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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
[2021] EWHC 3334 (Admin)

No. CO/2776/2021

Royal Courts of Justice

Thursday, 25 November 2021

Before:

MRS JUSTICE LANG DBE

B E T W E E N :

MALCOLM PAYNE — Appellant

- and -

(1) SECRETARY OF STATE FOR
HOUSING, COMMUNITIES AND LOCAL GOVERNMENT
(2) MALDON DISTRICT COUNCIL

Respondents

MR R. GREEN appeared on behalf of the Appellant.

MR L. GLENISTER (instructed by the Government Legal Department) appeared on behalf of the First Respondent.

The Second Respondent did not appear and was not represented

J U D G M E N T

(Transcript prepared without access to documentation)

MRS JUSTICE LANG:

1 This an appeal under section 289 of the Town and Country Planning Act 1990 ("TCPA 1990") against the decision of an Inspector appointed by the Secretary of State, dated 15 July 2021, dismissing the appellant's appeal against Enforcement Notice C, issued by Maldon District Council ("the Council") dated 28 February 2020 in respect of land at The Barn, Honeypot Lane, Tolleshunt Knights, Maldon, Essex ("the appeal site").

2 Permission to appeal was granted by Mr Tim Smith, sitting as a Deputy High Court Judge, on 6 October 2021.

Planning History.

3 The appeal site is owned by the appellant, and he resides there with members of his family. On 17 March 1998, the appellant purchased a property known as Krissimon Farm, which is about 12 acres in size. It included the appeal site as well as other land. The appellant and his family lived in a house at Krissimon Farm.

4 In 2007 the appellant put Krissimon Farm up for sale and accepted an offer. However, in April 2009 the house burned down and the sale did not go through. In May 2009 the appellant moved to a caravan on the appeal site. Later in 2009 he converted a building into a day room, and converted the garage into a bungalow. He rebuilt the main house. Then in 2010 the appellant put the entire property at Krissimon Farm up for sale again, but he sought to negotiate separately in respect of a field and the appeal site. The eventual purchasers only wished to buy Krissimon Farm and its grounds, and the field, but not the appeal site. So the property was divided with the appellant retaining the appeal site. The sale of Krissimon Farm, excluding the appeal site, took place on 11 June 2011.

5 On 28 February 2019, the Council applied to the Magistrates' Court for a Planning Enforcement Order ("PEO") pursuant to sections 171BA and 171BC of the TCPA 1990. The Magistrates' Court granted the application and made the PEO. The breach of planning control was described as: "the material change of use of part of the Land to residential (Use Class C3) with associated operational development." This was a reference to the conversion of a garage into residential use, not the caravan use. The description and plan of "the Land" is the same as that on the enforcement notice, i.e. the appeal site.

6 On 28 February 2020, the Council issued three enforcement notices in respect of the appeal site described as A, B and C. The appellant appealed against all three notices with one of his sons. The Inspector allowed appeals A and B quashing the notices, he dismissed appeal C.

7 Enforcement notice C set out the material breach of planning control as follows:

> "(a) The unauthorised material change of use of the Land to a mixed use comprising of external and internal storage use, a workshop, a caravan site for the station of a caravan (marked as 'C' on the attached plan) used for residential purposes, change of the use of the Land shaded red to residential (use class C3) with associated operational development and the use of part of the building B2 (its location and approximate extent shown shaded in blue on the attached plan) for residential purposes . . ."

In the reasons for issuing a notice it said that "it appears to the Council that the above breach of planning control has occurred within the last 10 years."

8 The appellant appealed against enforcement notice 3 on three grounds including ground (d) of section 174(2) TCPA 1990, namely, that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by the matters stated in the notice. It was the appellant's case that the uses enforced against began more than 10 years before the notice was issued and were therefore outside the time limit for enforcement action in section 171B(3) TCPA 1990.

