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QUEEN'S BENCH DIVISION

Mr Lionel Read QC (sitting as a deputy judge of the Queen's Bench Division)

March 4 1991

Dwellinghouse -- Erection of garage building -- Use of part of garage building as annex to house -- Whether breach of planning control -- Whether creation of separate planning unit -- Appeal by council dismissed

The second respondent, Mr Rowland White, is the owner of land and a house at Woodview, Cornells Lane, Widdington, Essex. Planning permission was granted in October 1988 for the erection of a house with a detached garage. The garage was erected to a height some 0.6m above that approved and following a second application planning permission was granted in April 1989 for the retention of the building on condition that it was used for domestic purposes only incidental to the enjoyment of the dwelling and not for a residential annex or a separate dwelling. At ground level the garage building is now divided into a conventional garage and, alongside it, a kitchen area and breakfast bar leading to a staircase. On the first floor there is a bathroom and small bedroom. The second respondent applied for planning permission for the change of use of the garage to provide living accommodation in conjunction with the existing dwelling. In October 1989 the applicant council issued an enforcement notice alleging breach of planning control.

By his inspector, the Secretary of State for the Environment allowed appeals by the second respondent against an enforcement notice issued by the appellant council and against a refusal of planning permission; the enforcement notice, which was quashed, had required the removal of the domestic features in the garage. The inspector had decided that the application was not strictly necessary as no material change of use is involved if a domestic garage within a residential curtilage is used for living accommodation in connection with a dwelling. The inspector treated the appeal against the refusal of planning permission as if an application for planning permission had been made under section 63 of the Town and Country Planning Act 1990 for the retention of the garage at its increased height without compliance with the condition attached by the April 1989 condition. The council applied under section 288 of the 1990 Act to quash the first respondent's decision allowing the appeal against the refusal of planning permission on the grounds that the inspector had erred in treating the appeal in the manner he had and that he was wrong in law.

Held The application was dismissed.

In treating the appeal as if an application had been made to retain the garage without compliance with the planning condition, the inspector did not have to decide and did not decide whether planning permission should be granted for the use proposed in the application submitted to the council: see p 79E. The inspector addressed and decided the first issue as to whether the application involved a material change of use.

The identification of a separate planning unit is a question of fact to be decided on the evidence: see p 82F. The annex in the garage building did not constitute a separate planning unit, the proper test being that of a

single family occupation. Having decided that the application did not involve a material change of use, it was unnecessary for the inspector to consider the second stage whether the user was incidental to the dwellinghouse: see p 83.

In relation to the planning condition, the inspector was entitled to find that it was contradictory with the planning permission to which it was attached: see p 83. Although the inspector came to the right conclusion for the wrong

reason, in concluding there had been no material change of use of the garage building, it was not necessary to quash the decision.

Cases referred to in the judgment

Burdle v Secretary of State for the Environment [1972] 1 WLR 1207; [1972] 3 All ER 240; (1972) 70 LGR 511; 24 P&CR 174; [1972] EGD 678; 223 EG 1597, DC

Emin v Secretary of State for the Environment [1989] JPL 909

Wallington v Secretary of State for Wales [1991] 1 PLR 87, CA

Application under section 288 of the Town and Country Planning Act 1990

This was an application under section 288 of the Town and Country Planning Act 1990 to quash a decision of the first respondent, the Secretary of State for the Environment, who by his inspector had allowed an appeal against a refusal of planning permission by the applicant council following an application made by the second respondent, Mr Rowland White.

Peter Village (instructed by Jameson & Hill, of Hertford) appeared for the applicants, Uttlesford District Council.

Guy Sankey (instructed by the Treasury Solicitor) appeared for the first respondent, the Secretary of State for the Environment.

The second respondent, Mr Rowland White, appeared in person.

The following judgment was delivered.

MR LIONEL READ QC: This is an application under section 288 of the Town and Country Planning Act 1990 by Uttlesford District Council, who are the local planning authority for their area, to quash a decision by one of the inspectors of the Secretary of State for the Environment, the first respondent, given on an appeal by Mr Rowland White, the second respondent, against a refusal of planning permission by the council. The second respondent, who appears in person on this application, converted the garage of his house to provide some very small separate living accommodation for his mother, but, unfortunately, she died before the conversion was completed and the intention, as I understand it, is that it should now be occupied by his mother-in-law. It is in short, as the second respondent aptly described it in his application for planning permission, a "granny annex".

