Case No: CO/12308/2009

Neutral Citation Number: [2010] EWHC 1420 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Sitting at:
Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M3 3FX

Date: Tuesday, 11th May 2010

Before:

MR JUSTICE LANGSTAFF

- - - - - - - - - - - - - - - - - - - -

Between:

FEATHER

Claimant

- and -

CHESHIRE EAST BOROUGH COUNCIL

Defendant

MR CHRISTOPHER WREN AND MRS SUSAN WREN

Interested Parties

- - - - - - - - - - - - - - - - - - - -

(DAR Transcript of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7404 1424
Official Shorthand Writers to the Court)

- - - - - - - - - - - - - - - - - - - -

Mr Jonathan Easton appeared on behalf of the **Claimant**.

Mr Ian Albutt appeared on behalf of the **Defendant**.

The **Interested Parties** did not attend and were not represented.

- - - - - - - - - - - - - - - - - - - -

Judgment
(As Approved)

MR JUSTICE LANGSTAFF:

1. This is an application for judicial review of a planning permission which was granted on 24 July 2009. Permission to appeal was granted on a renewed application by Foskett J on 17 February following a hearing on 12 February this year. The application relates to a planning permission granted by the Cheshire East Borough Council (the Northern Area Planning Committee were essentially responsible for the decision) for a development comprising a replacement dwelling at Broad Heath House, Over Alderley, Macclesfield. The property is owned by a Mr and Mrs Christopher Wren. The claimant, Mr Simon Feather, owns and lives at Broad Heath Farm, adjacent to Broad Heath House. Both properties are in the Green Belt, and Green Belt planning policies govern the approach to development in the area.

2. Those policies derive from national planning guidance, which is set out in what is known as PPG 2. The relevant paragraph of PPG 2 is paragraph 3, which sets out the policies in respect of control over development. Paragraph 3 begins with a presumption against inappropriate development. A new building is to be regarded as inappropriate, unless it falls within one of a specified number of exceptions. Amongst those is:

> "Limited extension, alteration or replacement of existing dwellings (subject to paragraph 3.6 below)."

   I emphasise the word "limited". Paragraph 3.6, which is central to this application, reads as follows:

> "Provided that it does not result in disproportionate additions over and above the size of the ***original*** building, the extension or alteration of dwellings is not inappropriate in Green Belts. The replacement of existing dwellings need not be inappropriate, providing the new dwelling is not materially larger than the dwelling it replaces. Development plans should make clear the approach local planning authorities will take, including the circumstances (if any) under which replacement dwellings are acceptable."

   There were no relevant local development plans at the time at which this application fell for consideration. Accordingly, regard had to be had, and had only to paragraph 3, insofar as the policies there set out were concerned.

3. The paragraphs to which I have already referred do not sit in a vacuum. Within paragraph 3 itself, for instance at paragraph 3.8, it is noted that:

> "The re-use of buildings inside a Green Belt is not inappropriate development providing:

> (a) it does not have a materially greater impact than the present use on the openness of the Green Belt and the purposes of including land in it."

And it continues. Of particular relevance in this case, and in particular in understanding, in my view, aspects of the planning officer's advice, is paragraph 3.15. That reads:

> "The visual amenities of the Green Belt should not be injured by proposals for development within or conspicuous from the Green Belt which, although they would not prejudice the purposes of including land in Green Belts, might be visually detrimental by reason of their siting, materials or design."

4. By way of broader background, reference might be made to paragraph 1.4, which sets out what is said to be the fundamental aim of Green Belt policy, which is to prevent urban sprawl by keeping land permanently open. The most important attribute of Green Belts, it says, is their openness. The purposes of including land in Green Belts are set out further at paragraph 1.5, and the use of land at 1.6. Paragraph 2.10 may also be worthy of further note, because it considers the consequences for sustainable development, of channelling development toward urban areas inside an inner Green Belt boundary, therefore away from the Green Belt itself.

5. The terms of this guidance, and in particular paragraph 3.6, were the subject of a decision at appellate level, binding upon me. It is common ground that the relevant legal principles are to be found in R (Heath & Hampstead Society v Camden London Borough Council [2008] EWCA Civ 193. That case involved a decision to grant planning permission for a house in the Vale of Health. It was to replace an existing 1950s dwelling house which was in part two storeys high with one which was in part three storeys high. The various calculations could broadly be summarised (see paragraph 3) by saying that there would be a three-fold increase in floorspace, perhaps a four-floor increase in built volume, and between a two and two and-a-half times increase in the footprint of the building. The planning officers in the council had not considered the question of size when determining whether the building was materially larger, but had rather asked whether the relative visual impact of the replacement building was materially different from that of the existing building.

