Neutral Citation Number: [2024] EWCA Civ 467

Case No: CA-2023-001916

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**
**PLANNING COURT**
**Mrs Justice Lieven**
**[2023] EWHC 2053 (Admin)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 May 2024

**Before:**

**SIR KEITH LINDBLOM**
**(Senior President of Tribunals)**
**LORD JUSTICE COULSON**
and
**LADY JUSTICE ANDREWS**

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**Between:**

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| **SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES** | **Appellant** |
| **- and -** | |
| **(1) IAN NIVISON CALDWELL**<br>**(2) TIMBERSTORE LIMITED** | **Respondents** |

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**Zack Simons and Nick Grant** (instructed by the **Government Legal Department**) for the **Appellant**
**Douglas Edwards K.C. and Michael Rhimes** (instructed by **Goodenough Ring Solicitors**) for the **Respondents**

Hearing date: 13 March 2024

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# Approved Judgment

This judgment was handed down remotely at 4.40pm on 2 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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## The Senior President of Tribunals:

*Introduction*

1. Did an inspector who determined an appeal against an enforcement notice issued under section 172 of the Town and Country Planning Act 1990 ("the 1990 Act"), which required the cessation of residential use on land and the demolition of a bungalow built upon it, misapply the principle in *Murfitt v Secretary of State for the Environment* [1980] 40 P. & C.R. 254? That is the basic question to be decided in this case.

2. With permission granted by Singh L.J., the appellant, the Secretary of State for Levelling Up, Housing and Communities, appeals against the order of Lieven J. dated 13 September 2023, quashing an inspector's decision, in a decision letter dated 14 February 2023, to dismiss an appeal by the first respondent, Ian Caldwell, under section 174 of the 1990 Act and to uphold, with corrections and variations, an enforcement notice issued by Buckinghamshire Council in February 2021 against an alleged breach of planning control on land in the Metropolitan Green Belt, close to the junction of Pyebush Lane and the A40 at Beaconsfield. The enforcement notice required both the cessation of residential use and the demolition of a bungalow known as "The Goose House", which had been built without planning permission in 2013 and 2014. The council has played no part in these proceedings, either in this court or below.

3. The inspector also dismissed an appeal under section 195 of the 1990 Act by the second respondent, Timberstore Ltd., against the council's refusal of an application under section 191(1)(a) and (b) for a certificate of lawful use or development for the change of use of the land to residential use, and an appeal by Mr Caldwell under section 195 against its failure to determine an application for a certificate of lawful use or development under section 191(1)(b) for the retention of "The Goose House".

4. Mr Caldwell had applied several times between 1996 and 2012 for planning permission to build various structures on the site, including a dwelling, without success. Building work began in November 2013 and was completed in March 2014. "Concealment" of the works was not an issue raised before the inspector. The council had evidently been made aware that a building was being erected on the site when it received a complaint in January 2014, about seven years before it eventually issued the enforcement notice in February 2021. As well as "The Goose House", Mr Caldwell erected a feed store, a storage shed, a chicken coop and a "utility enclosure". In his decision letter (at paragraph 8) the inspector described "The Goose House" as "a single storey brick-built dwellinghouse with small front, rear and side gardens enclosed by low walls and fences …".

5. In March 2023, Mr Caldwell appealed under section 289 of the 1990 Act against the inspector's decision to uphold the enforcement notice, and also made an application under section 288 for an order to quash the decision to dismiss his section 195 appeal. Lieven J. allowed both the appeal and the application.

*The main issues in the appeal*

6. Two main issues arise in the appeal. The first is the same issue as that identified by Lieven J. in her judgment (at paragraph 2), namely "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) [of the 1990 Act], as explained by the Divisional Court in [*Murfitt*]". The second is raised in the respondent's notice: whether the inspector's application of the *Murfitt* principle in this case was irrational.

*The statutory provisions*

7. Section 55(1) of the 1990 Act identifies two types of development: "the carrying out of building, engineering, mining or other operations in, on, over or under land" and "the making of any material change in the use of any buildings or other land".

