Case No: CO/4878/2015

Neutral Citation Number: [2016] EWHC 209 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 February 2016

Before :

HIS HONOUR JUDGE SYCAMORE
(Sitting as a Judge of the High Court)
- -

Between :

(1) GEOFFREY RICHARD NOQUET	
(2) JACQUELINE EILEEN NOQUET	**Claimants**
- and -	
(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT	
(2) CHERWELL DISTRICT COUNCIL	**Defendants**

- -
- -

Mr Jack Parker (instructed by **Duncan Lewis**) for the **Claimants**
Mr Hugh Flanagan (instructed by **Government Legal Department**) for the **1st Defendant**
Mr John Hunter (instructed by **Cherwell District Council**) for the **2nd Defendant**

Hearing date: 27 January 2016
- -

Judgment

HIS HONOUR JUDGE SYCAMORE:

1. This is an application by the claimants Geoffrey Noquet and Jacqueline Noquet under section 288 Town and Country Planning Act 1990 ("The 1990 Act") by which they seek a quashing of the decision of the First Defendant's Planning Inspector ("The Inspector") of 27 August 2015 ("DL") by which he dismissed the second claimant's appeal under section 195 of the 1990 Act against the failure of the second defendant to give notice within the prescribed period of it's decision on her application under section 192 of the 1990 Act for a Certificate of Lawful Use ("CLU") in respect of the property known as Bishops End, Burdrop, Banbury OX15 5RQ ("The Property").

2. The use in respect of which the CLU was sought for was a change in use from class A4 (Drinking Establishments) to A1 (Retail) pursuant to Part 3 of Schedule 2 to the Town and Country Planning (General Permitted Development) Order 1995 ("the GPDO"). The factual background is not in dispute. Essentially there is one issue in this application, namely whether the Inspector was wrong in law to reject the second claimant's appeal on the grounds that the property was not being used nor had it last been used for A4 purposes at the time that the application for the CLU was made.

3. It is helpful to recite the relevant facts as found by the Inspector in the decision letter, which recorded that the use for which CLU was sought was for a change of use from A4 use to a A1 use.

   The factual background can be found at paragraphs 2-10 of the decision letter:

> "2 Bishops End was a public house when it was acquired by the appellant in February 2006.
>
> 3 In March 2007 Bishops End closed for business as a public house. I understand that it may have briefly re-opened and then closed sometime in August/ September 2013.
>
> 4 In February 2012 an Enforcement Notice was issued relating to the unauthorised change of use of Bishops End from a public house to a residential dwelling-house. The appeal against the Enforcement Notice was dismissed in October 2012. The requirement of the Enforcement Notice was to cease using Bishops End as a residential dwelling-house except for residential occupation ancillary to the use of Bishops End as a public house.
>
> 5 In February 2013 an A1 use of part of Bishops End commenced. The A1 use related of part of the ground floor at Bishops End for the sale of wood burning stoves and fireplace accessories. This use finished in July 2014. Through that period the appellant and her

husband lived at Bishops End. They left Bishops End in mid-August 2014.

6 Also in July 2014 the Council granted planning permission for part of Bishops End (an attached barn) to be used as holiday accommodation. I understand that the conversion works have been carried out but as at the date of my site visit the use had not commenced.

7 The application for the CLU states that Bishops End, "is a vacant public house (A4) and we seek to formalise the proposed change of use to A1 as allowed under the class uses Act. The current use (A4) is lawful by virtue of 57/4 of the 1990 Act."

4. As I have already indicated, the Inspector rejected the second claimant's appeal on the grounds that the property was not being used nor had it been last been used for A4 purposes at the time that the second claimant made her application for the CLU. At paragraph 8 of the decision letter the Inspector said:

> "8 I do not agree with the appellant that Bishops End was a vacant A4 use at the time the CLU application was made – its last use was a mixed use of A1 (sale of wood burning stoves etc) and a residential use. That mixed use was unauthorised."

And at paragraph 15:

> "15 In my assessment those permitted development rights can only be exercised if Bishops End is in use or last used as an A4 use. In other words the appellant cannot begin to rely on the Class A Provisions until Bishops End is being, or was last used, as a public house. That is not the case here. Bishops End was vacant at the date of the application and its last use is explained in paragraph 8 above. Accordingly, the Class A Provisions do not apply in this case."

5. I now turn to the relevant law.

Sections 55/57 and 192 of the 1990 Act provide as follows:

> "***55. – Meaning of "development" and "new development".***
>
> *(1) Subject to the following provisions of this section, in this Act, except where the context otherwise requires, "development", means the carrying out of building, engineering, mining or other operations in, on, over or*

under land, or the making of any material change in the use of any buildings or other land.

57. – Planning permission required for development.

(1) Subject to the following provisions of this section, planning permission is required for the carrying out of any development of land….

...

(4) Where an enforcement notice has been issued in respect of any development of land, planning permission is not required for its use for the purpose for which (in accordance with the provisions of this Part of this Act) it could lawfully have been used if that development had not been carried out.

