Neutral Citation Number: [2021] EWCA Civ 976

Case No: C1/2020/1799

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT, PLANNING COURT
His Honour Judge Jarman QC
(sitting as a High Court Judge)
[2020] EWHC 2588

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/06/2021

Before :

LORD JUSTICE LEWISON
LADY JUSTICE ASPLIN
and
SIR TIMOTHY LLOYD

- -

Between:

MARK McGAW	**Claimant / Respondent**
- and -	
THE WELSH MINISTERS	**Appellant / Defendant**
THE COUNCIL FOR THE CITY AND COUNTY OF SWANSEA	**Interested Party Respondent**

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- -

Owain Rhys James (instructed by **Government Legal Department**) for the **Appellant**
Emyr Jones (instructed by **DJM Law Limited**) for the **First Respondent**
The Interested Party did not appear and was not represented

Hearing date: 16th June 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to

BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand down is deemed to be 11.30 a.m. on Wednesday 30th June 2021.

Sir Timothy Lloyd:

1. This appeal is brought against an order of HH Judge Jarman QC sitting in Cardiff as a judge of the High Court in the Administrative Court, Planning Court, made on 21 October 2020. He allowed the appeal of Mr Mark McGaw (the Claimant) against the decision of the Welsh Ministers on 19 February 2020 to refuse the Claimant's appeal against Swansea Council's refusal of a certificate of lawful use or development, and he directed the issue of such a certificate. His judgment is at [2020] EWHC 2588 (Admin). Permission to appeal was granted by Stuart-Smith LJ.

2. The Claimant owns a house at 216 Derwen Fawr Road, Sketty, Swansea. The land on which the house is built rises from east to west, with the road to the east. At the back, to the west, the garden abuts in part on land laid out as a model passenger railway, the Derwen Fawr Miniature Railway. To the south it abuts on the next property, 218 Derwen Fawr Road. The Claimant built a boundary wall along his southern boundary and part of the western boundary. He wishes to build a garden room in the southwest corner of his property, abutting the boundary wall. The issue in the proceedings is whether his proposal qualifies for a certificate of lawful use or development. He says it does as being within the terms of what is permitted under Class E of Schedule 2 to the Town and Country Planning (General Permitted Development) Order 1995, as it applies to land in Wales (the GPD Order).

3. The Claimant's application was first made in 2017. Its first refusal was set aside on judicial review on procedural grounds in October 2018. It was refused again on reconsideration by an inspector, Mr McCooey, in March 2019. The Claimant amended his plans and applied again, but this was also refused. The Claimant's appeal from that refusal was considered by another inspector, Mr Nixon. He too dismissed the Claimant's appeal in 2020. That is the decision which was the subject of the appeal to the judge. For completeness we were shown yet further revised plans which the Claimant has put forward since then. His application on the basis of those plans has also been refused, but that is not directly in issue before us.

4. Class E in the GPD Order permits "the provision within the curtilage of the dwellinghouse of (a) any building or enclosure, raised platform, swimming or other pool required for a purpose incidental to the enjoyment of the dwellinghouse as such …", but subject to qualifications. These include the requirement that the building must not have more than one storey, as well as restrictions by reference to the total area of ground covered by the building, as a proportion of the total area of the curtilage of the dwellinghouse, and restrictions by reference to proximity to the highway. The qualifying provisions material to the present case are paragraph E.1(e) and (f). A building is outside the general permission in Class E if either of these applies. As applicable in Wales, they are, relevantly, as follows:

> (e) the height of any part of the building … measured from the surface of the ground immediately adjacent to that part, would exceed (i) 4 metres in the case of a building having a roof with more than one pitch; (ii) 3 metres in any other case.
>
> (f) any part of the building … would be (i) within 2 metres of the boundary of the curtilage of the dwellinghouse; and (ii) exceed

> 2.5 metres in height above the surface of the ground immediately adjacent to it.

5. The issue arising under the GPD Order in the present case concerns how to measure the height of the proposed building. We were referred to article 1(3) of the Order, as follows:

> Unless the context otherwise requires, any reference in this Order to the height of a building … shall be construed as a reference to its height when measured from ground level; and for the purposes of this paragraph "ground level" means the level of the surface of the ground immediately adjacent to the building … in question … .

6. I have omitted from the quotation some words at the end of the sub-paragraph which might have assisted the Claimant in relation to property in England, because their effect is negated in Wales by the wording in Class E itself, with the references to "any part of the building".

