Neutral Citation Number: [2013] EWHC 3673 (Admin)

Case No: CO/4574/2012

IN THE HIGH COURT OF JUSTICE
IN THE MATTER OF A CLAIM IN JUDICIAL REVIEW

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/11/2013

Before :

MR C M G OCKELTON, VICE PRESIDENT OF THE UPPER TRIBUNAL (SITTING AS A DEPUTY HIGH COURT JUDGE)

- -

Between :

R (oao Alison Sellars)	**Claimant**
- and -	
Basingstoke & Deane Borough Council	**Defendant**

- -
- -

Mr D Kolinsky (instructed by **Richard Buxton Solicitors**) for the **Claimant**
Mr A Goodman (instructed by Borough Solicitors) for the **Defendant**

Hearing date: 5 November 2013

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR C M G OCKELTON, VICE PRESIDENT OF THE UPPER TRIBUNAL (SITTING AS A DEPUTY HIGH COURT JUDGE)

Mr C M G Ockelton, Vice President of the Upper Tribunal :

1. Blacklands Farm is at Old Basing in north Hampshire. Part ("the red line area") of one of the fields has been used for some years by the Aldershot Model Club. The members gather there to launch powered model aircraft. The red line area, about 100 square metres in total, is adjacent to a lane and is delineated by a fence, but part of the fence is from time to time lowered so that it does not interfere with the flight paths of the model aeroplanes. The aeroplanes themselves fly over an area that is larger than the red line area. Alison Sellars (the Claimant) is a neighbouring land owner, who says that she is disturbed by the model aircraft, particularly when she is in her garden.

2. Across the lane from the red line area, there are some huts, some of which appear to be in use for various purposes by the Aldershot Model Club. There is also an area where members park their cars. A nearby part of the farm, perhaps within the original boundary of the field now containing the red line area is used for microlite aircraft (which are not model aircraft). It appears that gliders too have at various times flown from the farm. But, so far as I know, the rest of the farm is used for various agricultural purposes.

3. The Aldershot Model Club was formed in 1974. It is represented in these proceedings by Peter Carter ("the Interested Party"). His evidence is that the Club has used the red line area on a daily basis (weather permitting) since then. His position is that long use of the red line area for this purpose has engendered immunity from enforcement under the Town & Country Planning Act 1990, because section 171B(3) of that Act provides that, in relation to an activity of this nature,

> "No enforcement action may be taken after the end of the period of ten years beginning with the date of the breach."

4. He therefore applied to the Local Planning Authority, Basingstoke and Deane Borough Council ("the Defendant") for a certificate of lawful existing use of the red line area which would, if granted, have the effect of conclusively presuming the lawfulness of the use of the land specified in the certificate. The application was made under section 191 of the Act, which, so far as relevant, reads as follows:

> "**191 certificate of lawfulness of existing use or development**
>
> (1) If any person wishes to ascertain whether –
>
> (a) any existing use of building or other land is lawful;
>
> (b) any operations which have been carried out in, on, over or under land are lawful; or
>
> (c) any other matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful, he may make an application for the purpose to the local planning authority specifying the land and describing the use, operations or other matter.

(2) For the purposes of this Act uses and operations are lawful at any time if –

(a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired for any other reason); and

(b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.

…

(4) If, on an application under this section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, operations or other matter described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case they shall refuse the application.

(5) A certificate under this section shall –

(a) specify the land to which it relates;

(b) describe the use, operations or other matter in question (in the case of any use falling within one of the classes specified in an order under section 55(2)(f), identifying it by reference to that class);

(c) give the reasons for determining the use, operations or other matter to be lawful; and

(d) specify the date of the application for the certificate.

(6) The lawfulness of any use, operations or other matter for which a certificate is in force under this section shall be conclusively presumed.

