*983 Sage v Secretary of State for the Environment, Transport and the Regions and another

Positive/Neutral Judicial Consideration

Court
House of Lords

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ICLR

House of Lords

Lord Nicholls of Birkenhead , Lord Hope of Craighead , Lord Hobhouse of Woodborough , Lord Scott of Foscote and Lord Rodger of Earlsferry

2003 Jan 30; April 10

Planning—Enforcement notice—Validity—Erection of uncompleted dwelling house in breach of planning control—No further building work in four years before notice served—Uncompleted work only affecting interior of building and not external appearance—Whether completion amounting to "development" requiring planning consent—Whether dwelling house "substantially completed"—Whether enforcement notice served in time— Town and Country Planning Act 1990 (c 8), ss. 55(2)(a), 171(B)(1) (as inserted by Planning and Compensation Act 1991 (c 34), s. 4)

The local planning authority served an enforcement notice on a landowner informing him that he was in breach of planning control in partially erecting a dwelling house, and requiring its removal. No building work was carried out on the structure during the four years preceding service of the notice, and the building was unfit for habitation since the ground floor consisted of rubble, there were no service fittings or staircase, the interior walls were not plastered and the windows were unglazed. The landowner appealed against the enforcement notice on the ground that the building was an agricultural building for which planning permission was not required, or alternatively, that the notice had not been served within the time limit of four years after "the operations were substantially completed" as specified by section 171(B)(1) of the Town and Country Planning Act 1990 [1] . An inspector appointed by the Secretary of State rejected the appeal and held that, having regard to the layout and appearance of the building, it was not an agricultural building but a dwelling house, that the time limit of four years did not begin to run until the whole operation of creating the dwelling house was substantially completed and that, as a question of fact and degree, the house was a building in the course of construction and was not "substantially completed". The landowner appealed to the High Court on the ground that since all the work remaining to be done on the dwelling house was either internal work or work which did not materially affect the external appearance of the building it was, pursuant to section 55(2)(a) of the Act, work which did not amount to the development of land for which planning permission was required so that there were no further building operations to which an enforcement notice could apply, and that therefore the operations referred to in section 171B(1) must have been completed. The judge allowed the appeal on those grounds and the Court of Appeal upheld that decision.

On appeal by the planning authority[amp]ldash;

Held , allowing the appeal, that the exception to "development" in section 55(2)(a) applied only to operations carried out on a completed building for its "maintenance, improvement or other alteration", and did not apply to work carried out by way of completing an incomplete building; that the work needed to complete the dwelling house was not within the exception so that it still required planning permission and involved breaches of planning control to which an enforcement notice could apply; that a holistic approach was implicit in planning control and if a ***984** building operation was not carried out, both externally and internally, fully in accordance with planning permission, the whole operation was unlawful; and that, accordingly, the building operation was not "substantially completed" for the purposes of section 171(B)(1) and the enforcement notice was not served out of time (post, paras 1 , 2 , 6 , 8 , 19 – 29 , 42 – 44).

Decision of the Court of Appeal [2001] EWCA Civ 1100 reversed.

The following cases are referred to in the opinion of Lord Hobhouse of Woodborough:

Belmont Farm Ltd v Minister of Housing and Local Government (1962) 13 P & CR 417, DC
Ewen Developments Ltd v Secretary of State for the Environment [1980] JPL 404, DC
Howes v Secretary of State for the Environment [1984] JPL 439
McKay v Secretary of State for the Environment [1989] JPL 590
Somak Travel Ltd v Secretary of State for the Environment [1987] JPL 630

The following additional case was cited in argument:

R v Secretary of State for the Environment, Ex p Baber [1996] JPL 1034, CA

APPEAL from the Court of Appeal

By leave of the House of Lords (Lord Bingham of Cornhill, Lord Mackay of Clashfern and Lord Hobhouse of Woodborough) granted on 24 April 2002, Maidstone Borough Council, in its capacity as local planning authority, appealed from a dismissal by the Court of Appeal (Schiemann, and Keene LJJ and Sir Murray Stuart-Smith) on 28 June 2001, of the planning authority's appeal from a decision of Mr Duncan Ousley QC sitting as a deputy judge of the Queen's Bench Division on 11 October 2000, allowing an appeal by the landowner, Alan Frank Sage, from a decision dated 16 December 1999 of an inspector appointed by the Secretary of State for the Environment, Transport and the Regions, upholding an enforcement notice served on 19 March 1999 by the planning authority on the landowner, informing him that the planning authority considered he was in breach of planning control in partially erecting a dwelling house at Holly Farm, Otham, Maidstone, Kent.