7. It is accepted that the building would be required for a purpose incidental to the enjoyment of the dwellinghouse. The question is whether it satisfies the height restrictions. If it does not, it would still be possible for the Claimant to apply for planning permission, but he argues, and the judge held, that he need not do so because his proposals are within the GPD Order.

8. This case has a rather long history. The Claimant says that he built the boundary wall in about 2012 to take the place of an unsatisfactory set of boundary features, consisting of a hedge, a conifer and some deciduous trees, with some slight evidence of a former fence. When he built the wall he already wanted to create a garden room, such as is now in contention, but he did not yet have the necessary plans. He had excavations done in the upper part of his garden in order to build the boundary wall and also with a view to the eventual garden room. The delay in preparing the plans and then the lengthy planning history resulted in the lie of the land in the garden being affected by the excavation for far longer than had been hoped or intended. It also led to an issue, which is not live before us, as to whether the relevant ground level of the adjacent land was the level as it stood or the level as it would be if the development were to be carried out, the Claimant contending that the excavated area would be backfilled, back to its original contours, once the garden room was constructed.

9. Mr McCooey's refusal seems to have been based on the proposition that "the front part of the building would be immediately adjacent to the lower ground level to the rear of the house and drive" (para. 9). He said that, measured from this ground level, the building would exceed 3 metres in height, and parts of it within 2 metres of the boundary would exceed 2.5 metres in height.

10. The Claimant amended his plans to overcome the latter point, by revising the design of a glass structure, which was to form the upper part of the building, so as to be at least 2 metres back from the boundary. The Council again refused the application. Mr Nixon's reasoning focussed not on the front of the proposed building but on the side walls to the north and the south. He said that the relevant ground levels were the existing levels, not the level of the intended backfilling on the northern side of the building. The height

should be measured from the ground levels existing at the time of the application, both as regards the northern side, where there would be backfilling, and also the southern side where there would be no backfilling because the new building would abut the boundary wall.

11. The judge rejected the argument that the ground level at the time of the application was the relevant level. He said that the reference must be to the state of affairs which would obtain if the proposed development were to be carried out. So far as the southern side of the building was concerned he said that the ground immediately adjacent could not be the boundary wall itself but it could be the neighbour's land just beyond that wall. On that basis he held that the building as proposed did fall within the terms of the GPD Order.

12. The Defendant sought to appeal so as to challenge the judge's conclusion that the relevant ground level was that which would exist if the proposed development were completed, but permission to appeal was refused on that ground, so it is not open before us. Permission was granted to challenge the conclusion that the neighbour's garden, just beyond the wall, could qualify as the relevant immediately adjacent ground.

13. We had the benefit of clear, succinct and helpful submissions from Counsel, Mr Owain Rhys James for the Appellant, the Welsh Ministers, and Mr Emyr Jones for the Claimant, both of whom had appeared before the judge. As before him, Swansea Council, the Interested Party, did not appear and was not represented.

14. The GPD Order exists in order to relieve developers of the regulatory burden of applying for planning permission in categories of case defined in such a way that it can be seen that such permission ought to be granted, and no doubt also to relieve planning authorities of the burden of dealing with such applications. The classes of case to which the GPD Order applies are therefore defined so as to set out the parameters for the grant of general permissions while protecting various concerns relevant to planning considerations. As regards the height restrictions, the concern is that of visual amenity, specifically the risk of a building being too prominent, by protruding too far above ground level. The Order only applies to buildings of a single storey and, by reason of the height restrictions, that single storey must, first, be limited in height above ground level and, secondly, must be even more limited insofar as any part of it is close to the boundary. As already mentioned, there are also restrictions designed to limit what can be seen from the highway.

15. In *English Clays Lovering Pochin & Co Ltd v Plymouth Corporation* [1973] 1 WLR 1346, Goulding J had to consider submissions about different provisions in the then applicable version of the GPD Order, which involved the concept of "adjacent", though not of "immediately adjacent". He said this about the correct approach to the interpretation of the Order:

> It is common ground that the Development Order is to be construed in what has sometimes been called in argument 'a broad or common sense manner,' at any rate in the manner appropriate, as counsel say, to a document framed for administrative purposes rather than as an instrument couched in conveyancing language. That has not prevented counsel on either side from spinning elaborate arguments worthy of a more

> complicated subject matter and drawn from other provisions of the Development Order itself, from other statutes or statutory instruments and from reported cases on different documents. While I greatly admire and acknowledge the thoroughness of counsel's endeavours, I do not find in the end that I can get any guidance from those illustrative arguments. It appears to me that, having considered all, I have to apply myself to the ordinary meaning of the language used by the Minister in making the Development Order … .