(7) A certificate under this section in respect of any use shall also have effect, for the purposes of the following enactments, as if it were a grant of planning permission –

(a) section 3(3) of the Caravan Sites and control of Development Act 1960;

(b) section 5(2) of the Control of Pollution Act 1974; and

(c) section 36(2)(a) of the Environmental Protection Act 1990. ”

5. The application was made on 4 October 2011. It was specifically confined to the red line area, and was made on the basis that the Interested Party was in a position to establish the continuous use of that area by the Aldershot Model Club for meetings, and launching, controlling and landing model aeroplanes, for (at least) the preceding ten years. The Defendant publicised the application and received representations in relation to it. At a number of meetings it received evidence, considered the reports and advice of its Officers, and received and considered submissions by or on behalf of the Interested Party and those opposing the grant of the certificate, including counsel instructed by the Claimant.

6. The certificate was granted. It is dated 3 February 2012. It is specifically limited to the red line area, and the use specified is as follows:

> "Flying a maximum of five powered model aircraft at any one time between the hours of 10am until dusk Monday – Saturday and 10am – 7pm or dusk (whichever is the earlier) on Sundays and Bank Holidays"

7. The reason for granting the certificate is expressed as follows:

> "The Applicant's evidence is sufficiently precise and unambiguous."

8. The present claim was issued by the Claimant, acting in person, on 1 May 2012. The principal grounds were as follows:

> "5. The Local Authority has wrongly concluded that the use to which the land in question has been put has been continuous for a period of ten years up to and including the date of the Application upon which this decision is based. In doing so, it failed to take account of material periods when the land was not so used, including a period when there was a foot and mouth outbreak
>
> 6. The Local Authority has also clearly failed to take cognisance of the fact that the use to which the land has been put, namely for the flying model aircraft, has materially altered and varied over time. This is evidenced by virtue of the fact, by way of example only, that there has been a substantial increase in the volume of flying, and therefore noise and interference, which has occurred of more recent times. This is therefore a substantially different situation than was the case formerly. The Local Authority has patently failed to apply principles of natural justice in implementing its own guidelines and failing to consider whether there has been a material change in the use of the land in the course of the relevant period of ten years.
>
> 7. Further, the Local Authority, in reaching its decision regarding the grant of a certificate of Lawfulness has

> wrongly applied the law in relation to the definition of "Planning Unit." It has failed to recognise and/or take into account properly or at all the fact that the use of the land for model aircraft in reality, and without any real doubt, extends beyond the red line of the Application site. The site is just part of the land under common ownership. In [treating] the application as appertaining to the red line only, the Local Authority has failed to apply principles of basic law for which purpose reference is made to the case of: **Burdle v Secretary of State (1972) 1 W.L.R. 1207.** The site identified in the Application and the actual Planning unit are not the same and in these circumstances the Planning Authority has wrongly applied the Law.
>
> 8. It is clear that the Local Authority has failed to take into account the fact that the use of model aircraft currently extends beyond the Red Line, being the site identified in the Application. It has also failed to take into account material changes of use, including uses additional to the existing one, as is the case in respect of this land.
>
> 9. The Local Authority has failed to apply the law in respect of the onus of proof which at all times remained the duty of the Applicant to discharge which it failed to do in so far as it was the Applicant's duty to establish that the use of the land was at all times lawful."

9. The Defendant's acknowledgement of service took issue (amongst other things) on the grounds of delay. The application for permission came before David Holgate QC, sitting as a Deputy Judge of this Court on the papers. By order dated 12 October 2012 he observed that he considered "the planning unit point" and "the intensification issue" as arguable but declined to grant permission without any proper explanation for the delay in issuing proceedings. He ordered the permission application into court for consideration of that issue.

