" is not merely a matter of construing the grant of permission. The grant may give reasons why the condition is imposed; but those reasons cannot resolve the question by themselves. Rather, the question can be answered only by a fact-sensitive enquiry into the terms of the condition in the context of the permission, and the permission in its planning context. In other words, this question is a matter of planning judgment. It is not for the Court: it is for the Inspector; and unless the Inspector's decision on the issue is at fault in a Wednesbury sense, the Court will not intervene.

20. I turn then to the Inspector's decision. Condition 2 and condition 4 are expressed using very similar words: they are both conditions precedent in that sense. But the Inspector distinguishes between them and gives his reasons. It is wrong to paraphrase his reasons in the way Miss Jackson does: that it depends on the stage of the development at which it will be necessary to get things sorted out. What he actually draws attention to is that condition 2 "clearly fundamentally controls the final appearance of the building and its relationship to its surroundings" and should be considered as going to the heart of the planning permission. That was a conclusion that he was wholly entitled to draw from all the material before him, including his observation of the building itself and its setting. In my judgment it is unassailable. The fact that he concluded that condition 4 arguably fell to be treated differently does not undermine his conclusion. He was entitled to decide that the method of soundproofing did not go to the heart of the planning permission; but he did not need to reach a concluded view because one condition that had been breached certainly did

have that characteristic. As he pointed out, the possible difference "does not in any way lessen the importance of condition 2".

21. In her skeleton argument for the hearing Ms Jackson raised a further point that she calls "Whitley stage 3". She submitted that the Inspector should have considered whether an exception to the Whitley principle was applicable. This is a reference to a point derived from Whitley itself, and explained but not undermined in subsequent cases (see Hammerton at [123] and [126-7], Hart Aggregates at [87], R (Prokopp) v London Underground Limited [2003] EWCA Civ 961 at [83-85]). There may be reasons for treating a development as lawful (or treating enforcement as unlawful) even if there has been a breach of a condition which was both expressed as a condition precedent and went to the heart of the permission. Such will be the case if on ordinary public law principles, the authority would not be able to enforce against the breach. In Whitley itself, the mining company had submitted the relevant material before it commenced mining, but had not received approval by the time the permission was about to expire. It began operations without approval. Approval was subsequently given. Dealing in the Court of Appeal with an enforcement notice issued after approval had been given, Woolf LJ (who gave the leading judgment) said at 307 that when the merits of enforcement proceedings came to be considered, it is necessary to take into account the situation at the time of enforcement action. As Ouseley J said in Hammerton after considering all the authorities to which he had been referred.

> "[W]here it would be unlawful, in accordance with public law principles, notably irrationality or abuse of power, for a local planning authority to take enforcement action to prevent development proceeding, the development albeit in breach of planning control is nevertheless effective to commence development. … [But] it would be insufficient to show that the authorities were indifferent to the breach, or unlikely to take enforcement action, or indeed that they had decided not to (although no concluded view is required). It is necessary to conclude that they could not do so" (at [127] and [131]).

22. The reason for that, as Ouseley J explained, is that planning law and its enforcement is governed by statutory procedures, which should not be capable of being sidestepped by mere agreement between developers and authorities, or by inaction; but as part of public law it must be subject to the general principles to which actions by public authorities are governed.

23. Ms Jackson argues that this point was clearly part of the appellants' case before the inspector, as, in their reply to Hackney's appeal statement they had asserted that on 5 February 2007 they had left samples of the proposed materials and had received a telephone call stating that they were acceptable; and that:

> "The appellant submits that the materials as approved and used, fit well with proposal and its setting. The works did not commence until well after the materials were deposited with the LPA."

24. Mr Glenister objects on the basis that this point was not in the original grounds, and so does not have permission. But there is nothing in it anyway. This is not a case where the condition was met at the time of the enforcement action: no written approval of the materials has ever been given. Nor, despite the assertions of the appellants, has it been established that Hackney has conducted itself in such a way that it could not now enforce the condition. There may have been inaction, but there has been nothing positive, and it is clear that merely failing to draw attention to the lack of approval does not amount to rendering enforcement impossible. The Inspector's comments about the congruence of the built envelope with the proposal could have no reference to the finish, because the finish had never had agreement, despite the appellants' inaccurate reference to materials "as approved".

