Case No: CO/3360/2016

Neutral Citation Number: [2016] EWHC 2853 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Birmingham Civil Justice Centre
33 Bull Street, Birmingham, B4 6DS

Date: 09/11/2016

Before :

MR JUSTICE GREEN

- -

Between :

Hibbitt and Another	**Claimants**
- and -	
Secretary of State for Communities and Local Government (1)	
Rushcliffe Borough Council (2)	**Defendants**

- -
- -

Mr Campbell (instructed by **Public Access**) for the **Claimant**
Mr Westmoreland-Smith (instructed by **Government Legal Department**) for the **First Defendant**
No Attendance for the **Second Defendant**

Hearing date: 25th October 2016

- -

Judgment

MR JUSTICE GREEN :

A. Introduction: The Issue

1. There is before the Court an application under section 288 Town and Country Planning Act 1990 ("TCPA 1990") to quash the decision of an Inspector dismissing an appeal against the refusal of a planning authority to grant prior approval to a proposed development. The Claimants own a large, 30 metre, steel framed barn largely open on three sides. Approval to convert the barn into an automatically approved dwelling upon the basis that it was a "*permitted development*" was refused by Rushcliffe Borough Council ("RBC") and an appeal to the Inspector failed. The issue before the Court boils down to a point of law. The Claimants say that on the facts of the case in order to fall within the scope of the permitted development it is sufficient that (a) the conversion is from an "*agricultural building*" to a dwelling *and* (b) the existing structure (here the barn) is sufficient to bear the load of the development works needed for the conversion of the barn into the dwelling.

2. The Inspector disagreed. She held that in the context of the case in addition to (a) and (b) there was a further and more elementary requirement which was that for the development to amount to an automatically permitted "*conversion*" the nature and extent of the works entailed had to fall short of that constituting a "*rebuild*".

3. The issue before the Court is a short point of construction of the relevant statutory material concerning permitted developments and in particular it focuses upon the meaning of the word "*conversion*".

B. Relevant Legislation: "Permitted Developments" – the conversion of agricultural buildings to dwelling houses

4. The principal applicable measure in this case is the Town and Country Planning (General Permitted Development) (England) Order 2015 ("the Order"). Pursuant to Article [3] of the Order "*... planning permission is hereby granted for the classes of development described as permitted development in Schedule 2*". Any permission thereby granted is subject to any relevant exception, limitation or condition also as specified in Schedule 2. Part 3 of Schedule 2 is entitled "*Changes of Use*". The Part identifies various classes of development which are permitted. Class Q is entitled "*Agricultural Buildings to Dwelling Houses*".

5. The Permitted Development in Class Q is defined in the following terms:

> "Q. Development consisting of –
>
> (a) a change of use of a building and any land within its curtilage from a use as an agricultural building to a use falling within Class C3 (dwelling houses) of the Schedule to the Use Classes Order; and
>
> (b) building operations reasonably necessary to convert the building referred to in paragraph (a) to a use falling within the Class C3 (dwelling houses) of that Schedule."

6. There is also set out provisions concerning "*Development Not Permitted*". For present purposes it is Class Q.1(i) which is relevant. This states:

> "Development is not permitted by Class Q if –
>
> (1)(i) the development under Class Q(b) would consist of building operations other than –
>
> (i) the installation or replacement of –
>
> (aa) windows, doors, roofs, or exterior walls, or
>
> (bb) water, drainage, electricity, gas or other services,
>
> to the extent reasonably necessary for the building to function as a dwelling house;
>
> and
>
> (2)(i) partial demolition to the extent reasonably necessary to carry out building operations allowed by paragraph Q.1(1)(i)…"

7. Article [2] of the Order sets out various definitions. It is relevant to the present case that there is no definition of "*convert*" (as in convert the building). There is, however, a definition of "*building*" which, for present purposes: "*... includes any structure or erection and includes any part of the building… and does not include plant or machinery and… does not include any gate, fence, or wall or other means of enclosure*". There is also a definition of "*Agricultural Building*" in paragraph X of Part 3 of Schedule 2 of the Order which refers to a building (excluding a dwellinghouse) used for agriculture and which is so used for the purposes of a trade or business. "*Agricultural use*" refers to such uses.