8. Under section 171A(1)(a) "carrying out development without the required planning permission" constitutes "a breach of planning control".

9. Time limits on enforcement are set by section 171B, which at the relevant time provided:

> "(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 four years beginning with the date on which the operations were substantially completed.
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> (2) Where there has been a breach of planning control consisting in the change of use of any building to use as a single dwelling house, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach.
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> …
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> (3) In the case of any other breach of planning control, no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach.
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> …".

10. Under section 172, the local planning authority may issue an enforcement notice where it appears to it that there has been a breach of planning control and it is expedient to do so.

11. Section 173 provides:

> "(1) An enforcement notice shall state –

> (a) the matters which appear to the local planning authority to constitute the breach of planning control … .
>
> …
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> …
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> (3) An enforcement notice shall specify the steps which the authority require to be taken, or the activities which the authority require to cease, in order to achieve, wholly or partly, any of the following purposes.
>
> (4) Those purposes are –
>
> (a) remedying the breach by making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land, by discontinuing any use of the land or by restoring the land to its condition before the breach took place;
>
> …
>
> (5) An enforcement notice may, for example, require –
>
> (a) the alteration or removal of any building or works …
>
> …
>
> …".

12. Section 174(2) sets out seven grounds on which an appeal against an enforcement notice may be made, grounds (a) to (g). Ground (d) is:

> "(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".

13. Section 191(1) provides that any person may apply for a "certificate of lawfulness" to ascertain whether any existing use of buildings or other land (section 191(1)(a)) or any operations which have been carried out (section 191(1)(b)) are lawful.

14. Section 115 of the Levelling-up and Regeneration Act 2023 ("the 2023 Act"), which came into force on 25 April 2024, amends section 171B of the 1990 Act to provide that for both operational development and material changes of use the time limit for the taking of enforcement action is to be ten years. Transitional arrangements are made by regulation 5 of the Planning Act (Commencement No.8) and Levelling-up and Regeneration Act 2023 (Commencement No.4 and Transitional Provisions) Regulations 2024, which provides that these amendments do not apply where "(a) in respect of a breach of planning control referred to in section 171B(1) of the 1990 Act … , the operations were substantially completed" or "(b) in respect of a breach of

planning control referred to in section 171B(2) … , the breach occurred" before 25 April 2024. The parties therefore agree that the coming into force of these provisions does not affect the outcome of this appeal.

*Relevant case law*

15. The principle stated in *Murfitt* is well established. The relevant case law was considered in *Kestrel Hydro v Secretary of State for Communities and Local Government* [2023] P.T.S.R. 2090 (in paragraphs 23 to 34 of my judgment).

16. In *Murfitt,* the Divisional Court recognised that local planning authorities, when enforcing against a material change of use under section 87 of the Town and Country Planning Act 1971 ("the 1971 Act"), could require the removal of operational development connected to the change of use "for the purpose of restoring the land to its condition before the development took place" (section 87(6)(b) of the 1971 Act, now section 173(4)(a) of the 1990 Act). The local planning authority had issued an enforcement notice alleging a material change of use of agricultural land for the parking of heavy goods vehicles belonging to a haulage business. The enforcement notice required the use to be discontinued and the land restored to its condition before the development had taken place, including the removal of hardcore laid on the site. An inspector upheld the notice. In his challenge to that decision Mr Murfitt maintained that the notice enforced only against the change of use, not against any operational development.

17. The first judgment was given by Stephen Brown J.. He said (at p.259):

> "Section 87(6)(b) of [the 1971 Act] 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 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."

18. Waller L.J., agreeing, is reported as having said this (at p.260):

> "The conflict is really between two different subsections of section 87. Section 87(6) gives specific authority for a notice in matters of this sort to specify the steps required to be taken in order to remedy the breach, that is to say, steps for the purpose of restoring the land to its condition before the development took place, and I see no reason to retract that meaning.

