



Neutral Citation Number: [2020] EWHC 2588 (Admin)

Case No: CO/1252/2020

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**  
**PLANNING COURT**



Cardiff Civil and Family Justice Centre  
2 Park Street, Cardiff, CF10 1ET

Date: 07/10/2020

**Before:**

**HIS HONOUR JUDGE JARMAN QC**  
**Sitting as a judge of the High Court**

**Between:**

**MARK McGAW**

**Claimant**

**- and -**

**THE WELSH MINISTERS**

**Defendants**

**-and-**

**THE COUNCIL FOR THE CITY AND COUNTY**  
**OF SWANSEA**

**Interested**  
**Party**

**Mr Emyr Jones (instructed by Douglas-Jones Mercer Solicitors) for the claimant**  
**Mr Owain Rhys James (instructed by Government Legal Department) for the Defendants**  
**The interested party did not appear and was not represented**

Hearing dates: 28 September 2020

**Approved Judgment**

**HH JUDGE JARMAN QC:**

1. The claimant wishes to build a garden room (the building) in the garden of his home in Sketty, Swansea. He has made two applications to the local planning authority, the interested party in this case (the council), for a certificate that his proposals fall within Class E of Schedule 2 of the Town and Country Planning (General Permitted Development) Order 1995 as it applies in Wales (the GPDO) and will amount to lawful development. Each application has been refused. He has appealed each decision to an inspector appointed by the defendants, the Welsh Ministers, and on each occasion the appeal has been dismissed.
2. In respect of the first application, made as long ago as 2017, he sought judicial review of the dismissal and by an order dated 2 October 2018 by His Honour Judge Keyser QC sitting as a judge of the High Court, the dismissal was quashed with the agreement of the Welsh Ministers, and remitted for reconsideration.
3. That reconsideration was made by an inspector, Mr McCooey in March 2019, under the written representation procedure and after a site visit. He dismissed the appeal on the basis that the front of the building would exceed 3 meters from the immediate adjacent ground and parts of the building would be within 2 meters of a boundary wall and would exceed 2.5 meters in height, and therefore would exceed those height limitations set out in Class E of the GDPO.
4. Class E, so far as relevant, permits the provision within the curtilage of a dwelling house of any building for a purpose incidental to the enjoyment of the dwellinghouse as such. It is common ground that the building comes within that definition.
5. However, E.1 then provides that development is not permitted by Class E, if the building comes within any of the subsections there set out from (a) to (m). It is clear that many of these seek to control the size of the development permitted by Class E. Examples are that the building is not permitted by Class E if it has more than one story (subsection (d)) or if the height of the eaves of the building, measured at any point along their length, would exceed 2.5 metres (subsection (g)).
6. It is suggested here that the building comes within only two of those subsections. The first, is subsection (e), which so far as material applies if “the height of any part of the building...measured from the surface of the ground immediately adjacent to that part, would exceed...(ii) 3 metres...”
7. The second is subsection (f), which applies if “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...”
8. The claimant amended his plans with a view to meeting the reasons for dismissal given by Mr McCooey. This he did by setting a glass structure on top of the building, called a roof lantern, about 2 meters back from the front edge and eaves of the building. He applied again for a certificate on the basis of the amended plans.
9. The council refused the application. Its delegated decision report set out the basis for doing so. It said that the building including the roof lantern would measure a total of 3.48 metres in height “from the level upon which it is to be constructed (despite the

setback of the lantern) and accordingly does not comply with E.1(e).” It was stated that the measurement should be taken for “the whole building which includes the lantern rooflight as it forms part of a single building operation.” Similar reasoning was deployed in saying that the building would not accord with the criterion in E.1(f).