192. – Certificate of lawfulness of proposed use or development.

(1) If any person wishes to ascertain whether –

(a) any proposed use of buildings or other land; or

(b) any operations proposed to be carried out in, on, over or under land,

would be lawful, he may make an application for the purpose to the local planning authority specifying the land and describing the use or operations in question.

(2) If, on an application under this section, the local planning authority are provided with information satisfying them that the use of operations described in the application would be lawful if instituted or begun at the time of the application, they shall issue a certificate to that effect; and in any other case they shall refuse the application.

(3) A certificate under this section shall –

(a) specify the land to which it relates;

(b) describe the use or operations in question (in the case of any use falling within one of the classes specified in an order under section 55(2)(f), identifying it by reference to that class);

(c) give the reasons for determining the use or operations to be lawful; and

(d) specify the date of the application for the certificate.

(4) The lawfulness of any use or operations for which a certificate is in force under this section shall be conclusively presumed unless there is a material change, before the use is instituted or the operations are begun, in any of the matters relevant to determining such lawfulness."

The GPDO in force at the relevant time provided as follows (I observe that in the decision letter the Inspector made reference to the GPDO 2015. All parties agreed that this was in error but that it made no difference as the impact was identical to the GPDO 1995):

"***3. – Permitted development***

(1) Subject to the provisions of this Order and regulations 60 to 63 of the Conservation (Natural Habitats, &c.) Regulations 1994 (general development orders), planning permission is hereby granted for the classes of development described as permitted development in Schedule 2.

(2) Any permission granted by paragraph (1) is subject to any relevant exception, limitation or condition specified in Schedule 2.

….

(5) The permissions granted by Schedule 2 shall not apply if –

in the case of permission granted in connection with an existing building ,the building operations involved in the construction of that building are unlawful;

in the case of permission granted in connection with an existing use, that use is unlawful.

Schedule 2

Part 3

Permitted development

Development consisting of a change of use of a building to a use falling within Class A1 (shops) of the Schedule to the Use Classes Order from a use falling within Class A3 (restaurants and cafes), A4 (drinking establishments) or A5 (hot food takeaways) of the Schedule)."

There is no challenge to the factual findings of the Inspector. As he observed at paragraph 8 of the decision letter, the last use of the land was a mixed use of A1 (sale of wood burning stoves etc) and residential use. That mixed use was unauthorised. In essence the claimant's case is that the rights under Part 3 operated so as to grant planning permission for change of use from A4 to A1 as the claimants were entitled to resume the A4 use of the property by virtue of section 57 (4) of the 1990 Act.

6. The Inspector dealt with this in the following way:

> "12 Section 57(4) of the 1990 Act explains that where an Enforcement Notice has been issued in respect of any development of land, planning permission is not required for the use of that land for the purposes for which it could lawfully have been used if that unauthorised development had not been carried out.
>
> 13 Accordingly, this statutory provision would allow the appellant to revert the use of Bishops End to its former use as a public house.
>
> 14 The appellant asserts that she is entitled to change the use of the relevant part of Bishops End from its lawful A4 use to an A1 use by virtue of the Town and Country Planning (General Permitted Development) Order 2015 (the GPDO). Part 3, Class A of Schedule 2 of the GPDO (the Class A Provisions) permits development consisting of a change of use of a building from a use falling within Class A4 (drinking establishment) to a use falling within Class A1 (shops)."

7. Two authorities were referred to by the parties in the course of submissions. The claimant accepted that on a superficial reading of those authorities they appear to prohibit any consideration of wider lawful use of land in the absence of any evidence of actual use. The claimants' case was that as the premises had previously been used as a public house the provisions of section 57 (4) of the 1990 Act applied.

The claimants sought to distinguish the authorities from the present case.

The first authority was that of Secretary of State for Transport v Waltham Forest LBC [2002] EWCA Civ 330. That case was concerned with an application under section 192 of the 1990 Act for a certificate of lawfulness of proposed use or development. What is clear from the ratio that case is that what has to be compared is the present use and the proposed use and not whether or not it would be lawful to carry out the proposed use if another notional use was carried out first. That is the case even if that notional use of itself would not require planning permission.

Schiemann LJ at paragraph 17 and 18 said this:

"17. It is clear that the word lawful in section 192 means lawful in the context of the planning legislation. What either does not require planning permission or has planning permission (either under the GPDO or because of an express planning permission) is lawful. Therefore in the context of an application for a section 192 certificate what has to be decided is whether a planning permission which has not been granted is needed for the making of the proposed change of use. It is clear that, in a case such as the present, what has to be compared, in deciding whether a proposed change of use is a material change of use, is the present use and the proposed use. The crucial question is what factors are in principle relevant in deciding whether a change of use is a material change of use. Assume that (1) under the planning legislation no further permissions are needed to move from the existing use to a notional use permitted under the planning legislation and (2) that a change from the notional use to the proposed use is not a material change. Does this have as a consequence that the change from the existing use to the proposed use cannot be material? The Inspector held that the answer to this question was in the affirmative. We disagree.