8. There is formal guidance to be taken into account. Paragraph [105] of the NPPG (Reference ID: 13-105-20150305), under the heading "*Are any building works allowed when changing to residential use?*", provides as follows:

> "Building works are allowed under the change to residential use. **The permitted development right under Class Q assumes that the agricultural building is capable of functioning as a dwelling**. However, it recognises that for the building to function as a dwelling some building operations which would affect the external appearance of the building, which would otherwise require planning permission, should be permitted. The right allows for the installation or replacement of windows, doors, roofs, exterior walls, water, drainage, electricity, gas or other services to the extent reasonably necessary for the building to function as a dwelling house; and the partial demolition of the extent reasonably necessary to carry out these building operations. **It is not the intention of the permitted development right to include the construction**

> **of new structural elements for the building. Therefore it is only where the existing building is structurally strong enough to take the loading which comes from the external works to provide for residential use that the building would be considered to have the permitted development right**."
>
> (Emphasis added)

9. There are three components of this guidance which are contained in the emboldened text above which are of particular significance to this case. First, the reference to the assumption that the permitted development must be "*capable*" of functioning as a dwelling. Second, the reference to the permitted development not including "*new structural elements*". Third, the reference to the existing building being sufficiently structurally strong to bear the loading from the external works. In principle guidance cannot bind a Court, which must construe and interpret the law in an objective manner taking into account relevant context and purpose. The Court will however take the guidance into account, bearing in mind that it is intended to assist in fostering transparency and legal predictability in planning and development matters. But ultimately the issue of interpretation is a matter for the Court.

C. The Development

10. The proposed development in question concerns a barn on land at Kingston Brook Farm, Thorpe in the Glebe, Wysall, Nottingham. The Parish of Thorpe in Glebe is situated in the south of Rushcliffe Borough Council. Very little at all survives of the original village. There are a number of farm houses or former farm houses scattered throughout the Parish but none form a group. The site in issue is accessed from the Wymeswold Road which is located at the end of an access track which is 380 metres long and it is located around 600 metres from the built up end of the village of Wysall. The building which is the subject of the litigation is a metal framed modern farm building: a metal frame, corrugated sheet and open sided cattle stall. The size of the barn is 30.5m x 7.96m (243sq.m). It has a maximum height of approximately 5 metres with the lowest eaves at a height of 3.2 metres. It is largely open on three sides and was, when the Inspector visited, used to house cattle. The barn is situated between two other large steel framed buildings that house livestock. There are a number of other structures and buildings on the site. The farm does not have an authorised farm house. There are open agricultural fields to the west and north and the building projects into the northern field. In order to convert the barn into a dwelling it was contemplated that there would be no demolition and the existing steel frame would be retained in its entirety, as would the roof.

D. The Inspector's Decision

11. The Inspector's decision is dated the 19th May 2016. It is clear from that decision that there was no dispute that the barn constituted "*an agricultural building*" within the meaning of the Order and that the development proposal entailed a change of use to that of a dwelling with associated operational development. The Inspector described the barn in question in the following terms:

> "The building in question is an open sided steel framed structure with a monopitch roof. It has a concrete floor slab and

> six steel uprights which span to support a corrugated fibre roof, supported on timber cross beams. It is open to two sides with a single skin steel panel to the rear and the long part of one further side. This sits above a concrete panel to around a metre in height. The concrete panel does not appear to be attached to the floor slab."

12. In paragraph [7] of the decision the Inspector described the proposed development:

> "The development right described in Part Q relates to conversion of a building. For that right to apply the building must first be capable of functioning as a dwelling. The Appellant's submission describes how the steel frame, roof and floor slab would be retained and how structural infill panels (SIPs) would be used to construct walls and a ceiling within the existing frame. Steel box profile cladding, some of which is currently in place and would be reused, would be used to clad the front and sides along with the insertion of windows and doors. No details are provided of works to the floor."

