Neutral Citation Number: [2021] EWCA Civ 1920

Case No: C1/2021/0926

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT
Mr Justice Julian Knowles
CO/2314/2020, CO/2315/2020

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 December 2021

Before :

LORD JUSTICE LEWISON
LORD JUSTICE DINGEMANS
and
LORD JUSTICE WILLIAM DAVIS

- -

Between :

MANCHESTER CITY COUNCIL	**Claimant/ Respondent**
- and -	
THE SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	**Defendant/ Appellant**
SAIF CHAUDRY	**(1) Interested Party**
PREM PATHAK	**(2) Interested Party**

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Freddie Humphreys (instructed by the **Treasury Solicitor**) for the **Appellant**
Horatio Waller (instructed by **Council Legal Services**) for the **Respondent**
The Interested Parties did not appear and were not represented

Hearing date : 7 December 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and released to BAILII. The date and time for hand-down is deemed to be at 10am on Wednesday 15 December 2021.

Lord Justice Lewison:

1. The issue on this appeal is whether a planning inspector was wrong to refuse to impose conditions on the grant of planning permission on the ground that they were unnecessary. Julian Knowles J held that he was. His judgment is at [2021] EWHC 858 (Admin).

2. 3 Grandale Road was originally built as a dwelling house. It has two storeys with two principal rooms at each floor level. On 23 October 2019 Manchester City Council served an enforcement notice alleging a breach of planning control in the following terms:

> "Without planning permission the material change of use of a dwellinghouse (Class C3) to form 4 commercial units operating as a travel agent (Class A1), 2 x couriers' offices (Class B1) and therapy/medical room (Class D1)."

3. Two of the recipients of the enforcement notice appealed to the Secretary of State under section 174 of the Town and Country Planning Act 1990. Section 174 sets out a number of possible grounds of appeal. That which is relevant for present purposes is:

> "(a) that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted or, as the case may be, the condition or limitation concerned ought to be discharged"

4. Where a person appeals on this ground, he is deemed to have made an application for planning permission "in respect of the matters stated in the enforcement notice as constituting a breach of planning control": Section 177 (5). On the appeal, the Secretary of State may grant such planning permission: section 177 (1) (a). Any planning permission thus granted is treated as having been granted on the deemed application: section 177 (6).

5. The council opposed the appeal, contending that planning permission ought not to be granted; and that the property ought to be returned to its former use as a single dwelling house. But as a fall back, the council argued that if planning permission were to be granted it should be granted permission subject to conditions. The suggested conditions included two conditions in the following terms:

> "The uses hereby permitted are limited to 1 x Class A1, 2 x Class B1 and 1 x Class D1, as set out in the Town and Country Planning (Use Classes) Order 1987…
>
> Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) Order 2015 … the only uses permitted within Class A1 are "Travel and Ticket Agencies", within Class B1 "Offices" and within D1 are "Therapy/Medical Treatment Room" and shall not be used for any other purpose within those respective Classes …"

6. Having considered the merits of the appeal, the inspector decided to grant planning permission. Paragraph 1 of the decision letter stated:

> "… permission is granted … for the development already carried out, namely the material change of use of a dwellinghouse (Class C3) to form four commercial units operating as a travel agent (Class A1), 2 x couriers' offices (Class B1) and therapy/medical treatment room (Class D1)…"

7. In relation to the conditions quoted above the inspector said in paragraph 12:

> "Two conditions that specify and limit the commercial uses of the property are … unnecessary because the planning permission that has been granted specifies these uses."

8. Section 289 (1) of the Act enables the local planning authority to appeal against a decision of the Secretary of State "on a point of law".

9. The principles applicable to the interpretation of a planning permission are now well-settled. The process of interpretation is an objective one. The question is what a reasonable reader would understand by the document in which the grant of planning permission is contained. The legal context is relevant to that question. The starting point, and usually the end point, is to find the natural and ordinary meaning of the words used, viewed in their particular context: *Lambeth LBC v Secretary of State for Housing, Communities and Local Government* [2019] UKSC 33, [2019] PTSR 1388 at [19].

