

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
(SIR GRAHAM EYRE, acting as Deputy High Court Judge)

93/1156/D

Royal Courts of Justice
Strand
London WC2

Thursday 16 June 1994

B e f o r e :

LORD JUSTICE GLIDEWELL

LORD JUSTICE PETER GIBSON

LORD JUSTICE HENRY

- - - - -

J L ENGINEERING & ANR

Appellant

- v -

SECRETARY OF STATE FOR THE ENVIRONMENT & ANR

... Respondent

- - - - -

(Computer Aided Transcript of the Palantype Notes of
John Larking Verbatim Reporters, Chancery House, Chancery Lane
London WC2 Tel: 071 404 7464
Official Shorthand Writers to the Court)

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MR. G MORIARTY QC & MR. R FOOKES (Instructed by Albinson Napier
WAI 1HP) appeared on behalf of the Appellant

MR. S RICHARDS (Instructed by solicitors to the Secretary of
State for the Environment) appeared on behalf of the Respondent

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J U D G M E N T
(As approved by the Court)

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Thursday 16 June 1994

LORD JUSTICE GLIDEWELL: This is an appeal against a decision of Sir Graham Eyre QC, sitting as a Deputy High Court Judge, given on 1 February 1993. The appeal raises two issues, the first, a question of principle as to the proper construction of provisions of the Town and Country Planning Act, the second a matter which has arisen during the proceedings in this case.

The Appellant company is the occupier of an engineering works in Chapel Lane, Rixton, near Warrington in Cheshire, in which it manufactures harvesting and other agricultural machinery. The appeal site lies behind, i.e. to the west of, the Appellant's works. It is a square area of open land with no buildings upon it. In 1988 one of the Appellants purchased the site. The site was then covered with hard material and was used thereafter for the storage of material and machinery to be used in, or produced by, the engineering works.

On 13 December 1990, Warrington Borough Council, the Local Planning Authority, served two Enforcement Notices on the Appellants. Both related to the site I have described. Notice A related to material change of use. It alleged that there had been a breach of planning control by:

"The making of a material change in the use of the land from use for the purposes of agriculture to use for the purposes of storage of various metal components and items of equipment, the parking of motor vehicles, and the stationing of various skips and trailers."

The notice required that use to cease and the equipment and vehicles all to be removed. The reasons for the issue of the

notice were essentially that the site lay within the Green Belt and was subject to Green Belt policies.

The second notice related to what, in the jargon and on its face, is called "operational development". The alleged breach of planning control was:

"The carrying out of an engineering or other operation on the land, namely.....levelling off of the substance known as burnoff or some other substance, to form a hardstanding."

The Appellants appealed to the Secretary of State for the Environment against both Enforcement Notices on the grounds contained in section 174 (2) of the Town and Country Planning Act 1990,

- (a) that planning permission should be granted for the alleged breaches of planning control;
- (b) that the matters alleged in the enforcement notices had not occurred; and
- (h) that the period specified in each notice for compliance was too short.

Success in the appeal regarding the surfacing of the site was, everybody agrees, dependent upon success in the appeal relating to the change of use notice, so it is that which has been in issue throughout.

The fact that the site had been used as alleged, and was being used as alleged, and that the surfacing had been carried out, was not disputed. In my view, the correct ground of appeal was therefore (c) in section 174(2), namely that those matters, that is to say the alleged change of use, did not constitute a

breach of planning control. Nobody has taken this point, and I propose to treat this as if throughout everybody read (b) as meaning (c).

An inspector, Mr. Russon, was appointed to determine the appeals. He did so after a Local Inquiry held on 8 and 9 October 1991. In his decision letter dated 4 February 1992 the Inspector dismissed the appeals but extended the time for compliance. An appeal by the Appellants to the High Court on points of law under section 289 of the 1990 Act came before Sir Graham Eyre, and the appeal from him has thus come to us.

There are broadly two issues in this appeal. The first I describe as, did the change of use of the site from use for agriculture to use for storage in conjunction with the engineering works, constitute the breach of planning control alleged, namely the carrying out of development without the required planning permission? The answer involves consideration of some of the basic provisions of the 1990 Act and some fundamental principles of planning law.

By section 57(1) of the 1990 Act:
"Subject to the following provisions of this section planning permission is required for the carrying out of any development of land."