10. The subsequent appeal was determined by another inspector, Mr Nixon, who also made a site visit. In the claimant’s comments on the council’s statement of case, the council’s reasoning was criticised as ignoring the wording of E.1 (e) and (f) in particular the reference to parts of the building and the surface of the ground immediately adjacent.
11. The focus of the appeal was not upon the front wall of the building, as it had been in the appeal before Mr McCooley, but because of the amended plans the focus was upon the side walls of the proposed building to the north and the south. Mr Nixon dismissed the appeal on the basis that the ground levels for the purposes of Class E should be the existing levels, and not the intended backfilling levels proposed along the northern wall of the building as part of the development, which backfilling would in any event not be possible along the southern wall of the proposed building as this would abut the existing brick boundary wall. It is that dismissal which the claimant now seeks, with permission, to have reviewed by this court pursuant to section 288 of the Town and Country Planning Act 1990 (the 1990 Act).
12. Mr Jones, counsel for the claimant, submits that each of these two conclusions of Mr Nixon involve an error in construing the relevant subsections of E.1, and that when those provisions are properly applied it is clear that the building does come within Class E. These are grounds 3 and 4 of the claim. Ground 2 involves allegations of breaches of natural justice in the determination by Mr Nixon. Those will not arise however if grounds 3 and 4 are made out, and both Mr Jones and Mr James for the Welsh Minister dealt with these grounds first.
13. Ground 1 involved a jurisdictional point under section 195 of the 1990 Act, under which the appeal to Mr Nixon was made, and which required him to consider whether the council’s refusal of the second application was “well-founded.” The claimant’s point was that this did not allow Mr Nixon to treat the appeal as a re-consideration of the lawfulness of the proposed development.
14. Mr James, in his skeleton argument, argued that by analogy the reasoning of Woolfe J, as he then was, in *Cottrell v SSE Tonbridge and Malling BC* [1982] JPL 443 applies to section 195. That was a decision which related to similar appeal provisions under the Town and Country Planning Act 1971, and the court held that it would be absurd if an appeal against the refusal of a certificate which was wrong as to a technical matter should result in a certificate being granted when it was clear that on the true merits that none should be granted. Mr Jones realistically accepted the force of that reasoning and properly at the outset of the hearing made clear that he did not pursue this ground.
15. The application which was the subject of the appeal before Mr Nixon had a number of elevations and plans of the building included with it. Sheet 1 showed the elevation of the building set against the southern boundary wall. None of the building, including the roof lantern, would project above the height of the boundary wall. This wall increases in height as the garden rises from east to west. There is a dotted line with the

annotation "Original garden profile (pre-excavation)." There is then a dashed line with the annotation "Garden profile (approximate)" and further towards the west where the profile levels off with "Upper garden level." The front eaves of the building is annotated "Eaves height <2.5m above adjacent land level." There is a similar annotation where the roof lantern begins; "Eaves height <2.5m above nearest adjacent land level."

16. The first floor plan has a circle on the centre point of the roof lantern's façade to indicate that no part of the roof lantern is closest to the front adjacent ground, and is annotated as such. This and other plans show that the southern edge of the southern wall of the proposed building is flush with the northern edge of the boundary wall. As is to be expected with plans submitted for the purpose of planning permission, no further construction detail is given as to how precisely the two walls would relate to one another.
17. Sheet 4 shows the elevation of the boundary wall from the south, the neighbour's side. The outline of the building is shown as a dotted line concealed by the boundary wall. There is then another line which is annotated "Approximate topography/profile of neighbours land against the boundary wall." It is not in dispute that the level of this profile is less than 2.5 metres below the top of the proposed roof lantern.
18. The existing ground floor plan shows the dwelling to the east and an upper garden to the west, the contours of which are shown by dotted lines. Nearer to the dwelling there is another dotted line and an annotation "Original extent of higher garden level (pre-excavation)." Between the upper garden and the southern boundary wall, where the other plans show the building is sited, there is an annotation "Localised excavation preparation for outbuilding." The proposed plan shows the upper garden flush with the northern wall of the building.
19. The issue of excavation for the building was dealt with by Mr McCooey in paragraph 4 of his decision letter as follows:

