Hawkey and Others v. Secretary of State for the Environment and Another

QUEEN'S BENCH DIVISION—DIVISIONAL COURT

LORD PARKER C.J., WIDGERY L.J. AND BEAN J.

March 26, 1971

Planning—Enforcement notice—Validity—Whether notice must identify planning unit—Notice containing errors and inelegant phrasing—Errors and inelegancies capable of amendment so far as necessary without injustice—Whether affecting validity of notice.

The appellants occupied a yard with six buildings in it together with an adjacent bungalow. The local planning authority served two enforcement notices on each appellant which referred, by reference to an attached plan, to the yard and the buildings other than the bungalow. The first notice in each case required the discontinuance of the repair and servicing of motor vehicles except in so far as those vehicles were the occupier's own, and the second required the discontinuance of a car hire business. The appellants appealed against the notices, and the Minister of Housing and Local Government, after an inquiry, upheld the notices, holding that there had been a material change of use. The appellants appealed against the Minister's decision, contending that the enforcement notices should have been directed towards the " planning unit," being in the circumstances of the case the yard and buildings plus the bungalow, and should have identified that unit and that, the Minister having failed to express a view as to the proper " planning unit," the matter should be remitted to him for reconsideration; that the notices should have been directed towards the whole planning unit; that the car hire business had been carried on in one building only and the repair business in five only of the six buildings and that, therefore, the notices had wrongly required the appellants to discontinue doing something which they were not doing; and that the notices contained so many errors, misleading statements and inelegancies that they should have been quashed.

Held, dismissing the appeal, that it was not essential that an enforcement notice should identify the " planning unit " or be directed towards it; that it would normally be directed to the area where it was to take effect, *i.e.*, where the action in question was taking place and where activity was required to be undertaken, subject to the occupier's right to rely on the planning unit alleged to show that no material change of use had taken place; and that, in the present case, it made no difference to the answer to the question whether a material change of use had taken place whether the notices were directed to the yard and buildings or to the yard and buildings together with the bungalow and the appellants were not entitled to object to the fact that the local planning authority had chosen to enforce against the alleged uses by reference to the yard and buildings only.

(2) That the fact that the objectionable uses were being carried on in part only of the premises to which the notices were directed did not mean that the appellants were being called upon to discontinue doing something which they were not doing but meant merely that they were being called upon to discontinue those uses wherever they were being carried on in the premises referred to, which was permissible.

(3) That an enforcement notice was not open to attack on the ground that it contained errors unless those errors could not be amended without injustice;

and that the admittedly inelegant language and the failure of the local authority to delete parts of their *pro forma* notice, by which no one had been misled, could, if necessary, be so amended.

Miller-Mead v. *Minister of Housing and Local Government* [1963] 2 Q.B. 196; [1963] 2 W.L.R. 225; [1963] 1 All E.R. 459; 14 P. & C.R. 266; 61 L.G.R. 152, C.A., applied.

APPEAL from the Minister of Housing and Local Government.

The facts are stated by Widgery L.J. (Leave was given at the conclusion of the appeal for the substitution of the Secretary of State for the Environment as respondent in place of the Minister of Housing and Local Government.)

Norman Wise for the appellants, Mary Kathleen Hawkey, Frederick Herbert Hawkey, Robert Frederick Hawkey, W. S. Ongley & Sons Ltd. and Shiremead Ltd.

Gordon Slynn for the first respondent, the Secretary of State for the Environment.

J. C. Taylor for the second respondents, the Bexley London Borough Council.

Lord Parker C.J. Widgery L.J. will give the first judgment.

Widgery L.J. This is an appeal on a point of law against a decision of the Minister of Housing and Local Government, as he was at the material time, namely, June 24, 1970, whereby he upheld a number of enforcement notices served by the Bexley Borough Council in respect of land at the rear of Victoria Road and fronting on Avenue Road, Erith. There were, in fact, a very large number of notices served because the title to the land was somewhat complex and many persons interested had to be included, but for all practical purposes, and certainly so far as concerns this court, the notices required two things to be done: first, the discontinuance of the activity of repairing and servicing motor vehicles on the site except so far as those vehicles were the occupiers' own; secondly, the discontinuance of a car hire business.