6. The decision to which the court came, the leading judgment being that of Carnwath LJ, with which Sedley and Waller LJJ agreed, was that that approach was wrong. It drew attention, basing itself upon the policy guidance which I have just set out, first to the concept of appropriate development, as compared to that which was inappropriate development; and that the relevant test as to whether a proposed replacement dwelling was appropriate was whether it would be not materially larger than the dwelling it replaced (see paragraph 12). The issue before the Court of Appeal was expressed at paragraph 13 in these terms:

> "…whether the 'materially larger' test imports, solely or primarily, a simple comparison of the size of the existing

> and proposed buildings; or whether it requires a broader planning judgment as to whether the new building would have a materially greater impact than the existing building on the interests which MOL policy is designed to protect [this policy is indistinguishable from that in PPG 2 which I have cited]. Mr Elvin's case [he appearing for the counsel], in a nutshell, is that, in the context of policies designed to protect the MOL, the development cannot said to be 'materially' larger, if the increase has no 'material' impact on the objectives of the MOL; or at least that the authority could reasonably take that view."

The court observed at paragraph 17 that that argument had been rejected at first instance by Sullivan J. He had relied in part upon the reasoning of Deputy Judge Christopher Lockhart-Mummery QC in Surrey Homes Limited v Secretary of State for the Environment (unreported) CO/1273/2000, in which the Deputy Judge had observed that the physical dimension which was most relevant for the purpose of assessing the relative size of the existing and replacement dwelling houses would depend upon the circumstances of the particular case, and might be floorspace, footprint, build volume, height, width etc, although he thought that in most cases, floorspace would be the starting point if not the most important criterion.

7. The court concluded that Mr Elvin's argument, as rejected by Sullivan J, that the argument (see paragraph 33) was to the effect that "material" meant material in planning terms; that it was a settled principle that matters of planning judgment, including the weight to be given to material considerations, were for the local planning authority and not the courts, and that the authority in that case had correctly identified the increased size of the building in all its aspects as a relevant consideration, but had decided on the facts that it was not material; that that was a judgment for them, and involved no issue of law justifying the intervention of a court. As to that, the Court of Appeal said (paragraph 34 of the judgment of Carnwath LJ):

> "Although I see the force of that submission, it ignores the context in which the word is used. The words "materially larger" in paragraph 3.6 should not be read in isolation. There are two important aspects of the context. First is that paragraph 3.6 is concerned with the definition of "appropriate development", as contrasted with inappropriate development, which is "by definition harmful to the Green Belt" (see para 8 above). This first stage of the analysis is concerned principally with categorisation rather than individual assessment."

I pause there to note that Mr Albutt, who appears here for the council, draws attention to the word "principally"; he does so to note the point that it is not the only matter to which the planning authority may have regard.

8. The judgment continues (see paragraph 35), making the point in the last sentence of that paragraph that if it had been intended to make appropriateness dependent upon a broad "no greater impact" test, the same words could have been used; but instead, the emphasis was on relative size, not relative visual impact. Then this, at paragraph 36:

> "36. That leads to the second aspect of the context, which is that of paragraph 3.6 itself. It is part of the test for a category which covers "limited extension, alteration or replacement…" "Limited" to my mind implies a limitation of size. Paragraph 3.6 deals with both extension and replacement. An extension must be "proportionate" to the size of "the *original* building". The emphasis given to the word "original" shows how tightly this is intended to be drawn, in order presumably to avoid a gradual accretion of extensions, each arguably "proportionate". It would be impossible, in my view, to argue that "proportionate" in this context is unrelated to relative size. For example, an extension three times the size of the original, however beautifully and unobtrusively designed, could not, in my view, be regarded as "proportionate" in the ordinary sense of that word.
>
> 37. The words "replacement" and "not materially larger" must be read together and in the same context. So read, I do not think that the meaning of the word "material", notwithstanding its use in planning law more generally, can bear the weight which the authority sought to give it. Size, as Sullivan J said, is the primary test. The general intention is that the new building should be similar in scale to that which it replaces. The *Surrey Homes* case, [2000] EWHC 633 (Admin), illustrates why some qualification to the word "larger" is needed. A small increase may be significant or insignificant in planning terms, depending on such matters as design, massing and disposition on the site. The qualification provides the necessary flexibility to allow planning judgment and common sense to play a part, and it is not a precise formula. However, that flexibility does not justify stretching the word "materially" to produce a different, much broader test. As has been seen, where the authors of PPG2 intend a broader test, the intention is clearly expressed."