What is development is defined in section 55(1) in terms that have been familiar since the Town and Country Planning Act of 1947:

"Subject to the following provisions of this section, in this Act, except where the context otherwise requires, development means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land."

So far as is material, section 55(2) provides,
"The following operations or uses of land shall not be taken for
the purposes of this Act to involve development of the land

-
(e) the use of any land for the purposes of agriculture or
forestry."

All those provisions have, in substance, remained unaltered since the inception of modern planning legislation in the Act of 1947. At first sight it would appear that a change of use from use for agriculture to use for industrial storage was clearly material, and Mr. Moriarty for the Appellants does not argue to the contrary. Thus it appears that the change of use constituted development, and since no planning permission had been granted for it, amounted to a breach of planning control. However, Mr. Moriarty argues that this analysis is too simplistic. He claims that the site has the benefit of an existing use for industrial storage, that in 1988 his clients resumed that existing use, as they were entitled to do, and thus that there has been no breach of planning control. This argument, which was advanced before the Inspector as well as before Sir Graham Eyre, involved the Inspector in consideration of the history of the site.

After an examination of the evidence put before him of the history, he made findings with great clarity on which I congratulate him. He found the following facts:

(1) From 1942 to 1972 the principal use of the site was for storage in association with the Appellants' adjoining engineering works. Since this use commenced before 1 July 1948, it was an existing use not requiring planning

permission. In paragraph 9 of his decision letter, the Inspector summarized his conclusion on that period of time

in the words:

"As such, it seems to me that in 1972 the site probably had an existing industrial use."

(2) However, in 1973 the use for industrial storage ceased. From 1973 to 1978 the site was cultivated and used for the purposes of agriculture. There was thus a change of use in 1973. The allegation of the Local Planning Authority and for the Secretary of State is that the agricultural use, "supplanted the former industrial use".

(3) In 1988, after the Appellant acquired the appeal site, the Appellant company again started to use the land for the purpose of industrial storage in connection with the engineering works.

It was this change which the Local Planning Authority considered to be development, ie a material change of use without the obtaining of planning permission, and what Mr. Moriarty submits was no more than the resumption of the existing use of the site.

I have used, and the Inspector has used, the phrase "existing use", which needs some explanation. All of the Town and Country Planning Acts since 1947 (the Acts of 1947, 1962, 1971 and 1990) have contained provisions to the effect that development lawfully carried out before 1 July 1948, the date when the Act of 1947 came into force, does not require planning permission under the current legislation. Thus a use of land which commenced lawfully before that date may be continued without the necessity for obtaining permission. This is

frequently referred to as an "existing use right". See, for example, Lord Scarman in Pioneer Aggregates v Secretary of State for the Environment [1985] AC 132 at 141E. It might be more accurate to describe such a right as a "pre-1948 existing use right".

Such a use is to be contrasted with an "established use", ie a use of land which commenced without planning permission after 1 July 1948 but before the beginning of 1964. If an established use certificate is obtained, such a use is immune from enforcement action - the Act of 1990, sections 191 and 192(4). The significance of the reference to 1964 is not relevant for the purposes of this appeal. It involves an excursus into the history of earlier Planning Acts.

Mr. Moriarty has referred to several leading authorities concerned with the concept of abandonment of an existing use right or of an established use, notably the decisions of this Court in Hartley v Minister of Housing and Local Government [1970] 1 QB 413, and White v Secretary of State for the Environment [1989] 2 PLR 29. If land or a building is unoccupied for a time so that it is not being put to any use during that time, the resumption at the end of that period of the former lawful use of the land, (lawful because permitted, established, or with the benefit of a pre-1948 existing use right) normally does not constitute development. Thus, in McKellen v Minister of Housing and Local Government [1966] 198 EG 683, Lord Parker Chief Justice, in the Divisional Court, said:

"It is of course plain that a change from A to X and then from X

to A does not involve development either way, if X is completely nil, no use at all."

