Brentwood Borough Council *v* Secretary of State for the Environment and others

QUEEN'S BENCH DIVISION

Christopher Lockhart-Mummery QC (sitting as a deputy judge of the Queen's Bench Division)

March 1 1995

Planning permission – Permitted development – Outbuilding erected less than 5m from dwelling – Whether siting of building visually harmful to the green belt – Whether breach significant to warrant its removal

The second respondents ("G") owned land in the Metropolitan green belt and a special landscape area. They erected an outbuilding some 2m from their dwellinghouse; had the outbuilding been erected 5m away it would have been permitted development under the Town and Country Planning General Development Order 1988. In May 1994 G's application for planning permission to retain the outbuilding was refused by the applicant council. In December 1994 the council served an enforcement notice requiring its removal. On appeal, the Secretary of State for the Environment, by his inspector, quashed the enforcement notice and granted planning permission. The council appealed against those decisions contending that the inspector had failed to give proper consideration as to whether there was a prospect of G reconstructing the outbuilding so as to fall within permitted development; and that he did not properly consider the question of "very special circumstances" before granting planning permission to G in the green belt.

Held The applications were allowed.

The inspector, by omission of an essential step in the decision process, had failed to have regard to a material consideration arising in the course of his decision, namely whether G would re-erect the outbuilding to comply with the General Development Order 1988: see p18G. There is a balancing exercise between, the harm, whether that is harm by virtue of inappropriate development in the green belt by itself or further actual harm to the green belt and, on the other hand, the factors by way of benefit or advantage which may in any particular case outweigh the harm. It is clear from PPG 2 and the authorities of the Court of appeal, which give guidance in relation go PPG 2, namely *Pehrsson v Secretary of State for the Environment* [1990] 3 PLR 66 and *Stewart v Secretary of State for the Environment* [1991] JPL 121, that the decision maker is required to look for factors having the character or quality that lie in the balance against harm. The inspector had misunderstood the nature of the balancing exercise prescribed by PPG 2 as that exercise has been explained by the Court of Appeal: see p20G.

Cases referred to in the judgment

Bloomsbury Health Authority v Secretary of State for the Environment [1993] JPL B13

Burge v Secretary of State for the Environment [1988] JPL 497

Crown Estate Commissioners v Secretary of State for the Environment [1994] JPL B113

New Forest District Council v Secretary of State for the Environment unreported July 13 1995

Pehrsson v Secretary of State for the Environment (1990) 61 P&CR 266; [1990] 3 PLR 66; [1990] JPL 764, CA

Snowden v Secretary of State for the Environment [1980] JPL 749, DC

Stewart v Secretary of State for the Environment [1991] JPL 121

Tesco Stores v Secretary of State for the Environment [1992] JPL 268

Vision Engineering Ltd v Secretary of State for the Environment [1991] JPL 951

Application and appeal under sections 288 and 289 of the Town and Country Planning Act 1990

This was a hearing of an application and an appeal under sections 288 and 289 of the Town and Country Planning Act 1990 by Brentwood Borough Council against the decision of the Secretary of State for the Environment, who by his inspector quashed an enforcement notice issued by the council and granted the respondents, Thomas Gray and Janet Gray, planning permission.

Robin Green (instructed by the solicitor to Brentwood Borough Council) appeared for the applicants

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

The second respondents, Thomas Gray and Janet Gray, did not appear and were not represented.

The following judgment was delivered.

MR LOCKHART-MUMMERY QC: This case is brought by way of two notices of motion under sections 288 and 289 of the Town and Country Planning Act 1990 seeking to quash a decision letter of an inspector dated September 15 1995. By that decision the inspector quashed an enforcement notice and granted planning permission for the retention and/or erection of an outbuilding for storage, playroom and studio at a property known as Gernons, Fryerning Lane, Ingatestone, in the area of the applicants, Brentwood Borough Council.

The background to this matter is as follows. The second respondents, Mr and Mrs Gray, own and occupy the house at Gernons. Along with adjoining properties it lies within the statutory metropolitan green belt and a special landscape area so designated under the relevant development plan. Wanting more accommodation, they commissioned an architect to provide for the construction of an outbuilding for the purposes I have mentioned. Under the then prevailing provisions of the Town and Country Planning General Development Order 1988 (those provisions are now in the 1995 Order) such a building would be permitted development not requiring an express planning permission if it were erected 5m away

from the existing dwelling. Owing to a lack of appreciation of this requirement on the part of someone, the outbuilding was in fact erected some 2m away from the dwelling. While the matters raised in this matter might appear to the layman to be a storm in a teacup, there are important planning issues involved in the decision.