The site in question referred to in the enforcement notices is found by the inspector who conducted the inquiry, whose findings were confirmed by the Minister in this respect, to be a haulage contractors' yard; it has a frontage of about eighty-four feet to a road in Erith called Avenue Road, and it has a depth of about sixty-one feet. On its eastern side as one looks at it from Avenue Road there is in addition a bungalow; this bungalow has a frontage to Avenue Road and also a frontage to Victoria Road, a road running northwards to which road its front door opens.

The first question which has arisen with regard to these notices is concerned with the fact that the appellants occupy not only the haulage contractors' yard to which I have referred but also the bungalow itself. It is quite clear that the bungalow is used in part in connection with the business in the yard because there are at least two

rooms in the bungalow used either for a drivers' canteen or for an office in connection with the business in the yard.

The activities which have given rise to the serving of enforcement notices in this case are twofold. The yard has a long history as a haulage contractors' yard and as such it has an established use for incidental repair work of the kind which a haulage contractor may do on his own vehicles in his own depot. Recently, according to the allegation of the planning authority, there has been added to this activity the use of repairing vehicles generally for reward—in other words, repairing vehicles which are not the property of the owner. In the yard there are six buildings; one is a substantial building used as a workshop and there are five other small buildings, one of which is employed as an office for a car hire service, which is the other new activity which, according to the local planning authority, has recently come to this site.

According to the findings of the inspector, dealing first with the repair activity on the site he found that the repair work carried on at the time of the inquiry was as to about 90 per cent. on the occupiers' own vehicles and as to about 10 per cent. on, as it were, foreign vehicles coming from outside.

So far as the car hire business was concerned, he found that it was run from an office conducted in one of these small buildings and that there were two hire cars apparently always available for this service on weekdays and that on Saturdays and Sundays the number of cars went up to seven or eight. There is no specific finding as to whether these cars came into the yard because the inspector noted that they were normally parked in the street nearby. For myself, however, I find it very difficult to believe that the cars never came into the yard or that the yard, apart from the small office building, can in any sense be regarded as not being concerned in the car hire business to which I have referred.

The first enforcement notice in each pair sent to each of the interested parties is in these terms. It recites that the recipient is:

> the owner/occupier of/a person having an interest in the land situate at the rear of 14 Victoria Road and fronting to Avenue Road, Erith, Kent and which is delineated on the attached plan and coloured pink.

Reference to the plan shows that the area indicated is the haulage contractors' yard to which I have referred, the six buildings to which I have referred and also some coal bunkers which were mistakenly included in the notices and were subsequently deleted therefrom by the Minister. The notice goes on to recite that the Council of the London Borough of Bexley is the planning authority; then it recites its complaint:

> It appears to the council that there has been a breach of planning control by the making of a material change in the use of the

> said land/of the building(s) situate thereon to a use for the purpose of the repairing and servicing of motor vehicles not being incidental to the established use of the premises as a haulage contractor's depot without the grant of permission required therefor under Part III of the Town and Country Planning Act 1962.

I have read the terms of that recital in detail because, as will appear in a moment, certain arguments turn upon it. The council then goes on to state its requirements, and, so far as this activity of repair is concerned, it requires the recipient of the notice:

> within one calendar month . . . to discontinue the use of the said land/of the building(s) situate on the said land for the purpose of the repairing and servicing of motor vehicles not being incidental to the established use of the premises as a haulage contractor's depot and to restore the said land and the building(s) situate thereon to its/their condition before the said development took place.

It is unnecessary to say more with regard to the concluding phrase of that requirement than that it was recognised at the inquiry that no restoration of the land or buildings was required in consequence of a discontinuance of the repair use and that the Minister deleted that requirement when the notice was before him.

The other notice, dealing with the car hire, is addressed in the same way to the owner/occupier of or person having an interest in the land. The land again is the whole of the yard together with the buildings upon it and the coal bunkers. The recital of complaint here is that

> It appears to the council that there has been a breach of planning control by the making of a material change in the use of the said land/of the building(s) situate thereon to a use for the purpose of a car hire business without the grant of permission required therefor.