The passage was quoted by Lord Denning MR from the transcript of McKellen in his judgment in Hartley at 420C. That passage is not to be found in the EG report. It is noticeable that Lord Parker did not use the phrase "a nil use", which has crept into the currency, and which I find to be a contradiction in terms. However, if a former use, to quote Widgery LJ in Hartley at page 421F:

".....has not merely been suspended for a short and determined period, but has ceased with no intention to resume it at any particular time",

it may be held to have been abandoned. The recommencement thereafter of the earlier use is not the resumption of a lawful use but a material change of use requiring planning permission.

It will be seen that the concept of abandonment applies where the earlier use has ceased completely, and in the intervening period the land is put to no use at all. That was not the case here, since from 1973 the land was used for the purposes of agriculture. For this reason, although I have thought it right in deference to Mr. Moriarty's argument to say something about abandonment, I do not find the decisions on the concept of abandonment of assistance in answering the question before us. Nor do I derive direct help from the decision of the House of Lords in Pioneer Aggregates v Secretary of State for the Environment [1985] AC 132, to the effect that there is no principle of planning law that a valid planning permission can be abandoned by the conduct of the owner or occupier of the land, valuable though Lord Scarman's speech in that case is as

an exposition of the broad principles of the law.

Mr. Moriarty's submission in brief is, quoting his skeleton argument:

"The issue is whether the existing use right to use the land for industrial purposes was lost by virtue of the introduction of this agricultural use. The Appellants' case is that the existing use right for industrial purposes was not lost by reason of its change from industrial use to agricultural use. In the result, the right to use the land for industrial purposes survives and has not been lost."

It is fundamental to Mr. Moriarty's submission that the change of use in 1973 from the use for industrial storage to use for agriculture did not constitute or involve development by virtue of section 55(2)(e) of the Act of 1990. Mr. Moriarty accepts that where there is a material change from a lawful use A to use B (B being a use other than agriculture) and thereafter a further material change from use B back to use A, that second change will constitute development and normally require planning permission. I say "normally" because if, in my example, the first change from A to B was made without planning permission and the Local Planning Authority served an Enforcement Notice alleging that the first change of use was a breach of planning control, then planning permission is not required to change back to use A. (See section 57(4) of the 1990 Act). But with that exception, if there is a material change of use with permission from use A to use B, use B "supplants" use A to use the words of Watkins LJ in Young v Secretary of State for the Environment

[1983] 47 P&CR 165 at 184:

"A further change back to use A will then be development requiring planning permission."

In his judgment at page 10, Sir Graham Eyre quoted a

passage from the judgment of Watkins LJ in Young, and then said:
" In my judgment the concept of one use supplanting or superseding another is wholly apposite and avoids the potential problems associated with the concept of spent permissions, a basis on which the Court of Appeal proceeded in Cynon Valley Borough Council - Secretary of State for Wales and Oi Mee Lam [1987] 53 P&CR 68 as identified in the West Oxfordshire case to which I have already referred. It is a happy circumstance which may or may not be fortuitous that the Inspector found as a fact -- and it is a matter of fact -- that the agricultural use supplanted the previous lawful existing use, namely the industrial use or a use ancillary to the industrial use. It would be difficult to conjure up a more convincing example of supplanting than the cultivation and use of the site for agricultural purposes over some 15 years so that not a trace of its former use was apparent. The correct approach is to look at the de facto use for agricultural purposes, whatever its pedigree, and find inevitably on the facts of this case that the installation of the hardstanding and the use of the site for industrial purposes de facto constitutes both development in the operational sense and a clear material change of use.

.....

In summary, the first industrial use was lawful and incapable of challenge by virtue of the fact that it was carried out on or before the appointed day. The change to agricultural use was as a matter of fact so material as to supplant the first use but was lawful and incapable of challenge by reference to subsection (2)(e). The change from agricultural use to industrial use was unlawful and clearly open to challenge."

Mr. Moriarty submits that that analysis by Sir Graham is incorrect in a way which vitiates his reasoning. The first change of use, he submits, in 1973 from industrial storage to agriculture was not development by virtue of section 55(2)(e), and therefore it was not a material change. As it was not a material change, the right to continue the existing use for industrial storage was not lost, despite the actual use of the site for agriculture. The existing use for agricultural storage could therefore be resumed at will.