In April 1994 an application for planning permission was submitted in respect of the outbuilding. Such application was refused on May 31 1994 on two grounds, first, that the site was located in the metropolitan green belt and very special circumstances did not exist to justify planning permission; second, that by virtue of its appearance, the building was detrimental to the surrounding character and visual amenities. On December 15 1994, the building still being present, the applicant borough council issued an enforcement notice requiring its removal. Appeals were lodged by the second respondents against both the refusal of planning permission and the enforcement notice, which appeals were conducted by way of written representations. In the course of the written representations dated October 1994, in respect, therefore, of the section 78 planning appeal at that stage, the agent for the second respondents said, *inter alia*, as follows:

> The appellant is most concerned that he finds himself in conflict with the authority through no fault of his own. Indeed he has considered demolishing the offending 3 metres of building and extending the building by a further 3 metres in the other direction. However, whilst this would comply with the requirements of the General

> Development Order it would not look materially different and would be an expensive operation.

In the course of the subsequent representations dated January 4 1995 in respect of the enforcement notice appeal, the agent prayed in aid the material on the section 78 appeal in respect of the planning appeal arising under ground (a) of section 174 of the 1990 Act. He added as follows:

> However, we have also appealed under ground (g) and do so on the basis that if both appeals fail then more than one month will be needed to demolish the offending three metres of the building and reconstruct it in a location acceptable in terms of the Permitted Development Limits of the General Development Order. I suggest that at least three months and preferably six months would be more appropriate.

It will be recalled that an appeal may be brought under ground (g) seeking an extension of the period within which to comply with the requirements of the notice.

It is common ground that, to the extent that the passages to which I have just referred discloses an intention on behalf of the second respondents to re-erect the building, they were not controverted by the borough council, nor was there evidence from the borough council that there would be any impediment to such re-erection.

The inspector's reasoning in relation to both appeals is set out at paras 7 to 14 inclusive of his decision letter as follows:

> 7. The main issues in both these cases are firstly, the effect that the outbuilding has on the character and appearance of this part of the District which lies within the Green Belt and a Special Landscape Area and, secondly, whether or not there are very special circumstances to outweigh any harm caused by both the inappropriateness of the extension and/or its visual impact.
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> 8. The development plan for the area comprises the Approved Structure Plan and the Brentwood Local Plan (BLP). These documents both contain policies which reinforce the national guidance set out in Planning Policy Guidance Note 2 (PPG 2) with regard to development within the Green Belt.
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> 9. In this case there is no dispute that the appeal building is inappropriate development within the Green Belt. It is contrary to the development plan and, because it is inappropriate, it is harmful in principle to the Green Belt. The Council also contends that by reason of its size, siting and materials the unauthorised outbuilding is detrimental to the general appearance, character and visual amenities of the locality.
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> 10. Turning to the first issue, I have noted the Council's concerns about the visual impact of the outbuilding. It is a large structure which is visually linked to the main building by means of its flank gate and fence. However, when considered in the context of the overall site, as well as in comparison with other large neighbouring properties, I do not consider that the building is out of scale within its surroundings.
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> 11. In my opinion, the size, scale, mass, character, materials and design of the outbuilding is acceptable in principle. I am satisfied that the appearance and character of the Green Belt is not detrimentally affected by this particular design. I acknowledge that, because it is sited only 2m away from the dwelling, it does not constitute permitted development. However, if your client dismantled the building and increased the distance between the structures to a minimum of 5m there would not be a breach of planning control.
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> 12. The question in this case, therefore, is whether or not the 2m gap results in a siting of a building which is visually harmful to the Green Belt. Having inspected the building and having noted the submitted photographs, I agree that the difference between a 2m gap and a 5m gap is not significantly material. Although a technical breach has occurred, it is my opinion that this breach has not, in

itself, resulted in any specific visual harm being caused to the appearance or character of the Green Belt.

13. I consider that the specific design of the outbuilding; its relationship in form and scale to the dwelling house; the overall size of the plot; the size and nature of other nearby properties and the fact that the outbuilding would constitute permitted development if re-located another 3m away from the house, all amount to sufficient very special circumstances to outweigh the harm in principle, caused by this inappropriate development within the Green Belt.

14. I am also satisfied that the building is satisfactorily located in respect of the surrounding landscape. It is evident that there is no physical link between the house and the outbuilding and, in any case, any additional works to either building would require the necessary planning permission due to their proximity to each other. I consider that the authority should be able to satisfactorily monitor the situation.

As a result of those conclusions he quashed the enforcement notice and granted planning permission.

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By his amended notices of motion, which are in identical form, Mr Robin Green takes a number of points which, however, by the end of the hearing had crystallised into two main points. First, did the inspector make a finding that there was a real prospect that the second respondents would demolish some or all of the outbuilding and re-erect it in accordance with the terms of the general development order? Second, did the inspector address himself properly to the question of "very special circumstances" so as to justify the grant of planning permission for inappropriate development in the green belt?