"The garden has been excavated in this corner so that it is around 1.5m lower than the ground level to the side and at a similar level to the patio area...The appellant states that the side of the proposed building was excavated around 5 or 6 years ago at the same time as the adjacent boundary wall was built. The excavation of the proposal was temporary in anticipation of a future building. The level area in front of the proposal (to the rear of the house and drive) is obviously the intended permanent ground level."
20. At paragraph 11 Mr McCooey stated that with backfilling after construction, ground levels would be higher on parts of two sides of the building, but they would remain lower on the rest. It was on this basis that he dismissed the appeal, and on this basis that the claimant then amended his plans to show the roof lantern, which on the plans before Mr McCooey had been flush with the front of the building, set back by about 2 metres.

21. Before Mr Nixon therefore, the claimant argued that as a result of that amendment, no part of the proposed building would exceed the 3 and 2.5 metres height restrictions in Class E in relation to the ground level immediately adjacent to that part.
22. Mr Nixon did not simply adopt the reasoning of the council in the delegated decision report. At paragraph 10 of his decision letter he said this:

“I note the criticisms levelled at the Council’s reasoning as set out in the delegated decision report and the two reasons for refusal. However, these criticisms of the Council’s approach do not alter my conclusions, which are based on the facts of this case and a rational and straightforward application of the provisions of Class E of the Order, as set out above.”

23. Instead he set out his own reasoning in dismissing the appeal. He dealt firstly with E.1(e). His approach to this, which forms the basis for ground 3 of the review before me are set out in paragraphs 5 to 8 of his decision letter as follows, referring to Mr McCooley’s decision:

“5. I do not accept this argument. As the previous Inspector noted in his decision, the calculation of height in Class E is in relation to the ground level immediately adjacent to that part of the building. Although the front edge of the lantern rooflight has now been moved away from the front edge of the building, it remains to be considered in relation to the adjacent ground level relative to other parts of the building relevant to the application of Class E.

6. It is evident that there has been previous ground excavation in this location, which it is said was in anticipation of the construction of the building now proposed. In relation to this it is argued that the ground will be backfilled against the completed building, and that the relevant ground levels in relation to which any measurements should be taken are the resulting ground levels once this has been completed. I reject this argument. It is evident from the vegetated nature of the excavated area and the presence on it of items including wooden storage cabinets abutting the boundary wall and a children’s trampoline that the excavated area has been in existence for a considerable time and has become an actively used part of the domestic curtilage in its current form. Any fill material placed against the completed building would probably be derived from floor slab and footings excavations yet to be undertaken, since none of the previously excavated material appears to remain on the site. In light of these factors I consider that the relevant ground levels from which heights should be calculated should be those existing at the time of the application.

7. Moreover, even should backfilling to some previous ground level be carried out post construction along the northern side of

the building, backfilling will not be possible on the buildings southern flank, which is to be built abutting the existing brick boundary wall. Regardless of the argument advanced in respect of the northern side of the proposed building, therefore, 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.

8. The height conditions within Class E are clearly worded. Dealing first with the application of subsection 1(e)(ii), the lantern rooflight structure is plainly an integral part of the building. Although the submitted drawings show the structure set in marginally from the outer face of the solid wall forming the proposed building's southern flank, the lantern's structure's southern side nonetheless rests on top of that external wall. Whilst there would be adjacent higher ground adjacent to some parts of the building, the ground level is lower along the building's southern flank. Measured relative to this lower ground level, the height of the adjacent part of the proposed building would exceed 3m, and so would not fall within the height limitation imposed by subsection 1(e)(ii)."