18. We agree with the Judge. Like him we consider that the fact (1) that no further permissions are needed to move from the existing use to the notional use and (2) that no further permissions are needed to move from the notional use to the use applied for is potentially relevant to the question whether planning permission should be granted for the use applied for. However, like him we agree that the interposition of a notionally permitted use between the existing use and the use applied for is a complication not relevant to the exercise under section 192."

In Kwik Save Discount Group Ltd v Secretary of State for Wales (1981) 42 P&CR 166 a case which was concerned with the predecessor to the GPDO 1995 the court held that it was not sufficient to rely on a permitted use of premises which had not actually been brought into use and that the actual use had to be more than de minimis.

Stephenson LJ at page 177 said this:

" …. In April 1976, the appellants' appeals (only one of which is relevant) were heard by an inspector, who stated his conclusions beginning in paragraph 59 of his report with a passage, which Talbot J, giving the first judgment in the Divisional Court, cited with implied approval, as follows:

> …. i) the offering of five cars for sale for a period of about one month in a building with a floor space of about 20,000 square feet amounted to no more than a token use of the appeal premises as a shop for the sale of motor vehicles, so minimal as to be of no planning significance. Articles 8 [of] and [Class] III *(b)* (v) of Schedule I [to] the [Town and Country Planning] General Development Order 1973 [refer] to a change of use of premises from "use as a shop …." and not from a permitted use of premises which have not actually been brought into use. There was therefore no effective use of the new building on the appeal site until the appellant's use of it as a discount store, which constituted a material change of use from a non-use, involving development for which specific planning permission was required; ….
>
> The Inspector went on to recommend that, if it was decided that development requiring planning permission was involved, planning permission should not be granted. The Secretary of State accepted his recommendation, upheld the relevant enforcement notice and refused planning permission."

And at page 179:

> " …. What is the answer to these submissions? In my judgment, the very fact that a device was resorted to by the appellants makes me suspect the use to which it is said the land was put. The Inspector and the Secretary of State found that it was *de minimis* on the facts. I would not disagree with that view, and in my judgment if the use is *de minimis* use it is not a use within the Order …."

8. The essence of the Inspector's reasoning for rejecting the second claimant's appeal is clearly set out in the decision letter in particular at paragraph 15. The finding of fact at paragraph 8 of the decision letter that the last use was a mixed use of A1 and residential use was undisputed by the parties. At paragraph 15 the Inspector explained clearly that as the property was neither in use nor last used for A4 purposes when the application was made the rights under part 3 Class A were not engaged.

9. A careful reading of Class A of part 3 to Schedule 2 of the GPDO makes it clear that the granting of permission in those circumstances is expressly limited to "*a change of use of a building to a use falling within Class A (shops) …. from a use falling within …. Class A4".* The point is a simple one. The Inspector determined that change of use of the claimants' land would not fall within this permitted development right as it was a change of use to A1 use from mixed A1/C3 use.

10. As I have indicated, the claimants' case was essentially, as set out at paragraph 4 of the claimants' skeleton argument, that the proposed change did benefit from the necessary grant of permission because:

1) The property was as a matter of fact previously in use as a public house and

2) The resumption of that public house use does not require planning permission by the operation of 57(4) of the 1990 Act. The claimant sought to argue that neither of the authorities referred to supported the Inspector's conclusion that article 3 did not operate to grant planning permission in these circumstances.

11. In my judgment that submission is inconsistent both with the scheme of the legislation and contrary to the two authorities to which I have made reference. Article 3 (5) of the GPDO is concerned with the grant of permission for changes from "*existing use*" not from potential alternative uses. It is informative to note that in the interpretation section of the GPDO at Article 1(2) "existing" is defined as follows:

> " "existing", in relation to any building or any plant or machinery or any use, means (except in the definition of "original") existing immediately before the carrying out, in relation to that building, plant, machinery or use, of development described in this order;".

In *Waltham Forest* it was made clear that what has to be compared is the present use and the proposed use. The court was not concerned with consideration of a notional use which could be exercised without the need for further permission, as would be the case here should the claimants revert to use of the property as a public house for which no planning permission would be required. That is not relevant to a section 192 exercise although it is relevant to an application for planning permission. The absence of a permitted development right would not preclude the claimants from applying for planning permission.

12. In my judgment the Inspector was correct to refuse to grant a certificate of lawfulness and he clearly explained his reasons for doing so properly concluding that the fact that there had been actual A4 use in the past was irrelevant to the question that he was concerned with in relation to permitted development rights. His conclusion that the second claimant could not rely on the Class A provisions until Bishops End was being or was last used as a public house was the correct conclusion against the undisputed factual history. The A4 use was not an existing use. It was an historic use. In those circumstances I dismiss the claimants' application.