13. The Inspector referred to the NPPG (set out at paragraph [8] above) and in particular the requirement that the existing structure have a load bearing capacity to support the proposed development works. The Inspector recorded that she had been provided with structural calculations indicating that the steel frame was capable of taking the loading for SIP panels. Construction detail provided to the Inspector also showed that the existing frame would be used to support the panels and that these would not comprise structural elements in their own right. Calculations supplied by the Claimants further stated that the existing foundations would need to be capable of taking a predicted loading of 1600kn and stated that the existing foundations were capable of taking that level of loading. She recorded that the Council appeared to dismiss out of hand the Appellant's assessment of structural capability describing the building as "*lightweight*". However, the Inspector took the view that the Council had not carried out any such assessment of the frames or viewed the foundations and based upon the information before her she had no proper basis upon which to dispute the Appellant's claim that they could use SIP panels to construct a dwelling using the existing frame.

14. In paragraph [10] the Inspector stated her view that the simple fact that the existing barn was sufficient to bear the load of the proposed development was <u>not</u>, in and of itself, sufficient to meet the requirements of part Q. She thus stated:

> "10. Nevertheless, having regard to the extent of works necessary for the frame and fibre roof to function as a dwelling, a demonstration of the load bearing capacity of the frame alone is insufficient to meet the requirement of part Q in this case. Although I accept that substantial works could fall under the scope of class Q they nonetheless presuppose that the works comprise 'conversion'. In this case, the building before me would not be capable of functioning as a dwelling without the building works outlined above which include the construction of all four exterior walls. This goes well beyond what could reasonably described as conversion, and notwithstanding the re-

> use of the 6 steel uprights as the main structural element for the building and the retention of the fibre roof, the works described would be so extensive as to comprise rebuilding. I must therefore conclude that the works necessary to create a dwelling from the structure onsite would not fall within the scope of that permissible under part Q. Accordingly, they would not be permitted development under Class Q(b)."

15. In this paragraph the Inspector identifies the gravamen of the present dispute.

E. Claimants' Submissions

16. The Claimants submit that the Inspector erred in her analysis of Class Q. Their submissions can be summarised as follows.

17. First, they submit that there are only two conditions precedent for the permitted development. These are, first, that the existing structure constitutes, in law, an "*agricultural building*"; and secondly, that the existing structure be sufficient to bear the load of the proposed development. In the present case those two conditions are met, as the Inspector recorded in her decision.

18. Second, the Claimants contend that the expression "*conversion*" does not incorporate a third condition because this would be otiose and would lead to inconsistency and uncertainty. Class Q by its very nature treats the "*conversion*" as the change of the "*agricultural building*" to the "*dwelling house*". Any change of that nature is, by definition "*the*" conversion. There is hence no need to introduce a vague and uncertain element into the concept of "*conversion*".

19. Third, the Inspector's interpretation introduces a condition which is that, in some unspecified manner, the extent or nature of the conversion must not amount to a "*rebuild*". The Claimants contend however that this is unworkable and creative of nothing but uncertainty. Further the need to avoid granting automatic permission to rebuild is already catered for in the requirement that the starting point must be an "*agricultural building*". The Claimants accept that if an agricultural building is to be demolished then the dwelling which emerges in its place is not a conversion because the dwelling would emerge from empty land which post-dated the agricultural building. The fact that there must, according to Class Q, be a conversion from an agricultural building accordingly is quite sufficient to prevent rebuilding. A structure is not an "*agricultural building*" if it is clear land or, by extension of the same underlying principle, a structure which is so skeletal or marginal that it cannot be properly be termed an "*agricultural building*". However once a structure is properly classified as an "*agricultural building*" (which is has been in this case) there is no further scope within Class Q for an evaluative exercise focusing upon the nature of the "*conversion*". Thus the concept of "*agricultural building*" itself serves to prevent rebuilding which is therefore a redundant and irrelevant concept.

20. Fourth, it is argued that this elongated and complex concept of "*conversion*" is not contained within Class Q and is not inherent, as the Inspector erroneously believes, in paragraph [105] NPPG. If it had been the draftsperson's intent to add this additional third condition then the Order would have defined "*conversion*" in Article [2] of the

Order or it would have been isolated as concept and explained in Class Q itself; but it was not. And nor does it emanate out of paragraph [105] NPPG.