9 The Inspector rejected this ground of appeal for two reasons. First, a PEO had been made on 16 January 2020 in respect of the material change of use of part of the site to residential (Use Class C3) and the effect of this order was to suspend the enforcement time limit as it applied to the residential use. As a residential use was part of the mixed use of the site which constituted a single breach of planning control, and as enforcement action could be taken against that element of the breach, the mix of uses as a whole did not benefit from the enforcement time limit. Secondly, the Inspector found that in 2011 the use of the site was associated with the appellant's occupation of the house at Krissimon Farm which, together with the site, were within a single title. On the sale of the house the planned unit was divided into two and the mixed use described in the Notice began when this happened.

Statutory Framework.

10 An appeal under section 289 TCPA 1990 is on a point of law only. It is not a review of the merits.

11 By section 55(1) TCPA 1990, development includes the making of any material change in the use of any buildings or land. Carrying out development without the required planning permission constitutes a breach of planning control under section 171A TCPA 1990.

12 Under section 172 TCPA 1990 the local planning authority may issue an enforcement notice when it appears to them that: (a) there has been a breach of planning control and (b) it is expedient to issue the notice having regard to the provisions of the development plan and any other material considerations.

13 Time limits for enforcement action are set out in section 171B. In respect of a material change of use of land no enforcement action may be taken after the end of the period of 10 years from the date of breach (see section 171B(3) TCPA 1990). Although before the Inspector the appellant asserted the shorter time period of four years for dwelling houses was applicable in respect of the garage converted into a dwelling, that point was not taken on this appeal because of the PEO.

14 Special provisions apply where a breach of planning control has been deliberately concealed. Section 171BA TCPA 1990 provides:

> " (1) Where it appears to the local planning authority that there may have been a breach of planning control in respect of any land in England, the authority may apply to a magistrates' court for an order under this subsection (a 'planning enforcement order') in relation to that apparent breach of planning control.

(2) If a magistrates' court makes a planning enforcement order in relation to an apparent breach of planning control, the local planning authority may take enforcement action in respect of—

(a) the apparent breach, or

(b) any of the matters constituting the apparent breach,

at any time in the enforcement year . . .

(5) Subsection (2)—

(a) applies whether or not the time limits under section 171B have expired, and

(b) does not prevent the taking of enforcement action after the end of the enforcement year but within those time limits."

15 The court's jurisdiction to make an order and the effect of such an order is set out in section 171BC:

"(1) A magistrates' court may make a planning enforcement order in relation to an apparent breach of planning control only if—

(a) the court is satisfied, on the balance of probabilities, that the apparent breach, or any of the matters constituting the apparent breach, has (to any extent) been deliberately concealed by any person or persons, and

(b) the court considers it just to make the order having regard to all the circumstances.

(2) A planning enforcement order must—

(a) identify the apparent breach of planning control to which it relates, and

(b) state the date on which the court's decision to make the order was given."

Grounds of Appeal.

Ground 1.

Submissions

16 The appellant's first ground of appeal was that the Inspector misunderstood the effect of the PEO. Its effect was confined to the "apparent breach" specified in the PEO; it did not extend to the other uses on the appeal site. The respondent accepted that the PEO was only made in respect of the apparent breach of planning control identified in the order, i.e. the

residential use. However, he submitted that the Inspector was correct to find that, as the apparent breach in the PEO was part of a single mixed use across the appeal site, the only means of enforcement was against the entire mixed use in respect of the whole of the site.

Conclusions.

