C1/2013/0777

Neutral Citation Number: [2014] EWCA Civ 241
**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE ADMINISTRATIVE COURT**
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 18 February 2014

**B e f o r e:**

**LORD JUSTICE SULLIVAN**

**LORD JUSTICE KITCHIN**

**LORD JUSTICE BEATSON**

- - - - - - - - - - - - -

**Between:**
**REED**

**Appellant**

v

**THE SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT & ANOTHER**

**Respondent**

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**Mr M Rudd** (instructed by DPA Bar Council) appeared on behalf of the **Appellant**
**Mr P Greatorex** (instructed by The Treasury Solicitor) appeared on behalf of the **Respondent**

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J U D G M E N T

1. LORD JUSTICE SULLIVAN: This is an appeal against the order dated 1 March 2013 of Mr Robert Jay QC, as he then was, sitting as a deputy High Court judge, dismissing the appellant's appeal under section 289 of the Town and Country Planning Act 1990 ("the Act") against a decision of an inspector appointed by the first respondent dismissing the appellant's appeal against an enforcement notice issued by the second respondent.

2. The inspector's decision letter is dated 24 May 2012. The inspector was considering, at a six day inquiry, appeals against four enforcement notices, which he lettered A to D. In this appeal, we are concerned only with enforcement notice A, which I will call "the notice".

3. As issued by the second respondent, the breach of planning control alleged in the notice was:

> "Without planning permission, change of use of the land from agricultural to use for the stationing of two number static mobile homes, touring caravans for residential use, one number storage container, and one number mobile utility block."

The notice stated that this breach of planning control fell within paragraph (a) of section 191A(1) of the Act. Section 171A provides that:

> "1) For the purposes of this Act a) carrying out the development without the required planning permission; or b) failing to comply with any condition or limitation subject to which planning permission has been granted constitutes a breach of planning control."

Section 173 deals with the contents and effect of enforcement notices. Subsection 1 provides:

> "An enforcement notice shall state a) the matters which appear to the local planning authority to constitute the breach of planning control and b) the paragraph of section 171A(1) within which, in the opinion of the authority, the breach falls."

4. In paragraph 7 of the decision letter, the inspector found that the appellant had been granted a personal planning permission on appeal in 2007 which covered part of the land the subject of the enforcement notice. That permission was for a caravan site for one gypsy family. The permission was subject to a number of conditions, they included a condition that the site should not be occupied by any persons other than gypsies and travellers, as defined; an occupation condition limiting occupation of the site to the appellant and his wife or partner and their resident dependant children; a condition limiting the number of caravans to not more than two caravans, as defined in the Caravan Sites and Control of Development Act 1960; and requiring them to be sited in accordance with the positions marked on the application plan.

5. The local planning authority maintained that the 2007 planning permission had not been lawfully implemented (see paragraph 8 of the decision letter). Presumably, this was why the local planning authority alleged that the breach of planning control was a material change of use from agriculture rather than a breach of condition of the 2007 permission. A curiosity of the case was that, over part of the enforcement notice site, there was an equestrian use which had the benefit of a certificate of lawful use. The inspector concluded that the 2007 planning permission had been implemented (see paragraph 14 of the decision letter) and there has been no challenge to that conclusion.

6. The inspector found that there was a mixed use on the site and one element of the mixed use, namely the use for equestrian purposes, had remained unchanged. The only change was from one static and one touring caravan, to two static mobile homes, touring caravans, and a storage container; the storage container was used as a day room and domestic storage for Mr Hume, who was the occupant of the second mobile home (see paragraph 48 of the decision letter).

7. Once it was concluded that the 2007 permission had been implemented and that there had not been a material change of use of the land from agriculture, careful consideration should have been given as to whether what had occurred was a breach of condition as opposed to a material change of use. The inspector recorded in paragraph 15 of the decision letter the submission made on behalf of the appellant, that the second respondent should, in these circumstances, have issued a hybrid breach of condition/change of use enforcement notice.

8. Following his conclusion that the 2007 permission had been implemented and the council's acceptance of the fact that there had not been a change of use of the land from agriculture (see paragraphs 14 and 16 of the decision letter), the inspector corrected the allegation of breach of planning control in the notice to the following:

> "Without planning permission, change of use of the land from a mixed use for equestrian purposes and the stationing of one number static mobile home for residential use and one number touring caravan to a mixed use for equestrian purposes and the stationing of two number static mobile homes for residential use, touring caravans and one number storage container."

9. When dealing with the ground C appeal, the inspector also recorded in paragraph 31 of the decision letter that:

> "The appellant claimed that the stationing of an additional residential caravan on the land does not amount to a material change of use and that, as a consequence, there has been no breach of planning control."

The inspector's answer to that submission was contained in the same paragraph of the decision letter and was as follows:

> "However, the additional caravan amounts to a doubling of the number of residential caravans permitted on the land and I am satisfied on a fact and

> degree basis that the alleged material change of use has occurred. Therefore, the matters alleged in the corrected notice constitute a breach of planning control and the appeal on ground C fails."