In my judgment, the submission by Mr. Moriarty is wrong. The scheme of section 55 is that by section 55(1), the making of a material change in the use of land is development. That, however, is subject, by the introductory words of subsection (2) to the exceptions set out in that subsection. Those exceptions provide that the various operations or changes of use described in section 55(2) are not development, but there is nothing in the section to the effect that the changes of use there described are not material. I entirely agree with Sir Graham Eyre that the change to agricultural use from industrial storage was a material change. I thus agree with the Deputy Judge's analysis, to which I have just referred, at page 12 of the transcript of his judgment.

I have not so far referred, save in passing, to the sole previous decision which is in my view wholly in point in relation to the present problem. It is that of the Divisional Court consisting of Lord Parker, Chief Justice, Marshall and James JJ in McKellen v Ministry of Housing and Local Government, decided on 6 May 1966. That decision is unreported, save in a brief report in the Estates Gazette. The case concerned a cottage which, from before 1 July 1948 had been lived in by a farm worker. In 1953 he ceased to live in the cottage, which was by then in considerable disrepair. The Local Authority threatened to make a demolition order. The owner undertook not to use the house as a dwelling until the necessary works of repair had been carried out. He started to use the building as an agricultural store. This use continued until

1958. A new owner then bought the cottage. He wished to repair it and to live in it himself. He applied to the Local Planning Authority to determine whether the resumption of residential use would constitute development for which planning permission was required. The Local Planning Authority and on appeal the Ministry of Housing and Local Government determined that it would. The owner appealed further to the High Court.

Before the Divisional Court Mr. Hugh Forbes QC advanced an argument which, though expressed somewhat differently from that of Mr. Moriarty in this case, is in substance, despite Mr. Moriarty's attempt to persuade me to the contrary, the same. In McKellen at page 4 of the transcript, Lord Parker, in a judgment with which the other two judges agreed, said of Mr. Forbes' submission:

"His argument is really based on a provision of Section 12 of the Act as to what shall not be taken to involve development. What he relies on is sub-section (2) of Section 12, paragraph (e): 'The following operations for uses of land shall not be taken for the purposes of this Act to involve development of the land, that is to say.....(e) the use of any land for the purposes of agricultural or forestry.....' He says, and I think it is quite clear and indeed conceded by Mr. Bridge, that despite the way in which the case was conducted below, the change from use as an agricultural labourer's cottage to that of an agricultural store, while it may have been a change of use, was certainly not a development for which planning permission was required. It was a use, to use the words of the section, not to be taken for the purposes of the Act to involve development.

Mr. Forbes starts from there, and in effect says: if a change from A to B does not involve development, how then can a change from B to A do so, and accordingly he says, looked at in that way, his Client is entitled to resume the use of the cottage for residential purposes without requiring planning permission."

I should say, if it is not already apparent, that section 12(1)

and (2) was the predecessor of section 55(1) and (2).

Later, on the next page of his judgment, Lord Parker said, "Mr. Forbes in effect says that a user which does not involve development, as this did not, is really exactly the same as a non-user, and accordingly he would say that the principle of Fyson applies.

Attractive as the argument may be, I find it quite impossible to accede to it."

Then there comes the passage I have already quoted.

"It is of course quite plain that a change from A to X and then from X to A does not involve development, either way, if X is completely nil, no use at all. But if X is a use, then the change from A to X may involve development, and the change from X to A may involve development. Granted, as in this case, that the change from A to X does not involve development, I simply cannot understand why it should follow that the change back, if I may put it in that way, from X to A may not involve development. The whole matter really depends upon the wording of the Act, and when one looks at the Act, it is perfectly clear that Section 12(2) is referring merely to a one way change of use, namely change to use for agricultural purposes. There is nothing to say that a change from agricultural use to some other use is not to be taken to involve development, or not to be taken to involve development if the original use had been agricultural use."

Mr. Moriarty has made strenuous attempts to distinguish McKellen from the present case, but in my judgment those attempts were unsuccessful. I would hold that McKellen was correctly decided and that the principles there laid down apply equally to the present case. This ground of appeal, in my judgment, must therefore fail. The Inspector was correct in rejecting the appeal on ground (c) (though referring to as ground (b)).

The second main ground of appeal relates to the appeal

against the Inspector's decision not to grant planning permission for the industrial storage use. The basis of this ground is that material facts came to light after the Inquiry but before the issue of the decision letter, but that the Inspector wrongly declined to treat them as material and thus reached his decision without having regard to them.