It is a sad commentary that such a modest proposal for a family purpose should end up in the High Court, but Mr Village, who appears for the council, has said that the council are concerned with the principle involved in the inspector's decision, if there be a principle, and its implications for proposals of a similar kind

in their district. The relevant facts are a little complex, but, stripped of matter not relevant to the application to this court, they may be shortly summarised.

Planning permission was granted in October 1988 for the erection of the house in which the second respondent now lives with a detached garage. This garage was built to a height greater than that which was permitted and planning permission for the retention of the garage with an increased height was granted in April 1989 subject to the condition that the garage should be used for domestic purposes only incidental to the enjoyment of the dwelling and not for any separate industrial commercial business use or as a residential annex or separate dwelling. In the event the second respondent converted the garage so as to preserve some garage space, but also to provide at ground-floor level and above what had been intended as storage space some small separate living accommodation.

In March 1989 the second respondent applied for planning permission for this conversion. The application was expressed to be for "change of use for detached garage to private living accommodation to be used in conjunction with existing dwellings (in short 'a granny annex')". That application was

refused by the council in May 1989 and the second respondent appealed against the refusal in August 1989. In October 1989 the council issued an enforcement notice in respect of the conversion, which the second respondent also appealed under para (*a*) of section 88(2) of the Town and Country Planning Act 1971 (section 174 of the 1990 Act), that is to say, seeking planning permission for the development enforced against as well as under para (*h*). The inspector's decision on that appeal to quash the enforcement notice is not the subject of the council's application to this court and it is unnecessary for me to refer to it again.

Both appeals were dealt with by written representations. Following the inspector's considerations of those representations an officer of the Department of the Environment wrote to the parties on May 14 1990 conveying, somewhat unusually but I believe helpfully, the inspector's initial reactions for the parties' comments. Among his observations reported in that letter were the following:

3. He

-- that is to say, the inspector --

> considers that the use of the building as a residential annexe to the existing dwelling would involve no material change of use of the dwelling and its curtilage and does not constitute development for which planning permission is required because the use of the planning unit was, and remains, residential. If

-- which is not the present case --

> the garage were to be severed from the house or to be independently occupied then, of course, this position would change. It follows that the application subject to the s 36 appeal was unnecessary.
>
> 4. Although no development would be involved the question remains whether use in the manner proposed would breach the condition attached to the approval of application UTT/0107/89

-- which I interpolate to explain is the one which permitted the increased height of the garage --

> In this connection the Inspector commented that ...
>
> B. the condition as drafted is arguably contradictory since use as a residential annexe (which it seeks to prohibit) would be a use incidental to the use of the dwelling (which it permits).

This letter is relevant to the extent that the inspector's subsequent decision is to be read in the light of, and reflects, these initial comments. I have omitted the additional criticism of the condition given in para 4A of this letter, since it is of no direct relevance to the issues which I have to determine. But I need to refer to para 8, which reads:

> If, the council, in light of the observations at 4A and 4B above, intend to assert the continued validity of the condition then it seems to the Inspector that a proper course for him to adopt would be to treat the application as being made under s 31A of the amended 1971 Act -- for the development of land without complying with a condition subject to which a previous permission has been granted. That would enable the validity of the condition as well as the planning merits of [its] removal to be considered.

The council responded to these initial comments by a letter of July 5 1990 from their director of planning. He expressed his agreement with the view of the inspector given at para 3 of the department's letter that "the use of the building as a residential annexe to the existing dwelling would involve no material change of use ... and does not constitute development for which

planning permission is required". He also agreed with para 4B of the department's letter and continued:

> It is the use of the unit as a separate dwelling which the Council seeks to prohibit. Planning permission has been granted for a garage -- if it is sold away separately from the main house then it will no longer be within its curtilage, so any residential occupation can then not be ancillary. In this instance planning permission would be required for a conversion to dwelling and any application would be considered on its merits.

He concluded by asserting the validity of the condition subject to which the April 1989 permission was granted.