Issue 1

The resolution of this issue is critical to the outcome of this case. Mr Green accepted that if, in reality, the inspector had found a real likelihood that if permission were refused the second respondents would reconstruct the building within the general development limits, then it was difficult to see how the decision could be impugned at all, and, indeed, that factor was capable of constituting a very special circumstance.

The law on this topic is hardly in issue. In considering the grant of planning permission for development A, the decision maker must have regard to the ability of the applicant to implement an existing or deemed planning permission for an alternative development B, which may have broadly similar planning implications. In shorthand, he must have regard to the applicant's ability to implement a "fall back" planning permission. This principle is now well established. In considering this question of fall back, however, the prospects of it taking place must be real and not merely theoretical: see *Snowden v Secretary of State for the Environment* [1980] JPL 749. This aspect of the principle has been considered in a number of cases referred to today, namely *Bloomsbury Health Authority v Secretary of State for the Environment* [1993] JPL B13, *Crown Estate Commissioners v Secretary of State for the Environment* [1994] JPL B113 and *Burge v Secretary of State for the Environment* [1988] JPL 497. A transcript of the judgment in this last case was supplied to me. Whether the test is one of probability, likelihood or possibility is not the real issue in this case. As Mr Nigel Macleod QC, sitting as a deputy judge in this division, put it in *New Forest District Council v Secretary of State for the Environment* unreported July 13 1995 at p12:

> I agree with Mr Humphries, for the second respondent, that the important word is the word "real", which word truly expresses the inspector's prospect of the fall back development occurring, and is consistent with the requirements of Donaldson LJ.

In *Burge* Mr Graham Eyre QC (as he then was), sitting as a deputy judge of this division, stated as follows:

> The appellant clearly identified a situation which, in the language of the *Snowden* case, would constitute a fall-back position. It may well be that it was for the inspector, once he had been told about the fall-back position, to make a judgment as to the likelihood or probability or as to the real possibility.

> Indeed, he should have done, because and I agree with Mr Holgate thus far if he came to the conclusion that there was no real possibility or probability, there would be little point and no requirement to compare the two situations: the situation for which planning permission would be necessary and the situation which would obtain without planning permission at all.

In a green belt context, one sees this approach in the decision of Auld J (as he then was) in *Tesco Stores Ltd v Secretary of State for the Environment* [1992] JPL 268. Those proceedings concerned a proposed food store in the green belt on a site where planning permission existed for major employment development. The question arose as to the proper approach to "very special circumstances". The learned judge at p276 stated as follows:

> The Inspector, in answering that question in the affirmative, had found the very special circumstances to lie in the fact that development at least equally harmful to the green belt as Tesco's proposal had been permitted on the site and was almost certainly going to take place whether or not the appeal succeeded. He (Auld J) had already expressed the view that he was entitled as a matter of planning judgment to find that to be a very special circumstance justifying a relaxation of normal green belt policy in this instance.

Mr Green submits that the inspector, in short, failed to make any finding as to the real prospect or likelihood of Mr and Mrs Gray actually demolishing the building in whole or in part and re-erecting it.

Miss Nathalie Lieven for the Secretary of State accepts that the evidence disclosed as at October 1994, as I have set it out, was inconclusive at that stage. She says that the material provided in support of the appeal under ground (g), as I have set out above, constituted unequivocal evidence to which there was no contrary evidence. She submits that it was therefore open to the inspector to find that the structure would be re-erected, and she further submits that, in reality, he so concluded. She submits that if there is any defect, it is as to reasons only.

I do not accept this benevolent construction. It would have been simple for the inspector to conclude, and so express himself, that, taking all circumstances into account, including the admitted expense, Mr and Mrs Gray would or were really likely to re-erect the structure. His language of mere supposition at the only two relevant passages in the decision letter is expressed by the word "if", and such is not, in my judgment, the necessary finding which is required in this process of decision. It is far more than a mere question of defective reasons but an omission of an essential step in the decision process. Accordingly, it is a failure to have regard to a material consideration arising in the course of the decision and thus constitutes an error in law.

Issue 2

I turn to consider issue 2 relating to very special circumstances. I have already set out and do not repeat para 13 of the decision letter. In that

paragraph the inspector seeks to identify five factors which appear to him to amount to very special circumstances. The first four of these relate to the nature and design of the building, the characteristics of the plot and nearby development. Miss Lieven has submitted that these must be read together with the fifth factor, which relates to the prospects of relocation of the building, cumulatively. If, as I have found, the fifth factor proceeds on an improper basis, then she concedes that this aspect of the decision letter would be flawed, and her only relief would be to urge, which she did but lightly, that I should exercise my discretion not to quash on account of the error in law. I would not so exercise my discretion. If the inspector had misdirected himself as to item five alone, and it therefore falls to be left out of account, I could by no means be sure that the same decision would have been reached apart from it.