10. The legal context for the interpretation of a planning permission is planning law. The reasonable reader must be notionally equipped with some knowledge of planning law and practice: *Lambeth LBC v Secretary of State for Housing, Communities and Local Government* [2018] EWCA Civ 844, [2019] PTSR 143 at [52], (not criticised on appeal) [2019] PTSR 1388 at [23].

11. In planning law development includes the making of a material change in the use of any buildings or other land: Town and Country Planning Act 1990 s 55 (1). But where a building is used for a purpose of any class specified in an order made by the Secretary of State, the use of the building for another purpose within the same class is not development: section 55 (2) (f). In addition, where a use falls within a use class, certain changes from one use class to another are permitted under the Town and Country Planning (General Permitted Development) Order 2015 without the need for planning permission.

12. At the time of the events with which we are concerned, the relevant classes of use were those specified in the Town and Country Planning (Use Classes) Order 1987. The Order has since been amended. Some of those classes as they then stood are mentioned both in the enforcement notice and in the inspector's decision. But although the Use Classes Order encompasses a wide range of uses, it is not all-embracing. The Use Classes Order itself specifies a number of uses which are not allocated to a class (e.g. a taxi business, a scrapyard, and a casino). There are, in addition, other uses which do not fall within a use class. In *Tessier v Secretary of State for the Environment* (1976) 31 P & CR 161, for example, a sculptor's workshop was held not to fall within any use class. A use like that is traditionally described as a *sui generis* use (a use of its own kind). Another

example which does not fall within a use class is that of a mixed use. In *Belmont Riding Centre Ltd v First Secretary of State* [2003] EWHC 1895 (Admin), [2004] 2 PLR 8 the Secretary of State argued that:

> "A mixed use does not fall within the Use Classes Order and cannot therefore benefit from the exception in s.55(2)(f): in particular, the specific mixed use does not fall within Class D2 and Class D2 does not bite on the question whether a change in the activities comprised in the mixed use causes a material change of use."

13. Richards J accepted that submission at [31]. He said:

> "That there was a mixed use … was common ground before the present inspector. I accept Mr. Strachan's submission that such a mixed use does not fall within the Use Classes Order and cannot therefore benefit from the exception in s.55(2)(f)…. In examining use classes the focus must be on the relevant use for the purposes of s.55, which in this case is the mixed use as a whole, rather than on individual components of a mixed use. A change in components will involve a change in the mixed use itself and, subject to the question of materiality, will amount to development."

14. Richards J returned to the point in *Fidler v First Secretary of State* [2003] EWHC 2003 (Admin), [2004] 1 PLR 1. He said at [80]:

> "… the Use Classes Order has no application to a mixed use: the mixed use does not itself fall within any class and a finding of material change of use is not avoided simply by showing that a component falling within a particular class has been substituted for another component falling with the same class."

15. That observation was approved by this court on appeal: [2004] EWCA Civ 1295, [2005] 1 P & CR 12 at [28] (iv) (Carnwath LJ).

16. Whether a change of use of land is "material" is a question of fact and degree and is decided by reference to the planning unit. The identification of the appropriate planning unit is itself a planning judgment, although there are well settled principles applicable to the identification of the appropriate planning unit: see, for example *Burdle v Secretary of State for the Environment* [1972] 1 WLR 1207. The court has no power to intervene unless the decision maker has made an error of law.