The Inspector found, and it is not in issue, that the appeal site lies within the Green Belt, as approved in the approved Cheshire County Structure Plan and as delineated in the draft Warrington Borough Council Local Plan. In his decision letter the Inspector said at paragraph 14:

"Bearing this in mind and from my inspection at the site and its surroundings and from the representations made I take the view that the principal issue in the ground (a) appeal is whether this storage use represents an inappropriate form of development within this Green Belt area and if so whether there are any very special reasons why the development should nevertheless be allowed.

15. During my visit I observed that the site can be seen from a number of vantage points and in particular along Chapel Lane where despite the existing screening clear views of the industrial storage can be obtained. Although no buildings have been erected on the land it seems to me that an industrial use of this sort is a completely inappropriate form of development within this area. Moreover, bearing in mind the site's prominent backland position I take the view that this storage facility has resulted in a most intrusive feature in the landscape that seriously harms the appearance of this attractive rural area. It seems to me therefore that the retention of this development would undermine the objectives of both national and local planning policies that are aimed generally at protecting the open character of Green Belts."

I emphasise that in that last paragraph the Inspector was relying particularly upon the opinion he himself had formed at his view, of the attractions of the open land behind, that is to say to the west and south of the appeal site, as being important

in its retention in the Green Belt.

Unknown to anybody at the Inquiry, including the representatives of the Borough Council, planning permission had been granted on 5 February 1948 under the then current Interim Development Order for the extraction of clay from the area of land lying immediately to the west and south of the site. Under that permission some extraction of clay had taken place, but not on the land adjoining the site. The permission had laid dormant for many years, no doubt because the nearby brick works had closed. However, by the time of the Inquiry in October 1991, section 22 and Schedule 2 of the Planning and Compensation Act 1991 had come into force. These provisions instituted a new regime for old mining permissions, including the permission of 5 February 1948. Shortly, the new procedure is that the person owning land with an old mining permission was required, not later than 25 March 1992, to apply to the Minerals Planning Authority to register that permission. That authority (which in this case is Cheshire County Council) if satisfied that the permission was still valid, would register the permission and if not so satisfied would refuse to register. After registration, the owner then, within a further 12 months, must apply to the Authority to determine conditions for the development which can be new conditions, that is to say supplementing or supplanting those originally contained in the original permission. In this case, the owners of the land, the subject of the permission of 5 February 1948, were aware of the legislation and at the time of the Inquiry before Mr. Russon were taking steps to seek

registration of the permission.

On 30 October 1991 a Mr. Humphrey of Tower Consultants, who are amongst other things planning consultants, wrote to a Mr. Love, who apparently is a gentleman with an interest in nearby land saying:

"I now enclose a copy of the plan showing hatched the area of land which still has the benefit of a 1948 planning consent for clay extraction.

.....

We hope you will agree to join with our clients GRS Developments Ltd in making one application to register the consent for the whole of the land affected as we are sure this is the best way forward."

Mr. Lennie, the Second Appellant, who is, I believe, the owner of the appeal site, deposes that in November 1991 Mr. Humphrey the Planning Consultant informed the present Appellants of the proposal by his, Mr. Humphrey's, clients to register the old planning permission. That was, of course, after the Inquiry had been concluded.

On 5 December 1991, solicitors then acting for the present Appellants wrote to Warrington Borough Council referring to the hearing of the appeals:

"You will recollect that a critical aspect of the Council's position and his,"

the Council's Planning Officer's evidence,

"was the green belt and in his words the 'open pastoral' farming of the adjoining land. Very shortly after the hearing it came to our client's attention:

- (a) the fact that the 'open pastoral' land which bounds the appeal site on both the west and the south has the benefit of a permission for extraction of clay.
- (b) the owner of that 15.25 acres, and Mr. Wilkinson as director of the company owning the land to the south of the 15.25 acres property, are both intending to register

their permission, under the recent Planning and Compensation legislation."

It is right to say that the letter accuses the Council of deliberately concealing what was said to be their knowledge of those facts. But that accusation is not persisted in, and if it had been, for my part I would certainly reject it. The letter concludes:

"Our clients obviously feel very aggrieved at the fact you have suppressed relevant facts which are particularly within your knowledge as the local planning authority. We were involved in much extra work to obtain the 1972 report and correspondence and we were not supplied with the clay extraction permission. Our clients are reserving their position but plainly the costs incurred by them must be met.