16. The case went to the Court of Appeal, reported at [1974] 1 WLR 742, where the judge's judgment was upheld for much the same reasons as he had given, without any comment on what he said as quoted above.

17. Thus, we should approach the GPD Order in the light of its statutory purpose, that of relieving developers and planning authorities of an unnecessary regulatory burden in cases of a kind where planning permission ought to be granted, and reading both the words which set out what is permitted and those that limit the scope of the general permission in a broad and common sense way according to the ordinary meaning of the language used. We must also bear in mind that if for some reason the case does not fall within the GPD Order, it remains open to the developer to apply for planning permission in the ordinary way. It may be that Mr McGaw now wishes he had taken that course years ago.

18. I need to say something about the detail of the proposed new building and the relevant history. For this, the plans originally supplied in the court bundle were of limited assistance, but the parties supplied larger and clearer copies of the plans at the hearing from which the details could be seen and understood more easily.

19. As I have said, the curtilage of 216 Derwen Fawr Road slopes upwards away from the highway, so that the original ground level in the back garden was (and in part still is) noticeably higher than that on which the house is built. There was a level area immediately at the back of the house, which was presumably cut away at the time the house was built, providing a patio. There was no doubt a retaining wall where the land had been cut away for the construction of the house, and the garden sloped gradually upwards from there towards the western boundary.

20. As mentioned, the Claimant caused excavations to be made in preparation for the construction of the new boundary wall and his desired garden room. The written submissions before the judge explained that the land was excavated on both sides of the boundary, so that the wall could be put up, and on the neighbour's side it was then backfilled, whereas the Claimant did not backfill, and indeed extended his excavation, because of his intention to build the new garden room. As matters stood after the boundary wall had been put up (which is shown on the plans as being a party wall, with the boundary line running through the middle of the wall), the lie of the land can be seen on the elevation and plan at pages 3 and 4 of the appeal bundle. The area of the patio at the back of the house had been extended. This meant that the rise of the slope in the back garden was sharper. A larger level area was created at the top of the rise, which is referred to as being about 1.5 metres higher than the level of the patio. In the northern part of the garden there was a shed at the top level, whereas against the southern boundary wall, as a result of what is described on the plan as "localised

excavation in preparation for outbuilding", the ground level seems to have been much the same as that of the patio. Two structures described as "garden store" were placed against the wall. I do not take what is represented on the plan and elevation as necessarily being a precise and accurate record in every detail of what was (and presumably still is) on the ground but it is an indication, providing context for what the Claimant said in his statement in the proceedings, which makes it possible to understand the effect of the points at issue in the appeal.

21. The proposed new building would sit in the southwestern corner of the curtilage, with its southern flank wall and part of the western back wall abutting the boundary wall. It is a single storey building but its design shows two separate parts, the lower part being bounded by solid walls on three sides, and the upper part, sometimes referred to as the lantern, having two walls of frameless glazing and two solid walls as well as a glazed roof. The area of that upper part is significantly smaller than that of the lower part, as a result of the Claimant's decision to set the lantern back in order to deal with the point taken by Mr McCooey. As shown on the plans and elevations, the excavated area would be backfilled on the north side of the new building to the same level as the pre-excavation back garden level. On the south side, however, there would be no scope for backfilling because the south wall of the building would be flush up against the boundary wall. It is that feature which gives rise to the conundrum in this case as to what is the ground "immediately adjacent" to that part of the proposed building, by measuring from which the height criterion is to be applied.

22. Mr Nixon decided, first, that the correct level from which to measure was the existing ground level, ignoring the prospect of any backfilling. However he went on to say that even if the land would be backfilled on the north side, this would not be possible on the southern side because that flank would abut the existing brick boundary wall. He therefore said that "the existing ground levels immediately adjacent to the southern flank of the building constitute the level from which the relevant building height calculations should be made". He went on to hold that, because on the southern side the ground level "alongside the building's southern flank" was lower than on the north, neither paragraph (e)(ii) nor paragraph (f) was satisfied in respect of that part of the building. He did not explain what he meant by the ground immediately adjacent to the southern flank of the building, but by reference to his reasoning he may have had in mind the fact that nothing would happen to alter the existing excavated ground level in that area other than to build a second wall, abutting on the existing boundary wall. From that he may have taken the existing ground level as being "immediately adjacent" to the southern wall of the new building, even though, at the very least, virtually all of the existing exposed ground level would by then be under the building, so not adjacent but rather subjacent to it.

