All England Law Reports/1972/Volume 3 /Burdle and another v Secretary of State for the Environment and another - [1972] 3 All ER 240

Burdle and another v Secretary of State for the Environment and another

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, WILLIS AND BRIDGE JJ

20, 22 JUNE 1972

Town and country planning - Development - Material change of use - Planning unit - Determination of what constitutes appropriate unit - Factors to be considered - Planning unit to be taken as whole unit of occupation unless smaller unit recognisable as site of activities amounting to a separate use physically and functionally.

A occupied a site on which there stood a dwelling-house to which was attached a lean-to annexe and certain other buildings. On that site, within the open curtilage, A had carried on, since a time prior to 1963, the business of a scrap yard and car breakers' yard. As an incident to that business from time to time he sold on the site car parts arising from the break-up of cars and occasionally sold car parts acquired from elsewhere. In 1965 the appellants purchased the site and substantially reconstructed the lean-to annexe, in particular by providing it with external display windows. They started using that building for the sale, on a substantial scale, of vehicle spare parts acquired new from manufacturers and for the sale of other goods. In February 1971 the local planning authority served an enforcement notice which stated that it appeared that 'a breach of planning control has taken place namely the use of premises ... as a shop for the purpose of sale of inter alia motor car accessories ... without the grant of planning permission ... ' The appellants appealed to the Secretary of State and both parties presented the case to the inspector on the footing that the whole site was the planning unit with which the inquiry was concerned, the appellants contending that, looking at the site as a whole, the intensification of retail sales had not been such as to amount to a material change of use. The inspector concluded that whether or not the notice was 'properly directed to the whole property or to the annexe' the appeal should fail. In his decision letter however the Secretary of State stated that the appellants' argument that 'the whole site was used for sales and should be regarded as a long established shop' could not be accepted having regard to the definition of 'shop' in the Town and Country Planning Acts and the enforcement notice as worded could relate only to the lean-to annexe. He therefore considered and dismissed the appeal on that limited basis. On appeal,

Held - (i) The reasons given by the Secretary of State for concluding that the lean-to annexe, rather than the site as a whole, was the appropriate planning unit for consideration could not be supported. Although the word 'shop' was inappropriate to describe the whole site it did not follow that the accident of language used by the authority in framing the enforcement notice could determine conclusively what was the planning unit to which attention was to be directed (see p 243 *j* to p 244 *a*, post).

(ii) In determining what was the appropriate planning unit a useful working rule was to assume that it was the whole unit of occupation, unless and until some smaller unit could be recognised as the site of activities which amounted in substance to a separate use both physically and functionally. Since it was impossible to conclude, on the factual and evidential material available, that the Secretary of State would have come to the conclusion that the lean-to annexe was the appropriate planning unit if he had approached the matter on that basis, the appeal would be allowed and the case sent back to him for reconsideration (see p 244 *b d e h* and

j to p 245 *c*, post); dictum of Diplock LJ in *G Percy Trentham Ltd v Gloucestershire County Council* [1966] 1 All ER at 704 applied.

Notes

For a material change of use constituting development, see 37 *Halsbury's Laws* (3rd Edn) 259-263, para 366, and for cases on the subject, see 45 *Digest* (Repl) 328-334, *14-30*.

Case referred to in judgments

Trentham (G Percy) Ltd v Gloucestershire County Council [1966] 1 All ER 701, [1966] 1 WLR 506, 130 JP 179, 64 LGR 134, *Digest* (Cont Vol B) 689, *30d*.

Cases also cited

Bendles Motors Ltd v Bristol Corporation [1963] 1 All ER 578, [1963] 1 WLR 247.

Wipperman and Buckingham v London Borough of Barking (1965) 130 JP 103.

Appeal

By an originating notice of motion dated 4 February the appellants, Derek Stanley Burdle and Dennis Williams, sought an order that the matter of two enforcement notices pursuant to s 47 of the Town and Country Planning Act 1962 and s 15 of the Town and Country Planning Act 1968 dated 3 February 1971 and made by the second respondents, New Forest Rural District Council ('the authority'), and a decision of the first respondent, the Secretary of State for the Environment, pursuant to s 16 of the 1968 Act notified by letter dated 7 January 1972 might be remitted to the Secretary of State for the Environment for rehearing and determination together with the opinion or direction of the court on the matters set out in the grounds of appeal. The facts are set out in the judgment of Bridge J.

R J Roddis for the appellants.

Gordon Slynn for the Secretary of State.

Alan Fletcher for the authority.

22 June 1972. The following judgments were delivered.

BRIDGE J

delivered the first judgment at the invitation of Lord Widgery CJ. This is an appeal under s 180 of the Town and Country Planning Act 1962 from a decision of the Secretary of State for the Environment given in a letter dated 7 January 1972 upholding, subject to variation, an enforcement notice which had been served by the New Forest Rural District Council as delegate of the local planning authority on the present appellants. The appellants occupy a site at Ringwood Road, Netley Marsh, in the New Forest area, which has a frontage of 75 feet and a depth of 190 feet, and on which there stand a dwelling-house to which is attached a lean-to annexe and a number of other buildings which it is not necessary to describe.