The requirement is similar to that of the previous notice except that in this case it is

> to discontinue the use of the said land/of the building(s) situate on the said land for the purpose of a car hire business and to restore the said land and the building(s) situate thereon to its/their condition before the said development took place.

Those notices having been served and the present appellants having appealed against them the matter came before the Minister who, apart from making the minor amendments to which I have referred, upheld the notices; it is from that decision that the matter comes before us today.

Mr. Wise makes, as I think logically his first complaint that these notices do not in any way identify what has been called in recent years the planning unit. It is now well established that, when determining whether a material change of use of land has taken

place, one must first ascertain what is the relevant unit to which the test must be applied. This is because one sometimes gets a wholly different answer in practice according as to whether one considers the existence of a material change as applied to a building alone or as applied to a building together with land beside it.

Mr. Wise submits that it was necessary in this case for the enforcement action to be directed to the planning unit, whatever it was. In his submission, the planning unit ought to have been the yard plus the bungalow, and he says that, the Minister having failed to express a view as to the proper planning unit and having taken no action in consequence of what Mr. Wise would submit is an error in his decision, the case should go back to him for reconsideration on this point.

For my part, I do not regard it as essential that any enforcement notice should identify the planning unit, using the phrase in the sense to which I have referred. An enforcement notice is directed to action being taken, and it will normally, as in the present case, be directed to the area where that action is taking place. Once a notice of the kind before us now is served alleging a material change of use it is, of course, always open to the landowner to contend, if he can, that the planning unit is something larger than that specified in the notice and that, if the true planning unit is looked at, no material change of use has occurred at all. That argument is always open to him and can be developed at the inquiry without any difficulty whatever, but there is no principle of which I am aware, or which I would regard as appropriate and proper in this context, requiring enforcement action as such to be directed towards the planning unit. Indeed, it is necessary from a practical point of view that enforcement action should be directed to the land where activity is required to be undertaken and that the correctness of the planning authority's allegation can nevertheless be tested by looking at the planning unit as a whole when asking oneself the first question: was there here a material change of use or not?

In this case, I am inclined to agree with Mr. Wise that the planning unit probably was a combination of the bungalow and the contractors' yard. If this conclusion left me in any kind of doubt as to the correctness of the Minister's decision that there was a material change of use it might be that further investigation would be required. I cannot for myself, however, see how the addition of the bungalow as part of the planning unit and as part of the area to which the test: " material change or no? " must be applied can make the slightest difference in this case.

It is quite true that the bungalow includes part of the business use; as I have said, it includes an office and canteen, but the proportion of acceptable and established use to new, and, in the planning authority's view, objectionable, use in the yard is likely, I think, to be exactly the same in relation to the bungalow; hence it becomes a matter of indifference whether the planning unit is the yard alone or the yard plus the bungalow. In any case, as I have already indicated,

there is, in my judgment, no substance in what I now turn to as Mr. Wise's second contention, namely, that this notice was in some way defective because enforcement was not directed to the entire planning unit.

Enforcement, as I have said, need not be directed to the entire planning unit; it must be directed to the area where it is to take effect. The local planning authority have chosen to enforce against these uses by reference to the yard only. It is in a sense a concession to the landowner that they have not sought to extend their enforcement to the bungalow as well. There is no logical reason why the landowner should object to the fact that less is being asked from him than might have been asked, and there is certainly no firm reason in the language of the Act that I know of which would justify such a conclusion.

This, however, is not the end of the argument put forward by the appellants because a number of other matters have been raised in the course of Mr. Wise's argument. He complains that, even if his argument so far fails, the enforcement notices were still defective because they required—and I try to use his own words—the occupier to discontinue something which he was not doing anyway. The argument is that the car hire business was carried on in one building only whereas the enforcement notices extend to all the buildings in the yard and the yard itself. Conversely, it is complained that the repair business was carried on in five buildings only, yet the notices prohibit a use of all six buildings and the yard for repairs of vehicles other than the occupiers' own.