9. Reference is made in his submissions by Mr Albutt to the fact that here, reference is made to such matters as design and disposition on the site as relevant to the question of whether one building is materially larger than another. Neither design nor disposition are themselves direct references to size. They are, however, plainly, and in this paragraph recognised to be, relevant planning considerations.

10. Mr Easton, appearing as he does for the claimants, argues for his part that in this paragraph a distinction is made between a small increase in physical size, measured objectively, as to which planning considerations may make the difference between an increase in size which is material and that which is not, and a larger increase in size, as to which he submits, bearing in mind the example given obiter at the conclusion of paragraph 36, the focus on size simply leaves no space for planning judgment to play a part. It is said here that the planning authority failed in two respects. It is argued by the claimants that the authority did not pay regard to the size of the building as it should have done, and it is said it reached a conclusion to which no reasonable authority could, on the facts, have come.

11. I turn, therefore, to look in greater detail at what was proposed, the advice given by the planning officer, in this case to the Northern Area Planning Committee, and subsequently to those two officials to whom that committee delegated the ultimate decision, and to review the arguments in detail against that background. The proposal in outline was to replace a 5-bedroom house, built in two storeys, which had an attached single-storey element reaching 5.8 metres in height. That existing dwelling has a stepped roof design, acting as a visual break in the overall appearance of the dwelling. The replacement dwelling would take the form of what was described by the planning officer as a solid two-storey dwelling of grand appearance, fabricated in facing brick, render and slate roof. The proposed design, as to a lay observer is manifestly apparent from looking at the architect's pictures and elevations, would be of solid appearance with a solid ridge line, therefore differing from the current stepped character of the existing building. The planning officer noted that the proposed dwelling would be approximately one metre taller than the existing dwelling, but that the overall height would increase only 0.2 of a metre; that may be a reflection of the fact that the replacement dwelling was to be sited further back from the road on the application site than the existing building, and that some minor excavation works were to be carried out. The overall depth and span of the replacement dwelling was to provide a small reduction upon that which exists.

12. In the planning officer's report which was compiled first on 28 May 2009, then updated on 22 June (see page 100 in the bundle) and updated again on 9 July (see page 138), the detail continued as follows:

> "In assessing whether the replacement dwelling would be materially larger than the existing it is important to assess the overall scale and appearance of the building, and also comparing the footprint and floorspace of each dwelling. As discussed above, the overall scale and appearance of the dwelling is considered to be relatively similar to the existing. The proposed replacement dwelling would provide a smaller footprint, approximately a reduction of 11%. The amount of floorspace afforded to the replacement dwelling would increase by approximately 30%. This increase in floorspace to the dwelling must be considered in conjunction with the overall scale and

> appearance of the dwelling. The increase in floorspace is noted, however, it is considered that as the overall appearance of the building would be broadly similar, therefore it is not considered that the replacement dwelling would be materially larger; therefore, it is considered that the proposal would comply with paragraph 3.6 of PPG2."

13. One can well understand those observations in relation to the building described in the terms I have already described it; however, that would be to omit what is a very significant feature of the proposed dwelling. It is this: it is proposed that the dwelling has a basement. The basement, so the plans show, extends well beyond the ground-level footprint of the existing dwelling, or the dwelling as described; it is completely subterranean and enclosed. It contains, or is to contain, a swimming pool, changing rooms, and associated plant and equipment. It is plainly an extensive and large basement area. There is no indication in the extracts which I have thus far read from the report to council of the existence of such a basement, or how the area and volume of the basement is to be taken into account in considering the size or scale of the building, and whether it has any relevance at all to the issue whether the building to be erected is or is not materially larger than the existing. But I have omitted to read a short paragraph which immediately follows that which I have already quoted. It reads:

> "It is noted that the dwelling would be afforded a large basement area underneath the dwelling. This area would be fully subterranean and therefore it is considered that there would be no impact on the visual amenity of the area."