The facts are stated in the opinion of Lord Hobhouse of Woodborough.

Representation

Stephen Hockman QC and Richard Barraclough for the planning authority.
Alice Robinson for the landowner.

LORD NICHOLLS OF BIRKENHEAD

Their Lordships took time for consideration.

10 April. **LORD NICHOLLS OF BIRKENHEAD**

1. My Lords, I have had the opportunity of reading a draft of the speech of my noble and learned friend, Lord Hobhouse of Woodborough. I agree that, for the reasons he gives, this appeal should be allowed.

LORD HOPE OF CRAIGHEAD

2. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Hobhouse of Woodborough. I agree with it, and for the reasons which he has given I too would allow the appeal.

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3. As my noble and learned friend has explained, Mr Sage's primary argument at first instance was that the building was an agricultural building for which he did not need planning permission. This was a pure question of fact, and it was resolved against him conclusively by the inspector's finding that the building was not an agricultural building but was best described as a dwelling house that was in the course of construction.

4. This led to the alternative argument that the notice was out of time because the operations that must be substantially completed for the purpose of section 171B(1) of the Town and Country Planning Act 1990 comprise the operations which constituted a breach of planning control, or (as it was put) the operational development, and not the whole operation of completing the dwelling house. The inspector's view was that the four-year period did not begin until the whole operation of creating the dwelling house was substantially completed. He then held, treating the question as one of fact and degree, that the building in this case was not a substantially completed dwelling house. Here again the inspector's decision on the facts went against Mr Sage and the contrary is not longer arguable. The question which remains is whether the inspector was right when he said that the four-year period did not begin until the whole operation of creating the dwelling house was substantially completed.

5. Mr Sage's argument is that the reference in section 171B(1) to the date "on which the operations were substantially completed" has to be read in the light of the wording of the other relevant sections in the 1990 Act, and that by tracing the language of that subsection back through section 171A(1)(a) the reader is required to bring into account the definition of "development" in section 55(1) of the Act, those operations which section 55(2)(a) says are not to be taken to involve development and the definition of the word "building" in section 336(1) . If this approach is right the position is, as Keene LJ explained in paragraphs 27–31 of his judgment, capable of being resolved quite simply by saying that what have to be substantially completed are those operations which amount to a breach of planning control and that operations and works which do not amount to development because they fall within section 55(2)(a) are not to be taken into account. On this approach, it does not matter that the inspector did not think that the building was a dwelling house. All one needs to find is that there is a building which has been erected in breach of planning control.

6. I was initially attracted to this approach, as it seemed to me to be consistent with the language of the statute and to be unlikely, as Keene LJ said in paragraph 32 of the judgment, to give rise to practical difficulties. But I have in the end been persuaded, with respect, that the language of the statute is open to a different interpretation and that it makes better sense of the legislation as a whole to adopt the holistic approach which my noble and learned friend has described. What this means, in short, is that regard should be had to the totality of the operations which the person originally contemplated and intended to carry out. That will be an easy task if the developer has applied for and obtained planning permission. It will be less easy where, as here, planning permission was not applied for at all. In such a case evidence as to what was intended may have to be gathered from various sources, having regard especially to the building's physical features and its design.

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7. If it is shown that all the developer intended to do was to erect a folly, such as a building which looks from a distance like a complete building[amp]ldash;a mock temple or a make-believe fort, for example[amp]ldash;but was always meant to be incomplete, then one must take the building when he has finished with it as it stands. It would be wrong to treat it as having a character which the person who erected it never intended it to have. But if it is shown that he has stopped short of what he contemplated and intended when he began the development, the building as it stands can properly be treated as an uncompleted building against which the four-year period has not yet begun to run.