17. There is another feature of planning law which would be known to the reasonable reader. That is the distinction between a limited description of a use permitted by the grant of planning permission and a condition prohibiting further change. That principle is exemplified by *I'm Your Man Ltd v Secretary of State for the Environment* (1998) 77 P & CR 251. In *Cotswold Country Grange Park llp v Secretary of State for Communities and Local Government*]2014] EWHC 1138 (Admin), [2014] JPL 981 Hickinbottom J neatly encapsulated the difference at [15]:

> "… the grant identifies what can be done – what is permitted – so far as use of land is concerned; whereas conditions identify what cannot be done – what is forbidden. Simply because something is expressly permitted in the grant does not mean that everything else is prohibited. Unless what is proposed is a material change of use – for which planning permission is required, because such a change is caught in the definition of development – generally, the only things which are effectively prohibited by a grant of planning permission are those things that are the subject of a condition, a breach of condition being an enforceable breach of planning control."

18. The Secretary of State seeks to uphold the inspector's decision on the basis that he granted planning permission for a mixed use of the property as a whole. That mixed use did not benefit from the changes in use permitted by section 55 (2) (f) because, as a mixed use, it did not fall within any class specified in the Use Classes Order. Since the mixed use did not benefit from section 55 (2) (f), the inspector was correct in concluding that the suggested conditions were unnecessary. The judge impermissibly exercised his own planning judgment to decide whether there was one planning unit or multiple planning units.

19. It is, I think, common ground, that if the result of the change of use from residential to commercial resulted in the creation of four planning units, then it could not be said that the conditions proposed by the council were unnecessary to prevent further change. If, on the other hand, there was a mixed use of a single planning unit which did not fall within any use class, then the inspector was entitled to conclude that the proposed conditions were indeed unnecessary.

20. What the inspector decided is, in the first place, a question of interpretation of the decision letter. The inspector did not give any explicit consideration in the decision letter to the identification of the appropriate planning unit. Nor did he mention the phrase "mixed use" anywhere in the decision letter. If he meant to say that there was a single planning unit with a mixed use, that is a surprising omission. What he decided must, therefore, be a process of objective interpretation of what he did say.

21. He began by setting out (in the bullet points at the start of the decision) the breach of planning control alleged. That breach was a change of use of a dwelling house "to form 4 commercial units". It clear from that description that the council's case was there were four units in place of one. As well as granting the planning permission in the terms I have quoted, the inspector attached a condition to the grant. That condition was that the "commercial units" (plural) should only operate between certain hours. In considering the amenities of neighbours in paragraph 11 of the decision letter, the inspector began by saying that "each commercial unit" was of limited size. He continued by consistently referring to "commercial uses" (plural). Similarly in his rejection of the proposed conditions in paragraph 12 of the decision letter, he referred to the "commercial uses" (plural) and asserted that the grant of the permission specified "these uses" (plural). This consistent description of uses in the plural militates strongly against the suggestion that what the inspector was describing was a single composite use. Similarly his reference to "each" commercial unit shows that he treated each separately, rather than as part of a single unit.

22. But the key point, to my mind, is the inconsistency between:

    i) The proposition that a mixed use of a single planning unit does not fall within any use class, and

    ii) Both the inspector's reference to "four commercial units" and also his description of the uses of each unit by reference to a use class.

23. These statements cannot, in my judgment, sensibly co-exist. In the first place a planning unit with a mixed use is, as *Belmont* and *Fidler* show, a single planning unit. Second, the use of that single unit does not fall within any use class. The description of the development as "four" units, each with its own use class, necessarily entails the proposition that each unit is a separate planning unit. If there were only one planning unit, then there would only have been one "commercial unit" with a mixed use that did not fall within any use class. This is reinforced by the description of the alleged breach of planning control in the enforcement notice, which also refers to four units each with its own use class; and the breach of planning control as the *formation* of those units; a description which the inspector repeated in the final paragraph of the decision letter as well as in the bullet points at its beginning. In that paragraph he acknowledged that planning permission was being granted for the formation of four commercial units.