10. On 5 February 2012 there was a hearing before Silber J. He granted permission and directed the Claimant to reformulate the grounds of challenge. The grounds upon which permission was granted are accordingly those set out in the order, dated 7 February 2013, as follows:

> "(1) That the Defendant erred in law in its approach to the planning unit and/or by treating as irrelevant activities which were taking place outside of the red line area identified in the application. In respect of the planning unit, the Claimant contends that the Defendant erroneously failed to identify the relevant planning unit or alternatively approached the relative planning unit wrongly having regard to (a) a proper analysis of the extent of the land used by the IP and (b) the range of flying uses taking place on the relevant land. Applying

the test in Simplex v Secretary of State for the Environment [1988] 3 PLR 25 at 42 and 44, the Defendant's decision as to whether 10 years lawful use had been achieved could have been different if the Defendant had approached this issue correctly. In particular, the Claimant contends that (1) the identification of the planning unit could have affected the Defendant's consideration as to whether a single use had occurred over the 10 year immunity period in respect of the relevant area of land to be considered and (2) could have influenced the correct assessment of lawful planning uses including the flying of microlight aircraft.

(2) The Defendant erred in its assessment of whether there had been a material change of use by way of intensification in that Council:-

a. improperly failed to appraise the extent to which the material from the IP dealt specifically and adequately with that issue;

b. relied largely upon the Club's membership levels over the years instead of appraising whether the IP had adduced sufficient evidence on issue (a);

c. following on from (a) and (b), wrongly suggested a burden on local residents to show an increase in activity amounting to a material change of use; and

d. wrongly suggested a material discrepancy between the evidence of the Sellars family and other residents which ignored the fact that the Sellars bought their property in 2010.

(3) The Defendant erred in granting the certificate for the use of up to 5 powered model aircraft at any time throughout the period from 10am to dusk Monday to Friday and 10am to 7pm or dusk (whichever is earliest) on Sunday and Bank Holiday given that the start of the 10 year period from the date of the application in October 2001 coincided with the foot and mouth restrictions."

A "Knockout" Defence?

11. It is convenient to deal straight away with what is in effect a preliminary submission made by Mr Goodman on behalf of the Defendant. The submission was that the grounds of challenge, as reformulated, raise no justiciable point in relation to the decision under challenge. His submission was as follows. There is no suggestion that the challenge is a reasons challenge, and during his submissions on behalf of the Claimant, Mr Kolinsky had expressly disavowed a reasons challenge. The challenge was also not on Wednesbury principles of rationality: it was not expressed as such,

and there was in the event no basis upon which it could be said that the decision under challenge was not a permissible response to the material before the Defendant. In those circumstances, submitted Mr Goodman, the challenge could not succeed, because there was no argument available to the Claimant, as he put it "between" these two possibilities. He reminded me of the speech of Lord Hoffmann in Tesco Stores Limited v Secretary of State for the Environment [1995] 1 WLR 759, 780 and to his reassertion there of the incontestable principle that:

> "If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgement are within the exclusive province of the Local Planning Authority or the Secretary of State."

12. I reject Mr Goodman's submission. The passage of Lord Hoffmann's speech before the part cited by Mr Goodman is as follows:

> "The law has always made a clear distinction between the question of whether something is a material consideration and the weight of which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority. Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into *Wednesbury* irrationality) to give them whatever weight the planning authority thinks fit, or no weight at all. The fact that the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process. "

13. That principle is found in numerous other authorities, going back at least to the judgment of Lord Denning MR in Ashridge Investments Ltd v Minister of Housing and Local Government [1965] 1 WLR 320. It is, in my judgment, clear beyond any doubt that if a claimant is able to show that, in making a planning decision, an authority has failed to take into a account a material consideration, or has taken into account an immaterial consideration, the decision is susceptible to challenge on that ground, as any other decision challenge in public law proceedings would be. Further, it is perfectly clear that in the present proceedings, to put the matter at its lowest, the question of whether the Defendant should have taken into account issues relating to the proper extent of the planning unit under consideration have been expressed from the beginning and continued. They are in paragraph 7 of the original grounds and paragraph 1 of the reformulated grounds on the basis of which permission was granted. It is because of the Defendant's position in this point that I have set out the procedural history, and the grounds, at such length above.

Ground 1 : Planning Unit

14. So far as that issue is concerned, therefore, the claim poses three questions: 1. Is the notion of a planning unit, and the identification of the relevant planning unit, a material consideration in the determination of whether a certificate under section 191 should be granted? 2. If so, can the Claimant show that in making the decision under

challenge, the Defendant failed to take that material consideration into account? 3. If so, can the Claimant show that that failure made (or perhaps could have made) a difference to the outcome of the application.