8. It must be emphasised that it is not for the inspector to substitute his own view as to what a building is intended to be for that which was intended by the developer. But that was not what the inspector did in this case. It was not just that the building looked to him like a dwelling house that was in course of construction. His conclusion was supported, in his view, by an application which Mr Sage had made in 1994 to use the building for tourist accommodation and by his finding that that remained Mr Sage's stated intention. These matters were relevant to the question which he had to decide, and in my opinion he was entitled on the facts which he found to reach the conclusion which he did.

LORD HOBHOUSE OF WOODBOROUGH

9. My Lords, on 19 March 1999, the Maidstone Borough Council (the council) as the relevant planning authority issued and served on Mr Sage an enforcement notice (the notice) under Part VII of the Town and Country Planning Act 1990 . The notice informed him that the council considered that he was in breach of planning control in erecting (or, as later amended, partially erecting) a dwelling house and requiring its removal. Mr Sage appealed raising various grounds under section 174(2) . Besides applying for planning permission ex post facto, the two main grounds of his appeal were firstly that the building was an agricultural building and did not require planning permission and, secondly, that the notice had been served outside the four-year time limit permitted by section 171B(1) , a section inserted into the Act by the Planning and Compensation Act 1991 .

10. Section 171B(1) provides:

> "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."

This provision followed the lead given by Robert Carnwarth QC in his report to the Secretary of State for the Environment entitled Enforcing Planning Control (HMSO February 1989) which called for greater simplicity and clarity in the law and procedures of enforcement which had become excessively technical and complex and open to evasion and abuse. There can be no doubt that the underlying purpose behind section 171B(1) was to introduce a single easily applied limitation period for operations. Section 171B(2) and (3) adopted in respect of change of use and other breaches four-and ten-year periods respectively, running in either case from the date of the breach.

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11. The point raised by this appeal by the council to your Lordships' House concerns the construction of section 171B(1) and the starting point of the four-year period[amp]ldash;i e "the date on which the operations were substantially completed". Mr Sage contends that it means the date after which the building work remaining to be done would no longer itself involve a breach of planning control, because, if taken on its own, it would not require planning permission. The judge, Duncan Ouseley QC, sitting as a deputy High Court judge, and the Court of Appeal summarised the point in a brief sentence: "The

building operations are complete when those activities which require planning permission are complete." The council on the other hand argue for a holistic construction, asking: has the building been substantially completed and, if so, when? The council, like the inspector, adopt the passage in the Ministry Circular No 10/97, para 280 .

> "in the case of a single operation, such as the building of a house, the four-year period does not begin until the whole operation is substantially complete. What is substantially complete must always be decided as a matter of fact and degree … All the relevant circumstances must be considered in every case."

The inspector, deciding in favour of the council and upholding the notice, applied the latter approach; the judge and the Court of Appeal (Schiemann LJ, Keene LJ and Sir Murray Stuart-Smith), deciding in favour of Mr Sage, preferred the former.

12. The inspector heard Mr Sage's appeal (together with two other appeals concerning the same parties) over the space of two days including a view of the relevant premises. Both parties were legally represented and adduced oral and written evidence. It was accepted by the council that Mr Sage had not done any further building work on the relevant structure during the last four years before the notice was served. It was also common ground that it was an "operation" case falling within section 171B(1) not a change of use case under subsection (2) .

13. The inspector started by considering Mr Sage's contention that it was an agricultural structure and therefore he had never needed any planning permission to erect it. He considered how it was constructed and concluded that it was constructed with domestic not agricultural features, as a dwelling not as a building to be used for agricultural purposes. It was constructed with cavity block walls. Three elevations were clad with tiles and the fourth with timber boarding (but the cladding was incomplete). The entrance door and the fenestration were typical of a dwelling designed and constructed for human habitation not agricultural use. The external tile hung walls in his view supported the same conclusion. The building had an upper floor with further fenestration though no stairway had been installed. He applied the test of physical layout and appearance derived from *Belmont Farm Ltd v Minister of Housing and Local Government (1962) 13 P & CR 417* and *Mckay v Secretary of State for the Environment [1989] JPL 590* .