24. Mr Humphreys, for the Secretary of State, argued that the inclusion of the classes of use by reference to their description in the Use Classes Order did no more than identify the components that made up the single overall mixed use. I do not agree. None of the individual uses to which the property was in fact put spanned the whole of any particular use class. For example the planning permission referred to one of the units operating as a travel agent. If the planning permission had granted permission for a single mixed use made up of various components, description of that component as "travel agent" would itself have been a sufficient description of that particular component without the additional reference to Class A1 (which embraces retail units of all kinds, apart from those selling hot foods, as well as many other uses). Use as a travel agent is merely a sub-class of that use class.

25. He also pointed out that the planning permission granted did not identify the individual rooms to which each description of use attached. That is true, but in my judgment it is a minor point, and does not detract from what is otherwise the clear import of the grant.

26. I do not consider that the decision letter is ambiguous in this respect. Its meaning is, to my mind, clear. The argument for the Secretary of State, if I may respectfully say so, seeks to create an ambiguity where none exists in the decision letter itself; and uses extraneous materials for that purpose. As Lord Hope explained in *Melanesian Mission Trust Board v Australian Mutual Provident Society* [1997] 2 EGLR 128:

> "Various rules may be invoked to assist interpretation in the event that there is an ambiguity. But it is not the function of the court, when construing a document, to search for an ambiguity. Nor should the rules which exist to resolve ambiguities be invoked in order to create an ambiguity which, according to the ordinary meaning of the words, is not there. So the starting point is to examine the words used in order to see whether they are clear and unambiguous. It is of course legitimate to look at the

> document as a whole and to examine the context in which these words have been used, as the context may affect the meaning of the words. But unless the context shows that the ordinary meaning cannot be given to them or that there is an ambiguity, the ordinary meaning of the words which have been used in the document must prevail."

27. It follows, in my judgment, that as a matter of interpretation of the decision letter the inspector did grant planning permission for a change of use which resulted in four separate planning units, each with its own use class. The consequence is that changes of use of a particular unit within the applicable use class (as well as changes between use classes permitted by the General Permitted Development Order) would not amount to development requiring planning permission; and would therefore be permitted in the absence of any conditions limiting such changes. The limited verbal description of those uses within the grant would not be enough. In those circumstances, I consider that the inspector failed to apply the principle in *I'm Your Man Ltd*, and wrongly concluded that conditions limiting further changes of use were unnecessary.

28. The judge approached the question in a slightly different way. He first set out his understanding of the law relating to planning units, and the criteria used to define them. There is no criticism of his summary of the relevant criteria. The complaint is that he embarked upon the exercise at all. He then said that the inspector's decision was ambiguous and did not directly state whether the four business rooms were individual planning units. But he held that, having regard to permissible extraneous material, "the only rational conclusion" was that each of the four rooms amounted to an individual planning unit.

29. It is perfectly true, as the Secretary of State submits, that matters of planning judgment are for the decision maker and not for the court. But the decision maker must exercise that planning judgment on a correct legal basis. In *Burdle* the court was clearly of the view that it could intervene if, on the materials available, one conclusion was "inevitable".

30. As I have said, an appeal from a decision of the Secretary of State to the court lies only on a point of law. In *Edwards v Bairstow* [1956] AC 14 Lord Radcliffe, in a well-known passage, said:

> "But, without any such misconception appearing *ex facie*, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that, this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, *or as one in which the true and only reasonable conclusion contradicts the determination*." (Emphasis added)

31. In this case the judge found at [57] that "the only rational conclusion" was that there were four planning units. That finding amounted to a finding that the inspector had made an error of law, either on the basis of what Lord Radcliffe said, or on the basis of irrationality in public law. The consequence of that error of law was that the inspector made a further error of law; namely to decide that because the description of what was permitted was expressed in limited terms, there was no need for any conditions precluding further changes of use. That was not in my judgment an exercise of planning judgment by the judge: it was the identification of an error of law made by the inspector.

32. I would dismiss the appeal.

Lord Justice Dingemans:

33. I agree.

Lord Justice William Davis:

34. I also agree.