10. On behalf of the appellant, Mr Rudd submitted that, in concluding in paragraph 31 that the doubling of the number of residential caravans had resulted in a material change of use, the inspector had either a) applied the wrong test and assumed that "mere intensification" amounted to a change of use even if it did not change the character of the mixed equestrian/residential caravan site use of the land, or b) if the inspector had considered whether there had been a change not merely in the number of caravans on the land but in the character of the mixed use, then he did not give any, or any adequate reasons for concluding that there had been a change in character.

11. In support of his submission, Mr Rudd referred us to the decisions of Mr Justice Ouseley and of this court in Hertfordshire County Council v the Secretary of State for Communities and Local Government and Another [2012] EWCA Civ 1473. In that case, the throughput of a scrap yard had almost doubled. The local planning authority issued an enforcement notice, and the Secretary of State allowed an appeal against the enforcement notice on the basis that there had been no material change of use. The local planning authority's appeal against that decision was rejected by Mr Justice Ouseley in the High Court, and on further appeal by this court.

12. Having considered a number of authorities, the Court of Appeal confirmed the test adopted by Ouseley J, namely that while intensification is capable of amounting to a material change of use, for it to do so it must have resulted in "a material change in the definable character of the use of the land" (see paragraphs 9 to 11 of the judgment of Pill LJ with which the other members of the court agreed).

13. Mr Rudd submits that, although the inspector found as a matter of fact and degree that the corrected material change of use had occurred, intensification had not formed part of the local planning authority's case at the inquiry and, moreover, it is common ground that the inspector's decision letter does not mention the concept of intensification, much less, Mr Rudd submits, does it contain any acknowledgement that mere intensification by way of increase in numbers is not sufficient for intensification to amount to a material change of use. There is no recognition in the decision letter that there must be a change in the character of the mixed use, and the inspector does not identify any such change. The only basis for the inspector's conclusion that there had been a material change of use as opposed to a breach of condition, which was not alleged, was that "the additional caravan amounts to a doubling of the number of residential caravans".

14. Mr Rudd rhetorically poses the question, what has the introduction of one residential caravan done to change the character of the mixed use? He submits that, on a fair reading of the decision, the inspector's conclusion was based on the erroneous premise that mere intensification could amount to a material change of use. If the court did not accept that submission then he further submitted that the inspector had not given any reason for concluding, if he did so conclude, that the character of the mixed equestrian and residential caravan site use had changed.

15. The judge dealt with this ground of challenge in paragraphs 80 to 92 of his judgment, which is reported at [2013] EWHC 787 (Admin). In paragraphs 87 to 90 the judge said this:

> "87)Put in these terms, the appellant's submission on ground 2 does have a technical and somewhat unattractive quality. The appellant does not and cannot submit that erecting two caravans rather than one could not constitute a material change of use as a matter of law.
>
> 88) The inspector did not have regard to the size or location of the caravan for this purpose (that would have been impermissible) he merely had regard to number.
>
> 89) I accept Mr Greatorex's submission that materiality is a matter of judgment for the inspector. The inspector after all rejected the section 142(2)(a) appeal, from which it may be inferred that the number of caravans was relevant to the issue of whether planning permission ought to have been granted.
>
> 90) I do not accept Mr Rudd's submission that he can draw solace from the decision of the Court of Appeal in Hertfordshire County Council v Secretary of State ... the facts there were somewhat different. There was one and the same scrap yard with a significantly increased level of throughput. Here we have two caravans rather than one."

16. On behalf of the Secretary of State, Mr Greatorex submitted that the point now raised before this court on behalf of the appellant was barely an issue before the inspector, let alone a principal or controversial main issue. Therefore, he submitted, the very brief reasoning in paragraph 31 of the decision letter was perfectly adequate. During the latter part of his submissions he was prepared to go so far as to accept that if there had been what he described as a "proper debate" about the issue before the inspector, then he could see the force of the point made by the appellant in this court.

17. I am unable to accept that this issue was not squarely raised before the inspector. We have a copy of the written final submissions made on behalf of the appellant. While it is true that they are very lengthy and largely concentrate, as might be expected, on the ground A appeal on the planning merits, nevertheless the point was put before the inspector in this way:

> "The original permission was for a caravan site for one gypsy family. The corrected allegation alleges a change of use from a mixed use for equestrian purposes and the stationing of one static mobile. Taking the description of the extant permission, the described original use in the allegation is not correct. The use described to which the land is now put is accepted as being factually correct, however it is not accepted that the change amounts to a change of use. In effect the allegation alleges a

> change of use from a caravan site/equestrian mixed use to a caravan site/equestrian mixed use. The issue is one of intensification and in these circumstances the appellant does not consider that intensification amounts to a change of use."

18. Mr Greatorex pointed out that that submission was made under the heading of "ground B" in respect of the notice, but in the following paragraph it is made plain that these points apply also in the case of the notice to the ground C appeal in respect of that notice.