Lest I be wrong in my approach as to the inspector's reasoning and approach in relation to the fall back matter, I turn to consider the other main ground arising in this case; that is to say, did the inspector take a proper approach to the finding of very special circumstances?

Para 3.1 of PPG 2 provides policy guidance to the effect that inappropriate development should not be approved except in very special circumstances. Para 3.2 advises as follows:

> Inappropriate development is, by definition, harmful to the Green Belt. It is for the applicant to show why permission should be granted. Very special circumstances to justify inappropriate development will not exist unless the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations. In view of the presumption against inappropriate development, the Secretary of State will attach substantial weight to the harm to the Green Belt when considering any planning application or appeal concerning such development.

The question of inappropriate development, very special circumstances and the balance between the two has been the subject of extensive authority. It is not necessary to do more than cite the leading authorities of the Court of Appeal, namely, *Pehrsson v Secretary of State for the Environment* (1990) 61 P&CR 266[1] and *Stewart v Secretary of State for the Environment* [1991] JPL 121.

191 [1990] 3 PLR 66.

In approaching this question, I bear also in mind the observations of Mr Roy Vandermeer QC, sitting as a deputy judge in this division, in *Vision Engineering Ltd v Secretary of State for the Environment* [1991] JPL 951, at p953, as follows:

> All three counsels accepted that in reaching a conclusion upon the question of whether there were very special circumstances, a conclusion which inevitably was a matter of planning judgment for the inspector or the Secretary of State, it would be appropriate to look at the overall situation so that the fact that the harm was relatively slight, if that were the position,

> could itself be part of the very special circumstances, albeit, the appellant would have to demonstrate that there were benefits from the development that he was proposing.

He continued at p954:

> First it was common ground, that the proposed developments were within the Green Belt. Secondly, it was not disputed that neither of them could be described other than as inappropriate development in terms of the guidance in the relevant PPG. That leads to the accepted conclusion that they would cause demonstrable harm to an interest of acknowledged importance. The inspector had accepted this proposition. That, however, was not determinative of the application, and it then became incumbent upon the applicant to show what advantages flowed and that they outweighed the harm. As already pointed out, it was then for the inspector in considering the balancing exercise to determine whether the overall circumstances amounted to very special circumstances.

There is thus a balancing exercise between, on the one hand, the harm, whether that is harm by virtue of inappropriate development in the green belt by itself or further actual harm to the green belt – the existence and the degree of the actual harm will weigh in the balance – and, on the other hand, the factors by way of benefit or advantage which may in any particular case outweigh the harm. I do not seek in any way to limit the scope of very special circumstances, which should be for the decision maker. For example, there is, as here, that category of cases which are special, the fall back category, where, since the applicant can implement a development causing similar or greater harm, the question of benefits need not arise. Those cases aside, it is clear from PPG 2 and the authorities of the Court of Appeal giving guidance in relation to PPG 2, that the decision maker is required to look for factors having the character or quality that they lie in the balance *against harm*.

Those factors can vary widely. They can be green belt factors as such; for example, that the development may preserve or increase openness or contribute to green belt functions. They can be other planning factors, such as, perhaps, a building of exceptional architectural quality. They can be factors derived from national or other economic needs. They can be factors

relating to personal circumstances. The list is endless and it would not be for the court to restrict it. But, in my judgment, they share the common feature referred to above, that they outweigh harm. In my judgment, this inspector has misunderstood the nature of the balancing exercise prescribed by PPG 2 as that exercise has been explained by the Court of Appeal.

I return to the decision letter at paras 12 and 13 as follows:

> Although a technical breach has occurred, it is my opinion that this breach has not, in itself, resulted in any specific visual harm being caused to the appearance or character of the Green Belt.
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> 13. I consider that the specific design of the outbuilding; its relationship in form and scale to the dwelling house; the overall size of the plot; the size and

> nature of other nearby properties and the fact that the outbuilding would constitute permitted development if re-located another 3m away from the house, all amount to sufficient very special circumstances to outweigh the harm in principle, caused by this inappropriate development within the Green Belt.

I have, of course, dealt separately and above with this fifth and last factor.

It is clear, in my judgment, that the remainder of the factors constitute overall a conclusion that the degree of harm from this development is slight. In this regard, for the reasons given above, the inspector fell into error. It is not, contrary to Miss Lieven's submission, a question of a conclusion which can only be attacked on the grounds of *Wednesbury* unreasonableness, but a failure properly to understand and apply relevant policy. That, on first principles, constitutes an approach which is wrong in law. I therefore find that the decision letter would have been defective on this ground also. For those reasons these applications are allowed.

Applications allowed.

[1996] 3 PLR 21

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