This, I think, in my own judgment, is a complete misconception, because what is being directed by the enforcement notices here is that the two objectionable uses shall cease. If, in fact, the car hire use is confined to the sixth building then it must cease in the sixth building. If, in fact, it extends to a further part of the area then it must cease in that further part.

The appellant is in no sense being called upon to discontinue doing something which he is not at present doing because all that he is asked to do in precise terms is to discontinue these two objectionable uses.

Then it is said that these enforcement notices contain so many mistakes, errors and—I think it will have to be—misleading statements that they really should be torn up and regarded as not worth the paper they are written on. It is a very strong thing to say of an enforcement notice that by reason of minor difficulties of grammar and phraseology such a consequence should follow, and, in my judgment, one can never attack an enforcement notice on the ground that it contains errors within it unless those errors reach the point referred to by Lord Denning M.R. in *Miller-Mead* v. *Minister of Housing and Local Government.*[1] Lord Denning M.R., having talked about

[1] [1963] 2 Q.B. 196; [1963] 2 W.L.R. 225; [1963] 1 All E.R. 459; 14 P. & C.R. 266; 61 L.G.R. 152, C.A.

the errors and difficulties of the notice and the Minister's power to amend under the section, went on to say [2]:

> Applied to misrecitals, it means this: if the misrecital goes to the substance of the matter, then the notice may be quashed. But if the misrecital does not go to the substance of the matter and can be amended without injustice, it should be amended rather than that the notice should be quashed or declared a nullity.

The test as to whether errors in a notice should be amended or whether the notice must go comes in the end to the question whether the amendment can be made without injustice. Upjohn L.J., considering the same aspect of this legislation, makes exactly the same point and adds, to support Mr. Wise's argument in a sense, these words [3]:

> . . . of course, the Minister cannot by amendment cure a bad notice which wholly misfires and which it is his duty to quash on proof of the relevant facts . . .

So, when one looks at a notice which is being criticised for errors on its face or contradictions one has to bear in mind that the proper approach is that the Minister may amend where this can be done without injustice and cannot, at any rate, quash except where no amendment can with justice be made.

What are the criticisms here? First of all, reference is made to a point to which I tried to give particular attention in the course of reading the enforcement notices themselves: the very inelegant phrase in the requirement paragraphs which requires the appellant " to discontinue the use of the said land/of the building(s) situate on the said land." It is said that this is a meaningless phrase; that it does not show whether the notices are to relate to land or to a building or buildings in the plural. Of course it is, as the Minister said, open to criticism on the footing that whoever filled up these notices omitted to delete from the *pro forma* before him that part of it which was irrelevant. It cannot, however, amount to more than that. No one can say that anyone, whether well advised by expert advisers or not, is misled by what is there recited, and such criticism is of no consequence at all. Then it is said that the notices are bad because they do not show that the uses complained of are additional uses. It is said that, reading the notice, one would think that an old use had been abandoned and a new and exclusive use for a car hire business or repairs introduced. It is perfectly true that, if one looks at the language used, such a meaning can be taken from the words, but if there were the slightest doubt about the meaning being clear to the recipient it would no doubt be amended by the Minister if and in so far as that could be done without injustice. To my mind, however, no one reading the paragraph knowing what is going on on the site, as does the recipient of these notices, would be misled by it at all.

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[2] [1963] 2 Q.B. 196, 221; 14 P. & C.R. 266, 280.
[3] *Ibid.*, 233; 291.

For good measure Mr. Wise adds the error to which I have already referred, namely, that requiring restoration of the buildings which, as I have said, the Minister has already corrected by amendment, and he again concludes by referring back to the beginning of his argument in which he said that the notice ought to have identified the planning unit. I have already given the reason why, in my judgment, such identification is not necessary.

In the end, I have formed the view that none of the matters raised by way of complaint against the Minister's decision are valid and I would dismiss the appeal.

Bean J. I agree.

Lord Parker C.J. I also agree.

Appeal dismissed.
Appellants to pay second respondents' costs.
Leave to appeal refused.

Solicitors—Carters; Solicitor, Department of the Environment; Clive Dennis, Town Clerk, London Borough of Bexley.

[*Reported by Michael Gardner, Barrister-at-Law.*]