Official Transcripts (1990-1997)

Whitehead v The Secretary of State for the Environment and Another

[1991] Lexis Citation 1581

[1992] JPL 561

CO/0483/91, (Transcript:Marten Walsh Cherer)

QUEEN'S BENCH DIVISION (CROWN OFFICE LIST)

MALCOLM SPENCE QC (SITTING AS A DEPUTY JUDGE OF THE QUEEN'S BENCH DIVISION)

10 JULY 1991

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HB Sales for the Applicant; DJ Elvin for the First Respondent; The Second Respondent did not appear and was not represented.

Ouvry Goodman & Co, Sutton; The Treasury Solicitor

MALCOLM SPENCE QC

(sitting as a Deputy Judge): Mr Whitehead, the applicant in this case, has a home at Sloghterwyks near Charlwood in Surrey and in the Green Belt. It stands within a curtilage of about 5 acres. He also has a barn and it is common ground in this case that the barn lies within the curtilage.

Mr Whitehead has two alternative proposals. Both involve the same minor alterations to the external facades of the barn. The first proposal is to use the building thus altered as an annexe to the existing house to provide live-in accommodation for a housekeeper. The second proposal is to use the building as an independent home, thus, it is conceded, creating a new separate curtilage.

Mr Whitehead made planning applications for these proposals and was refused permission. Each was refused for broadly the same reasons and each included this reason, although in slightly different language:

"The building the subject of the proposed development is not considered to be genuinely redundant as it forms an ancillary building within the curtilage of Sloghterwyks incidental to the enjoyment of the dwellinghouse".

Mr Whitehead appealed to the Secretary of State for the Environment. An inquiry was held and the Inspector appointed to determine the appeals dismissed them both.

Mr Whitehead now applies to this court to quash these decisions under section 288 of the Town and Country Planning Act 1990. Although there are eight points in the notice of motion, the case breaks down into two separate parts. First, it is said, and I read paragraph 2 of the notice of motion as encapsulating the main thrust:

"The Inspector failed to determine whether the use of the barn for residential purposes ancillary to the use of the main dwelling would constitute development and require planning permission".

I think I should read paragraph 5 as well.

"The Inspector was wrong in law to say that use of the barn as staff accommodation would require planning permission because a new unit of living accommodation would be formed".

This point is relevant because of what the Inspector said in paragraph 13 of the decision letter, to which I shall come in a moment. This part of the case relates only to the first of the two appeals. Secondly, it is said that the Inspector failed to determine that the barn was redundant. This is relevant because redundancy or otherwise of a barn underlies the Government, the Structure Plan and the Local Plan policies for the Green Belt. This part of the case relates to both appeals.

I now read certain passages from the Inspector's decision letter. In paragraph 6, she said, towards the end of the paragraph:

"however, no common ground could be reached during the course of the inquiry as to whether or not this building is redundant, although it was accepted that this is a matter of fact and judgment rather than law.

7. The barn appears not to have been in agricultural use for some time. It no longer forms part of an agricultural holding, but has been subsumed into the residential curtilage of Sloghterwyks, where it may now have an established, although not necessarily lawful, use ancillary to the main dwelling.

8. Your client finds outbuildings, excluding the barn, sufficient for his present needs, although concedes that some items have been left in the building for many years. At the time of my visit I could see that the barn had been used as an animal shelter and was being used to store some items. It appears to be in good condition, and in my view could be more intensively used than the present owners choose to do. I am not therefore satisfied that it is a genuinely redundant building".

In paragraph 10 she says:

"In the absence of evidence to suggest that your client's proposal could be considered as falling within any of the categories specified as exampt from the general presumption against inappropriate development in the Green Belt, I intend to consider whether or not the proposals would cause harm to the Green Belt, were planning permission to be granted".

I interpose to say that her reference to the "categories specified" plainly includes a reference to redundant buildings. Paragraph 13 reads:

"The barn is some distance from the main house and, to my mind, not in a definable residential grouping . . . In its present condition it could be used for purposes incidental to the enjoyment of the dwelling without a material change in the way it relates to the surrounding rural area. You have suggested that amendments to the submitted design could result in conversion works being undertaken to the building without development

being involved. That may be the case. However, the use of the converted building as staff accommodation could not be considered as a purpose incidental to the enjoyment of the main dwelling as a new unit of living accommodation is being formed for which specific planning permission would be required.

14. I believe that the conversion of the building in the manner proposed would result in a material change in its appearance, by introducing a more urban form into a rural setting. Further, a dwelling could bring with it a requirement for a more orderly garden area and an assortment of domestic appurtenances and ancillary buildings associated with modern day living . . ."

