Swale Borough Council v First Secretary of State and another [2005] EWHC 290 (Admin)

QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

EVANS-LOMBE J

4 MARCH 2005

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Town and country planning — Development — Material change of use — Use as residence — Continuity of use.

J Findlay for the Claimant

P Copell for the First Defendant

R Green for the Second Defendant

Sharpe Pritchard; Treasury Solicitors; Clarke Kiernan, Tonbridge

EVANS-LOMBE J:

[1] This is an application under s 288 of the Town and Country Planning Act 1990 by Swale Borough Council *("the Council")* against the First Secretary of State *("The Secretary of State")* as first defendant and Roger Lee *("Mr Lee")* as second defendant to quash the decision of Mr B C Wilkinson *("the Inspector")* appointed by the Secretary of State allowing an appeal from the decision of the Council to refuse Mr Lee a certificate of lawfulness in relation to his occupation as his dwelling of a building on property known as 18 The Courtyard, Seed Road Newnham *("the barn")*, quashing an enforcement notice with relation to the barn and granting unconditional planning permission for the development already carried out at the barn under s 177(5) of the Act. The decision in question was a re-determination after the quashing of previous decisions in circumstances which I will set out.

[2] In 1996 Mr Lee acquired certain land at 18 The Courtyard, Seed road Newnham *("the site")* on which stood a wooden clad building known as the barn within which his predecessor in title had stationed two caravans which he had used as a residence, thereafter Mr Lee and persons assisting him or employed by him undertook works to the barn to improve the facilities of the barn as a residence until in March 2001 Mr Lee applied to the Council for a certificate of lawful development (an *"LDC"*) in respect of his residential use of the barn. That application was refused on the 3 May 2001. Mr Lee appealed against that refusal under s 195 of the Act. On the 4 March 2002 an inspector appointed by the Secretary of State dismissed Mr Lee's appeal *("the first decision").* Mr Lee applied to quash the first decision under s 288. On the 15 August 2002 the Council issued an enforcement notice in respect of various works of alteration which had been carried out on the barn. Mr Lee appealed against that enforcement notice. In August 2002 the decision was quashed it having been conceded by the Secretary of State that that decision was flawed. Thereafter a fresh inspector was appointed by the Secretary of State to re-determine both Mr

Lee's application and appeal. A further inquiry was held for that purpose on the 4 March 2003. On the 20 March 2003 the second inspector issued his decision *("the second decision")* dismissing both appeals. Mr Lee applied under ss 288 and 289 of the Act to quash the second decision. On the 3 September 2003 his Honour Judge Rich QC decided these further appeals of Mr Lee in his favour and quashed the second decision. In due course the Secretary of State appointed the Inspector to re-determine Mr Lee's appeals and a third inquiry took place on the 29 June 2004. By a decision letter dated 10 September 2004 the Inspector decided Mr Lee's appeals in favour of Mr Lee making the orders which I have set out above. On the 20 October 2004 the Council lodged the present application under s 288 of the Act and on the 21 October applied for permission to appeal out of time against the quashing of the enforcement notice under s 289.

[3] The Inspector decided two of the issues before him against Mr Lee namely that the works to the barn were permitted development works for the purposes of Pt 1 of Sch 2 to the Town and Country Planning (General Permitted Development) Order 1995 and that the operational development of the barn had not been completed more than four years before an enforcement notice was issued by the Council. In the result the application before me concerned two questions, the decision by the Inspector to allow an appeal from the Council's decision refusing a certificate of Lawful Use for the residential use of the barn and, secondly, an appeal against the Inspector's decision to quash the Council's enforcement notice with relation to the barn. It is accepted that the second appeal raises no separate issue and is entirely dependant upon the outcome of the first appeal.

[4] Section 171B(2) of the Act provides:-

> "2 Where there has been a breach of planning control consisting in the change of use of any building to use as a single dwelling house, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach."

[5] Section 191(2) of the Act provides: –

> "For the purpose of this Act uses and operations are lawful at any time if –
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> (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 or for any other reason); and
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> (b) They do not constitute a contravention of any of the requirements of any enforcement *notice then in force."*

[6] The broad question in the appeal is whether the Inspector's finding that the barn had been used as a single dwelling house within s 171(B)(2) for a continuous period of four years prior to Mr Lee's application for an LDC can be supported.