17 The Inspector addressed this issue at DL42 to 46:

> "42 An appeal under this ground is that at the date when the notice was issued no enforcement action could be taken in respect of the breach of planning control which may be constituted by those matters. The alleged breach in enforcement notice C constitutes a material change of use to a mixed use and operational development, although the mixed use comprises a number of individual uses, that mixed use is a single use itself. Similarly, as the mixed use and operational development are all contained within the description of the alleged breach, they would constitute a single breach of planning control. Consequently, if it were possible to take enforcement action against one element of the mixed use, neither that part of the breach of planning control nor the breach as a whole would benefit from the lawfulness conferred by section 171B of the Act. In that case an appeal on this ground would fail.
>
> 43 The mixed use alleged in the breach of planning control under enforcement notice C includes the residential use of the area showed in red to residential with associated operational development. As set out above that part of the alleged breach of planning control is subject of the planning enforcement order.
>
> 44 Section 171BA(2) of the Act states that enforcement action can be taken in respect of the apparent breach for any of the matters constituting the apparent breach that are set out in the planning enforcement order. The description of the breach of planning control within the planning enforcement order is the change of use of the land shaded red to residential (use class C3) with associated operational development.
>
> 45 In this case the description of the breach of planning control in enforcement notice C includes the exact wording in its entirety from the planning enforcement order. It is clear, therefore, that enforcement action can be taken against that part of the breach of planning control. For the reasons set out above, as that forms part of the breach of planning control enforcement action can be taken in respect of the breach of planning control as a whole.
>
> 46 As I have determined the whole site to be one planning unit, in practice the impact of the planning enforcement order extends to a wider area than the planning enforcement order actually covers. Therefore, to ensure that there are no issues of natural justice arising from this I need to consider whether appeals A or C under ground D would have succeeded if the planning enforcement order had not been made. The enforcement notice was issued on

> 28 February 2020, consequently if there had not been a planning enforcement order the mixed use of the site constituting the breach of planning control on enforcement notices A and C would have become lawful were it to have continued for a period of 10 years beginning with the date on which the use had started."

18 In my judgment, the purpose of a PEO is to permit an authority to take enforcement action against an apparent breach of planning control that had been deliberately concealed, therefore denying the authority the opportunity to take enforcement action within the statutory time limit. The relevant provisions in sections 171BA and171BC are confined to the "apparent breach" specified in the PEO and the power to take enforcement action goes no further.

19 A PEO does not suspend or disapply the time limits in section 171B. Section 171BA(5)(a) states that subsection (2) applies (a) whether or not the time limits under section 171B have expired, and (b) does not prevent the taking of enforcement action after the end of the enforcement year but within those time limits. Instead, it permits a further period of enforcement action in respect of the apparent breach specified in the PEO.

20 The PEO provisions are intended to operate only where a use has been concealed. In my judgment, they were not intended to operate in respect of other uses which were not concealed, merely because those uses are on the same site as part of a mixed use. Where, therefore, a change to a mix of uses would otherwise be immune from enforcement action by virtue of section 171B(3), a PEO made in respect of one of the uses does not affect the operation of the statutory time limit in respect of the remaining uses.

21 Under section 172(1)(b) TCPA 1990, the local planning authority has a discretion as to which breaches of planning control it enforces against. Even where there is a mixed use it may find it expedient to issue an enforcement notice in respect of individual aspects of the unauthorised use. Here, an enforcement notice could have been issued limited to the breach identified in the PEO. It was not necessary to enforce against the entirety of the mixed use in order to enforce against the breach in the PEO, therefore, ground 1 succeeds. However, it is common ground that the appellant must also succeed on ground 2 for the appeal to be allowed.

Ground 2.

Submissions.

22 The appellant submitted it was not open to the Inspector to find that there was a material change of use of the site when the house and part of the land at Krissimon Farm was sold in 2011. The only rational conclusion which the Inspector could properly reach was that the original planning unit, comprising the house and 12 acres at Krissimon Farm, was divided in 2009 when the appellant ceased to live in the house, and moved into the caravan and other buildings within the appeal site. That was when the functional link between the use of the appeal site and Krissimon Farm was severed.

23 The respondent submitted that the Inspector made a planning judgment which he was entitled to reach on the evidence. The appellant's challenge did not come close to the high threshold required to establish *Wednesbury* unreasonableness.

Conclusions.