As I have said, she dismissed both appeals.

I also now read certain of the most relevant passages from the relevant policies. I read the approved Surrey Structure Plan of 1989 Policy C17A:

"Where the local planning authorities are satisfied that a building in a rural area is genuinely redundant, changes of use will normally be permitted only where the use or retention of the building will not detract from the character or appearance of the area . . ."

I also read the Mole Valley Rural Areas Local Plan:

"POLICY ENV. 13: IN CONSIDERING PROPOSALS FOR THE CONVERSION OF REDUNDANT AGRICULTURAL BUILDINGS THE COUNCIL MAY UNDER EXCEPTIONAL CIRCUMSTANCES RELAX PLANNING STANDARDS OR OTHER PLANNING POLICIES WHERE THESE WOULD OTHERWISE PREJUDICE THE PRESERVATION OF SUCH BUILDINGS . . ."

I also read the Secretary of State's policy in this regard, which is set out in paragraph 16 of Planning Policy Guidance Number 2:

"Redundant agricultural buildings can provide suitable accommodation for small firms or tourist activities or can be used as individual residences . . ."

Finally, I should read paragraph 18 of Planning Policy Guidance No 7.

"There are often opportunities for re-using existing buildings or adapting them to new commercial, industrial, residential or recreational uses . . ."

Concerning the first point, Mr Sales, who appears in this court on behalf of the applicant, has submitted, first, that in considering the relevant questions it is necessary to look at the whole of the area used for a particular purpose, including any part of the area incidental or ancillary to the achievement of that purpose. He referred me to the case of Frith and Another v Minister of Housing and Local Government (1969) 210 of the Estates Gazette 212.

Secondly, he submitted that, if the use of the whole area is for residential purposes any part of the area can be used for any element of that purpose unless this is in breach of planning condition or amounts to a change of use. He gave some examples, that is, such as by dividing it into two separate dwellinghouses as well as another example.

Mr Elvin, who appears on behalf of the Secretary of State, does not dispute those propositions and I accept them entirely.

Mr Sales submitted that the last sentence of paragraph 13 of the decision letter is simply wrong. He further submitted that the use of a separate building for staff accommodation appurtenant to the main house is not a change of use needing permission whilst it remains so appurtenant.

He referred me to a number of authorities, including the case of Wakelin v Secretary of State for the Environment and Another 46 P & CR 214, [1978] JPL 769 which was a case before the Court of Appeal in which the main matter for consideration was the division of a planning unit into two separate planning units. But there is an interesting passage at the beginning of the judgment of Lawton LJ on page 218 where he said:

"On the evidence in this case, in 1975 when the property Bourne Martyn was put on the market it could have been described by an old-fashioned estate agent as 'a gentleman's desirable residence with two acres of garden and outbuildings providing accommodation for staff and garaging for three cars.' Such a description in planning jargon is of a single unit of occupation; and that clearly was what it was when Mr Wakelin entered into negotiations for its purchase".

Mr Sales also referred me to a decision of the Secretary of State which is reported in [1987] JPL 144 where at the bottom of page 145 the Secretary of State said:

"The view is taken that the word 'incidental', on the other hand, means something occurring together with something else and being subordinante 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, with regard to the earlier case cited in [1975] JPL 104, 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 the dwelling-house as such for the purposes of section 22(2)(d) [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 the land; in those circumstances it is now considered that there is therefore no need to rely on section 22(2)(d)".

I should at this point read the equivalent section to section 22(2)(d), now section 55(2)(d) of the Town and Country Planning Act 1990.

"(2) The following operations or uses of land shall not be taken for purposes of this Act to involve development of the land -- . . .

(d) 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".

In the light of these submissions Mr Sales submitted that permission was not needed to use the barn for residential purposes in connection with the primary use of the main house and that planning permission for some alterations would not be needed.

He said that the Inspector had gone fundamentally wrong in not paying regard to this or rather and more especially erroneously determining in paragraph 13 the issue about it. Therefore she had fallen foul of the

well established principle that a decision maker when considering whether or not to grant planning permission must take into account the existence of another extant permission or of other changes that could be made without the grant of permission and all the potential consequences flowing therefrom. See, for example, Spackman v Secretary of State for the Environment [1977] 1 All ER 257, 33 P&CR 430, as well as other High Court authorities.

Mr Elvin, on the other hand, has shown that the applicant and his advisers hardly took this line or pressed this point at all. Indeed their application was for a "change of use". That was the theme of their pre-inquiry statement and it runs throughout most of the expert's proof of evidence. All that was said about this point was a short passage at paragraphs 7.15 and 7.16 of his proof. I read 7.15:

"If, as the council claim, it is correct to view the appeal building as an 'ancillary building . . . incidental to the enjoyment of the existing house' this suggests to me that planning permission should not be required for the change of use in the case of the ancillary proposal. In these circumstances planning permission would only be required (at all) for the ancillary proposal in circumstances in which the physical conversion works did not fall to be considered as permitted development".