25. Because there was a condition precedent that went to the heart of the permission, the development was unlawful as a matter of planning law when it began, and so was begun without planning permission. It can be saved only by showing that at the time when the matter is being determined the breach has become unenforceable, so that it can no longer be said that there was a breach. The argument that there has been no "relevant planning harm", to use Ms Jackson's phrase, belongs in the realm where enforcement is (lawfully) being considered, not where it cannot lawfully occur. Further, I do not accept that the passage I have cited from the appellant's reply raised this issue. It is clearly directed to an assertion that there had been no breach of the condition. It follows that the matter was not before the Inspector, and he had no need to deal with it; but if the question had been properly raised, he would have been bound to decide it against the appellants on the material available to him.

26. For the foregoing reasons I reject ground 1.

Ground 2

27. I can deal with this matter very briefly. The Inspector had to determine whether development (authorised or not) had begun on or before 24 February 2009. Ms Jackson submits that the Inspector's reasons for preferring the cancellation notice over the email from the building inspector are irrational or not properly reasoned. She objects to the Inspector's concentrating on the validity of the cancellation notice rather than the facts of the development; and to his remarking that there was no contemporaneous documentary evidence of any site visit. The Inspector was correct about that. The appellants say that they had heard at some time from LBC Ltd that there was a site visit by the building inspector Mr Edwards (but not recording any outcome); and there is an email from Mr Edwards, now no longer in the same employment, dated March 19 2018, nine years after the event, in which, under the heading "re Manor Road", and apparently in response to being sent some plans relating to 113 St Mary Street, he says that his diary shows that an Initial Notice [of intention to carry out work] was submitted on 30 January 2009, he remembers dealing with this site and that he was "happy that works had commenced" at a visit on 19 February 2009.

28. The effect of the cancellation notice was of importance, because there had been no suggestion when it was issued that it was incorrect or should be set aside. It was contemporary documentation of the official view, apparently uncontested, that on the date it was issued, 2 May 2012, no work had commenced. The only evidence to the

contrary was that to which I have referred. The Inspector did not need to take any specific points about either the email or the appellants' statement. He was entitled to prefer the contemporary evidence of the state of affairs in 2012 (and reflecting the lack of any work before that) to the far from contemporary statements that some unspecified work had taken place in 2009. Nothing in the material submitted by the appellants gives me any reason to think that the Inspector's approach, or his conclusion, was irrational, or that he ignored something that would have established the appellants' case.

29. In any event, however, ground 2 cannot assist, because even if work was begun before the expiry of the permission it was, for the reasons I have given in relation to ground 1, not in accordance with the permission and so does not qualify as "the development hereby permitted" by the permission, which had to be begun before 24 February 2009.

30. I reject ground 2.

Ground 3

31. The Inspector's third reason for concluding that the permitted development had not begun before 24 February 2009 was that what had been built was so different from what had been permitted that the development was the implementation of "a quite different scheme for which planning permission had not been granted". Ms Jackson submits that this conclusion was either irrational or erred in law by failing properly to balance the features of the development that conformed with the permission against those that did not conform.

32. She referred me to one authority: Commercial Land Ltd v Secretary of State for Transport, Local Government and the Regions [2002] EWHC 2164 (Admin). There was a grant of planning permission for an extra storey on a block of flats; planning permission was granted for development in accordance with the plans. Two walls were erected, different in some respects from anything in the plans. Work then ceased. Some years later, after the expiry of the validity of the planning permission, the developer wanted to continue the development and sought a Certificate of Lawful Use or Development under s 190: it argued that the building of the walls constituted commencement of the development authorised by the permission. Ouseley J informed his decision by an analysis of four previous decisions, three of which were primarily concerned with what work would need to be done in order to constitute beginning work, and the relevance of the genuineness of the developer's intention, the fact that work had had to be reversed immediately, and the ambivalent nature of the works relied on. The exception was Spackman v Wiltshire County Council (1976) 33 P & CR 430, where the work relied upon was the construction of drains and a driveway, all deviating from the approved plans. It appeared that there had been mistakes by the contractor; and that at least two of the three drains could be used if the rest of the development was completed in accordance with the plans. Willis J held 'with diffidence' that the work was sufficient to be regarded as beginning the authorised development. As Ouseley J said at [32]:

> "The decision in Spackman shows that as a matter of law differences between the approved plans and the operations

> relied upon need not be fatal to the capability of the operations in commencing the development."