14. The inspector rightly did not investigate the intentions of Mr Sage at various stages in the history nor the uses he had made of the structure from time to time. The character and purpose of a structure falls to be assessed by examining its physical and design features. The relevance of the assessment is to determine whether or not the building operation is one requiring planning permission. The actual use made of the building does not alter the ***988*** answer to be given. Keeping a pig in the sitting-room or hens in the kitchen does not turn a dwelling house into an agricultural building even if the humans move out. Permission for a change of use may have to be applied for but that would be a separate question. The starting point for considering the permitted use of a new structure is the character of the building for which permission has been given or does not require to be given (section 75(3)): "the permission shall be construed as including permission to use the building for the purpose for which it is designed"

15. He expressed his conclusion in the words:

> "As a matter of fact and degree, I consider that, having regard to its layout and appearance, [this building] is not an agricultural building and was not designed as such … [It] is best described as a dwelling house that is in course of construction."

Having read the evidence and considered the photographs which have been included in our papers, the inspector's conclusion on this point would seem to have been inevitable. Therefore that ground of appeal failed.

16. This led on to Mr Sage's further ground for challenging the notice, that it was out of time. The starting point is that the building is to be classified as an unfinished dwelling house. It was unfit for habitation. The floor at ground level consisted of rubble. There were no service fittings. There was no staircase. The interior walls were unfinished, without lining or plaster. None of the windows, including that on the upper floor, was glazed. One witness refers to the roof-light as being glazed. There was no guttering. Mr Sage had said in evidence that the building had originally been glazed but that the glass had been broken by vandals more than four years earlier and he had not replaced it. Mr Sage's evidence was contradicted by other evidence which was inconsistent with the windows ever having been glazed. It appears that the inspector probably did not accept Mr Sage's evidence on this point. But it was not critical to the inspector's decision nor to those of the judge and the Court of Appeal.

17. On this state of the facts, the issue of the construction of section 171B(1) became critical and was the effective subject matter of Mr Sage's recourse to the jurisdiction of the High Court. On the argument of Mr Sage, it was necessary to consider whether the work needed to complete the structure as a dwelling house was such as of itself to require planning permission, a point which Mr Sage submitted was at least arguable and had not been taken into account by the inspector in arriving at his decision and therefore (as the judge ordered) his decision should be quashed and he be directed to reconsider the appeal against the notice having regard to that factor.

18. It is convenient to examine this argument at the outset although it is not the central point raised by this appeal. Section 57(1) in Part III of the Act provides that (subject to immaterial exceptions) "planning permission is required for the carrying out of any development of land". "Development" is defined in section 55 as meaning: "the carrying out of building, engineering, mining or other operations in, on, over or under land …" Subsection (1A) , added in 1991, amplifies this by providing that "building operations" shall include: "(a) demolition of buildings; (b) rebuilding; (c) structural alterations of or additions to buildings; and (d) other operations normally undertaken by a person carrying on business as a ***989** builder." Subsection (1) is subject to subsection (2) which so far as material provides:

> "The following operations … shall not be taken for the purposes of this Act to involve development of the land[amp]ldash;
>
> (a) the carrying out for the maintenance, improvement or other alteration of any building of works which[amp]ldash;
>
> (i) affect only the interior of the building, or
>
> (ii) do not materially affect the external appearance of the building …"

Mr Sage submits that the work remaining to be done was all either internal work or work which did not materially affect the external appearance of the building.

19. It would be a question of fact whether the external work still to be done would have had a material effect on the building's appearance. But that question would only become significant if the work was work carried out "for the maintenance, improvement or other alteration" of the building. Work carried out by way of completing an incomplete structure would not come within exception (a). So, once it has to be accepted, in accordance with the inspector's finding, that the structure was a dwelling house in the course of construction, it follows that the work would be properly described as work carried out in the course of completing the construction of the building. Exception (a) clearly contemplates and involves a completed building which is to be maintained, improved or altered. It follows that an essential element in the argument of Mr Sage is missing. He cannot on the facts of this case rely upon exception (a) to say that he would not still require planning permission to complete the structure because it would not have amounted to a "development" (the premise upon which his argument under section 171B is founded). The breach of planning control would not have been exhausted; it would be continuing.