23. In his judgment the judge rejected the proposition that the level existing at the time of the application is what is relevant, holding that the provision is prospective and requires a consideration of what the relevant levels would be if the building were put up according to the plans. As I have said, that issue is not open before us, permission to appeal having been refused on it.

24. As regards the southern flank of the building, noting that the boundary wall is next to that part of the building, the judge held that the wall itself cannot be taken as the immediately adjacent ground. That is not seriously challenged, and is clearly correct:

the top of the wall is not "ground", nor is the soil at the base of the wall because "ground" must be open, not under a built structure.

25. Mr James then submitted, as he did to us, that the relevant ground remained the existing ground level, because there would be no backfilling and although a new wall would be constructed, there would be two walls abutting "and there is bound to be some gap even if bridged by mortar". The judge rejected this argument at paragraph 37. He noted that Mr Nixon had said that the two walls would abut one another, and that on the plans, which show the two walls as flush, no other finding was open. He went on to say: "There is no room to infer a gap, or at least not to the extent that the bottom of the gap could sensibly be regarded as the ground immediately adjacent."

26. He went on to accept the argument presented by Mr Jones for the Claimant, that the immediately adjacent land was the neighbour's garden just the other side of the boundary wall. If that was correct, it is not in dispute that the height restrictions were satisfied.

27. On appeal, Mr James challenged the judge's reasoning on the basis that the neighbour's garden, even if adjacent, cannot be regarded as immediately adjacent, because it is separated from the new building by the boundary wall. He argued that the measurement should be taken (in effect) in the gap which he contended will necessarily exist, even if wafer thin, between the two walls.

28. Furthermore, he submitted that the measurement must in any event be taken from within the curtilage, so that it would not be legitimate to take a neighbour's land even if there were no boundary structure which separated the land in the two ownerships.

29. As an alternative he contended that it was open to the inspector to deem the existing ground level along the southern boundary to be the relevant level, and accordingly the judge ought not to have rejected that approach. I have to say that I can see no basis for a deeming approach to the height restrictions under Class E and I do not propose to spend more time on that submission. He also referred to the opening words of article 1(3) "Unless the context otherwise requires", but I was unable to perceive any respect in which the context might require an approach other than that set out in article 1(3) and, more specifically of course, in Class E itself. On any basis it is necessary to identify ground immediately adjacent to the relevant part of the building, from the surface of which the measurements can be taken.

30. Before I discuss the arguments about what is meant by ground immediately adjacent to the building, I must describe briefly the Claimant's fall-back position, represented by his latest designs. The critical difference is that the walls of the building are set back by 150mm from the boundary wall. The plans and elevations show that this gap would be backfilled to the same level as on the northern flank of the building. The only other noticeable change in the design is that, in consequence of setting the structure back from the boundary wall, the lantern would have frameless glazing on three sides rather than two, but that feature is irrelevant for present purposes.

31. For the Claimant it is said that, on these plans, the ground level in the 150mm gap would be the level from which to apply the height criteria, because that would be the ground immediately adjacent to the relevant parts of the building. On the basis that the ground level would be the same as on the northern side, where it is accepted that the restrictions

are satisfied, so they would be on the west and the south. Mr James told us that his clients accepted in principle that this design would satisfy the requirements of Class E, while reserving the possibility of arguing that the ground level in the gap might be artificial.

32. Thus, it seems that if the building were set back from the boundary wall by 150mm, creating a gap which would be of no practical use and might even be detrimental in terms of maintenance, the requirements of Class E could be satisfied, whereas, on the Appellant's contentions, if the building is built flush with the boundary wall, which seems in principle to be a more sensible use of the land, it does not and cannot satisfy those requirements.

33. As mentioned, one of Mr James' arguments is that the "adjacent ground" must be within the curtilage of the dwellinghouse. I do not accept that. The concern is about detriment to the visual amenity in the area, and I do not understand why that should necessarily be tested only by reference to the situation within the curtilage. For one thing, the developer might well own land beyond the curtilage, as was the case in *Burford v Secretary of State for Communities and Local Government* [2017] EWHC 1493 (Admin), where a paddock was found not to be part of the curtilage of the dwellinghouse. If a new building were proposed to be constructed within the curtilage but extending right to the boundary of the curtilage, there seems to be no good reason why the ground immediately adjacent to that part of the building should not be taken to be relevant even though it is outside the curtilage, whatever may be the ownership of the land just beyond the curtilage.