21. Finally, it is pointed out that, in any event, the dictionary definition of conversion refers to the "*... process of changing or causing something to change from one form to another*". In the present case, giving Class Q its normal meaning, the process of change is from an agricultural building to a dwelling house. Anything which occurs on the continuum between those two end points is, in ordinary parlance, a "*conversion*". In these circumstances since the Inspector acknowledged and agreed that the barn amounted to an "*agricultural building*" and it was also acknowledged that the end result was a "*dwelling house*" then Class Q applied and the operation amounted to a permitted development.

22. In my view there is much to commend this analysis. It has the benefit of certainty and predictability. It avoids the interjection into Class Q of an evaluative assessment about "*conversion*" and where the divide lies with a "*rebuild*", for which no guidance is provided in Class Q itself. Nonetheless, I have to decide whether this interpretation is in law correct.

F. Analysis

23. It is helpful to identify what is and what is not in dispute between the parties. The dispute is not about whether the barn amounts to an "*agricultural building*": the Inspector accepts that it does. It is also not about whether the existing structure of the barn would be sufficient to bear the load of the proposed development: the Inspector accepts that it would. Equally, it is not about whether the proposed works are reasonably necessary (in the sense of not being superfluous, such as a sauna or swimming pool might be) for the building to function as a dwelling. The Inspector accepts that they are. The essence of the dispute concerns whether the proposed "*conversion*" amounts to a "*rebuild*" and, if it does, whether that is relevant.

24. The question boils down to (i) whether inherent in the concept of "*conversion*" in Class Q is a limit introduced by the concept of a "*rebuild*"; and (ii) whether even if there is that limit it is already incorporated into Class Q by virtue of the other limitations in the Order.

25. As I have already observed the arguments both way are persuasive and during the hearing I found myself being attracted to the arguments of both Mr Campbell for the Claimant and by Mr Westmoreland Smith for the Secretary of State. It seems to me that to resolve this issue it is important to stand back and analyse the issue from first principles of construction. On this basis, on balance, I prefer the submissions of the Secretary of State who endorses the logic and rationale of the Inspector. This is for the following reasons.

26. First, the concept of "*conversion*" is found in the overarching provisions of Class Q (not in Q.1) and it thereby introduces a discrete threshold issue such that if a development does not amount to a "*conversion*" then it fails at the first hurdle and there is no need to delve into the exceptions in Q.1. It is thus a freestanding requirement that must be met irrespective of anything in Q.1. Mr Campbell responded to this by saying that Class Q must be read as a whole (including therefore Q.1) and read as such it provides a comprehensive definition of "*convert*". This was made up of

(i) the requirement in Q that the starting point be an "*agricultural building*" and the end point be a "*dwelling*"; and (ii) the requirement in paragraph [105] NPPG that the existing building be sufficiently load bearing. The requirement in Q.1(i) that the works be no more than "*reasonably necessary for the building to function as a dwelling house*" was inherent in the first condition i.e. the definition of a dwelling. It was argued that provided these conditions were met there was no more that was needed to be assessed by a decision maker in order to come to the conclusion that the works amounted to a conversion. The difficulty with this argument is that, on a fair construction of the drafting logic of the Order, the requirement that development amount to a "*conversion*" is drafted as a separate requirement from these other conditions. In particular (as set out in the second point below) the concept of conversion has inherent limits which delineate it from a rebuild.