[7] The Inspector's essential findings of fact are contained in paras 20 to 23 of his decision letter as follows:-

> "20 Initially the barn was probably used for agricultural and other storage, and the evidence suggests that an element of residential use was first introduced during Mr Bennett's ownership of the site. It was during this period that the mobile homes were first *introduced and by the end of it they were so firmly attached and incorporated into the* building that they were in essence part of its structure rather than freestanding mobile homes. However, the evidence before me indicated that Mr Bennett's use was sporadic and casual and did not amount to use of the building as a dwelling house. In contrast Mr Colby's evidence suggest that, for a period of almost a year he occupied the building on just that basis. That evidence was not substantially undermined during cross examination or by contrary evidence and I attach due credence to it. I am satisfied that residential use of the building began during his occupation.
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> 21 Mr Lee acquired the site in 1996 but didn't live in the building straight away. Indeed for two or three years the mobile home on the site and the barn appear to have provided residential accommodation for several people at various times, sometimes both being occupied and occasionally neither. This erratic pattern of use probably accounts for the various observations of the site recorded by the Council and possibly the failure of the appellants' agent to refer to residential use in planning applications and letters during this period. However once initial repairs were carried out the barn appear to have been fitted and available for residential use from then onwards. The Council acknowledges its residential use from 2000 to the present day. There is no substantial evidence that, since Mr Colby's occupation, the barn was used for any purpose other than residential except, from time to time, for minor storage connected with the use of the site as a whole.
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> 22 I have taken into account Miss Champion's evidence and the lack of reference to residential use in some planning

> applications and correspondence. However during part of the relevant period the appellant had a difficult and complicated personal life, and I accept that these factors affected both his use of the site, and the control he was able to apply to the works being carried out there. I have no doubt that the barn was in full time residential occupation in 1995/6 and again from 2000 onwards. In the period of 1997 – 1999 the evidence indicates substantial work on the barn to complete its conversion to residential purposes, as well as on the remainder of the site. The appellant and several other people were involved in this work and frequently lived and slept in the barn for substantial periods. I am aware of no evidence of any intention to abandon the residential use of the barn. Indeed the main intention appears to have been to improve it to allow for full time occupation as the appellants home.
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> 23 I have borne in mind the meaning of residential use described in paras 18 and 19 above, and that failure to occupy the building for a period, with no other use being introduced does not often mean that residential use has ceased. I conclude, on the balance of probability, that residential use of the barn as a ingle dwelling house began more than four year prior to date of submission of the LDC application and has continued since then without significant break."

[8] In the course of argument I was referred to the decision of the Court of Appeal in *Thurrock Borough Council v Secretary of State for the Environment Transport and the Regions & Terry Holding* [2002] EWCA Civ 226. That was a case where the land use in question in breach of planning regulation was as an airfield and the relevant period under s 171B was that prescribed by sub-s (3) namely ten years. It seems to me that, so far as relevant to the case with which I have to deal the principles which emerge from the judgment of the Court of Appeal in that case are first, that save in a case where earlier use had given rise to an *"established use"* under former planning legislation, which is not this case, the inspector needed to inquire whether it had been established that the planning authority had been in a position to serve an enforcement notice at any time during the relevant period, in this case four years, leading up to relevant date, in this case the application for the LDC. Secondly, in order to find that the provisions of s 171B are met the inspector must find continuing use in breach of planning regulations during such period discounting cessation for purposes not inconsistent with the use continuing. See per Schiemann LJ at paras 26 to 29 and per Chadwick LJ at paras 54 to 58. In particular at para 28 Schiemann LJ says this: –

> "28. I accept Mr Corner's point that an enforcement notice can lawfully be issued notwithstanding that at the moment of issue the activity objected to is not going on – because it is the week-end or the factory's summer holiday, for instance. The land would still be properly described as being used for the objectionable activity. However, I would reject Mr Hockman's submission that enforcement action can be taken once the new activity which resulted from the material change in the use of land has permanently ceased. I accept that there will be borderline cases when it is not clear whether the land is being used for the objectionable activity. These are matters of judgment for others."

[9] Where Schiemann LJ refers in para 28 to the judgment of *"others"* I understand him to be referring to the planning judgment of the Secretary of State's inspectorate.

[10] Applications under s 288 and appeals under s 289 are confined to points of law only. This court is bound by the findings of fact of the inspector save where the court is satisfied that a finding of fact is sufficiently unreasonable to meet the test prescribed in *Edwards v Bairstowe* [1956] AC 14, [1955] 3 All ER 48. Save for that contained in the second sentence of para 23, it is not suggested that any of the findings of fact of the Inspector in this case can be impugned under that test.