> 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." (emphasis added)

19. This approach has consistently been followed at first instance. In *Perkins v Secretary of State for the Environment and Rother District Council* [1981] J.P.L. 755, Glidewell J., as he then was, dismissed an appeal against an inspector's decision upholding an enforcement notice against a change of use, which required the removal of various machinery, piles of rubble, heaps of soil and battery cases. He accepted (at p.756) that "… [*Murfitt*] was binding authority for the proposition that section 87(6) of the Act permitted an enforcement notice to be served where the operational development was an integral part of the change of use". In *Somak Travel Ltd. v Secretary of State for the Environment* (1988) 55 P. & C.R. 250, Stuart-Smith J. dismissed an appeal against an inspector's decision upholding an enforcement notice against a material change of use by the conversion of a maisonette above a ground-floor office into office space, requiring the removal of a spiral staircase installed to connect the ground floor with the first floor. He said (at p.256) that "[the] test laid down in that case by Stephen Brown [J.], that the operational activity should be part and parcel of the material change of use or integral to it" was satisfied. This, he added, "must, of course, be a question of fact in each case …". He went on to say (at p.257) that "[adopting] the integral and part and parcel test, which [counsel for the company] accepts is the correct test laid down in *Murfitt*, it seems to me that there was abundant material on which the inspector could come to the conclusion that it was part and parcel of it and integral to it". In *Shephard and Love v Secretary of State for the Environment and Ashford Borough Council* [1992] J.P.L. 827, Sir Graham Eyre Q.C., sitting as a deputy judge of the High Court, upheld an inspector's decision dismissing an appeal against an enforcement notice in which the appellant had challenged a requirement in the notice to remove huts associated with a material change of use of land to a "leisure plot".

20. The narrowness of the *Murfitt* principle is well illustrated in *Newbury District Council v Secretary of State for the Environment* [1995] J.P.L. 329, where Mr Roy Vandermeer Q.C., sitting as a deputy judge of the High Court, concluded that it did not apply to the requirement to remove a tennis court in an enforcement notice against the unauthorised change of use of an agricultural field to a residential garden. The deputy judge had "considerable doubt" that *Murfitt* could be interpreted "to effectively set aside the provisions of section 171B(1)" (p.335). In his view, the "clearest statement of principle" was to be seen in Waller L.J.'s formulation of the question as "being whether the act of construction or building operation is simply ancillary", and his reference to "issues such as the extent and degree of the development". He went on to say (at pp. 335 and 336):

> "What seemed to emerge … is that it is proper, when looking at a building operation or the construction of a building, for the question to be asked as to whether it is simply ancillary to the change of use. … [It] is a matter depending upon facts, and is therefore essentially a matter of fact and degree. It is for the decision maker to look at the position.
>
> Where what is built is substantial, obviously seen it is unlikely … that one could come to the conclusion that it should lose the protection of section 171B because it involved also a change of use. When it was something as modest as putting hardcore in the land which, as Waller LJ pointed out, could really not be seen externally and rendered the land useless, then it is clear that one can treat it as a step on the way to the change of use and not as a separate development in its own right. It would not, therefore, achieve the support and comfort of the four-year rule."

21. Twice in this court the principle has been acknowledged. In *Welwyn Hatfield Borough Council v Secretary of State for Communities and Local Government* [2010] P.T.S.R. 1296, the landowner had permission to build a barn, but in fact built a dwelling house disguised as a barn. Richards L.J. said:

> "30. If, as I have found, the situation falls within section 171B(2), the council's reliance on section 171B(3) must fail. The plain legislative intention is that, once the four year time limit is found to apply, it displaces the ten year time limit even if the situation could be analysed by another route as one to which the longer time limit also applied … ."