He continued:

> "[33] It is in my judgment necessary for an Inspector dealing with this sort of problem to consider not just the existence of differences between the plans and the operations relied on, but also to consider the significance of those differences. It is insufficient just to mark and measure the existence of differences. In my judgment this can be seen either as a question of the correct approach in law, or as a question of whether an Inspector has had regard to material considerations. Consideration of the similarities, or degree of compliance of the operations with the approved plans is also relevant, together with the substantial usability of those works in the permitted development, and the degree of alteration required for them to be effective to that end. …
>
> [34] The Inspector ought to have appraised the whole in order to reach a conclusion about whether the works were operations comprised in the development rather than just to have focussed on the differences. He had the necessary material in front of him on his site visit and needed no further evidence from the claimant in order to weigh the visible similarities and the visible differences.
>
> [35] I do not accept Mr Hobson's submission [for the developer] that it is sufficient to look only at whether there was a modicum of works which complied with the plans and that the existence of works which did not comply with the plans was irrelevant. I consider that the question of whether the operations done were comprised within the development involves looking at what has been done as a whole and reaching a judgment as a matter of fact and degree upon that whole. It does not entail any artificial process of ignoring part of what has been done. I reach that view even where it is not contended that the works are different functionally from the planning permission which has been granted … ".

33. In the present case the material that the Inspector had in front of him "as a whole" on his site visit was not merely what was claimed to be the very beginning of the development. It consisted of much of the outside walls to the three sides of the development, and a largely completed residential development at the rear. The outside walls were, as he said, largely in accordance with the permission. The interior arrangements of the residential extension were different: instead of four flats with a total of six bedrooms spread over four floors and each occupying a whole floor, there were five flats with a total of nine bedrooms, spread over three floors. Hackney's appeal statement drew attention to the small size of many of the bedrooms, limited daylight, and access to bathrooms directly from living areas instead of from hallways

as in the approved plans. The appellants' response was simply to repeat that "the built form adheres to the approved plans".

34. Ms Jackson submits that the Inspector's failure to refer under this head (paragraphs 19-21 of the decision) to the similarities between the outside of the approved development and the outside of the development as built, to which he does refer in paragraphs 9, 10 and 23, shows that he did not take this factor into account. I do not accept that submission. An Inspector's decision is not to be read with that level of scepticism. There is no reason at all for supposing the Inspector did not have in mind what he had written a few paragraphs earlier and what he was to write two paragraphs later. But it is clear from what he wrote that he had the facts and the proper test in mind. He considered what he saw, and concluded 'as a matter of fact and degree' that the building that was there was 'so significantly different' from that approved that the construction must be regarded as one for which permission had not been granted; and he did that specifically referring, in the opening words of para 20, to the distinction between external and internal matters

35. Even without relying on Ouseley J's observation in <u>Commercial Land</u> at [31] that "No doubt there will be cases where the difference between the plans approved and the development carried out is so large that of itself that prevents the operations relied on being operations comprised in the development and that of itself would permit an Inspector rationally so to conclude without more ado", the position here is that although the exterior was similar to that proposed, the interior was not. The differences were substantial; the development of the interior of the rest of the building was incomplete and so could not contribute to the balancing process; the basement was storage instead of a single spacious flat; the other floors were small flats with restricted accommodation rather than the spacious flats proposed, and the occupancy level was to be much higher than envisaged. I cannot see any proper basis for challenging the Inspector's judgment that this was not an implementation of the original scheme, and so (whenever begun) was a breach of planning control.