15. 1. *Is the planning unit material for s 191?* Mr Goodman includes in his submissions the incontrovertible fact that the notion of a planning unit is not to be found in any statute. That is acknowledged too by Lord Widgery CJ in Johnston v Secretary of State for the Environment (1974) 28 P & CR 424 at 426, which is a decision of the Divisional Court applying that very notion:

> "[O]ne gets no assistance from the statute because the learning, such as it is, on the identification of the planning unit is entirely judge-made law, and, as to be expected, the rules which have been laid down for guidance are generally not rigid rules but guidelines or pointers."

16. No rule of English law is the worse for being extra-statutory, unless, of course, a statute overrides or contradicts it; and the law, such as it is, relating to planning units and their identification is none the worse for being judge-made. Nor is it right to attempt to reduce its importance by asserting that it is 'designed to aid decision-making , not to create obstacles to decision-making': that is equivalent simply to a submission that the process of determining a planning unit should be disregarded if the result might be a decision against the proponent of that view. The truth of the matter is that the identification of the appropriate planning unit is the beginning of many enquiries connected with enforcement. To cite again from Lord Widgery's judgment in Johnston:

> "[W]here a material change in use is put forward as the breach of planning control the first step in deciding whether the change of use is or is not a material change is to look at the planning unit concerned. It is quite obvious that a single activity may be a material change in the use of a relatively small area in which it takes place without being a material change in the use of a much larger area of which that area is part, and so one must begin by deciding what is the planning unit."

17. The issue here however is not enforcement as such, but the issue of a certificate under s 191. It is perhaps surprising that the researches of counsel have not produced any authority directly on the question whether the identification of the appropriate planning unit is an essential part of the process of deciding whether a certificate of lawfulness of existing use, or whether the applicant for a certificate is entitled to have the matter decided by reference only to the land specified in the application. Perhaps the nearest approach to such authority is the decision of King J in R (North Wiltshire District Council) v Cotswold District Council [2009] EWHC 3702. That was a claim in relation to a s 191 certificate covering the existing use of an airfield. The airfield straddled the boundary between the administrative areas of the Claimant council and the Defendant council. It followed that an application under s 191 to either council could be effective only in relation to the part of the airfield within that council's area. The application under consideration, however, specified the entire airfield, although the accompanying plan marked the county boundary. Dealing with an argument that

the certificate as issued, read as a whole, did not specify sufficiently precisely the area of land to which it related (and so failed to comply with the requirement of s 191(5)(a)) or alternatively specified land over which the Defendant had no planning control, King J said this at [116]:

> "The fact that the Reasons (understandably) refer to the entirety of the planning unit and thereby in part to that part of the airfield which fell within the administrative area of the Claimant council, does not in itself mean that the certificate was purporting to certify the entirety of the planning unit. In fact, by its terms the certificate specified as the land covered by it, only Kemble Airfield Gloucestershire which is the land within the Defendant's area … and I see nothing inconsistent between the terms of the Reasons and the description of the land covered by the certificate. I agree with the Defendant's submission that it was inevitable that the Defendant council should look to the use of the land making up the entirety of the planning unit in the course of deciding whether to certify the use of that part of it within its area. "

18. Those comments are clearly helpful to the Claimant, but it does not look as though there was any argument directed to the particular issue under consideration here; and in North Wiltshire the applicant did describe in the application the area that was in due course considered as the whole planning unit. North Wiltshire does not answer the question whether the planning authority, looking at an application under s 191, was entitled or bound to consider it by reference to a planning unit that may be more extensive than the land specified in the application as subject to the claimed existing use.

19. Nothing in s 191 contradicts the idea that the decision on whether to grant a certificate should be made by reference to a planning unit: indeed the very phrasing of the section, in the context of planning law as a whole, appears necessarily to imply it. It seems to me that in his written skeleton Mr Goodman's summary of the section is incomplete. At para 47 he writes this:

> "The task for the Council pursuant to section 191(4) of the Town & Country Planning Act 1990 was to consider whether it was satisfied that the use as ultimately described (following substitute wording by the committee) had been established over ten years. That is precisely what the council did … ."

