Case Name: *McGaw v The Welsh Ministers* [2021] EWCA Civ 976 (30 June 2021)

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Commentary:
This Court of Appeal decision dismissed an appeal against the decision of HH Judge Jarman QC who allowed Mr McGaw's appeal against the decision of the Welsh Ministers to refuse his appeal against Swansea Council's refusal of a certificate of lawful use or development.

Mr McGaw wishes to build a garden room in the southwest corner of his property in Swansea, abutting the boundary wall. The issue in these proceedings was whether his proposal qualifies for a certificate of lawful use or development under Class E of Schedule 2 to the Town and Country Planning (General Permitted Development) Order 1995, as it applies to land in Wales (the "GPDO").

Class E in the GPDO permits "the provision within the curtilage of the dwellinghouse of (a) any building or enclosure, raised platform, swimming or other pool required for a purpose incidental to the enjoyment of the dwellinghouse as such …" subject to qualifications and restrictions on the height of the proposed building. The issue that arose in this case was how the height of the proposed building should be measured. Article 1(3) of the GPDO deals with this: "Unless the context otherwise requires, any reference in this Order to the height of a building … shall be construed as a reference to its height when measured from ground level; and for the purposes of this paragraph "ground level" means the level of the surface of the ground immediately adjacent to the building … in question …".

Prior to submitting his application for a certificate of lawful use or development, Mr McGaw caused excavations to be made in preparation for the construction of a boundary wall. Once the wall had been constructed, the neighbour's side was backfilled but Mr McGaw did not backfill on his side of the boundary and there was no scope for backfilling on that side because the south wall of his proposed garden room would be flush up against the boundary wall. HH Judge Jarman QC rejected the argument that the ground level at the time of the application was the relevant "ground level" (without any backfilling) and concluded that the neighbour's garden, just beyond the boundary wall, could qualify as the "immediately adjacent" ground such that Class E applied. Permission was granted to the Welsh Ministers to appeal so as to challenge the conclusion that the neighbour's garden could qualify as the relevant "ground level".
One of the arguments for the Welsh Ministers was that the "ground immediately adjacent to the building" must be within the curtilage of the dwellinghouse. The Court of Appeal did not accept this argument but did recognise the complication in this case – there is a brick structure (the boundary wall) between the proposed building and the nearest piece of ground (i.e. land not built on) by reference to which one can assess the height of the proposed building above ground level. As such, the neighbour's land would not normally be described as "immediately adjacent" to it. Taking a purposive approach and recognising that the aim of the height restrictions is to limit the impact of a generally permitted building on visual amenity in the area, the Court of Appeal did not accept that the relevant "ground level"

was the level of the excavated area: "Class E is not concerned with digging down below ground level. If the relevant area of the Claimant's land had not already been excavated in order to build the boundary wall, the excavation aspect of the proposals would not of itself have been of concern under Class E. What matters is how far the new building would protrude above ground level."

The Court of Appeal did consider whether Mr McGaw should be required to set the new building back by approximately 150mm so that the height restrictions in Class E could be applied by reference to the land in the gap between the building and the boundary wall, but this was dismissed as "wasteful and absurd".

The Court of Appeal, therefore, agreed with HH Judge Jarman QC's conclusion that the most relevant "ground level" for the purposes of Class E in this case is the neighbour's land just the other side of the boundary wall – "…it is separated from the building not by any other ground but by a boundary wall of ordinary size and construction". The appeal was dismissed accordingly.

Case summary prepared by Nikita Sellers