Paragraph 7.16 is to like effect. Of course, that is merely a reference to the point in the proof of evidence of the planning witness and does not, of course, deal with the submissions that were made by counsel at the inquiry. It would be in the submissions that I would expect it and have been told that in this case submission was made about the point. First of all, it may well be that the form of the application and the pre-inquiry statement were somewhat inept in this respect, but that in no way binds the appellants as to the conduct of their case at the inquiry itself. It frequently happens that by the date of the inquiry the appellants find that they should make more of a point than they have so far. If they take a point, even if they take it in not too forceful a fashion, in my judgment, they are entitled to have proper consideration given to it. I am in no doubt that the Inspector was under a duty in this case to give such consideration to this important principle, namely, whether or not it would have been possible to form almost the same type of unit as that for which planning permission was sought without the need for applying for permission at all.

Mr Elvin pointed out that the Inspector did deal with this matter in paragraph 13. It is true that she did. The question is whether she got it right.

Mr Elvin made some submissions about the planning unit. I have no difficulty with that in this case because, as I have said, it was common ground that this barn was within the curtilage of the dwellinghouse and there was apparently no discussion about the planning unit in the context of the first appeal before the Inspector, no reference to it in the decision letter and nothing to suggest that the planning unit was any different from the curtilage.

Mr Elvin referred me to the case of Emin v Secretary of State for the Environment and Mid-Sussex District Council [1989] JPL 909 which was a decision of Sir Graham Eyre QC sitting as a deputy judge of this court. Sir Graham said this at page 912, referring to a case where one is concerned with the question of incidental use of buildings within the curtilage of a dwellinghouse:

"The arbiter of the facts in a case such as this would need to concern himself with the nature of the activities carried on in the proposed buildings so as to ensure that they were incidental or conducive to the very condition of living in the dwellinghouse and, in that sense, further that condition. In that connection the scale of those activities was obviously an important matter because there had to be a prospect that the nature and scale of such activities could go beyond a purpose merely incidental to the enjoyment of the dwellinghouse as such and constitute something greater than a requirement related solely to that purpose. In that context the physical sizes of buildings could be a relevant consideration in that they might represent some indicia as to the nature and scale of the activities.

The fact that such a building had to be required for a purpose associated with the enjoyment of a dwellinghouse could not rest solely on the unrestrained whim of him who dwelt there but connoted some sense of reasonableness in all the circumstances of the particular case. That was not to say that the arbiter could impose some hard objective test so as to frustrate the reasonable aspirations of a particular owner or occupier so long as they were sensibly related to his enjoyment of the dwelling. The word 'incidental' connoted an element of subordination in land use terms in relation to the enjoyment of the dwellinghouse itself. He (the Deputy Judge) would endorse the general approach adopted by the Secretary of State in the present case. He was correct in stating that the overriding factor in deciding the question as to whether uses of the proposed buildings could properly be regarded as incidental to the enjoyment of the dwellinghouse had to concern the incidental use, which, in that context, had to be a use which occurred together with something else but nevertheless remained at all times subordinate to it. The view was also taken by the Secretary of State, and he agreed, that the test to be applied was whether the uses of the proposed buildings, when considered in the context of the planning unit, were intended and would remain ancillary or subordinate to the main use of the property as a dwellinghouse".

I gratefully follow the words of Sir Graham Eyre.

Mr Elvin went on to deal with the decision letter of the Secretary of State, which I have said was reported in [1987] JPL 144, referring to the distinction between a building which constitutes an integral part of the main use of the planning unit as a single dwellinghouse and the use of a building which may be incidental to the enjoyment of a dwellinghouse within the meaning of section 55(2)(d).

I do not intend to decide this case upon any such fine distinction nor say whether or not, in my judgment, the language of the Secretary of State, which I have already ready read, is correct, although I am inclined to think that it is. I have not been told whether, at the inquiry, the submission on this point was founded solely on section 55(2)(d) or on the point which actually comes first for the consideration, namely, whether the building and the use thereof constituted an integral part of the main use of the planning unit.