20. But that is not what the section says or requires. It requires not merely an assessment of whether an activity has continued for ten years on the specified land but whether the existing use has become lawful by the expiry of the time for enforcement action, so that no enforcement action may be taken in respect of it. That means that an enquiry has to be made not only into the historical facts but into the law relating to them: the question of lawfulness of an existing use is more extensive than the question whether the existing use has continued for ten years. Assuming the use in question amounts to a material change in use and hence to unauthorised development, one needs to look at what would be the process of enforcement, and whether it would or

could succeed, in order to see whether the position is now that 'no enforcement action may … be taken … because the time for enforcement action has passed', to use the relevant words of s 191(2).

21. An enforcement action against the use of land on the ground that there had been a material change of use would not confine its ambit to the piece of land on which the use in question was taking place, nor could it be confined by the occupier's specifying that that land and no other should be taken into consideration. It would begin by identifying the appropriate planning unit. Having done that it would consider whether in relation to that planning unit there had been a material change of use, and would go on, if required, to consider whether the new use had been continuing for ten years and so had become immune from enforcement action. The operation of the provisions of s 171B (time limits for enforcement) have no meaning outside the enforcement process; and that process is in my judgment imported hypothetically into s 191 by the reference to the time for enforcement action having expired.

22. The answer to the first question is therefore that the identification of the appropriate planning unit (whether larger or smaller than the land specified in the application) is an essential part of the decision whether a certificate under s 191 should be granted.

23. 2. *Was the planning unit considered?* The answer to this question is in my judgment unfortunately obvious from the material relating to the Defendant's meetings leading up to the decision, and the decision itself. The latter is expressed briefly, but the words 'The applicant's evidence is sufficiently precise and unambiguous' have to be regarded as discharge of the Defendant's duty under s 191(c) to record in the certificate 'the reasons for determining the use … to be lawful' . The words used in the certificate are entirely apposite for a judgment made on the basis of evidence going to the proof of facts: for example, how long a particular activity had taken place in a particular area. They contain no hint of an assessment of any other planning issue, which would be determined by judgment rather than simply by a finding of facts on evidence.

24. When one looks at the reports produced for the relevant meetings and the transcripts of discussions, the position is even clearer. The Officer's report for the meeting of 18 January 2012 (following which the certificate was granted) deals with the issue of planning unit as follows:

> "Officers address the issue raised by legal Counsel concerning the relevant planning unit. Officers maintain that in respect of this application only the red line application site is relevant. As a result the caravan and car parking is outside of the site in question and will not form part of the certificate. Should the applicant wish to ascertain the lawfulness of this land, for example to establish a lawful use for the purposes ancillary to the operation of the Club, a separate application would need to be submitted."

25. For the same reason, as it appears it me, the report discounts evidence of any use of adjacent land. In speaking of mircolites and gliders, the report says this:

> "This claim [that manned flights have taken place] has been refuted by the Applicant who has stated no such use has taken place at the application site…. In addition, the Club have confirmed the site is not suitable for the use of gliders and categorically state only model gliders have been used at the site (note, model gliders fall under the category of model aircraft). Consequently Officers do not consider that microlites and manned gliders have flown from the site (as confirmed by the red line on the application plans)…. " [emphasis added].

26. At the meeting itself, Counsel on behalf of the Claimant is recorded as having made the point very firmly:

> "I am afraid in the Officer's [report there is] a clear error of law in the advice you have been given, we have pointed this out in two letters now in the last six weeks. You are being told that you look at nothing here apart from what has gone inside the red line of the application site. That is wrong because in deciding whether there is a material change of use here you have got to look at the planning unit, that this use forms part of… I can't put the warning any starker, if you proceed on the basis you have been told to proceed on it is an error of law which will expose the council to a High Court challenge."