Kindly let us have a draft of the letter to go to the Inspector when replying to this letter."

The officers dealing with this matter in Warrington did not know anything about this 1948 permission at the time, so the lady who was dealing with the matter wrote to Cheshire County Council and received a reply dated 18 December which, in effect, informs them of the 1948 Interim Development Order Planning Permission. The letter said:

"The permission is therefore live, although following a High Court hearing in 1982 it was ruled that, under the conditions of the IDO, tipping was no longer permitted. However this ruling could be challenged in the future."

The letter also said:

"We have recently received an application to register the IDO at Rixton. There is a 3 month period in which this application is to be determined, and if successful the registered permission for clay extraction would remain live until 22 February 2042."

Having received that letter and Christmas having passed, Warrington Borough Council on 2 January 1992 wrote to the

Department of the Environment, the Inspectorate at Bolton Street, Bristol, a letter referring to this appeal and saying: "It has been brought to my attention by the Solicitor of the appellant that the land adjacent to the appeal site shown edged red on the attached plan may well have the benefit of a planning permission granted in 1948 for clay extraction. Warrington Borough Council, as a District Planning Authority, had no record of any such planning permission.

However I enclose a copy letter received from Cheshire County Council in response to my request for information dated 11 December 1991.

Despite the existence of the planning permission the Director of Community Services is still of the opinion that the character of the land adjacent to the appeal site is generally of open pastoral farming."

With a covering letter of the same date, a copy of that letter, as they had requested, was sent to the solicitors then acting for the Appellant.

It is clear that that letter was brought to the Inspector's attention because we have a copy of a pro forma used in the Department of the Environment addressed to him, referring to the name of the appeal to the Secretary of State and the date of Local Inquiry, which reads:

"The attached letter has been received from the LPA.....and you may wish to look at it in the light of Rule 14 of the Town and Country Planning Appeals (Determination by Appointed Persons) (Inquiries Procedure) Rules 1974.

Our records show that the file is with us.

Will you please initial the letter and indicate below the category into which it falls."

There then followed a three-choice selection of steps which the Inspector might invite the Department to take:

- "(a) The letter does not contain any new evidence.
- (b) The letter contains new evidence but it does not affect my position.

(c) The letter contains new evidence which was not raised at the inquiry and which may be material to my decision."

The Inspector chose (b) "The letter contains new evidence but does not affect my decision", and signed that form and dated it 14 January 1992.

His decision letter followed some three weeks later on 4 February 1992. It contains no reference at all to this evidence or to the 1948 permission for clay working from the adjoining land. After the Inspector had given his decision, on 6 March 1992, Cheshire County Council determined that the 1948 permission was effective and dormant, and thus opened the way for the owners of that land to propose conditions for its working.

In relation to this ground of appeal Mr. Moriarty applied to us to admit fresh evidence - fresh in the appeal, that is to say - because some material to much of which I have referred, had been put in front of Sir Graham which was not, of course, in front of the Inspector. The fresh evidence which it sought to adduce before us was contained in a second affidavit of the Second Appellant, Mr. Lennie, sworn on 7 June this year. It exhibits, firstly, a recommendation by the County Planning Officer which was subsequently accepted, made in July 1993, that a consent for the clay working be granted and setting out the conditions which he proposed. Mr. Lennie deposes that consent in those precise terms was granted by Cheshire County Council in November 1993. Secondly, he exhibits photographs taken very recently of the clay working site.

This evidence, it is apparent from the dates, all came into existence after the date of Sir Graham Eyre's judgment. We are therefore not bound by the criteria for admission of fresh evidence which was available at the time of the earlier hearing, laid down in the well-known decision in Ladd v Marshall. However, we decided not to admit the evidence and announced that decision at the conclusion of the application.