22. The local planning authority argued that the *Murfitt* principle would allow the enforcement notice to require the demolition of the barn. Richards L.J. addressed this point incidentally:

> "32. I am very doubtful about that elaboration of the council's argument. *Murfitt* was a very different case … . 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] 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)

23. Although the Supreme Court overturned the decision of the Court of Appeal ([2011] 2 A.C. 304), the principle in *Murfitt* and the observations Richards L.J. had made about it were not mentioned in the leading judgment of Lord Mance (with whom Lord Phillips of Worth Matravers, Lord Walker of Gestingthorpe, Baroness Hale of Richmond, and Lord Clarke of Stone-cum-Ebony agreed). Lord Mance noted that the legislative scheme created a "basic distinction" in the time limits on enforcement, between operational development and change of use (paragraph 16). He said (in paragraph 17) that "[protection] from enforcement in respect of a building and its use are … potentially very different matters". After referring to the appellant's argument that if there was no change of use under section 171B(2) the barn itself would be immune from enforcement as operational development under the four-year limit in section 171B(1) while its use as a dwelling could still be enforced against under the ten-year limit in section 171B(3), he said:

> "17 … 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."

24. In *Kestrel Hydro* the alleged breach of planning control was the making of a material change of use, without the necessary planning permission, by the conversion of the premises from residential use to mixed use for residential purposes and as an "Adult Private Members' Club". The enforcement notice required the removal of various structures and a car park on the site, as well as the cessation of the change of use. Applying the principle in *Murfitt*, the inspector upheld it. The appellant argued that the principle was incompatible with the statutory scheme and that *Murfitt* had been wrongly decided. That argument was rejected by Holgate J. ([2015] EWHC 1654 (Admin)).

25. The appeal to this court failed. Endorsing the inspector's approach, I said:

> "23 … [The] decisions in *Murfitt* and *Somak Travel 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 the 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 As [counsel] submitted for the Secretary of State, it is necessary in every case to focus on the true nature of the breach of planning control against which the local planning authority has enforced. It is the nature of the breach that dictates the applicable time limit under section 171B. Under section 173(1) the enforcement notice must state the matters that appear to the local planning authority to "constitute the breach …". The nature of the alleged "breach" will also be evident in the requirements of the notice and in any appeal against it. The provisions of section 173(3) and (4) are directed to "remedying the breach", and include, as one means of achieving that purpose, "restoring the land to its condition before the breach took place". And the provisions for grounds of appeal in section 174 are framed in terms of the "breach" that is "constituted" by the matters that constitute the "breach"."

26. I went on to say:

> "26 This was one of those cases in which the change of use offending lawful planning control entailed the carrying out of physical works to enable and facilitate the unauthorised use of the land. Though some or all of those works comprised engineering or building operations, this in itself did not, as a matter of fact and degree, take the breach of planning control out of the ambit of section 171B(3) and into the scope of section 171B(1). In such a case, as one might expect, the remedy for the breach provided for under section 173(4)(a) can involve the removal of works carried out in association with the unlawful change of use.
>
> 27 The principle at work here is … unsurprising. And, contrary to [the appellant's counsel's] submission, the "juridical basis" for it is not obscure. It has been recognised in jurisprudence extending back at least to the Divisional Court's decision in *Murfitt* … , and has been constantly 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.
>
> 28 What, then, is the principle? It is that an enforcement notice directed at a breach of planning control by the making of an unauthorised 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 unauthorised use. … 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.

> …
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> 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 LJ 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 recognise 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)."

*The council's enforcement notice*

27. The enforcement notice was issued by the council on 23 February 2021. The breach of planning control alleged in paragraph 3 of the notice, as subsequently amended by the inspector, was:

> "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 … and incidental structures … ."

28. The requirements of the notice, in paragraph 5, as amended, were:

> "5.1 Cease the residential use of the Land; and
>
> 5.2 Demolish or dismantle the building occupied as a dwelling …
>
> 5.3 With the exception of Utility Building E, demolish or dismantle the incidental structures … ."

*The section 174 appeal*

29. Mr Caldwell's appeal against the enforcement notice under section 174 was made on grounds (a), (b), (c), (d), (f), and (g) in section 174(2) of the 1990 Act. The relevant ground in these proceedings is ground (d).