24. The claimant has in these proceedings filed a witness statement setting out why he says that the sheds and the trampoline were placed on the excavated ground on a temporary basis pending the granting of a certificate that the building would be permitted development. This impacts upon the breach of natural justice ground, that this was not put in issue by the council or by Mr McCooey and had the claimant been made aware that Mr Nixon was contemplating a different approach he could have put this evidence before him.
25. So far as ground 3 is concerned, Mr Jones submits that Mr Nixon's approach of taking the ground levels as seen is inconsistent with the express wording of E.1(e). That is expressly prospective and contemplates whether the height would exceed 3 metres from ground level after completion of the proposed development in accordance with the submitted plans which show the backfilling of the garden along the northern wall of the building to pre-excavation levels, or just above at some points to achieve some levelling. Moreover to hold otherwise would be to give rise to a potential unjustified difference between outcomes depending on whether the building is to be built and a prospective application is made under section 192 of the 1990 Act, as occurred in the present case, or whether it has been built and an application is made for a certificate of lawfulness of existing development under section 191. Plainly in that case what must be looked at is the development as carried out, which would include any backfilling, and the same must apply where the application is made prospectively under section 192.
26. Mr James's response is that the question of the correct ground level for the purpose of subsection E.1(e) is a question of fact, and Mr Nixon on the evidence before him was entitled to come to the conclusion that the existing ground level was the correct level on the evidence before him. The position in respect of an application under section 191 of the 1990 Act does not assist in that determination.

27. It does not appear that Mr Nixon rejected the evidence that the garden alongside the northern wall of the building when completed would be backfilled approximately to pre-excitation levels. This is what the plans show. At the least, there is no finding that this work would not be carried out. Mr Nixon found that any such backfilling would be with material taken from floor slab and footing excavations as none of the previously excavated material appeared to remain on site. It was that factor taken together with the finding that the excavated area existed for a considerable time and had become an actively used part of the domestic curtilage in its current form on which he based his conclusion that the relevant ground levels from which heights should be calculated should be those existing at the time of the application.
28. However, in my judgment, the height of any part of the building referred to in E.1(e), namely from the surface of the ground immediately adjacent to that part, is expressly said to be the height that *would* exceed 3 metres (emphasis added). Indeed, this is the tense used in each of the subsections of E.1. The use of the conditional tense, or hypothetical future, can only sensibly be taken to indicate the state of affairs which would obtain if the proposed development is carried out. The proposed development in this case, as the plans forming part of the application for the certificate make clear, includes the backfilling of the northern wall of the building to bring the upper garden at that point back up to, or at points slightly exceeding, pre-excitation levels.
29. That being so, I cannot see that the length of time that the excavated area has existed or the use made of it in the meantime pending applications for or grant of a certificate can be relevant on the facts of this case to the calculation of height for the purpose for E.1(e)(ii). That is not to say that it is never appropriate to take existing ground levels for such a purpose. For example, if proposed backfilling were found to be a device artificially to raise the adjacent ground level so as to come within the 3 metres limitation therein set out, then such an approach may well be justified. However, there was no suggestion let alone a finding that such was the case here.
30. In my judgment ground 3 is made out.
31. I turn now to ground 4, which relates to the southern wall of the proposed buildings and the proper interpretation of E.1(f). In that respect, Mr Nixon developed his reasoning in paragraph 9 of his decision letter as follows:

“9. As regards subsection 1(f), the proposed outbuilding would occupy the south-east corner of the rear garden, such that it would adjoin parts of the southern and western boundaries of the curtilage of the dwelling house. Whilst the ground level adjacent to the rear elevation of the proposed building would be at a higher level, the immediately adjacent ground level along the southern boundary is significantly lower, such that the part of the proposed building incorporating the lantern rooflight structure and located within 2 m of that southern boundary of the curtilage would exceed 2.5m in height relative to that adjacent ground level. Because of this the proposed outbuilding would not fall within the limitation imposed by subsection 1(f).”