[11] It seems to me that where, at para 23 of the decision letter, the Inspector says:

> "I conclude, on the balance of probability that residential use of the barn as a single dwelling house began more than four years prior to the date of submission of the LDC application and has continued since then without significant break"

the Inspector was making a clear finding based on the evidence that he had taken at the inquiry and which he had described that the provisions of s 171(B)(2) conferring immunity from the service of an enforcement notice on Mr Lee had been met. Without more this court is bound by that finding.

[12] The Claimants seek to impugn that finding on *Edwards v Bairstowe* principles. They contend that the Inspector took into account immaterial considerations in arriving at that conclusion. Those immaterial considerations are shown by two passages in the decision letter where the Inspector says at the end of para 22: –

> "I am aware of no evidence of any intention to abandon the residential use of the barn. Indeed the main intention appears to have been to improve it to allow for full time occupation as the appellant's home."

And at the beginning of para 23 where the Inspector says: –

> "I have borne in mind the meaning of residential use described in para 18 and 19 above, and that failure to occupy a building for a period with no other use being introduced does not often mean that residential use has ceased."

[13] At para 18 of his decision letter the Inspector makes plain, by reference to para 2/81 of planning circular 10/97, that for the purposes of his decision, he recognised the difference between use of a building as a dwelling house and a building itself constituting a dwelling house. He made no finding that the barn, although being used as a dwelling house, had been so developed by alteration to include the typical facilities of a dwelling house so as to constitute such. His finding at para 23 was confined to a finding that the barn had been used as a dwelling house for minimum period of four years preceding Mr Lee's application for a LDC.

[14] It was submitted for the Claimants that the approach of the Inspector as illustrated by the two passages from his decision letter which I have set out above shows that his approach was inconsistent with relevant law as propounded in the decision of the Court of Appeal in the *Thurrock* case. The idea that a landowner could acquire immunity form service of an enforcement notice by intermittent user for an objectionable purpose under planning regulation, in circumstances where the period of disuse could be discounted because it was not shown that the landowner intended to abandon the use or alternatively it was shown that there was a continuing intention by him to continue the use in the future, were expressly disapproved in that case.

[15] Mr Findlay for the claimant drew my attention to passages in the judgment of Schiemann LJ in the *Thurrock* case where he highlighted passages in the decision letter he was considering. In particular he drew my attention to the quotation from para 2 of that decision letter set out at para 14 of the judgment as follows: –

> "There is no need to demonstrate that a use has been in continuous existence throughout a ten-year period. Unless there has been a clear-cut change in planning circumstances, such as a grant of planning permission for an alternative use, the introduction of another use incompatible with the original use or an indication of a deliberate intention to abandon the original use then the use will survive throughout ten years."

[16] Then at para 6: –

> "This evidence was garnered to demonstrate a material change of use to a general aviation airfield some considerable time after I consider that it took place. Its overall effect is to reinforce my conviction that at no time was the airfield use abandoned after the Sky-ads operation ceased. Panton and Farmer makes it clear that once a use had ceased, its resumption would not amount to a material change of use unless that use had been abandoned. The result is that land can have a dormant use even though the unauthorised activities may not be functioning for significant periods of time . . . Overall, I can find no clear evidence of abandonment of the airfield use since the Sky-ads operation ceased in 1983-4. As a consequence, I find, as a matter of fact and degree, that the airfield operation of 1983 is not materially different from the present usage of the site which has therefore continued for more than ten years."

[17] Mr Findlay submits that the passages from the decision letter in this case which I have set out above show a similar approach by the Inspector to that of the inspector in the *Thurrock* case. Since the Court of Appeal in the *Thurrock* case went on to disapprove this aspect of the inspector's approach it follows that the Inspector in this case has fallen into the same error.

[18] In the alternative Mr Findlay submits that, at least, the inclusion of those passages in the decision letter in this case make it unclear whether or not the Inspector arrived at his conclusion for reasons which at law were immaterial and he drew my attention to the speech of Lord Brown in the decision of the House of Lords in *South Bucks District Council v Porter (No 2)* [2004] UKHL 33, [2004] 1 WLR 1953where he says at para 36: –

> "36. The reasons for a decision must be intelligible and they must be adequate . . . 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."