*The inspector's conclusions on the ground (d) appeal*

30. The inspector dealt with the ground (d) appeal in paragraphs 15 to 22 of his decision letter. In paragraph 15 he acknowledged that "the Goose House and the utility/services cabinet … would, in their own right, be immune from enforcement by virtue of section 171B(1)", but added 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". He identified the issue as being "whether, in the circumstances, [Goose House and the utility/services cabinet] can be required to be removed". He went on, in paragraphs 16 and 17, to consider the Court of Appeal's decision in *Kestrel Hydro*:

> "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 v Secretary of State for Communities and Local Government* [2013] EWHC 1115 (Admin); [2013] J.P.L. 1417] 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 the 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 and part and parcel of the change."

31. Having stated that understanding of the authorities, the inspector applied it in this way, in paragraphs 18 to 20:

> "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."

32. His conclusion, in paragraph 21, was this:

> "21. Overall, I find that the requirement to demolish the building does not exceed what is necessary to remedy the breach, and that it is a requirement that the Council could properly impose under section 173(4)(a) of the 1990 Act."

*The judgment in the court below*

33. Lieven J. concluded that the inspector had erred in law. While section 173(3) and (4) allowed a local planning authority to require the restoration of land to its condition before the breach of planning control, section 171B gave operational development, including the erection of dwelling houses, immunity from enforcement action four years after substantial completion (paragraph 32 of the judgment). The case law clearly established that the power to require restoration could include the removal of operational development that could not be enforced against on its own because of section 171B (paragraph 33). But the *Murfitt* principle, said the judge, "is subject to limitations" and "cannot override or extend the statutory scheme" (paragraph 34). She continued (in paragraph 35):

> "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 [L.J.] 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."

34. The judge also relied (in paragraphs 36 to 38) on Richards L.J.'s observations in paragraph 32 of his judgment in *Welwyn Hatfield Borough Council* and those of Lord Mance in paragraph 17 of his judgment in the same case. Lord Mance had drawn a clear distinction between the four-year limitation for enforcement against the construction of a building and the ten-year limitation for enforcement against a material change of use. In *Kestrel Hydro* the Court of Appeal had held that this distinction did not undermine the *Murfitt* principle (paragraph 38). The judge therefore concluded (in paragraph 39):

> "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."

*The first issue – did the inspector misdirect himself on the scope of the power under section 173(4)(a)?*

35. For the Secretary of State, Mr Zack Simons argued that the decisive question here, following the Court of Appeal's reasoning in *Kestrel Hydro*, is whether the inspector was entitled to find that the construction of "The Goose House" was "part and parcel" of the unlawful change of use. The *Murfitt* principle, he submitted, is subject to two restrictions: first, that the relevant operational development cannot exceed the nature and scale of that which is truly "integral to or part and parcel of" the material change of use, and second, that an enforcement notice cannot require the removal of works previously undertaken for a lawful use of the land and capable of being employed for that or some other lawful use once the unlawful use has ceased. Only the first of those two restrictions was relevant here. The restriction identified by the judge had no basis in the authorities, and would lead to the creation of "useless" buildings and the associated planning harm. In this case, Mr Simons submitted, the breach of planning control that the council's enforcement action sought to redress was the material change of use, and the purpose of the enforcement notice was to restore the site to the state it was in before that change of use occurred. In the exercise of his planning judgment on the facts as he found them to be, the inspector concluded that "The Goose House" was integral to, or "part and parcel" of, the unauthorised use. That conclusion was lawful. It was true to the *Murfitt* principle. And it was not *Wednesbury* unreasonable.

36. For Mr Caldwell, Mr Douglas Edwards K.C. relied on the judge's reasons. He submitted that an overly expansive application of the *Murfitt* principle would disrupt the legislative distinction in the different periods for enforcing against operational development and material changes of use. The importance of this distinction had been recognised in *Welwyn Hatfield Borough Council* (in paragraph 16 of Lord Mance's judgment in the Supreme Court and paragraph 26 of Richards L.J.'s judgment in the Court of Appeal), and in *Kestrel Hydro* (at paragraphs 23, 27 and 30). The principle does not allow for the removal of operational development "fundamental to or causative of the change of use". Mr Edwards emphasised Waller L.J.'s use of the word "ancillary" in describing operational development caught by the *Murfitt* principle, Richards L.J.'s obiter dicta in *Welwyn Hatfield Borough Council* and the reasoning of the deputy judge in *Newbury District Council*. He also pointed to the use of the word "entailed" in *Kestrel Hydro* (at paragraphs 26 and 34). The use of the site for residential purposes, he argued, did not "entail" or "result in" the construction of "The Goose House". Both "temporally and functionally", the residential use had followed from the erection of that building. The inspector had misunderstood the scope of the *Murfitt* principle, which is limited by the parameters set by the statutory scheme. The decision in *Kestrel Hydro* did not reduce that principle merely to a matter of planning judgment.