The relevant history of the matter is that before the end of 1963, which of course in relation to changes of use is the critical date under the Town and Country Planning Act 1968, the appellants' predecessor in title, a Mr Andrews, carried on, on the site, within the open curtilage, the business of a scrap yard and a car breakers' yard. As an incident of that business he effected from time to time on the site retail sales of car parts arising from the cars broken up on the site. There was some evidence at the inquiry at which this history emerged of a very limited scale of retail sales of car parts arising from sources other than the break-up of vehicles in the course of the breakers' yard business.

The lean-to annexe adjoining the dwelling-house was used by Mr Andrews as an office in connection with the scrap yard business. In 1965 the present appellants purchased the property; whereas Mr Andrews had carried on business under the modest title of 'New Forest Scrap Metals', the present appellants promptly changed the title to the more grandiose 'New Forest Autos'. They found the lean-to annexe in a somewhat decrepit state, and effected a substantial reconstruction and alteration of it which clearly materially altered its appearance. Inter alia they provided it with two external display windows. They started to use that building for retail sales on a

substantial scale for vehicle spare parts not arising from the break-up of vehicles as part of the scrap yard business, but new spares of which the appellants had themselves been appointed stockists by the manufacturers. They also embarked on retail sale of camping equipment and the goods to be sold by retail from the annexe lean-to were displayed both in the new shop windows if one could so call them, and on shelves within the buildings. Finally it is to be observed that as well as advertising themselves as stockists of spare parts for all makes of motor cars, they included in the advertising material the phrase 'New accessories and spares shop now open'.

Those activities prompted the local planning authority to serve on 3 February 1971 the enforcement notice which is the subject of the appeal to this court. That notice recites:

> '... that it appears to the Council: That a breach of planning control has taken place namely the use of premises at New Forest Scrap Metals, Ringwood Road, Netley Marsh, as a shop for the purpose of the sale inter alia of motor-car accessories and spare parts without the grant of planning permission required in that behalf in accordance with Part III of the Town and Country Planning Act, 1962.

The steps required to be taken by the notice are the discontinuance of the use of the premises as a shop and the restoration of the premises to their condition before the development took place. Concurrently with that notice with which the court is concerned, it is to be observed merely as a matter of history that there was also served an enforcement notice directed at the building alterations which had been effected to the lean-to annexe, but as the Secretary of State allowed an appeal against that enforcement notice, it is unnecessary for us to consider it.

The enforcement notice alleging a change of use, be it observed, uses the perhaps ambiguous expression 'premises' to indicate the unit of land to which it was intended to apply. We were told in the course of argument by counsel for the authority that the authority's intention was to direct this notice at the whole of the appellants' site; it alleged a material change of use of the whole site. It seems to have been so understood by the appellants, and when the matter came before an inspector of the Department of the Environment following the appeal to the Secretary of State by the appellants against the notice, both parties presented their cases on the footing that the whole site was the planning unit with which the inquiry was concerned.

The authority's case was that the change in the character and degree of retail sales from the site, as a matter of fact and degree, effected a material change of use of the whole site which had taken place since the beginning of 1964. Indeed, in these proceedings, counsel for the authority has submitted before us that that is

still the proper approach which the Secretary of State should adopt if the matter goes back to him. On that view, so counsel said, the notice as applied to the whole site should be upheld subject to any necessary reservation to preserve to the appellants their right to effect retail sales in the manner and to the extent that such sales were effected by their predecessor before the beginning of 1964.

The appellants' case at the inquiry was in essence that, as a matter of fact and degree, looking at the site as a whole, the intensification of retail sales had not been sufficient to amount to a material change of use.

The inspector, after indicating his findings of primary fact, expressed his conclusions thus:

> 'The legal implications of the above facts are matters for the consideration of the Secretary of State and his legal advisers but it appears to me, from the almost complete absence of reference to wholesale deliveries, that the original business was based on the scrapyard, grew out of the then proprietor's specialisation in the Austin "Seven", an obsolete vehicle, and would not have survived as a mainly retail business. In contrast, while sales of salvaged spares survive, the combination of advertising with improved facilities for display, and the emphasis on new

> items in that display, all now support the appellants' claim that the annexe is a shop. But in becoming a shop a material change has taken place, without planning permission and later than 1 January 1964. Whether or not notice A [which is the use notice] is properly directed to the whole property or to the annexe, the appeal should therefore fail on ground (d).'

I read that conclusion as indicating first that the inspector was aware, although it does not appear from the report that it was raised by the parties, that there was an issue for consideration as to what was the appropriate planning unit to be considered, either the whole site on the one hand, or on the other hand the lean-to annexe, but he took the view that whichever unit one considered, there had been a material change of use, and accordingly he thought the notice could be upheld on that footing. Speaking for myself, if the Secretary of State had adopted and endorsed that view, I do not see that such a conclusion could have been faulted in this court as being erroneous in point of law.