27. The meeting then turned to consider the evidence relating precisely to the use of the red line area. The Chairman asked the Council's Legal Officer to give advice on the issue of the relevance of a planning unit, to which the response was this:

> "The Officer who has prepared the report has looked at this issue, if, essentially the lawful development certificate is for the red line which the applicant has submitted in their application…. The Council is required to respond to that application and not to amend the application to require the applicant to submit evidence as to the use of a much wider area, say for example a whole field. The offset effect of this is that uses which go on outside the red line application will not benefit from the certificate of Lawfulness and therefore could for example still be subject to enforcement action…. But the opinion of Officers is that the application should determine on the area which was specified rather than seeking to force the applicant to refer to a wider area…. "

28. The Chairman then drew comments from the four other members of the committee. Three members said in turn that they would grant the certificate on the basis of the Officers' recommendation. The fourth member, mentioning the issue of planning unit, said this:

> "I think the arguments over the red line and whether that's appropriate, I think that's a planning issue, I wouldn't like to say who's correct."

29. That member then endorsed the proposal that the certificate should be granted. There is no room for doubt that the members, who made the decision, did so by adopting the officers' reports; and the officers' reports clearly excluded consideration of activities anywhere outside the red line area, and rejected the suggestion that the decision on the certificate should be made by reference to the appropriate planning unit.

30. It follows that the makers of the decision failed to take into account relevant matters.

31. 3. *Did it make any difference?* Relief ought not to be granted even for a clear error of law in the decision-making process, if it is clear that the decision would be the same if remade.

32. Mr Goodman submits that a different approach, taking into account that the red line area might not be the appropriate planning unit, would make no difference, because (if I have understood him correctly) it is clear if the enquiry were to be made, the red line area would be determined as being the appropriate planning unit. Therefore, he says, there would be no useful purpose served by requiring the Defendant to remake the decision. I cannot accept that submission: neither the law nor the evidence on which he relies support it.

33. It is true that the authorities, from Burdle v Secretary of State [1972] 1 WLR 1207 onwards, propose the unit of occupation as the starting point for the identification of the planning unit, but, as Church Commissioners v Secretary of State for the Environment (1995) 71 P & CR 73 shows, it does not follow that the existence of a smaller unit of occupation removes the possibility of the planning unit's being a larger unit, occupied in a different character. In that case the larger unit was a shopping centre, owned by the applicants as landlord; the smaller unit was one of the individual shops separately let to, and occupied by, retailers. Although the decision of the Secretary of State was that the smaller unit was the planning unit for the purposes of a certificate of lawfulness of a proposed use, the discussion in the judgment of the deputy judge shows that it would have been open to him to decide that the larger unit was the appropriate planning unit.

34. In the present case there has been no evidence relating to the precise terms of the agreement under which the Club occupies the redline area, and there is little evidence to support an assertion that that is the only land the Club occupies, or of what its 'occupation' (as distinct from its use) of the red line area consists. There is a host of other possible planning units, any of which might apparently be chosen: the area used by the Club for all it activities on the ground, the whole area used for aeronautical activities of any kind, the whole field, a group of fields where non-agricultural activities take place, the whole farm, even, (though this is perhaps unlikely) the whole area over which model aircraft fly. It is simply not possible to say that the small area specified in the application is the only possible planning unit for the assessment of the application. Nor (incidentally) is or was it for the Interested Party to identify the planning unit. That was a matter for the Defendant.

35. For me to reach a judgment that the red line area was the appropriate planning unit for the purposes of the application in question would be to do precisely what Mr Goodman correctly submits that the court should not do: that is to say, presume to

make planning judgments itself. The judgment is to be made by the planning authority, not the court.

36. There is another important respect in which the identification of the appropriate planning unit might have a material impact on the outcome of the application. Although the matter is contested by the Claimant, suppose it be regarded as clear that flying of model aeroplanes at the level specified in the certificate had indeed taken place continuously in the red line area for the ten years before the application. It might be thought, and I have to say it looks very much as though the Defendant's officers thought, that that would be sufficient at any rate to render lawful that particular activity in that place, whatever the planning unit, and whatever other activities might be taking place within the planning unit. That, however, is not correct.