27. Second, a conversion is conceptually different to a "*rebuild*" with (at the risk of being over simplistic) the latter starting where the former finishes. Mr Campbell, for the Claimant, accepted that there was, as the Inspector found, a logical distinction between a conversion and a rebuild. As such he acknowledged that since Class Q referred to the concept of a conversion then it necessarily excluded rebuilds. To overcome this Mr Campbell argued that a "*rebuild*" was limited to the development that occurred following a demolition and that it therefore did not apply to the present case which did not involve total demolition. In my view whilst I accept that a development following a demolition is a rebuild, I do not accept that this is where the divide lies. In my view it is a matter of legitimate planning judgment as to where the line is drawn. The test is one of substance, and not form based upon a supposed but ultimately artificial clear bright line drawn at the point of demolition. And nor is it inherent in "*agricultural building*". There will be numerous instances where the starting point (the "*agricultural building*") might be so skeletal and minimalist that the works needed to alter the use to a dwelling would be of such magnitude that in practical reality what is being undertaken is a rebuild. In fact a more apt term than "*rebuild*", which also encapsulates what the Inspector had in mind, might be "*fresh build*" since rebuild seems to assume that the existing building is being "re" built in some way. In any event the nub of the point being made by the Inspector, in my view correctly, was that the works went a very long way beyond what might sensibly or reasonably be described as a conversion. The development was in all practical terms starting afresh, with only a modest amount of help from the original agricultural building. I should add that the position of the Claimant was that the challenge was as to law; if the argument in law was lost (and the Inspector did not therefore misdirect herself) then it was not argued that the Inspector acted irrationally in coming to the conclusion that the works were a rebuild / fresh build, and not a conversion.

28. Third, in relation to the argument that the conversion/rebuild distinctions is flawed because it is not defined and, in any event, interpreted in its normal dictionary sense covers the works in issue, there is in my judgment no need for the concept formally to be defined and the lack of a definition is not an indication that the concept lacks substantive meaning or content. The Order is directed towards a professional audience and the persons who have to make an assessment of whether works amounted to a conversion are experts, such as inspectors, who are well able to understand what the term means in a planning context (see by analogy *Bloor Homes v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin) at paragraph [19(4)] in relation to policy guidance). The concept of "*conversion*" must also be

understood in its specific planning context. It is not a term that can be plucked without more directly from a dictionary. Indeed, Mr Campbell acknowledged the logic, in the planning context, of the distinction between a rebuild and a conversion.

29. Fourth, I also accept the broader policy argument advanced by Mr Westmoreland Smith as providing at least some modest support for the conclusion reached above. Class Q as a category of permitted development defines cases where permission is automatically granted without there being any assessment or appraisal of the merits or otherwise of the proposed development against the guidance set out in the NPPF. It was argued that for this reason the permitted development should be construed conservatively and narrowly so as to ensure that it struck an appropriate balance between the advantages of automatic approval and the more onerous process of substantive appraisal and did not do damage to wider policies. Paragraph 55 of the NPF is the main guidance on the balance to be struck between the desire to increase the housing stock and rural developments. It reads:

> "To promote sustainable development in rural areas, housing should be located where it will enhance or maintain the vitality of rural communities. For example, where there are groups of smaller settlements, development in one village may support services in a village nearby. Local planning authorities should avoid new isolated homes in the countryside unless there are special circumstances such as:
>
> ● the essential need for a rural worker to live permanently at or near their place of work in the countryside; or
>
> ● where such development would represent the optimal viable use of a heritage asset or would be appropriate enabling development to secure the future of heritage assets; or
>
> ● where the development would re-use redundant or disused buildings and lead to an enhancement to the immediate setting; or
>
> ● the exceptional quality or innovative nature of the design of the dwelling. Such a design should:
>
> – be truly outstanding or innovative, helping to raise standards of design more generally in rural areas;
>
> – reflect the highest standards in architecture;
>
> – significantly enhance its immediate setting; and
>
> – be sensitive to the defining characteristics of the local area."

30. Mr Westmoreland Smith argued that the existence of Paragraph 55 was itself a reason to avoid a wide interpretation of Class Q. Class Q permitted development classes

which were intended to be suitable for fast track, clear cut, developments; not short cuts for complex cases which might raise significant issues under Paragraph 55. When the present development was measured against the principles in paragraph 55 it could be seen that the development raised an issue about the need to "*avoid in the countryside*" new isolated homes. Clearly a balance had to be struck between the more detailed and rounded assessment under the application route and the automatic approval under the permitted development route. But, nonetheless, these considerations militated in favour of only approving clear-cut cases and leaving more marginal cases to the ordinary planning system, and therefore against a wide construction of Class Q such as that advocated for by the Claimants which would permit wholesale circumvention of Paragraph 55. A proper balance was struck between the need for speed and certainty and a fuller evaluation by ensuring that only genuine conversions, and not fresh or re-builds, were automatically cleared. I agree with this analysis.