20. The Court of Appeal rejected this conclusion for two reasons. Keene LJ, in paragraph 26, said that so long as the structure had progressed to the stage where it could be said to have an interior, i e, as Mr Sage's counsel put it, say three or four walls and a roof, exception (a) could be applied and the developer could potentially take advantage of it. Schiemann LJ, in paragraph 37, thought that the council's argument introduced a subjective element: "I can see no policy reason why we should construe section 55(2)(a) as limited in its application to buildings which have been completed according to some notional plan." I do not accept either argument. It is not a question of referring to "some notional plan". Ex hypothesi, the erection is an uncompleted dwelling house; what is involved is its completion as a dwelling house by carrying out works essential for a completed dwelling house. The approach of Keene LJ not only does violence to the language used in exception (a) but also would make a mockery of planning control by inviting abuse and evasion.

21. Returning now to section 171B(1), it can be seen that the same words have been used by the draftsman to describe building operations as in section 55(1) , inviting, it is said, the reader to read the two sections together. However it still does not equate the term "operation" with the term "development" as further appears from section 191 . But the more important part of Mr Sage's argument is that such a cross-reference is required by the words: "Where there has been a breach of planning control consisting in the carrying out without planning permission of building … operations …" ***990*** The phrase "the date on which the operations were substantially completed" should, he submits, be answered by asking when did those operations reach the stage at which no further breach of planning control was involved. He would then answer that question by reference to exception (a) in section 55(2) . Section 171A(1) provides that: "For the purposes of this Act … carrying out development without the required planning permission … constitutes a breach of planning control." He thus argued that the enforcement notice could only relate to breaches of planning control and that, once no further breach was involved in completing the development, there could be no further building operations to which an enforcement notice and section 171B could apply. Therefore the operations referred to in section 171B must have been completed.

22. Again these arguments were accepted by the Court of Appeal. Keene LJ, at paragraph 31, said:

> "I conclude that, as a matter of law, operations and other works which do not amount to development are not to be taken into account in deciding whether there has been substantial completion within the meaning of section 171B(1) . As the deputy judge pointed out, where all the operations amounting to development have been carried out there is nothing remaining against which the local planning authority could take enforcement action."

Schiemann LJ added, at paragraph 38:

> "I am presently inclined to the view (without the matter having been fully argued) that substantial completion has taken place when there is enough to enable a planning authority to judge whether or not the building has sufficient adverse effects to make it expedient to issue an enforcement notice."

The section might have been drafted as Schiemann LJ prefers but it was not. The criterion he suggests would fly in the face of the simplicity and clarity that the revisions of planning control law were seeking to achieve. As regards the reason given by Keene LJ and the judge, it involves giving a limited meaning to the phrase "building operations", not its natural meaning, and does so on the basis of adopting an extended meaning to exception (a) which is open to the objections I have already referred to. But the most substantial objection to his approach is that it is contrary to the holistic approach upon which this part of planning law is based.

23. When an application for planning consent is made for permission for a single operation, it is made in respect of the whole of the building operation. There are two reasons for this. The first is the practical one that an application for permission partially to erect a building would, save in exceptional circumstances, fail. The second is that the concept of final permission requires a fully detailed building of a certain character, not a structure which is incomplete. This is one of the differences between an outline permission and a final permission: section 92 of the Act. As counsel for Mr Sage accepted, if a building operation is not carried out, both externally and internally, fully in accordance with the permission, the *whole* operation is unlawful. She contrasted that with a case where the building has been completed but is then altered or improved. This demonstrates the fallacy in Mr Sage's case. He comes into the first category not the second.

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

25. These decisions underline the holistic structure of planning law and contradict the basis upon which the Court of Appeal reached its decision in favour of Mr Sage.

26. Finally, it was argued for Mr Sage that the inspector should have had express regard to an inspector's decision letter reported in *[1972] JPL 385* where the facts bore some similarity to those of the present case and he had held the enforcement notice to be out of time. However that decision was based upon the finding by the inspector that "the appeal building had become a viable building more than four years before [the] service of the notice and that in the form which it then took it [was] immune from enforcement action". The inspector's finding in the present case was that the structure was best described as a dwelling in the course of construction. The inspector was right to think that the 1972 decision did not help; indeed it was adverse to Mr Sage's case.