The reason for this decision was that this ground of appeal concerns a decision by the Inspector as to the materiality of new evidence submitted to him before his decision on the enforcement notice appeal, that decision about the new evidence being that the evidence did not affect his decision on the enforcement notice appeal. What is relevant to our consideration is the material which was before the Inspector when he decided that the new evidence was not relevant or material. Evidence as to facts which arose later can only be relevant and admissible insofar as it throws light on what the Inspector might reasonably have expected to happen, having regard to the new facts disclosed to him. There has already been placed before Sir Graham Eyre a copy of the determination by Cheshire County Council on 6 March 1992 of the application for registration of the clay land, and part of the correspondence to which I have already referred. The remainder of that correspondence has been put before us, emanating from the Borough Council, and so has the form signed by the Inspector, all of which is non-contentious because it fell within the principle outlined, that is to say, that it was

relevant to consideration of the question of the materiality of the new facts before the Inspector. But evidence which arose approximately 18 months, or in the case of the photographs, 2½ years after the Inspector's decision, is in our view not properly admissible for the limited purpose which I have outlined.

We were referred to a decision of this Court in R v Secretary of State for the Environment ex parte Powis [1981] 1 WLR 584. Giving the judgment of the Court, Dunn LJ said at page 595G:

"Finally there was an application on behalf of the tenant to admit fresh evidence which the Divisional Court had refused to admit. Like the Divisional Court we considered the evidence de bene esse. What are the principles on which fresh evidence should be admitted on judicial review? They are (1) that the court can receive evidence to show what material was before the Minister or inferior tribunal, Ashbridge Investments v Minister of Housing and Local Government per Lord Denning MR; (2) where the jurisdiction of the minister or inferior tribunal depends on a question of fact, or where the question is whether essential procedural requirements were observed, the court may receive and consider additional evidence to determine the jurisdictional fact or procedural error. (See de Smith's Judicial Review of Administrative Action, at page 140 and cases there cited.....

Although this appeal concerns a procedural requirement, what Dunn LJ was obviously referring to in that passage was evidence as to whether or not the particular procedural requirement was complied with. Here we have that evidence and it has been admitted, largely from Warrington Borough Council. That is the correspondence and the Inspector's decision on the pro forma. But the evidence here sought to be admitted is not in that category. For those reasons we took the view that it did not fall within any exception to the normal rule and we refused to

admit Mr. Lennie's second affidavit and its exhibits.

I go back to the substance of the appeal on the second ground. In his judgment, Sir Graham Eyre said at page 18:

"The general rule must be that the Inspector can only proceed to a decision on the basis before him, his own expertise and what he sees on his inspection of the site and its environment. If further material emerges after the close of the Inquiry it must be brought to his attention together with clear representations as to its alleged relevance and materiality and as to how and why it might affect his decision or indeed the exercise of balancing judgments which may be necessary along the way.

.....

What was the inference he,"

the Inspector,

"was supposed to draw? Should he assume that by virtue of the 1948 permission which had yet to go through the new registration machinery that overnight there would be a clay winning apocalypse on land adjacent to the site so as to destroy its landscape context and what he had described as 'an attractive rural area'. I should make it clear that in any case where a party wholly fails to take the elementary steps I have described above he can hardly anticipate the unctioin of this Court. No such steps were taken and the course followed by the Inspector was in my view unimpeachable."

He therefore dismissed the appeal on that ground.

With respect to Sir Graham Eyre, I believe it goes too far to say that "the new material must he brought to his attention together with clear representations as to its alleged relevance and materiality." I agree, of course, that with the benefit of hindsight it would have been wise for the Appellant's solicitors, when they received the Council's letter of 2 January 1992, to make such representations to the Inspector, but the Rules do not require it.

The relevant Rules, as has been made clear to us, are not

the Rules referred to in the form put before the Inspector but the Town and Country Planning Enforcement Inquiries Procedure Rules 1981 Rule 14(2). Fortunately there is no material

difference between the two. Rule 14(2) reads:

"If in the case of a transferred appeal the pointed person proposes after the close of the Inquiry to take into consideration any new evidence..... or any new issue of fact (not being a matter of Government policy) which was not raised at the Inquiry and which he considers to be material to his decision, he shall not come to a decision without first notifying the appellant and the Local Planning Authority of the substance of the new evidence or of the new issue of fact, and affording them an opportunity of making representations thereon in writing within 21 days, or of asking within that time for the re-opening of the Inquiry."