24 There are three broad tests for determining the appropriate planning unit as set out in the classic case of *Burdle v Secretary of State for the Environment* [1972] 3 All ER 240 at 244 per Bridge J:

> "First, whenever it is possible to recognise a single main purpose of the occupier's use of his land to which secondary activities are incidental or ancillary, the whole unit of occupation should be considered . . .
>
> But, secondly, it may equally be apt to consider the entire unit of occupation even though the occupier carries on a variety of activities and it is not possible to say that one is incidental or ancillary to another. This is well settled in the case of a composite use where the component activities fluctuate in their intensity from time to time, but the different activities are not confined within separate and physically distinct areas of land.
>
> Thirdly, however, it may frequently occur that within a single unit of occupation two or more physically separate and distinct areas are occupied for substantially different and unrelated purposes. In such a case each area used for a different main purpose (together with its incidental and ancillary activities) ought to be considered as a separate planning unit."

25 The determination of the planning unit is a matter for the Inspector's planning judgment subject to review on grounds of rationality. It will often be the same as the unit of occupation. In *Burdle* at 1213 Bridge J said:

> " . . . It may be a useful working rule to assume that the unit of occupation is the appropriate planning unit, unless and until some smaller unit can be recognised as the site of activities which amount in substance to a separate use both physically and functionally."

26 In *Johnston v Secretary of State for the Environment* [1974] 28 P&CR 424 at 427 Widgery LCJ set out this passage in *Burdle* and approved it saying:

> "The important phrase there is the suggestion that one should start with the 'unit of occupation,' in other words, that prima facie the planning unit is the area occupied as a single holding by a single occupier."

This principle was subsequently applied in *Gregory v Secretary of State for the Environment* [1990] 60 P&CR 413 at 417.

27 However, changes in the Planning Unit do not necessary equate to changes in use. As stated in the Encyclopaedia of Planning Law and Practice, volume 2, at P55.49:

> "A material change in use does not occur automatically upon the subdivision of a planning unit. The primary use of the new units may remain the same as the former primary use of the whole. But the subdivision may have the effect of changing the character of the use

and may have planning consequences which indicate that a material change has occurred . . ."

28 Special provision is made in section 55(3) TCPA 1990 for the functional subdivision of a dwelling house:

> "(3) For the avoidance of doubt it is hereby declared that for the purposes of this section—
>
> (a) the use as two or more separate dwellinghouses of any building previously used as a single dwellinghouse involves a material change in the use of the building and of each part of it which is so used . . ."

29 The use made of a piece of a piece of land and whether it has materially changed are issues of fact and degree to be decided looking at the physical state of the land and the activities taking place on it. (See e.g. *Welwyn & Hatfield Borough Council v Secretary of State for Communities and Local Government* [2011] UKSC 15 [2011] 2 AC 304 at [14], [27] and [29]; *Moore v Secretary of State for Communities and Local Government* [2012] EWCA Civ 1202 at [16], [19], [27], [32] and [36]. If there is no change in the state of the land or the activities taking place on it, there is no material change of use notwithstanding that the ownership of the land may have changed: *Lewis v Secretary of State for the Environment* [1972] 23 P&CR 125 at 127 to 128. *Snook v Secretary of State for the Environment* [1977] 33 P&CR 136).

30 In *Wakelin v Secretary of State for the Environment* [1983] 46 P&CR 214 the owner of a large house obtained planning permission for and then built additional residential accommodation in the grounds known as 'The lodge'. The permission was conditioned on the accommodation being occupied only by close relatives or members of the household staff. This permission "contemplated that the whole premises should be retained as one planning unit." Subsequently, the appellant sought to purchase the lodge and separate it from the large house. The court considered it was when the sale occurred that the planning unit split and there was a change of use. Lord Denning held at 217:

> "The essential point in this case, as I said at the beginning, is whether it is right to permit this large planning unit to be divided into two separate units. It seems to me beyond question that a change of this kind is a material change of use within the Statute . . . If a large house and grounds are divided into two units, as was done here, that is a material change of use. It is often done. A large house remains one unit. There is a separate garage block or stable turned into a separate unit altogether, it is conveyed to a separate family to use as they please. That is a material change of use of the whole unit."