The inspector then gave his decision by letter dated August 29 1990. By that time the Town and Country Planning Act 1990, which consolidated the Town and Country Planning Act 1971 and other enactments, had come into force. As I have said, he quashed the enforcement notice. On the appeal against the refusal of planning permission he decided that he should treat the application for planning permission as if it were made under section 63 of the 1990 Act for the retention of the building at its increased height without compliance with the condition attached to the April 1989 consent. He considered this was the appropriate course rather than under section 73 of the 1990 Act (previously section 31 A of the 1971 Act), as suggested in the department's letter of May 14 1990, since the consent on which the condition was imposed had been implemented. The council make no criticism of this course of action. Indeed it was, as Mr Village for the council accepts, agreed by the parties.

In the result, by treating the application in this way the inspector did not have to decide and did not decide whether planning permission should be granted for the use proposed in the application submitted to the council. On the, as it were, amended application the only question was whether the condition attached to the April 1989 permission for the retention of the garage should be removed or modified. On their second principal head of argument the council challenged the correctness in law of the way in which the inspector decided that question. I deal with that argument later in this judgment, but at this stage I am concerned to identify and then address the council's first principal ground for challenging the inspector's decision.

This first principal ground of challenge is directed to the inspector's reasons for determining the application under appeal in the way that he did. That reason was foreshadowed in para 3 of the department's letter of May 14 1990. It was formally incorporated as part of his decision at para 9 of his decision letter. It is this paragraph which is the subject of challenge. That paragraph reads as follows:

> The application the subject of this appeal was not strictly necessary in my view since no material change of use is involved if a domestic garage within a residential curtilage is used for living accommodation in conjunction with the dwelling -- a point made in paragraph 3 of my earlier letter and -- again -- one from which the Council do not dissent.

In arguing that this paragraph reveals error of law Mr Village conceded at the outset of his argument that the council not only had not dissented from the proposition there stated by the inspector but had agreed to it. This is apparent from the passage in the council's letter of July 5 1990, which I have already read. Hence the council agreed on the argument now addressed to the court to an error of law by the inspector, but, Mr Village argues, an error of law cannot be agreed by the parties to an appeal. Now contending that there is such an error of law, the council by this application accordingly bring the matter before the court for correction.

I agree with this part of Mr Village's argument to this extent. If there be

error in law by the inspector such that his decision was outside the powers given to him by statute, the council cannot bring his decision within those powers by any agreement to what the inspector in fact did. The burden of Mr Village's submissions is that the inspector erred in law because he did not approach correctly the question which he had to determine on the application under appeal, reached a wrong conclusion on that question and failed to give adequate reasons for it. Those submissions were pervaded throughout by Mr Village's contention that there is no rule of law that, as para 9 of the decision reads, "no material change of use is involved if a domestic garage within a residential curtilage is used for living accommodation in conjunction with the dwelling". That, he submits, is not only an over-simplification; it is a manifestly wrong approach.

In deploying his argument on those submissions Mr Village begins with the definition of development, now to be found in section 55 of the 1990 Act. Subsection (1) defines development as meaning, so far as here relevant, "the making of any material change in the use of any buildings or other land". Subsection (2) then provides that the operations or uses of land therein set out "shall not be taken for the purposes of this Act to involve development". The use at para (d) is here relevant, that is to say, "the use of any buildings or other land within the curtilage of a dwellinghouse for any purpose incidental to the enjoyment of the dwellinghouse as such".

Mr Village submits that section 55 required the inspector to follow a two-stage approach by which he should first have considered whether the use of the garage as proposed constituted a material change of use and hence, at that stage, development, and, if it did, whether, as a second stage, that use was for a purpose incidental to the enjoyment of the principal dwellinghouse as such. In support of his submission Mr Village referred to the judgment of Farquharson LJ in *Wallington v Secretary of State for Wales* given on November 7 1990 and so far unreported[*]. At p 3 of the transcript of his judgment Farquharson LJ said[+] :

> The section contemplates a two-stage approach, first, has there been any material change in the use of, in this case, the cottage? If not, then the enforcement notice is bad and the appellant would be entitled to succeed. If there has been a material change of user, there will still not be a development within the meaning of subsection (1) if that user is incidental to the enjoyment of the dwellinghouse as such. In the argument before us the questions posed by these two subsections have been taken together, but they should be dealt with separately.