14. The advice to the council in each of its forms, that in May, that in June, and that in July, returned toward the end to consider again the question of whether the proposed building was materially larger than the existing. These words are used:

> "… as discussed within the body of this committee report it is considered that the proposal would not result in a materially larger dwelling. This assessment has been made using several tests relating to increase in floorspace, foot print, and the scale and massing of the proposed replacement dwelling. The figures used regarding the potential increase in floorspace of the dwelling have been assessed within the report as 32% using the Council's own figures. The agent has also put forward floorspace counts that demonstrate that the percentage increase in floorspace would be 36%. Whilst this would increase the level of habitable floorspace afforded to the dwelling, it is not considered to result in an unreasonable increase."

15. The approach which a court should take to the reasoning of a decision made by a planning officer or planning inspector has been expounded in the House of Lords by Lord Brown

of Eaton-under-Heywood in South Buckinghamshire District Council v Porter (No. 2) [2004] UKHL 33 at paragraph 36:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

16. Here I draw attention to these features arising from the case of Heath & Hampstead to which the council was obliged to pay particular attention. First, the question of "materially larger" is regarded as a threshold question. Secondly, that visual amenity is not the determinant of that question, though it is separately and importantly relevant (see paragraph 3.15 of PPG 2). I must bear in mind that the planning officer's advice fulfils a number of functions. It must draw attention when it is addressed to the committee to the law which applies, to the threshold question, and to those matters which it is relevant to consider in respect of that threshold question; but it must also necessarily consider the other several planning issues which arise. One would thus expect it to contain a mixture of observation about design, size, appearance and the like. And in the light of the approach to be taken (see South Buckinghamshire), it cannot be a valid criticism of that advice or report that it runs a number of matters together. I have to, however, recall that a building which is not materially larger is not thereby necessarily rendered appropriate. It may be, it may not be; that will depend upon other considerations, and one must expect the planning authority to have regard to those other considerations. But what can

certainly be said is that a building which is materially larger cannot be appropriate; except, that is, in very special circumstances indeed, none of which applies here.

17. With those considerations in mind, I turn to look more closely at was, and what was not, said in the planning officer's report to the council, bearing in mind the forgiving approach which must necessarily be adopted to its wording. Under the heading "Scale and Design", it is plain that the planning officer directed the attention of committee members to issues of size. However, Mr Easton complains that it is clear textually, and on any sensible reading of the paragraph, that it does not include any reference to the basement. It is common ground between counsel that the size of the basement is relevant to the question whether the dwelling is materially larger than that which it is designed to replace. He points to the reference to the amount of floorspace increasing by approximately 30%. It is quite plain, he says, that that 30% can relate in context only to the portion of the building which is at ground level and above, and does not contain any consideration of the size of the basement, swimming pool and adjacent area.

18. Indeed, that point, it seems to me, is obvious simply from looking at the plans for the proposed building; but if it were not so, it has as a matter of objective fact been put beyond doubt, and without any dispute from Mr Albutt, in general terms, by a report -- albeit compiled after the decision was taken -- by a Mr Turley, from which it is apparent that if the floorspace of the basement were to be included, there would be an increase in floor area not of 30% but of some 230%.

19. The footprint of the proposed building which is referred to, it might be added, is referred to in the text as being smaller by 11% than the existing; that plainly looks, and looks only, at the footprint of the building as measured at ground level; it does not look at the basement, which extends considerably beyond the confines of the original foundations. I might add that the paragraph itself indicates that the author drew a distinction between the "dwelling" and "the basement". She posed the question whether the replacement dwelling would be materially larger. She answered that by saying that the replacement dwelling would not be materially larger, but the reference to the footprint of the dwelling, and the reference which immediately follows to the large basement area being *underneath the dwelling*, leads a reader naturally to conclude that when considering the question of material size and largeness, one has regard to that which is built from ground level upwards as constituting the dwelling, and not that which is beneath the dwelling.

20. When the author returned towards the conclusion of her report, and referred to the proposal not resulting in a materially larger dwelling, she mentioned as I have noted that assessment fell to be made using several tests relating to an increase in floorspace, footprint, scale and massing; but all that was said about floorspace, or footprint and scale, and massing, related to the building at ground level and above. The conclusion to which I am bound to come is that any reader of this report would understand that the question of material increase in size was important; but they would think the answer to the question lay in the size of the dwelling above ground level, and would not necessarily include the basement.