37. I cannot accept Mr Simons' argument, elegantly as it was presented. I think Mr Edwards' submissions are basically correct. In my view the judge's reasoning was sound. She understood the principle in *Murfitt*, and its limits. Her observation, in paragraph 39 of her judgment, that the legislation and the relevant authorities indicate a "limitation on the power described in [*Murfitt*], where the operational development is itself the source of or fundamental to the change of use" captured the essential point. And her conclusion that the inspector "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" was also correct.

38. That an important principle was stated in *Murfitt* is not in dispute. Nor is it suggested that that principle has subsequently been mis-stated or misapplied in any of the cases to which I have referred. It is also agreed that the reasoning of the Court of Appeal in *Kestrel Hydro* is binding on us. Both parties relied on that reasoning. In my view, therefore, there is no need for us to revise the *Murfitt* principle itself, and it would be inappropriate to do so. The principle is familiar, and the limitations upon it are clear.

39. Five points emerge. First, as was emphasised in *Kestrel Hydro* (at paragraph 30), the *Murfitt* principle must not be over-stated. Crucially, it operates, as it must, within the bounds of the statutory scheme, which set different time limits for enforcement against unauthorised operational development and unauthorised material changes of use. As Lord Mance said in *Welwyn Hatfield Borough Council* (at paragraph 17), immunity from enforcement respectively for buildings and their uses are "potentially very different matters" (see also *Kestrel Hydro*, at paragraphs 23, 27 and 30). The *Murfitt* principle cannot override this "basic distinction" put in place by Parliament. As a judge-made principle, it can only exist within that framework, not outside it.

40. Secondly, the principle embodies 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. It reflects the substance of that remedial, or restorative, provision. It represents a practical means of remediating the unauthorised change of use. The decision in *Murfitt* recognises that the statutory power to require restoration of the land to its previous

condition can, in some circumstances, include the removal of operational development that could not be enforced against on its own because of the four-year time limit in section 171B. However, the principle does not extend to works that are more than merely ancillary or secondary and are instead fundamental to or causative of the change of use itself.

41. Thirdly, the language used in the authorities to convey the meaning and scope of the *Murfitt* principle is significant. It indicates the narrowness of the principle, and demonstrates the court's intent to confine it within the statutory scheme. Thus the relationship between the unauthorised change of use and the operational development generated by it has consistently been described in the cases in terms of the operational development being "ancillary to" the change of use (see the judgment of Waller L.J. in *Murfitt*, at p.260, the judgment of Richards L.J. in *Welwyn Hatfield Borough Council*, at paragraph 32, and the judgment of the deputy judge in *Newbury District Council*, at pp.335 to 337). The word "ancillary" recurs. Operational development carried out "in its own right", or "fundamental to or causative of" the change of use is not "ancillary" to that change of use. Other words and phrases have been used to express the idea of the operational development serving, or being subordinate or secondary to, the change of use. These include the phrase "part and parcel of the material change" (*Somak*, at p.256), and the words "integral" (*Somak*, at p.256; *Shephard and Love*, at p.831; *Newbury District Council*, at pp.333 to 334; the judgment of Richards L.J. in *Welwyn Hatfield Borough Council*, at paragraph 32; and *Kestrel Hydro*, at paragraphs 28 and 30), "associated" (*Kestrel Hydro*, at paragraph 28), and "entailed" (*Kestrel Hydro*, at paragraph 26). Whether these words are truly synonymous in this context, as Mr Edwards submitted, they all have the sense that the operational development envisaged by the *Murfitt* principle is, as the word "ancillary" implies, subordinate or secondary to the material change of use. I agree with Lieven J.'s description of the kind of works to which the principle has been applied as "secondary, ancillary or "associated with" the change of use", and "facilitative only" (paragraph 35 of her judgment). This explains what the principle does in practice, as the court has consistently held.