34. Similarly, if there were no structure such as a brick wall on the boundary between the developer's land and that of a neighbour, and if the developer's proposal is to build right up to the boundary, as a matter of fact the ground immediately adjacent to that part of the building would be the other side of the boundary, so owned by the neighbour rather than by the developer. I reject Mr James' submission that, in such a case, the ground which is in fact immediately adjacent to the proposed building on that side must be ignored because it is not in the developer's ownership nor within the curtilage. If that were right, no building constructed with one of its walls on the boundary could fall within Class E because there would be no relevant ground that could be used to apply the height limits to that part of the building. I can see no good reason, consistent with the statutory purpose of the GPD Order, why land across the boundary should be excluded from being taken as the ground immediately adjacent to the building, so as arbitrarily to prevent a building on the boundary from satisfying the requirements of Class E.

35. Mr James pointed out that there could be problems and difficulties in using a neighbour's land for this purpose. One is that the development would be at risk if, for whatever reason, the neighbour were to alter the ground level on his side of the boundary. That is no doubt true. Until the building is constructed, the developer would face a risk that the neighbour might carry out works on his side of the wall which would affect the developer's ability to satisfy the requirements of Class E. He also suggested that this construction would mean that if the neighbour wished to put up a building abutting on the boundary wall, he would face the problem that, at least at present, the ground level on the claimant's side is so much lower, which would create problems in satisfying Class E. That is also true. But the fact that possible reliance on a neighbour's land as being the ground immediately adjacent to the proposed building would involve

a degree of dependence on what the neighbour does or has done on his land does not seem to me to be a valid objection in principle to the proposition that such land can be the ground immediately adjacent to the relevant part of the new building if that is otherwise a legitimate reading of the GPD Order.

36. In the present case, the complication is that there is a brick structure between the proposed building and the nearest piece of unbuilt-on land, namely the boundary wall. Accordingly, while the neighbour's land is adjacent to the building, it is not the physical feature that is nearest to it, and therefore would not normally be described as "immediately" adjacent to it. Mr James' principal argument is that the ground immediately adjacent to the relevant part of the building, from the surface of which the measurement is to be taken, is the bottom of the gap which he argued must exist between the boundary wall and the wall of the building. He said that it does not matter that the gap is not one within which it would be possible to carry out an actual measurement, because it would be possible to ascertain, perhaps by external or circumstantial evidence, where the bottom of this gap must be. In practice, no doubt, he would argue that it was the same level as the base of the boundary wall as it now stands, which is presumably more or less the same level as the patio, because the wall of the new building will be built up from the same point, and nothing will be done to create a different level within the gap which he said must exist between the two walls.

37. The judge rejected that argument in the passage I have cited at paragraph [25] above, basing himself on what Mr Nixon had said. In my judgment it does not assist Mr James to contend that all that is needed is a point, possibly a notional one, from which a measurement is to be taken, even if it has no other utility or significance. The point is prescribed by Class E (consistently with paragraph 1(3) of the GPD Order) as being the surface of the ground immediately adjacent to the relevant part of the building. One must, therefore, be able to identify something which can be fairly described as ground which has a surface level. I agree with the judge that the bottom of a notional or wafer-thin gap between two walls built flush to each other cannot be regarded as ground with a surface, or indeed ground at all. Moreover, to use a notional point of that kind would seem to me to have nothing to do with the statutory purpose of this aspect of the GPD Order. On the basis that the aim of the height restrictions, as also of other aspects of the qualifications in Class E, is to limit the impact of a generally permitted building on visual amenity in the area, it must surely be necessary to identify some ground (i.e., land not built on) by reference to which one can make a real assessment of the height of the proposed building above ground so as to limit its impact on what can be seen from elsewhere.

38. Class E is not concerned with digging down below ground level. If the relevant area of the Claimant's land had not already been excavated in order to build the boundary wall, the excavation aspect of the proposals would not of itself have been of concern under Class E. What matters is how far the new building would protrude above ground level. It seems to me to make no sense to suggest that, whereas on the northern side, the height of the building is within the permitted limits, the same is not also the case on the southern side merely because the building would be flush with the boundary wall, leaving no open ground between the new building and the boundary wall. If, for the reasons given in paragraph [34] above, a building whose outside edge is on the boundary can fall within Class E because the neighbour's land can be the "ground immediately adjacent", I can see no good reason to suppose that the position should be

intended to be different if the boundary is marked by a normal feature such as a boundary wall. To require the developer to set the new building back by, say, 150mm from the boundary or from the boundary wall, just so that the height restrictions in Class E can be applied, would seem wasteful and absurd.