But the Secretary of State did not simply endorse his inspector's conclusion; what he said in the decision letter was this:

> 'Both enforcement notices allege development associated with a shop. It is clear that enforcement notice B [that is the notice relating to the building operations] relates to the building called variously the annexe or lean-to. Enforcement notice A refers to the use of premises as a shop and at the inquiry it was argued for your clients that the whole site was used for sales and should be regarded as a long established shop. This is not an argument that can be accepted in the light of the clearly established definition of a shop for the purposes of the Town and Country Planning Acts as a building used for the carrying on of any retail trade etc The view is taken that enforcement notice A as worded can relate only to the lean-to or annexe. It is proposed to amend the notice to make this clear. The appeal against enforcement notice A has been considered on that limited basis.'

The Secretary of State then went on to ask himself the question: has there been a material change of use of the lean-to annexe? and on the facts, as it seems to me inevitably, he answered that question in the affirmative. Given that the lean-to annexe was the appropriate planning unit for consideration, the decision of the Secretary of State that there had been a material change of use of it was, as I think, clearly right, and, in spite of the argument of counsel for the appellants, I cannot accept that the Minister in any way exceeded his jurisdiction in ordering that the scope of the notice be cut down if it was originally intended to apply to the whole site, so as to limit the ambit of its operation to the lean-to annexe. As such, that was a variation of the notice in favour of the appellants.

But the real complaint and grievance of the appellants is that the Secretary of State has for insufficient or incorrect reasons directed his mind to the wrong planning unit and thereby deprived them of a consideration and decision by the Secretary of State, as opposed to the inspector, of the real question which the appellants

say should have been considered, namely: has the change of activities on the whole site effected a change of use of the whole site which is the appropriate planning unit to be considered?

For my part I am unable to accept that the reasons as expressed by the Secretary of State in his decision letter were good reasons for concluding that the lean-to annexe was the appropriate planning unit for consideration. I accept at once that whether one uses the definition of 'shop' in the Town and Country Planning (Use Classes) Order 1963[a] or the ordinary dictionary meaning of the word 'shop', it is really an absurdity to describe the whole of this site as a shop, but what I cannot

[a] SI 1963 No 708

accept is that the accident of language which the planning authority choose to use in framing their enforcement notice can determine conclusively what is the appropriate planning unit to which attention should be directed.

What, then, are the appropriate criteria to determine the planning unit which should be considered in deciding whether there has been a material change of use? Without presuming to propound exhaustive tests apt to cover every situation, it may be helpful to sketch out some broad categories of distinction.

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. That proposition emerges clearly from the case of *G Percy Trentham Ltd v Gloucestershire County Council* ([1966] 1 All ER 701 at 704, [1966] 1 WLR 506 at 513), where Diplock LJ said:

> 'What is the unit which the local authority are entitled to look at and deal with in an enforcement notice for the purpose of determining whether or not there has been a "material change in the use of any buildings or other land"? As I suggested in the course of the argument, I think that for that purpose what the local authority are entitled to look at is the whole of the area which was used for a particular purpose including any part of that area whose use was incidental to or ancillary to the achievement of that purpose.'

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 separte 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 indicental and ancillary activities) ought to be considered as a separate planning unit.

To decide which of these three categories apply to the circumstances of any particular case at any given time may be difficult. Like the question of material change of use, it must be a question of fact and degree. There may indeed be an almost imperceptible change from one category to another. Thus, for example, activities initially incidental to the main use of an area of land may grow in scale to a point where they convert the single use to a composite use and produce a material change of use of the whole. Again, activities once properly regarded as incidental to another use or as part of a composite use may be so intensified in scale

and physically concentrated in a recognisably separate area that they produce a new planning unit the use of which is materially changed. 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.

It may well be that if the Secretary of State had applied those criteria to the question: what was the proper planning unit which fell for consideration in the instant case? he would have concluded on the material before him that the use of the lean-to annexe for purposes appropriate to a shop had become so predominant and the connection between that use and the scrap yard business carried on from the open parts of the curtilage had become so tenuous that the lean-to annexe ought to be regarded as a separate planning unit.

But for myself I do not think it is possible on the factual and evidential material which is before this court for us to say that that was by any means an inevitable

conclusion at which the Secretary of State was bound to arrive, and that being so I do not think it would be appropriate for us to usurp his function of deciding the question: what is the appropriate planning unit here? to be considered as a matter of fact and degree. Accordingly I reach the conclusion that this appeal should be allowed and that we should send the case back to the Secretary of State with a direction to reconsider his decision in the light of the judgment of this court.

WILLIS J.

I agree.

LORD WIDGERY CJ.

I entirely agree for the reasons so fully and clearly given by Bridge J.

Appeal allowed.

Solicitors: Heppenstall, Rustom & Rowbotham, Lymington (for the appellants); The Solicitor, Department of the Environment; Sharpe, Pritchard & Co (for the council).

Jacqueline Charles Barrister.