Slade LJ at pp 6 and 7 of the transcript[§] similarly stressed the need for the inspector to adopt this two-stage approach, though he referred to the two stages as "two separate questions".

Mr Village then submits that, if this two-stage approach had been followed, which, he submits, it was not, the inspector should first have determined the correct planning unit. On that question Mr Village cites the judgment of Bridge J (as he then was) in *Burdle v Secretary of State for the Environment* [1972] 1 WLR 1207 at p 1212. There the learned judge sketches out three broad categories of distinction, as he put it, to assist in determining the planning unit which should be considered in deciding whether there has been a material change of use. I quote those passages of most relevance:

> First, whenever it is possible to recognise a single main purpose of the occupier's use to his land to which secondary activities are incidental or ancillary, the whole unit of occupation should be considered....
>
> *[1991] 2 PLR 76 at 81*
>
> 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....
>
> 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....
>
> 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.

Mr Village challenges the inspector's decision at para 9 of his decision letter on three grounds, that is to say: first, he did not address his mind to whether the garage building was a separate planning unit; second, he should have determined that it was a separate planning unit by reason of its location at the end of the rear garden area and of the fact that it was self-contained and therefore there was a material change of use and accordingly development within section 55(1); and, third, he failed to give any reason for finding that the dwellinghouse and garage were part of the same planning unit.

If, as Mr Village submits, there were two separate planning units and a material change of use, he argued that the inspector should have gone on to consider within the terms of section 55(2)(d) whether, nevertheless, development was not involved because the use of the garage was incidental to the enjoyment of the dwellinghouse as such. On that second stage of the correct approach he submits that the inspector should have found that, the garage building with its residential annex being a separate planning unit, its use as living accommodation was not incidental to the enjoyment of the principal dwellinghouse as such. On this question Mr Village referred to the judgment of Sir Graham Eyre QC (sitting as a deputy High Court judge) in *Emin v Secretary of State for the Environment* [1989] JPL 909 at p 913, where the learned deputy judge said that "the word 'incidental' connoted an element of subordination in land use terms in relation to the enjoyment of the dwellinghouse itself". Reliance was also placed upon a passage in the judgment of Farquharson LJ in the case of *Wallington* (at p 6 of the transcript[*]), where he said: "In my judgment the word 'incidental' in this context means as Mr Laws for the respondents puts it 'subordinate in land use terms to the enjoyment of a dwellinghouse as a dwellinghouse'."

Lastly, Mr Village adopts as the correct approach which the inspector should have followed but did not follow the views expressed by the Secretary of State in a decision reported at [1987] JPL 144+ . That decision was given on an appeal against a determination which raised the question whether a proposal to erect a granny-annex building in the garden of a dwellinghouse would be permitted development within class 1.3 of Schedule 1 to the Town and Country Planning General Development Order 1977 as a building required for a purpose incidental to the enjoyment of the dwellinghouse as such. I read what appears to me to be the most relevant passages of that decision:

> Additions to the normal, basic, domestic living accommodation of a dwelling-house, such as bedrooms, which are normally to be expected as part and parcel of any dwelling's normal facilities, are not regarded, as a matter of fact and degree, as being "incidental" to the enjoyment of the dwelling-house as such for the purposes of Class 1.3; they are an integral part of the

> ordinary residential use as a dwelling-house ... The view is taken that the word "incidental", on the other hand, means something occurring together with something else and being subordinate to it. Accordingly, a purpose which is incidental to the enjoyment of a dwelling-house is distinct from activities which constitute actually living in a dwelling-house. Incidental purposes are regarded as being those connected with the running of the dwelling-house or with the domestic or leisure activities of the persons living in it, rather than with the use as ordinary living accommodation. Similarly, ... the Department's present view is that the use of an existing building in the garden of a dwelling-house for the provision of additional bedroom accommodation is not now to be regarded as being "incidental" to the enjoyment of a dwelling-house as such for the purposes of section 22(2)(*d*)

-- that is a reference to the Town and Country Planning Act 1971 --

> it merely constitutes an integral part of the main use of the planning unit as a single dwelling-house and, provided that the planning unit remains in single family occupation, does not therefore involve any material change of use of the land; in those circumstances it is now considered that there is therefore no need to rely on section 22(2)(*d*).