39. As it seems to me, the most relevant ground level on the southern side of the proposed building, as regards assessing the impact of the building on local visual amenity, is the neighbour's land just the other side of the boundary wall. Returning to the question of construction, if the proposed building would be built so as to abut on a boundary wall, not cutting into the wall but so that its wall is flush with the boundary wall, what is the ground that will be immediately adjacent to the relevant part of the new building? Immediately next to the building is the boundary wall. Beyond that is ground forming part of the neighbour's garden. The wall is not "ground". The neighbour's garden is the ground nearest to the relevant part of the building. It seems to me that it is a proper construction of the words, on facts such as those of this case, to hold that the ground which is just the other side of the boundary wall is ground immediately adjacent to the new building. It is separated from the building not by any other ground but by a wall of ordinary size and construction. In practice it is this ground that provides the context, in terms of assessing the extent to which the new building would protrude in height on its southern side so as, potentially, to affect visual amenity in the area.

40. I can see that there might be other cases in which the structure on or immediately across the boundary was significantly bigger – even a house, for example – where it could not properly be said that the ground beyond that would be immediately adjacent to the developer's proposed building on his side of the boundary. It would be a question of fact and degree, for the planning authority and for the inspector. In an unusual type of case on the facts, it would be easier to suppose that the GPD Order was not intended to cater for the particular combination of facts, leaving it to the developer to apply for planning consent. But in what seems to me likely to be a relatively normal case, where a developer wishes to build a new structure up against an ordinary boundary wall, in order to make best use of his land, and the land on the other side of the boundary wall is not itself built on, it seems to me legitimate to read Class E as allowing a conclusion that the ground immediately adjacent to the part of the building which abuts the boundary wall is the ground lying on the other side of the boundary wall. This sort of factual situation cannot be regarded as rare or uncommon, so the GPD Order ought to be able to be applied to it in a sensible way which is consistent with its statutory aim. Thus, on the basis that the wall cannot count as "ground" but that there is "ground" immediately on the other side of the wall, I would hold that land in the neighbour's ownership which is next to the boundary wall is ground immediately adjacent to the proposed building for the purposes of Class E.

41. For that reason, I find that the judge was right in his identification of the neighbour's garden as the immediately adjacent ground for the purposes of Class E, and accordingly right to allow the Claimant's appeal. I would therefore dismiss the Appellant's appeal.

Lady Justice Asplin:

42. I have had the opportunity of reading both the judgment of Sir Timothy and that of Lewison LJ in draft. I agree with both of them. I also agree that the facts of this case have presented us with a conundrum which is difficult to resolve by linguistic means. I also note that circumstances of this kind can hardly be unusual.

43. I too, am persuaded that in the end, it is necessary to adopt the pragmatic approach based upon the relevant underlying policy considerations, set out by Sir Timothy at [39].

Lord Justice Lewison:

44. I agree with Sir Timothy that the facts of this case present us with a conundrum. On the one hand, the surface of the neighbour's land is not "immediately adjacent" to the proposed garden room. On the other hand, what is "immediately adjacent" to the proposed garden room is not "surface of the ground". Although, as Sir Timothy points out, it is necessary to find something immediately adjacent that can fairly be called "surface of the ground," it is also necessary to find surface that can fairly be called "immediately" adjacent. I do not think that it is possible to resolve the tension between the two by purely linguistic means.

45. There was, I think, force in Mr James' submission that all that paragraphs E.1 (f) and (g) require is a measuring point. Neither paragraph requires a piece of usable surface of the ground. His point is, perhaps, stronger in the case of a building yet to be constructed; but, as Mr Jones rightly submitted, the same approach must apply to a building that has already been constructed and for which a certificate is sought.

46. There are also difficulties in adopting an approach that is reliant on a judgment of fact and degree. The purpose of the GPD Order is to provide both developers and local planning authorities with clear rules that predict when an application for planning permission need not be made.

47. In the end, however, I consider that our choice must be a pragmatic one, based on the policy underlying the height restrictions contained in paragraph E.1. Although it is not a perfect solution, I have been persuaded, on balance, that the approach that Sir Timothy adopts in paragraph [39] is the preferable one.

48. It may be that those responsible for drafting the GPD Order can devise a clearer form of words to deal with this kind of situation which, although likely to be relatively common, does not fit comfortably within the wording as it stands.

49. Accordingly, I agree that the appeal should be dismissed.