42. Fourthly, therefore, the *Murfitt* principle does not support the removal of a building or other operational development that is "a separate development in its own right", the concept referred to by the deputy judge when considering the tennis court in *Newbury District Council* (at p.336), or, as Lieven J. put it in her judgment in this case, works "fundamental to or causative of the change of use" (paragraph 35). Where the operational development has itself brought about the change of use, the *Murfitt* principle is not engaged. This was the basis for what Richards L.J. said in paragraph 32 of his judgment in *Welwyn Hatfield Borough Council*, acknowledging that the enforcement notice in *Murfitt* was "very different" from one that required the removal of a dwelling house, as in that case. Obiter as they were, his observations were not doubted by the Supreme Court in that case, or by this court in *Kestrel Hydro* (at paragraphs 32 to 34). In my view they were right. Bringing within the scope of the *Murfitt* principle operational development that has itself caused the material change of use would have gone against the statutory scheme, undermining the different time limits in section 171B, and compromising, if not removing altogether, the immunity of operational development from enforcement action after four years (section 171B(1)). What immunity would then remain for a building when a change of use had taken place as a consequence of its construction? It would presumably have remained open to the

local planning authority to take enforcement action against such buildings for a period of ten years. This would have negated the effect of section 171B(1).

43. And fifthly, this understanding of the *Murfitt* principle is not displaced by the submission that it would create "useless" buildings, beyond the reach of enforcement action. Under the different time limits in section 171B(1) and (3) it was inevitable that in some cases a building erected without planning permission would become immune from enforcement but the material change of use generated by the construction of the building would not, with the consequence that a "useless" building would remain after the change of use had been successfully enforced against (see the judgment of Lord Mance in *Welwyn Hatfield Borough Council*, at paragraphs 16 and 17, and my judgment in *Kestrel Hydro*, at paragraph 31, referring to the discussion of "Immunities" in chapter 7 of the Carnwath Report). In those circumstances, the local planning authority may have had to consider whether it was expedient to enforce against the material change of use even though it would have been lawful to retain the building itself. This would be a matter of judgment for the authority. It may have been that a grant of planning permission for a different use of the building, or even, with suitable conditions, the same use, would accord with relevant policy. Or it may have been, no doubt rarely, that requiring the removal of the building under section 102 of the 1990 Act, with the requisite payment of compensation, would have been the appropriate course to take.

44. Whether the *Murfitt* principle is engaged in a particular case will always be a matter of fact and degree. But the principle itself must not be lost. It is not enough to say that an inspector, when applying the principle, must undertake an evaluative judgment, subject only to *Wednesbury* review. That judgment must be exercised on a correct understanding of the principle itself. The parameters set by the statutory scheme must be kept in mind. Only then can the principle be lawfully applied.

45. In my view the elasticity for which Mr Simons contended in the *Murfitt* principle was incompatible with the distinction between operational development and change of use in the time limits for enforcement under section 171B. The construction, without planning permission, of a new dwelling house on an undeveloped site, as took place here, was operational development to which the four-year time limit under section 171B(1) applied, not the ten-year time limit for material changes of use under section 171B(3). Otherwise, section 171B(1) would have become obsolete, or largely so. Building a dwelling house on land previously undeveloped will, of course, be likely to result in a change of use of that land. But this does not mean that there was a ten-year time limit for enforcement against such operational development, when the statutory time limit for enforcing against unauthorised operational development was four years under section 171B(1). That was not the effect of the principle in *Murfitt*.