I have summarised Mr Village's submissions at some length because of the concern that the council is said to have at the implications of the inspector's decisions for other similar proposals, but I am bound to say that I do not accept that the decision has implications for proposals which are not identical on the facts. In considering those submissions I have in mind throughout the precise nature of the change of use for which planning permission was sought, that is to say, from "detached garage to private living accommodation to be used in conjunction with existing dwellings (in short 'a granny annex')".

This is ordinary language and I have no difficulty in understanding the proposal. The provision of such accommodation is common place.

It is not necessary that the inspector should have expressed himself as adopting a two-stage approach to the issue he had to decide if he in fact decided such questions as were required to be answered. The first was whether the application involved a material change of use. That turned on whether a separate planning unit would be created. In my judgment, the inspector addressed and decided that question. Para 9 of his decision

letter must be read with the department's earlier letter, which conveyed his initial views and to which the inspector referred in his decision letter. The language which he there used may not be as precise as might reasonably be expected from a judge of this court, but I have no doubt that the inspector is there expressing his conclusion, albeit then provisionally, that the garage with the living accommodation would remain part of the same planning unit as the dwellinghouse. That was a finding of fact and degree and the council did not dissent from it in their letter, as the inspector observed in his decision letter. His reasons for that decision are there stated adequately and intelligently.

I can find no error of law in that decision. Mr Village submits that the inspector should have found that the garage with its living accommodation was a separate planning unit. The decision was, however, one of fact and degree. There was evidence on which the inspector could reasonably have decided as he did. Mr Village stressed the second respondent's representation that the accommodation gave the "occupant the facilities of a self-contained unit", although "intended to function as an annexe only with the occupant sharing her living activity in company with the family in the main dwelling". In so far as that was a material fact it was for the inspector to weigh it. I have no reason to conclude that he did not. As a material fact I do not think it has on the facts of this case the significance that Mr Village attributes to it. In the end it amounts to no more than the fact that the elderly relative to be accommodated

would have her own bedroom, bathroom and, I assume, lavatory, small kitchen, somewhere to sit and her own front door. To that extent she will be independent from the rest of her family. I find no reason in law why such accommodation should consequently become a separate planning unit from the main dwelling. So to conclude would suggest that the removal of any element of what was to be provided in this case, for example, the bathroom, such that the relative would to that extent be dependent on the facilities in the main house, would maintain that living accommodation in the same planning unit. There is, in my judgment, no reason in law why that should be so.

It follows that, having decided the first question arising on the two-stage approach required in the way he did, the second stage did not fall for determination. It is therefore unnecessary for me to make any judgment on the argument put to the court on the second of the two stages and I do not do so. Those are matters best left to be dealt with if and when they are in point.

When the inspector came to consider the condition attached to the April 1989 permission he decided at para 13 of the decision letter:

> The condition as drafted is also self-contradictory since it purports to limit the use to purposes incidental to the enjoyment of the dwelling and then proceeds to exclude one such use -- namely use as a residential annexe. In so far as it also seeks to preclude any separate industrial commercial or business use the condition is in my view unnecessary since any such separate uses would constitute a material change of use and require planning permission.

Mr Village challenges the first part of this paragraph. He submits that the condition was not unnecessary or self-contradictory since use as a residential annex cannot be equated with use for purposes incidental to the enjoyment of the dwellinghouse.

Mr Sankey for the Secretary of State does not dispute that the reason given by the inspector for the condition being self-contradictory cannot be supported. If, as the inspector found, a garage with its living accommodation was part of the same planning unit as the dwellinghouse and provided that the planning unit remains in single family occupation, no material change of use is involved and no question arises of the use of the garage being used for a purpose incidental to the enjoyment of the dwellinghouse as such. Mr Sankey also submits that the inspector would have been right, however, to have found that the condition contradicted the planning permission to which it was attached and that his finding that it was unnecessary was a matter of planning judgment.

I accept Mr Sankey's submissions, which to an extent concedes Mr Village's point. Since, in my judgment, the inspector came to a correct conclusion although for the wrong reasons, I am not satisfied that the court is necessarily justified in quashing the decision on that limited ground. In any event I am satisfied that there is neither need nor purpose in the exercise of my discretion to quash it on that ground and to send it back for redetermination. Accordingly, I do not quash it. In the result the application is dismissed.

Application dismissed.