21. It is said in his submissions by Mr Easton that there are two reasons for holding the decision made by the council to be flawed. The first is that the council did not take account of a material consideration. He argues that the evidence shows that the council considered, and considered only, the building at and above ground level, and did not take into account the basement. It is accepted by Mr Albutt that the council were bound to have regard to the size of the basement, though he asks me to see it in context. Mr Easton augments his submission by noting that there was no comparison made here in the report between the built volume of the house as is, and the house as was to be. He urges the court to have regard to the fact, as he submits, that the increase in floorspace and in built volume is so significant that it the report to the committee is inadequately stated.

22. As a second point, he argues that a house of this proposed size, containing the basement as it is designed to do, could not be granted planning permission by any reasonable council upon a proper understanding of the law; it would be perverse to do so. He argues this by reference to the material which has emerged since the decision was taken in two reports by Mr Turley, containing a calculation of the built volume; there was no calculation of built volume before the council. He draws my attention to the tables contained in a report dated 15 April 2010 (the second report from Mr Turley). Those tables show that if the floorspace and volume of the basement is to be included, the built volume (see table 1, page 4 of the second report) is 209% larger; that on different scenarios, there is a range of values, all indicating a greater than doubling of the existing volume. This, he says, could not possibly be regarded by any council as not being materially larger.

23. In response, Mr Albutt argues first, that on the evidence, I should conclude that the relevant Planning Committee and Officials did indeed have regard to the size of the basement in determining whether the building was to be materially larger. He relies on a witness statement of Susie Helen Bishop of 26 March 2010. She explains that she is a planning assistant who was the planning officer responsible for the planning application which is subject to challenge. She describes how that application was not determined by her, but was called in for consideration by the Northern Planning Area Committee -- hence it going to committee -- and that at the meeting of that committee on 10 June, oral representations were made by the applicant's agent, Peter Yates (the architect who had designed the replacement building) and by neighbours, including the claimant. The claimant, she reports, drew the basement area to the attention of members, and gave its dimensions to perform floorspace calculations. She notes that that figure was also included within letters of representation received during the course of the application, and reports that during the meeting, members requested a site visit, in order to provide better clarity and understand of the proposal in the context of the site itself. They requested that the basement area be marked out on site. And she comments that they were fully aware of the basement being *part of* the proposed replacement dwelling: I note that her observation here is not to the same effect as that given by a fair reading of the reports which she made to the committee, which as I have noted drew a distinction between the dwelling and the basement.

24. Her statement then says this at paragraph 17:

> "The site visit held by the Council's Northern Area Planning Committee was attended by 13 out of 14 members who considered the application at the meeting of the committee on 1 July 2009. [I should add, the site visit was on 26 June, therefore before that meeting]. As requested by members the basement area was pegged out using hooks and white tape. The area was measured by the attending planning officers, Emma Tutton, Principal Planner and me. The area followed the submitted plans. The planning application plans were also provided during the site visit for members to view. This level of detail enabled members to be better informed of both the application sites site-specific issues and the scale of the basement."

She went on to describe that the application was not finally determined by the committee on 1st. July because of a letter making representations being missing, but that the members resolved to approve the application, subject to the contents of that missing letter not raising any issues material to the decision-making process which had not already been considered by them. It delegated the decision to its head of planning and policy, John Knight. Miss Bishop comments at paragraph 20:

> "The letter of representation was located … and its contents assessed after the committee meeting on the 1 July. The letter made reference to the basement area, and stated that it should form part of the assessment of whether the replacement dwelling would be materially larger. This was the approach I had adopted in the assessment of the application. The basement area had been considered as part of the proposal in terms of whether the replacement dwelling would be materially larger."

25. That is evidence that Miss Bishop had in mind the basement as relevant to the issue of size, and had considered it herself as such. It is not, however, evidence that that is how the members of committee saw it. I have no direct evidence from any member of committee. I have no evidence from Miss Bishop or from anyone that the committee were told in terms that they should consider the size of the basement when they came to consider the size of the dwelling. Indeed, I have a repeated description in each of the three planning reports to which I have referred which deal with the "materially larger" question which excludes, rather than includes, the basement, and which appears to deal with the question of the basement by considering whether it would have any visual impact or not; a highly relevant planning consideration under paragraph 3.15 for instance, but not obviously relevant when one is considering the question of material size.