37. In the present case it is highly unlikely that the planning unit could be smaller than the red line area; and so it might follow that if the planning unit is not the red line area, the change of use for the flying of model aeroplanes is less likely to be a material change of use and so the argument for the issue of the certificate would be stronger. To put the matter like that, however, ignores the possibility that within the planning unit there may be other unauthorised uses, and that they may not have continued for ten years. The position then may be that during the ten years prior to the application there has not been one single unauthorised use, but (first) a single unauthorised use, then (for the rest of the period) a mixed unauthorised use. In those circumstances, even if the original use continues as part of the mixture, it has not become unenforceable.

38. As Ouseley J explained in D. Beach v Secretary of State for the Environment, Transport and the Regions [2001] EWHC 381 (Admin) at [18]:

> "In my judgment, the law is as follows: where in respect of one planning unit a use comprising uses A, B, and C together is joined by use D, there is a change of use, which may or may not be a material change of use to uses A, B, C, and D but whether there is a material change of use or not involves a comparison of uses A, B and C with uses A, B, C and D. If the change does involve a material change of use, it is to a new use which comprises both the old and the new uses, whether they are separate uses within the one planning unit or mixed or composite uses within the one planning unit. If, as time goes on, another use is added so that the use being carried on is A, B, C, D, plus now E the same issues arise. Whether a material change of use has occurred is to be judged by whether the uses A, B, C, D and E are materially different in planning terms from the use A, B, C and D if it is a new use again comprising old and new uses. Uses A, B and C are not treated as distinct uses unaffected by the additional uses unless they are carried out in a distinct planning unit. That is not an issue that arises here."

39. Ouseley J expressly approved the reasoning of Mr Bartlett QC sitting as a deputy judge in Lynch v Secretary of State for the Envvironment [1999] JPL 354. There use A had continued for many years, but at some time within ten years before enforcement action commenced, use B started, adjacent to the land under use A, both being within the same planning unit. The correct analysis of the history was that the single use A had been superseded by a mixed use: neither had continued for ten years.

40. "What is the planning unit?"; Both of those cases were enforcement cases. They demonstrate that where there has been ten years use for A and less than ten years use for A and B in the same planning unit the ten-year use for A is no defence at all to an action for enforcement even in relation to use A: the periods of use for A and for A+B are separate periods. It necessarily follows that ten years use for A is no ground for a certificate of lawful use unless for the whole of that period A has been the only use (or rather the only use for which planning permission would have been required) of the whole planning unit. As I have said, there are several possible answers in this case to the question What is the planning unit?; and it may well be that the identification of the planning unit will raise further questions as to mixed uses within it.

41. It is perfectly clear that the decision not to attempt to identify an appropriate planning unit but to confine consideration to the assessment of the evidence of use of the red line area was erroneous in law and must have had a significant effect on the decision-making process. In those circumstances the remedy is quashing of the decision under challenge and remittal of the application to the Defendant for it to make a lawful decision.

Ground 2 : Intensification

42. For present purposes the law in relation to intensification may be set out as follows on the authority of Hertfordshire County Council v Secretary of State for Communities and Local Government [2012] EWCA Civ 1473. Intensification of an existing use may constitute a material change of use. The change may be established by considering the effects of it on neighbouring land, provided that those effects are shown to have been caused by the intensification of use. The question is whether there has been a 'material change in the definable character of the use of the land' (that was the phrase used by the trial judge Ouseley J in Hertfordshire, described as correct by the Court of Appeal). Only if there has been such a change can the intensification be regarded as constituting a material change of use. Whether there has been such a change is a matter of judgment for the planning authority.

43. If there had been a material change of use by way of intensification in the period of ten years before the application for the certificate, the certificate ought not to have been issued, for reasons similar to those I have set out in relation to mixed uses. To refer again to the terminology of paragraph 40, the principle set out there also applies if B is the same use as A, where A+B constitutes a material change from use for A alone in the definable character of the use of the land. The applicant would in those circumstances not be entitled to a certificate on the basis of ten years of use A: the use at the earlier level would have been superseded by the use at the intensified level, which latter would not have continued for ten years.