32. As Mr Jones submits, this reasoning does not fit easily with the finding in paragraph 7 that no backfilling is possible to the southern wall as it to be built abutting the existing boundary wall. That finding was clearly justified on the plans submitted with the application. Mr Jones submits that the “ground immediately adjacent to” that part of the proposed building incorporating the roof lantern within the meaning of subsection 1(f) must be the boundary wall itself, or the level of the neighbour’s garden immediately adjacent to that. In either case that level would not be greater than 2.5 metres from the relevant part of the building. Only by taking the surface of the floor level of the building itself would this be exceeded. However, that is underneath the relevant part of the building and not immediately adjacent to it.
33. The first response of Mr James is that under subsection (f) it is the height of the building which must be considered, rather than part of the building, as he accepts is the proper consideration under subsection (e). That is because in the latter there is an express reference to the ground immediately adjacent to “that part,” whereas in the former the reference is to the ground immediately adjacent to “it.” The “it,” submits Mr James, can only refer back to “the building” earlier on in the subsection and not to “any part of the building,” otherwise instead of “it” the subsection would have said “that part” as subsection (e) does.
34. I do not accept that submission. The different wording in my judgment is explained by the differing opening words of the subsections respectively. Subsection (e) begins “the height of any part of the building” and the subsequent phrase “that part” makes clear what is being referred to. However, subsection (f) begins with “any part of the building” and it is tolerably clear that that is the “it” then referred to. Moreover, no reason was put forward why the approach should be different if any part of the building is within 2 metres of the boundary, other than to reduce the limitation on height from 3 metres to 2.5 metres. It is difficult to see why that should alter the consideration of the height of part of the building to a consideration of the height of the building as a whole.
35. Mr James next submits that the immediately adjacent ground cannot be the boundary wall. Such a construction would mean that the building could be built 2.5 metres higher than the top of the wall. As the purpose of the restriction is to prevent overbearing outbuildings being built near the boundary with neighbouring property that cannot be what was intended. I accept that submission.
36. Finally, submits Mr James, the immediately adjacent ground to the southern wall of the building is properly seen as the existing level immediately adjacent to that wall, as there is no room for backfilling. It is not proposed that the boundary wall will be interfered with and so there will be two brick walls abutting and there is bound to be some gap even if bridged by mortar.
37. However, that was not the finding of Mr Nixon, who found that the two walls would abut one another. On the plans, which show the walls as flush, there was no other finding open to him in my judgment. As indicated above the plans do not show precise details of construction and they would not be expected to. There is no room to infer a gap, or at least not to the extent that the bottom of the gap could be sensibly regarded as the ground immediately adjacent.



38. Accordingly, I accept the alternative submission on this point of Mr Jones, that the immediately adjacent land to the southern wall of the building refers to the neighbour's garden, which is less than 2.5 metres lower than the nearest part of the building. It follows that ground 4 is also made out.
39. That makes it unnecessary for me to deal with ground 2. Mr Jones submits that if that is the case, then it is clear the building does come within Class E and that this court on review should quash the determination of Mr Nixon, and because these are binary issues I should direct that the Welsh Ministers should reconsider the matter and reach a decision in accordance with this judgment, without the need for yet another appeal. Mr James submits that as there were issues of fact involved the matter should be remitted to another inspector for determination.
40. However, as I have already indicated the facts on which Mr Nixon based his reasoning were not relevant to the consideration of Class E as applied to the proposed development in this case. The claimant does not challenge the remainder of the decision and in my judgment there is only one correct answer on that basis and that is the proposed development is within Class E.
41. CPR Rule 54.19(2) provides that where the court makes a quashing order the court may (a) remit the matter to the decision maker and direct it to reconsider the matter in accordance with the judgment of the court or (b) in so far as any enactment permits, substitute its own decision. It was not submitted that there is any such enactment in the present case. In my judgment the appropriate order is to quash the determination of Mr Nixon and to direct the Welsh Ministers to reconsider the matter and reach a decision in accordance with this judgment.
42. I am grateful to each counsel for his clear and focussed submissions. I invite them to submit a draft order and written submissions on any consequential matter remaining in issue, within 14 days of hand down of this judgment. I will then make a determination on paper of any such issues.