26. There were matters, Mr Albutt asks me to note, which I could conclude directed the minds of the committee on 1 July to having regard to the size of the basement as part of their determination of what was or was not materially larger. Thus, the letters of objection were fairly summarised in Miss Bishop's reports to council. Thus, the size of

the basement was orally drawn to the attention of the members in committee. One has to ask why it was the members of the committee asked that the basement area be indicated on the ground surface by tape and post, as they did, if they did not fully appreciate the size and scale of the basement. In my view, all these are significant and important points.

Conclusions

27. In reply, Mr Easton has pointed out to me what is contained in a documentary update to the agenda of 29 June 2009 (see page 131). In that, in the first paragraph under the heading "issues", it is noted that the basement was to be sited within the confirmed garden area, it therefore being considered that the potential outstanding enforcement issues on site would have no impact on the determination of the proposal. That was a reference to the potential for the dwelling -- and one has in mind here the basement of it -- to encroach into agricultural land to the rear of the site. The siting of the basement was thus materially important for that reason.

28. It is impossible for me to determine whether it was for that reason (to be assured there was no material encroachment on agricultural land) or because the members wished to have some proper idea of the size of the basement relative to the existing building, that they asked for it to be mapped out. What was relevant for the consideration of the committee, and the two Officers to whom the decision was delegated thereafter, was how they should approach the question of "materially larger". Can I be satisfied that they took into account the basement area and size? The planning officers' reports, upon a fair and not over-technical reading, were to the effect that that was not something which fell for consideration; those precise words are not used, but that is the sense of it. There is no evidence that anything different was said to the members during the course of the hearings. There is no material to indicate to me that they were told to accept as legally valid the point which the objectors were making; one bears in mind that objections are frequently made, so have to be evaluated, and the committee will make that evaluation, one supposes, by reference to the guidance which the Officers of the council can give. And here there was no steer, in terms to which Mr Albutt can point, to assist them to make it properly.

29. I have, therefore, come to the conclusion that in this case, I cannot be satisfied that the council had regard to what was, it is accepted, a material consideration; namely, the size and scale of the basement. I, therefore, cannot be satisfied that the council took that into account in determining whether the building was or was not materially larger. Indeed, such indications as there are in the papers before me indicate, and if necessary I would hold, that they did not do so. That being my conclusion, Mr Albutt accepts that the necessary consequence will follow that the decision made by the council as local planning authority must be quashed, because it was reached in the absence of a consideration to which material regard should have been had.

30. However, I am conscious that the matter of perversity has been fully argued before me, and I should deal with that, since I can see that it may be relevant to the parties in what may follow consequent upon my decision upon the ground on which it was reached. Here, I conclude that all necessarily depends in an assessment of "materially larger" upon the particular facts and circumstances of a case. It can be said, usually, whether one

building is or is not larger than another; though reference may need to be had to particular measurements in respect of which it is said to be larger than the other. Whether it is "materially larger" has to be answered in accordance with the guidance given by the Court of Appeal; that is, primarily as a question of size. But it is not exclusively a question of size; I entirely accept Mr Albutt's submissions as to that.

31. The expression "materially" invites a consideration of size in context; what is the relevant context? The relevant context necessarily has to be the object of and policies relating to establishing a Green Belt. It is possible to give several examples which may illustrate this, and may demonstrate that it is not a sufficient answer, as Mr Easton would propose, to suggest that a qualitative analysis is only relevant within very small increases in size. The first example was that given in the Surrey Homes case. There, the Deputy Judge pointed out that a building might have a much smaller footprint, and have the same overall floorspace, because it was built as a tower; yet if a tower replaced a bungalow, it is not difficult to see how the relevant considerations of size would have nothing to do with footprint, and nothing to do with floorspace, but everything to do with height. In the context of affecting the openness which green belt policy emphasises, the tower might be said to have much greater impact than the bungalow.

32. It is equally not difficult to see that some buildings may have a much larger floorspace as newly-built than those than they replaced, without altering in any way the external dimensions and footprint of the original building. For instance, where a large barn is converted or rebuilt; where a high-ceilinged building is replaced by one with more floors, and therefore more floorspace, but with no change to exterior dimensions. Similarly, it is not difficult to see how, if one replaced a bungalow with a two-storey building on a narrower footprint, the planning considerations relevant to a determination of material largeness would not depend at all upon floorspace or footprint, but in that case upon height and depth of the building.