44. Ground 2 makes various complaints in relation to the way in which the Defendant dealt with the allegations of intensification. The thrust of them is that it gave undue weight to the evidence of the Interested Party, discounting or ignoring evidence pointing in the other direction.

45. Despite Mr Kolinsky's endeavours I am entirely unpersuaded that the Defendant did other than consider the relevant evidence and make a decision on it that it was entitled to make. It is true that the Claimant's own evidence could not be expected to go back beyond 2010, but there were various differences in the evidence, and the Defendant had to resolve them, deciding for itself which evidence was more, and which less, reliable. That is what it did.

46. There is one area only in which I might have found it possible to accept Mr Kolinsky's submissions on this point. The burden of proof of such facts as needed to be established to justify the grant of the certificate lay on the applicant. It does look as though the Planning Committee were advised to look to see whether those opposing the grant of the certificate had shown intensification. But that is not *necessarily* wrong: even where the applicant has the burden overall, it may be appropriate to assign the burden on individual issues to the party asserting them, bearing in mind in particular the difficulty in proving a negative. That is especially so in the procedure of a committee, to which the strict rules of evidence clearly do not apply. But I do not have to make a decision on this, for another reason.

47. That reason is that as it appears to me the evidence before the committee was wholly insufficient to support a claim that any intensification had changed the character of the use of the land. The position, on the undisputed facts as found, was that there had been flying of model aircraft from the red line area for many years, and it was never suggested, nor could it realistically be suggested, that at first the flights were not outside that area. Those opposing the certificate sought to show that they had only become aware of the noise from the aircraft recently, and based the claim of intensification on that, particularly since 2009. In my judgment a decision that there had been an intensification of the use of the red line area for flying model aeroplanes, amounting to a material change in the use of the red line area or any other appropriate planning unit, could not have been made on the evidence available and if made would have been irrational. Whatever errors might have been made by the Defendant in its consideration of this question were accordingly not material.

Ground 3 : Foot and Mouth

48. Ground 3 challenges the Defendant's conclusion that the activity of flying model aeroplanes from the red line area continued during the period when the farm was closed during the outbreak of foot and mouth disease in 2001, at the beginning of the period of ten years immediately before the date of the application. The Claimant's submission is that the Defendant failed properly to assess the evidence, including the way in which the evidence adduced on behalf of the Interested Party varied between saying that during that period only a few members well known to the farmer were allowed to fly on the one hand, and that all members had access to the flying area on the other. But the assessment of the evidence was for the planning authority and, although it might be said that other findings of fact would have been open to the authority on the evidence this is not an appeal on fact and I cannot see any proper

basis for saying that the Defendant was not entitled to reach on that issue the factual conclusion it did reach after the enquiry it undertook.

49. Having said that, however, I add two reservations. One relates to Mr Goodman's submission that this point would in any event not merit the quashing of the decision because now the foot and mouth outbreak is over ten years ago so that if the decision were to be taken again the question of the level of activity in that period would not be relevant because it would not fall within the requisite ten-year period. That does not appear to be right: it would need a new application to achieve that result. If this application is to be determined again the relevant period remains the ten years prior to the date of the application, not that prior to the date of the decision: the application is made on the basis that by the date it is made the change of use has passed beyond enforceability; the certificate will be issued if the position 'at the time of the application' is as alleged (s 191(4)) and the certificate if issued is required, for that reason, to show the date of the application: s 191(5)(d). The second reservation is that for the reasons I have given in relation to grounds 1 and 2, the conclusion that there was activity, at the level set out in the certificate, in the red line area, for the period of ten years before the application may not, on a proper consideration of the Interested Party's application, assist very much in showing that the certificate should be granted.

Conclusion

50. The claim therefore succeeds on ground 1 but not ground 2 or ground 3. For the reasons I have given, the decision under challenge will be quashed.