31 Applying these legal principles to this case, I conclude that the Inspector made a planning judgment which he was entitled to reach on the evidence before him. The Inspector found at DL13 that the appeal site was currently a single planning unit comprising a mixed use.

32 The Inspector then said at DL47 to 50:

> "47 Prior to occupying the caravan on the site the appellant had lived in the house at Krissimon Farm. At this time he used the appeal site in much the same form as it is currently used with external and internal storage and workshop. However, this was associated with his occupation of that house. There was no

caravan and what is now the dwelling house had not been constructed. Those uses, both of Krissimon Farm and the yard that forms the appeal site, were integrated as a single planning unit.

48 I understand that the house burned down in 2009. It was rebuilt and subsequently sold with the details of a sale produced in October 2010, and the sale taking place in 2011. It was at that point that the house was sold, that the yard was split from the house dividing the planning unit into two.

49 For these reasons, based on the evidence provided, and on the balance of probability, I consider that the mixed use described in the enforcement notice commenced when the house was sold and the planning unit was split into two. That was less than 10 years before the enforcement notice was issued on 28 February 2020. So even if the planning enforcement order had not been made the breaches of planning control set out in enforcement notice ANC would not have become lawful under section 171B of the Act prior to the issue of the enforcement notices.

50 For these reasons I conclude that the appeal under ground D must fail."

33 I accept the respondent's submission that it was rational for the Inspector to conclude that the split of the planning unit and change of use occurred in 2011. The appellant relies on the fact that he moved into the caravan and utilised other buildings on the appeal site for residential purposes in 2009, well before the sale of the land. However, this did not inevitably mean that the planning unit split prior to the sale. The appellant himself described these actions as "short term immediate decisions arising from the tragedy of the house fire" (see paragraph 151 of his statutory declaration).

34 The appellant's evidence was clearly considered by the Inspector in his decision letter. However, there was a sufficient evidential basis upon which the Inspector could rationally conclude that, in all of the circumstances, the planning unit split and the change of use occurred in 2011. That conclusion was also in accordance with the principles of law that I have set out.

35 After the house burned down, Krissimon Farm remained in single occupation with the appellant and his family decanting to other temporary accommodation on the site. The house was rebuilt by the appellant. During this time, the Inspector was plainly entitled to consider the "prima facie" case of the planning unit being the same as the area of occupation applying *Johnston*. As in *Wakelin*, there remained a link between the appeal site and larger house until the sale. This is demonstrated by the fact that the appellant stated that during this time he rebuilt the house himself, and: ". . . there was a short term convenience living on the appeal site where all my tools where and where there was a stock of materials" (see paragraph 157 of the statutory declaration).

36 In 2010 and 2011 Krissimon Farm, in its entirety was marketed for sale by the appellant, albeit with proposals for separate negotiations for the field and the appeal site. If it had been successfully sold as a whole, then logically it would have remained as one planning unit. When the new purchasers bought part of Krissimon Farm, and the appellant remained the owner and occupier of the other part, the planning unit was split. The Council's case was that the separation of the planning unit "resulted in a new chapter in the planning". (See statement of case at paragraph 6.2A and 6.39). The Inspector clearly agreed with this submission. Sullivan LJ held in *Newsmith Stainless Ltd v SSETR* [2017] PTSR 1126 at [7]:

". . . an applicant alleging an Inspector has reached W*ednesbury* unreasonable conclusion on matters of planning judgment, faces a particularly daunting task."

37 In my view the appellant has not come close to reaching the high threshold required for a finding of *Wednesbury* unreasonableness and therefore this ground cannot succeed. In the light of the Inspector's finding that enforcement could lawfully take place within a 10 year period from 2011 the appellant's appeal has to be dismissed.

CERTIFICATE

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This transcript has been approved by the Judge.