36. I therefore reject ground 3.

<u>Ground 4</u>

37. In relation to their appeals on ground (f) the appellants have to face a major obstacle "The power to allow an appeal under ground (f) in subs 174(2) is not a power to grant planning permission" (<u>SSCLG v Ioannou</u> [2015] P & CR 185 at [28] per Sullivan LJ). A ground (f) appeal cannot have the result of granting planning permission where there was none before. Ground (f) therefore only provides a remedy in a case where there is extant planning permission. The Inspector's view was that the planning permission had expired in 2009 without there being any development in accordance with the permission, and I have held that that view was lawfully open to him. This is not a case in which a ground (f) appeal could succeed.

38. The inspector nevertheless dealt briefly with it. His conclusions are to my mind unimpeachable. The ground (f) appeal is part of the enforcement process, and its limitations are those inherent in the statutory scheme. The Enforcement Notice specifies the breach and what the authorities require to be done to remedy it (ss 173(3) and (4)); the ground (f) appeal allows an appellant to show that some lesser step

would remedy the breach sufficiently. Within that structure (although not otherwise: see Ioannou at [37]) the Inspector's process is that set out by Carnwath LJ (as he then was) in Tapecrown Ltd v First Secretary of State [2006] EWCA Civ 1744 at [33] and [46]:

> "[33] In short, the Inspector has wide powers to decide whether there is any solution, short of a complete remedy of the breach, which is acceptable in planning terms and amenity terms. … I would emphasise, however, that his primary task is to consider the proposals that were put before him. Although he is free to suggest alternatives, it is not his duty to search around for solutions … .
>
> [46] [T]he Inspector should bear in mind that the enforcement procedure is intended to be remedial rather than punitive. If on his consideration of the submissions and in the light of the site view, it appears to him that there is an obvious alternative that would overcome the planning difficulties, at less cost and disruption than total removal, he should feel free to consider it."

39. As the Inspector said, the appellants did not offer any alternative proposal. The Inspector's judgment was that he was unable to see what could be done to implement the approved scheme, even though the exterior largely conformed with that scheme. Ms Jackson says that the appellants cannot understand why the Inspector reached the view that although the building "could possibly" be adapted to comply, he dismissed the appeal on this ground. In oral submissions she criticised the decision on the ground that the Inspector ought to have regarded the original, approved scheme as an obvious alternative to demolition and reinstatement.

40. It is perfectly evident from what he said that the Inspector did consider the viability of building out the approved scheme and rejected it, for sound reasons based on his own planning judgment. Besides, it is far from easy to see precisely what this obvious alternative is said to be. The scheme was envisaged as a whole. The part that had been finished was not, by a considerable margin, in accordance with the plans. The appellants' position was that there was no deviation from the approved plans. In these circumstances there is simply no basis for saying that the original scheme was an obvious alternative to complete demolition. If there was to be partial, or only internal, demolition of what had been built, in order to enable new construction according to the approved plans, the precise scope of that operation would need to be fully detailed and worked out. Only then could the Inspector properly consider it within the ground (f) appeal. And, as Tapecrown emphasises, the duty is only to consider the solutions put forward. There is no duty to search around for alternatives, and even in the case of an "obvious alternative" there appears to be no duty: Carnwath LJ's words are that the Inspector "should feel free to consider it". These are words removing a restraint, not imposing a duty.

41. The reason why the Inspector found that although the building might be modified, the appeal on ground (f) failed, was that there was no scheme of modification put

forward, and no obvious alternative to the measures required by the Enforcement Notice. The appellants' failure to understand that is not an error by the Inspector.

42. I reject ground 4 as pleaded; but, because of my conclusions on the other grounds, ground 4 could have no application to this appeal anyway.

Conclusion

43. This appeal will therefore be dismissed. I have set out above what the Inspector said at the end of his decision about the best way forward. It seems to me to have been good advice to both sides; and it coincides exactly (allowing for the fact that here there was no ground (g) appeal) with the process endorsed by the Court of Appeal in Ioannou at [38]. No doubt the appellants and their advisers will now give it careful consideration.