27. Accordingly the inspector's decision was correct. The notice had not been served after the end of the period of four years beginning with the date on which the building operations were substantially completed. Indeed they had still not been substantially completed at the date of the notice. The appeal should be allowed and Mr Sage's CPR Pt 8 proceedings dismissed and the orders of the judge and the Court of Appeal set aside, including the costs orders made in favour of Mr Sage.

28. Leave to appeal to your Lordships' House was given "on terms that, if successful, the petitioners do not seek any order for costs against the respondent". Accordingly no order will be made in respect the costs in this House or in the courts below.

LORD SCOTT OF FOSCOTE

29. My Lords, I have had the advantage of reading in advance the opinion of my noble and learned friend, Lord Hobhouse of Woodborough, and gratefully adopt his exposition of the facts and statutory provisions that have given rise to this appeal to the House. I, like your Lordships, have come to the conclusion that this appeal by Maidstone Borough Council should be ***992** allowed and I am in general agreement with the reasons expressed by Lord Hobhouse as to why that should be so. There is, however, an aspect of this case which seems to me unsatisfactory and I think I should explain what it is.

30. The purpose of section 171B of the Town and Country Planning Act 1990 (added to the 1990 Act by amendment with effect from 2 January 1994: see section 4, Planning and Compensation Act 1991 and the Planning and Compensation Act 1991 (Commencement No 5 and Transitional Provisions) Order 1991 (SI 1991/2905)) was, as Lord Hobhouse has explained in paragraph 10 of his opinion, to introduce a straightforward, easily applied, set of time limits within which enforcement action to remedy breaches of planning control must be brought. The section divides breaches of planning control into three categories.

31. First, where the breach consists of "building, engineering, mining or other operations" over land, enforcement action cannot be taken after four years from "the date on which the operations were substantially completed" (subsection (1)). Second, where the breach consists of a change in the use of a building to use as a single dwelling house, enforcement action cannot be taken after four years "beginning with the date of the breach" (subsection (2)). And, third, in the case of any other breach of planning control, enforcement action cannot be taken after ten years beginning with the date of the breach (subsection (3)).

32. In the present case Mr Sage, without planning permission, commenced the building of a dwelling house. In 1994, however, while the dwelling house was still uncompleted he ceased his building works. The building, such as it then was, although uncompleted as a dwelling house, had reached a stage of construction in which it was capable of use for other purposes. It could, in particular, be used for agricultural purposes. Hay, straw or grain could be stored in it. Agricultural machinery of a size small enough to be manoeuvred through the single entrance door could be sheltered in it. Livestock or poultry could be kept in it.

33. The council served an enforcement notice on Mr Sage on 19 March 1999. This was more than four years after the building work had ceased. The issue before the inspector centred on the question whether or when the building operations were "substantially completed". It is, in my opinion, important to notice how the argument proceeded before the inspector and in the courts below.

34. The inspector recorded in his decision letter (paragraph 22) that the issue was whether the building was an agricultural structure, as Mr Sage contended, or an uncompleted dwelling house, as the council contended. In paragraph 26 the inspector made the important finding that "as a matter of fact and degree … having regard to its layout and appearance, [the building] is not an agricultural building and was not designed as such". This finding was not challenged in the courts below and was expressly accepted before your Lordships by counsel for Mr Sage.

35. Accordingly, in the courts below and before the House the argument was whether, for the purposes of section 171B(1) the building of the intended dwelling house, in the state in which the building works stood in 1994, was "substantially completed". My noble and learned friend, Lord Hobhouse, has analysed the arguments and concluded that the inspector's decision that the building operations were not substantially completed was **993* correct. On the premise that the inspector was faced with an uncompleted dwelling house, I respectfully agree.

36. My concern, however, is with the premise. I have no doubt at all that the inspector was right in concluding that what had been designed by Mr Sage and what he had been building was a structure intended for use as a dwelling house. But the classification of a building, for planning purposes and as a matter of common sense, is not immutable but can change if the use to which the building is put changes. It is a common feature in this country for agricultural barns to be converted into dwellings. Once the conversion is complete and use of the property as a dwelling commences, and perhaps at an earlier point of time, the classification of the building as a barn ceases to be accurate. Planning permission for any building operations involved in the conversion and for the change of use should, of course, have been obtained. But the change in the appropriate classification of the building, from agricultural barn to dwelling house, would not depend on whether planning permission had been obtained. It would be a question of fact.