[19] I am unable to accept Mr Findlay's submission. It must be borne in mind that the *Thurrock* case concerned the use of land as an airfield. It seems to me that there is an essential difference between such use and the use of a building as a dwelling house or, to avoid confusion, the use of a building as a dwelling. In the former case the activity is well defined and consists of the use of land to provide space for aircraft to land and take off and to be stored between flights. The activity can be shown to cease when aircraft movements cease and there are no aeroplanes on the land and such cessation cannot be accounted for for reasons which are not consistent with continuing use such as weather conditions or a Government ban on flying. By contrast, it seems to me, that use of a building as a dwelling does not cease if the landowner or his invitees do not actually sleep there for even quite long periods of time. Thus an absence from the building while the owner takes a substantial holiday does not mean that

he has ceased to use the building as his dwelling. By contrast indications that there had been such cessation of use would be absence combined with removal of all personal effects and disconnection of services.

[20] It seems to me clear that in the two passages from paras 22 and 23 of the decision letter which I have quoted above, the Inspector is directing himself to these sorts of considerations. In my judgment there is no justification in reading them as if the Inspector was treating as immaterial, for the purpose of coming to a conclusion whether there had been four years uninterrupted user of the barn as a dwelling, that Mr Lee had actually ceased to use it as such for material periods even though during such periods of disuse the building stood empty and unused. In my judgment it is readily apparent from the decision letter how the Inspector arrived at this decision.

[21] Contrary to the submissions of Mr Findlay I do not consider that the evidence before the Inspector that Mr Lee did not sleep at the barn while required to live at a bail hostel in Maidstone nor while improvements were being made to the barn to render it more suitable for use as a dwelling house, are necessarily inconsistent with Mr Lee's continued use of the barn as a dwelling.

[22] It does not seem to me that the fact that the Inspector does not expressly reject the evidence of Miss Champion that between Christmas 1997 until May 1999 no one lived in the barn affects my conclusions. Miss Champion was a witness at the first inquiry but did not give evidence before the Inspector at the third inquiry. At that inquiry the Inspector had evidence which conflicted with that of Miss Champion and which he was entitled to accept in preference to hers.

[23] As a separate submission it was submitted by Mr Findlay that the Inspector's decision letter was deficient because he did not give reasons why he differed from the findings of the earlier inspectors that the mobile homes were not secured to the structure of the barn and could have been removed. I do not accept that the degree to which the mobile homes were secured to the fabric of the barn was a matter which was fundamental to the conclusion of the Inspector that the barn had been used as a dwelling for four years. The issue which he had to decide was whether the barn was being used as a dwelling during such period, albeit that the method of use was by the incorporation into it of the facilities contained in the two mobile homes. It must be borne in mind that a misapprehension by the second inspector of this aspect of the use by Mr Lee of the barn was the reason why Judge Rich quashed the second inspectors decision. At para 8 and 9 of Judge Rich's judgment he said this: –

> “8 Mr Green's submission in support of the appeal can be encapsulated in the simple proposition that it does not follow from the fact that the caravans are not part of a building that heir use is not part of the use of the building.
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> 9 Although it is easy to understand how the inspector came to overlook that proposition it seem to me to be clear and unassailable. Non operational development involves the making of a material change in the use of land. That includes a building. The space enclosed by a building is necessarily the area whose use determines the use of the building. In my judgment the use of caravans positioned within a building must be part of the use of the building, and will be material to, if not determinative of, the question whether the use of the building is, or is not, used as a single dwelling house. Of course if a caravan is merely stored within a building, its use may be ancillary to the use of the building, or independent of that use. Where however, its use is residential, and such use is in conjunction with the use of the building, it must constitute a part of the use of the building. It is on that basis that the test which the inspector set out correctly in para 14 of his decision letter, namely whether the building affords the facilities required for day to day private domestic existence, must be judged. Of course, if the caravan were regularly moved, that would lead to a different conclusion than if they are, although not fixed in reality, in fact permanently stationed to provide the facilities for the use made of the space enclosed by the walls and roof of the building.”

[24] It seems to me, that by the time of the second inquiry it must have been appreciated that the degree to which the caravans were affixed to the barn was a matter of little consequence. It follows that even if the Inspector's departure from earlier inspector's findings on the point can be criticised because no explanation for that departure is contained in the decision letter (a criticism which Judge Rich made of another aspect of the second inspector's decision) it cannot be treated as effective to undermine the decision of the Inspector which I am dealing with.

[25] In my judgment there was evidence before the Inspector which justified him in arriving at the conclusion which he describes at para 23 of the decision letter. The decision letter is of sufficient clarity in showing the basis of the

approach of the Inspector and the reasons for his arriving at the conclusion which he reached. The decision letter does not show any misapprehension by the Inspector of the law in his approach to the making of his decision. Accordingly the application under s 288 fails. In those circumstances it is accepted that the appeal under s 289 would also fail if leave were given to adduce it out of time.

Judgment accordingly.