46. I therefore do not accept that the determining question for the court in this case is purely whether it was *Wednesbury* unreasonable for the inspector to find that the construction of "The Goose House" was "part and parcel" of the change of use. At the outset he had to direct himself appropriately on the meaning and scope of the principle in *Murfitt*. If he did not direct himself as he should, his decision on the ground (d) appeal was flawed by legal error.

47. That, in my view, is what happened here. The inspector did misdirect himself, and in doing so he made an error of law. Though he purported to follow the reasoning of this court in *Kestrel Hydro* and other relevant cases, he did not succeed in doing so. In

paragraph 15 of the decision letter he acknowledged that "The Goose House" and "building E", whose construction was completed more than four years before the enforcement notice was issued, would "in their own right" be immune from enforcement under section 171B(1) of the 1990 Act. He went on to consider whether the removal of these structures could nonetheless be required, to restore the land to its condition before the breach of planning control. In paragraph 16 he referred to some of the relevant authorities, including *Murfitt*, *Welwyn Hatfield Borough Council*, and *Kestrel Hydro*. And he acknowledged that they do not embrace operational development of a nature and scale exceeding what is truly integral to the material change of use as the alleged breach of planning control, nor override the regime of different time limits for different types of development in section 171B.

48. Having done that, however, he went on in paragraph 17 to recast the *Murfitt* principle to the concept of the operational development in question being "supportive" of the change of use. The penultimate sentence in that paragraph is not entirely easy to understand, but it seems clear that he discounted the concept of the operational development being "ancillary" or "incidental" to the material change of use. He said he found "nothing in the cases cited to indicate that the development must necessarily be capable of being described as ancillary or incidental". It was, he said, "sufficient that it is part and parcel of, and integral to the change of use", a proposition he thought was justified by the Court of Appeal's decision in *Kestrel Hydro*.

49. This understanding of the *Murfitt* principle was incorrect. The court has consistently held that, to come within the principle, the operational development in question must be "ancillary" or "incidental" to the change of use itself. The inspector also discounted the relevant observations of Richards L.J. in *Welwyn Hatfield Borough Council*, a case where the facts were perhaps closer to those of this case than any of the other authorities. This too, I think, was wrong. By putting aside the essential requirement of the *Murfitt* principle that the works must be "ancillary" or "incidental" to the change of use, the inspector effectively expanded the principle beyond its boundaries to a broad jurisdiction to pursue enforcement action within the ten-year time limit under section 171B(3) against operational development plainly falling under the four-year limit in section 171B(1). And his conclusions in paragraphs 18 to 21 clearly hinged on this misunderstanding of the principle in *Murfitt*.

50. Had the inspector understood the *Murfitt* principle as it has been recognised by the court, it is difficult to see how he could have concluded that the material change of use in this case was not, in reality, the consequence of, and caused by, the construction of "The Goose House" as "a separate development in its own right" (as it was put in *Newbury District Council*). He would, I think, have acknowledged that the facts here were materially different from those of *Kestrel Hydro*, and that the operational development involved in the erection of "The Goose House" was not merely "ancillary" or "incidental" to the material change of use, but, in the words of Lieven J., "fundamental to or causative of [that] change of use" (paragraph 35).

51. To conclude on this issue, the inspector did misdirect himself on the *Murfitt* principle and thus misapplied it. This was fatal to his decision on the ground (d) appeal, and enough for the section 289 appeal to succeed.

*The second issue – was the inspector's decision irrational?*

52. Given my conclusion on the first issue, there is no need to decide the second, which concerns the alternative argument that the inspector's conclusion was in any event irrational. There may be force in that argument, but I express no view upon it.

*Conclusion*

53. For the reasons I have given, I would dismiss the appeal.

*Postscript*

54. This judgment must be read bearing in mind the change to the statutory time limits for enforcement action in section 171B that has now been brought about by section 115 of the 2023 Act. Although different time limits for enforcement will continue to apply to breaches of planning control that occurred before 25 April 2024, this reform of the statutory scheme will clearly affect future cases where the facts are similar to these (see paragraph 14 above).

**Lord Justice Coulson:**

55. I agree.

**Lady Justice Andrews:**

56. I also agree.