37. Conversely, dwellings may become agricultural barns. There are throughout the countryside, usually well off the beaten track, innumerable examples of buildings which have been farm workers' cottages but which, with increasing agricultural mechanization, have become surplus to farming requirements and have, usually in some state of disrepair, become used for storage of hay or straw or for sheltering livestock. Planning permission is, I suspect, very rarely sought for this change of use, but here, too, classification of the building as a dwelling or as a barn is a question of fact, dependent on the permanency of the use to which it is being put and the intentions of the owner in that regard.

38. Just as change of use can change the appropriate classification of a completed building so, too, in my opinion, there can be no logical objection to the appropriate classification of a building in course of construction being changed by use, or by intentions for future use, of the uncompleted building inconsistent with its original classification. As with a completed building, the change could be either a change from an uncompleted agricultural building to an uncompleted dwelling, or a change from an uncompleted dwelling to an agricultural barn, whether completed or uncompleted.

39. For example, under the Town and Country Planning General Development Order 1988 (SI 1988/1813) planning permission is in general not necessary for the erection of a building which is reasonably necessary for the purposes of agriculture. A farmer who commenced the construction of such a building would not, by doing so, be in breach of planning control. But if, before the building operations were complete, his intentions changed and he began to install a bathroom and other features indicative of a dwelling, the operations would be in breach of planning control. Conversely, I suggest, in a case where the construction of a building as an additional dwelling has been commenced by a farmer but before the building is complete he changes his mind, decides to use the uncompleted building for agricultural purposes and actually does commence and continue that use, the classification of the structure as an uncompleted dwelling would no longer be accurate. The structure would have become an agricultural building.

40. The correct application of the section 171B time limits to a case where the building operations intended at the outset have not been *994 completed but the use to which the structure has been put since the building operation ceased has changed the nature of the building from one which did require planning permission to one which did not may raise difficult questions of fact and law.

41. In principle, however, there must, in my opinion, be some time limit after which it would no longer be open for enforcement action in respect of the original planning breach to be taken. The present case may be taken as an example. The building works ceased in 1994. The enforcement action was taken in 1999. Let it be assumed that at some point between those two dates Mr Sage decided he would not complete the originally intended dwelling but would instead use the structure for his agricultural purposes and that he thereafter did use the structure for those purposes. It cannot, in my opinion, be the case that for an indefinite and open-ended period the council would remain free to commence enforcement action contending that the structure still remained a substantially uncompleted dwelling house. Such a state of affairs would, in my opinion, be inconsistent with the scheme of section 171B.

42. These reflections are of no assistance to Mr Sage in the present case. There is no evidence of the use to which the uncompleted structure was put by Mr Sage in the period between 1994 and 1999. There are no facts in evidence which enable to be identified a date after which the 1994 structure could be regarded as no longer an uncompleted dwelling but as having become an agricultural building.

43. There have, naturally, been no submissions from counsel on either side as to how section 171B would have had to be applied if there had been such evidence. It seems to me, however, well arguable that it would no longer be open for enforcement action to be taken in respect of an uncompleted dwelling house if a period of more than four years had elapsed since the structure had become, de facto, an agricultural building. I think it is important to be clear that nothing in the result of the present case decides that issue. However, I agree that this appeal must be allowed and the order proposed by Lord Hobhouse should be made.

LORD RODGER OF EARLSFERRY

44. My Lords, I have had the opportunity of reading the speech of my noble and learned friend, Lord Hobhouse of Woodborough, in draft. For the reasons that he gives I too would allow the appeal and make the order which he proposes.

S H

Representation

Solicitors: Sharpe Pritchard; Brachers, Maidstone .

Appeal allowed. No order as to costs.

Footnotes

1 Town and Country Planning Act 1990, s. 55(2)(a) : see post, para 18 . S 171(B)(1) , as inserted: see post, para 10 .