The general point for consideration by the Inspector was to almost the same effect upon either basis. It is apparent to me that the Inspector in paragraph 13 has had in mind much of the relevant material. She has referred to the fact that the barn is some distance from the main house. She has referred to the fact that it was suggested that amendments to the submitted design could result in conversion works being undertaken to the building without development being involved and said about that that it may be the case. That was because she was not shown actual drawings. In my view, she did not have to be shown actual drawings. It was good enough, provided she appreciated that so far as the physical works of conversion were concerned it may be that they could be carried out in a form which did not require the grant of planning permission.

One is left with the real point at issue, namely, the use to which the building would be put. Given that, as I have said, the whole purpose of this application, as opposed to the second application, was to provide live-in accommodation for a housekeeper, it seems to me to be impossible to hold that the use of the building thus converted would be otherwise than for a purpose incidental to the enjoyment of the main dwelling as a unit of living accommodation or, alternatively, having regard to the Secretary of State's language, to which I have just referred, would form an integral part of the main use of the planning unit as a single dwellinghouse. It matters not, in my judgment, whether this building, as converted, happened to include its own kitchen or bathroom. Nevertheless, the whole purpose of it was to provide somewhere to live for the housekeeper, who would doubtless be looking after the house at all relevant times, and walking to and fro the short distance to the house to cook means in it and so on.

For that reason, in my judgment, that sentence was simply wrong, and the determination of what was an important point in the case, having regard to the facts, is one which the Inspector could not possibly reach.

Mr Elvin has submitted that I ought not to exercise the discretion of the court to quash this decision. I cannot accept that. In my view, this case needs to be reconsidered properly upon the basis which I have set out and having fully in mind that this building may be used for the purpose of providing living accommodation for a housekeeper without the need for planning permission for that use.

I now turn to deal with the second point, namely, paragraphs 6 to 8 of the notice of motion relating to redundant barns. I have already read the relevant policies. I can deal with the point shortly because I am satisfied that the Inspector has not made any error of law upon the point. Mr Sales has show me the Oxford Dictionary definitions of the word "redundant". He said that the meaning of a word is a matter of law for the court and that the Inspector has erred in law.

However, on looking at the relevant paragraphs, 6 and 8 of the decision letter, I can see nothing to suggest that the Inspector has misconstrued the word "redundant". I should say in passing that I attribute little or no significance to the last sentence in paragraph 6. It does not matter, in my judgment, whether or not it was accepted that this is a matter of fact and judgment rather than law. In my view, the Inspector has in paragraph 8 properly approached the matter by taking the word "redundant" and considering it in the light of the relevant facts. First, she has acknowledged, in the opening sentence of paragraph 8, that the other outbuildings are sufficient for Mr Whitehead's present needs. On the other hand, she has paid regard, quite legitimately, to the fact that at the time of her visit it was being used to store some items. Moreover, it appeared to be in good condition and could be used more intensively.

I should have thought that it was manifest that a building such as this might well come in useful within a domestic curtilage such as this. It extends to 5 acres. Almost any use of 5 acres requires maintenance with equipment of various kinds. Even though the building was little used at the time of the inquiry, it was perfectly legitimate to consider that "it could be more intensively used". In considering whether a building is redundant one is not confined to the present; none of the definitions in the Oxford Dictionary suggest that. The future may be just as relevant for consideration as the present, especially in the case of a building which is in good condition. I can detect no error of law and no incorrect approach to the matter in this Inspector's finding that the building was not redundant. Incidentally, she said "genuinely redundant", in my view, simply because she was using the language of the structure plan.

That is sufficient to deal with this second point, but it may assist if I say that in order for a building to be redundant one is not confined by law or practice to a consideration of the present owner's means.

Mr Sales referred me to a decision of the Secretary of State on an appeal to which I give the reference number T/APP/C/88/L3625/32/P6 where there is a passage in the decision of the Inspector at paragraph 34 which I shall read:

"I can find nothing in the policy statements or elsewhere to indicate that redundancy of an agricultural building . . . means anything other than redundant to the immediate needs of the landowner".

It is not completely clear what that sentence means.

Mr Elvin has told me that on instructions from the Secretary of State, if that means that consideration must be confined to the needs of the present owner, then the Secretary of State would not wish to follow what is said in that sentence.

I would agree with that. I accept completely that a building may well not be redundant if it would or might be useful for a future owner's needs. Again, nothing in any of the Oxford Dictionary definitions causes me to hold that it could relate only to the present owner's needs. It may be entirely unused by the present owner but yet potentially useful to a future owner and so not be redundant. In practice much will depend upon the

nature and condition of the building and the nature of the existing and potential use of the surrounding land, rather than upon the needs or intentions of the present owner.

For those reasons the application is upheld in respect of the first appeal and the decision on that appeal quashed. But the application in respect of the second appeal is dismissed.

Application upheld in respect of the first appeal. Application in respect of the second appeal quashed.