19. While it is true that the inspector had four enforcement notices to deal with in a relatively lengthy inquiry, where there was no doubt a mass of factual material, it seems to me that once he had himself concluded that the 2007 permission had been implemented and the local planning authority had accepted that there had not been a material change of use from agriculture to a use for stationing caravans, that that inevitably raised the vital question: whether the breach of planning control was a breach of condition or development without permission. It is plain from the inspector's decision at paragraphs 15 and 31 that this very issue was raised on behalf of the appellant and that it was contended that adding an additional residential caravan did not amount to a material change of use. Those submissions are expressly recorded in the decision itself.

The points having been raised, they had to be addressed by the inspector.

20. When he was considering the ground C appeal the inspector had to correctly direct himself as to the test to be applied if he was to conclude that an increase in the number of caravans on the site had been such as to amount to a material change of use. The inspector, as I have mentioned, did not refer to intensification in the decision. That would not necessarily have been fatal if it had been plain from the decision that he had correctly directed himself, but the inspector did not expressly conclude that there had been a change in the character of the mixed use. On the face of the decision, the character of the mixed use remained the same for equestrian purposes and as a caravan site for gypsies.

21. If the inspector did consider whether there had been a change in the character of the mixed use on the site, then it would seem that the sole basis on which he concluded that there had been a material change of use was the simple fact that the additional caravan amounted to a "doubling of the number of caravans". A caravan site with four caravans rather than two caravans upon it still has the character of a caravan site, that is the very reason for the imposition of conditions relating to the numbers of caravans such as were imposed on the 2007 permission granted on appeal. Thus, the only express reasoning in the decision is consistent with the inspector having adopted an erroneous approach: that "mere intensification" could amount to a material change of use.

22. Mr Greatorex submitted that, rather than focussing on the inspector's decision, we in this court should be concerned with the judge's reasoning. If one looks at the judge's reasoning, it seems to me that it very largely endorses that of the inspector's, so that if the latter is defective then so would have been the reasoning of the deputy judge. But looking a little more closely at paragraphs 88 to 90 of the judge's judgment, in

paragraph 88 the judge confirms what Mr Rudd submits, that is to say that the only matter to which the inspector had regard when deciding whether there was or was not a material change of use was the number of caravans. That would suggest that the inspector was adopting the erroneous - mere intensification amounts to a material change of use - approach.

23. If one then turns to paragraph 89 of the judgment, in which Mr Greatorex's submission that materiality was a matter of judgment for the inspector was accepted, there is no dispute with that proposition so far as it goes but in deciding the issue of materiality as a matter of planning judgment, the inspector had to correctly direct himself. The question was not simply whether the number of caravans had increased, it was whether the definable character of the mixed use had materially changed.

24. In paragraph 89 the deputy judge referred to the fact that the inspector had rejected the appeal on ground A, that is to say the appeal on the planning merits. The difficulty with that conclusion, in my judgment, is that if one looks at the way in which the inspector addressed the planning merits and the impact of the caravans on the site, it is plain from paragraph 50 of the decision that he was concerned with the fact that one of the permitted caravans had been replaced by a larger mobile home which had been placed in a more visually prominent position on the site, where it was more clearly visible.

25. The inspector also considered matters which were the subject of the other enforcement notices, that is to say the impact of fencing, hard standing and lamp posts. All of those matters were plainly relevant for the purposes of the ground A appeal but they did not go to the key question on the ground C appeal: had there been a change in the character of the mixed equestrian/caravan site use of the site?

26. Turning to paragraph 90 of the deputy judge's judgment, I would respectfully disagree with his conclusion that the Hertfordshire case could be distinguished on the basis that in that case there was one and the same scrap yard whereas here we have two caravans rather than one. Here, we have two caravans rather than one caravan on the same caravan site. In Hertfordshire one had a scrap yard which had virtually doubled in its output. I therefore do not consider that Hertfordshire can be distinguished on the basis adopted by the deputy High Court judge. Moreover, the underlying principle which emerges from Hertfordshire, namely that mere intensification is not sufficient if it falls short of materially changing the definable character of the use of the land, is a principle which was directly applicable to the circumstances of this case as soon as the inspector had decided to correct the allegation of breach of planning control in the notice in the manner that he did.

27. Mr Greatorex sought to persuade as that, unlike the kind of permission that might have applied in the scrap yard case, where there is a general permission for a type of use, the permission given on appeal in the present case was a very narrow one. He submitted that the permission had to be read as a whole and that included the conditions which meant that the permission was not simply a permission for a caravan site for a gypsy family, but it was a caravan site very tightly hedged about in terms of who could occupy the caravans, the number of caravans, their position on the site and so on and so

forth. It seems to me that that submission confuses matters which might well have been relevant if the alleged breach of planning control had been a breach of condition, with the breach of planning control that was actually alleged in the notice as corrected by the inspector: a material change of use. The inspector was simply concerned with whether there had been a material change in the character of the mixed equestrian and caravan site use.

28. For these reasons, whether one focuses on the judge's reasoning or on the inspector's reasoning in paragraph 31 of the decision, I for my part am left in no doubt that the inspector did apply the wrong test, namely a mere intensification test, and that therefore this appeal should be allowed.

29. LORD JUSTICE KITCHEN: I agree.

30. LORD JUSTICE BEATSON: I also agree.