33. The dictum of Carnwath LJ at the end of paragraph 36 made the point that if an extension were three times the size of the original -- and I note that would mean a building four times the size of the original, being the original plus the extension - it could not be regarded as proportionate. When looking at a replacement building, the test is not what is "proportionate" , though material largeness is to be read in the same spirit. But that is very different, as it seems to me, from the situation here. It seems to me that, in this particular case, a very important fact and issue to which the local planning authority will wish to have regard in attributing whatever weight it thinks is appropriate to the size of the basement is the fact that, as part of the dwelling, that basement is intended to be entirely below ground level.

34. I could not, in short, have said that it would necessarily and obviously have been perverse for the local authority in this case to have concluded, if it did so having had regard to all proper considerations, that the replacement building was not *materially* larger than the existing. Providing it did not lose sight of the overall size and floorspace of the basement, the authority would be entitled, in my view, to come to a conclusion that the building above ground was such, and the basement such, that overall, the building, in the contexts to which I have referred, was not materially larger. Indeed, it is plain from Susie

Bishop's statement that she did not regard that conclusion as being to her, as an experienced planning officer, necessarily perverse.

35. But it does not follow that I can say that the decision to be reached by the local authority will necessarily be the same if it has regard to the matters to which it should properly have regard as that it actually reached which is the subject of this litigation; indeed, Mr Albutt has not sought to argue that I should sustain the decision upon the basis that it is plainly and obviously right. It seems to me that the size of the basement is significant. As a matter of sheer size, the issue of how that affects a conclusion as to whether it is or is not such as to make the building as a whole materially larger than that which it replaces, is not one which I can say necessarily should be determined one way or the other.

36. Although this last part of my decision, from paragraph 30 onward, is necessarily obiter, I hope that those observations are of assistance to the parties.

37. In conclusion, for the reasons I have given, this application must succeed. The decision ultimately taken on 24 July 2009, and signed by Head of Planning and Policy for Cheshire East Borough Council, must be quashed, and I shall hear counsel as to any consequential orders which they may seek.

Order: Application granted.

MR EASTON: My Lord, I am grateful. I do have an application for costs against the local authority defendant. My Lord, I have a schedule, a copy of which has been handed to my learned friend and his instructing solicitor, I regret only recently.

MR ALBUTT: And we agreed that to be fair and sensible.

MR EASTON: I do not understand there to be any objection in principle but it is agreed between the parties, subject to anything my Lord has to say, that the costs should be set off to a detailed assessment if not agreed.

MR JUSTICE LANGSTAFF: Very well.

MR EASTON: That is the order that we propose.

MR JUSTICE LANGSTAFF: So be it.

MR EASTON: I am very grateful.

MR ALBUTT: My Lord, there is only one other matter. First of all, with regard to your Lordship's obiter comments towards the end, I express our gratitude, because in terms of the guidance that we can obviously adopt. The next matter that arises is obviously the question of permission to appeal. Clearly, my Lord, I accept that there is a great deal that you have decided clearly upon the particular facts of this case; what I can point to is that is obviously

of considerable importance to the authority, and in addition it is, so far as I am aware, the first case really regarding the application of the test of "materially larger" in circumstances where there is a wholly-enclosed basement. Certainly all of the other cases that have been tested on appeal all relate to where there is some impact, because it is a part of the basement. So my Lord, I do, with respect, seek permission to appeal on those grounds.

MR JUSTICE LANGSTAFF: I do not need to trouble you. No; the reasons are these. You are absolutely right in saying that there has not been a case, so far as I am aware, which involves an enclosed area such as the basement, but in this case it was common ground between counsel before me that the size of the basement was relevant, and my decision was that the council as a matter of fact, so far as I can determine it, did not have regard to that matter. And therefore, it is no more and no less than a failure to take into account what was agreed to be a relevant criterion. It follows that no new principle of law or no issue of law really arises; and if, in the light of that, you wish leave to appeal, you will have to get it from the Court of Appeal.

MR ALBUTT: My Lord, we will see if we can interest the Court of Appeal or not.

MR JUSTICE LANGSTAFF: I should add that on the issue of substance which interests you, I appreciate that Mr Easton may in due course have something to say, that you rather succeeded rather than failed.

MR ALBUTT: Yes, indeed.

MR JUSTICE LANGSTAFF: But that was obiter.

MR ALBUTT: I know, my Lord, and I am most grateful. Thank you.

MR JUSTICE LANGSTAFF: Can I thank you both for the economic way in which you presented your submissions.

MR EASTON: Thank you, my Lord.