31. Fifth, the distinction between a conversion and a rebuild is implicit in paragraph 105 NPPG which states in relation to Class Q that it is not the "*... intention of the permitted development right to include the construction of new structural elements for a building*". It can be said that one reason for this conclusion is that a development that includes "*new structural elements*" is one that involves a degree of rebuild and is not a conversion.

32. Sixth, I am not convinced that the answer lies in the analysis of the phrase "*agricultural building*" (see paragraph [7] above). That notion includes, according to the definition in the Order, "*any structure*" and any "*erection*" and it includes "*part of the building*". It seems clear that in principle an "*agricultural building*" can, at one end of the extreme, be a very minimalist or skeletal structure indeed. To convert such a building into a dwelling might involve a very great deal of fundamental work which in terms of its nature and extent is much closer to a rebuild than a more traditional conversion. Unless it can be said that there is some compelling policy reason why permission should be accorded automatically to such skeletal structures (and none has been advanced) then a purposive construction would tend to stray away from using the concept of an "*agricultural building*" as an outer marker for conversion and as a proxy for the divide between a conversion and a rebuild.

33. Seventh, there are the words "*capable of functioning as a dwelling*" in paragraph 105 NPPG to consider. In paragraph [10] of the Inspectors decision she found as a fact that the building would not be capable of functioning as a dwelling without the proposed works and she then went on to assess the extent of those works before concluding that they "… *went well beyond what could reasonably be described as conversion*". The words in Paragraph [105] NPPG are not easy to construe. On one level <u>any</u> pre-existing structure is "*capable*" of functioning as a dwelling <u>once</u> the development works have been completed. In this sense capability is no more that another way of expressing potential and any building, howsoever skeletal, has that potential. But if one construes the concept differently as implying that the "*agricultural building*" must possess some inherent or pre-existing feature(s) which are redolent of a dwelling this might impose an unnaturally restrictive construction on the scope of the permitted development. A traditional wooden barn which is converted into a dwelling might, objectively, be not much more than four outer walls and a roof supported by wooden beams and it might in that state be a long way from

being a dwelling. Is it nonetheless "*capable*" of functioning as a dwelling? And if so what is it about the structure that makes it so? If the answer to the question is no more than as a structure it is sufficiently strong to bear the load of the proposed development works then the barn in the present case met that requirement. The Inspector in her decision seemed to equate the concept of capability in Paragraph [105] with the difference between conversion and rebuild; but in my view that flows logically from the reference to "*convert*" in Q, and not from the NPPG. Ultimately I do not gain very much from these particular words in Paragraph [105].

34. Finally, I should say a brief word about two discrete points of construction which were raised in argument. The first concerns the Inspector's analysis of the weight she attached to the extent of the proposed works. In my view she correctly recognised that the extent of the works was not dispositive. In many permitted developments the work might be extensive yet that does not thereby disqualify a development from automatic permission. I also accept her analysis that the extent of the works to be undertaken was one, amongst other, relevant consideration that could assist in forming a judgment whether the works were part of a conversion or were, instead, part of a rebuild or fresh build. I thus accept the analysis that the extent of the works is a relevant but not dispositive consideration. The second point concerns the reliance placed upon an observation in a DCLG Consultation dated March 2014 published shortly before the Order was promulgated. The document summarised the responses to the consultation and in relation to Class Q stated (at paragraph [24]): "*To further ensure historic barns are not lost it has also been decided not to allow total demolition and new build, although limited physical alterations permitted*". In principle this response is not admissible as a formal guide to interpretation (see *Solar Energy Holdings Ltd et ors v Secretary of State for Energy and Climate Change* [2014] EWHC 3677 (Admin) at paragraphs [40] – [60], affirmed on appeal [2016] EWCA Civ 117). However, there is no reason why it is not admissible in the same way that an academic article or professional commentary is admissible. It thus has a passing interest and is informative and in this respect I note that the tenor of the observations supports a narrow interpretation of Class Q. I emphasise however: my decision is not based upon this comment.

G. Conclusion

35. For all of the above reasons this application does not succeed. In my judgment the Inspector did not misdirect herself. Her analysis was correct.