It is for the Inspector, after deciding whether the fresh evidence is material, ie it might affect his decision, to invite the parties to make representations. In this case the Appellant's then solicitors may have thought that the evidence having been submitted to the Inspector they would receive such an invitation and therefore waited to do so. But of course they did not.

Mr. Moriarty criticises the wording of the form which the Inspector was invited to complete, to which I have already referred. His criticism is shortly that the second alternative (the one chosen by the Inspector) "The letter contains new evidence but it does not affect my decision", does not say, "...because it is not material to my decision", but reading the whole in its context, it can only be understood as meaning that, and I have no doubt that the Inspector so understood it.

In Bolton Metropolitan Borough Council v the Secretary of

State for the Environment [61] P&CR 343, this Court said at page 352 in relation to what is material or relevant for present purposes, that a matter is material or relevant if it is, "a matter which might cause him to reach a different conclusion to that which he would reach if he did not take it into account."

Mr. Moriarty submits that it appears that the Inspector did not take the new evidence into account in reaching his decision because he refers to it nowhere in his decision letter. But since the Inspector clearly considered the new evidence before completing the form, I cannot so conclude. The real issue is, I believe, could the Inspector, directing himself properly as to the decision he then had to make, decide that the new evidence was not material in the sense to which I have just referred? In my judgment the new evidence clearly might have resulted in the Inspector reaching a different conclusion on the enforcement notice appeal. Certainly if he had known that there was a likelihood that there would be clay working on the adjoining land over a number of years, it is difficult to believe that he would have expressed paragraph 15 of his decision letter in precisely the words he did, without any qualification. It is true that the decision as to materiality of the evidence at that stage was a matter for the Inspector. But we do not know why he decided as he did. He made no attempt to explain why he reached that decision, as in my view he should have done, in his decision letter issued only a few weeks later.

We are thus left with a decision that evidence that an application had been made to register an old permission for clay

working of land described in the terms of the Inspector's paragraph 15 would have made no difference to his decision on the Enforcement Notice appeal as to the attractions of that land, and thus as to the Green Belt issue. Such a conclusion, without explanation, is in my view so surprising as to be in my judgment one which no Inspector, considering the issue properly, could reach. In other words, it is Wednesbury unreasonable or perverse.

I would therefore allow the appeal on this ground, and remit the matter to the Secretary of State for the Environment for him to re-consider with our opinion. I add that, in my view, though we have not heard argument about this, it must follow that such a reconsideration should be upon the facts as they now exist at the date when the new decision is made.

LORD JUSTICE PETER GIBSON: I agree and add only a few words on the second issue as we are differing from a judge of such experience in this field, and in deference to the Inspector whose decision, apart from the one point of the additional evidence, seems to me to have been impeccable. It is a strong thing to come to a conclusion that the Inspector was perverse and I do so with the greatest reluctance.

The question which the Inspector had to decide was whether the additional information belatedly made known to him after the close of the Inquiry was material to his decision. If so, he was required by the 1981 Rules to offer the Appellants the opportunity either to make representations thereon in writing or to ask for the re-opening of the Inquiry. We must accept that the Inspector took into account the new information when forming the view that this was not a case where the information was material to his decision and did not affect his decision. But the Inspector's reasoning in his decision places heavy emphasis on the visual aspect of the Appellant's development, its inappropriateness in the particular rural setting and the intrusiveness of the development in the landscape, such that, as he put it, "it seriously harms the appearance of this attractive rural area". Yet the Inspector, in his decision letter which is dated more than one month after the new information was made available to him, makes no mention whatever of the additional information. Clay working operations on a substantial site adjoining the Applicant's land and which will no doubt last a number of years were bound to affect the visual appearance of

the area in which the Appellant's development had taken place, at any rate during the currency of the operations. Of course, it was only a possibility, as Mr. Richards in his lucid submissions stressed, that those operations would be carried out. But the Inspector could not dismiss that possibility because of the recent application for registration of the Interim Development Order. I am unable to understand how any Inspector properly instructing himself as to the law, who based his decision against the development on the rural appearance of the area could decide that the new information was not material to his decision.

For this reason, as well as for those given by my Lord, I too would allow the appeal and concur in the orders which he proposes.

LORD JUSTICE HENRY: I agree with both judgments and do not wish to add anything.

Appeal allowed. Matter to be remitted to the Secretary of State. No order as to costs.