Status: Positive or Neutral Judicial Treatment

*142 Gravesham Borough Council v Secretary of State for the Environment and Another

Queen's Bench Division

8 November 1982

(1984) 47 P. & C.R. 142

McCullough J.

October 22 and November 8, 1982

Town and Country Planning—Permitted development—Extension of dwelling-house—"Dwelling-house"—Meaning—Holiday chalet— Town and Country Planning General Development Order 1977 (S.I. 1977 No. 289), art. 3(1), Sched. 1, Class I .

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The respondent was the owner of a building erected in or soon after 1968 pursuant to a planning permission for a "weekend and holiday chalet" subject to the conditions: "(i) the chalet shall not be used for the purposes of human habitation between November 1 of any year and February 28 in the following year, and (ii) during the periods when the chalet is not used for human habitation, furniture and other household effects may be stored there." The respondent subsequently added an extension to the building, arid the local planning authority served an enforcement notice on him alleging that it had been built without planning permission and requiring its removal. The respondent appealed, contending that permission for the extension was granted by Class I of Schedule 1 to the Town and Country Planning General Development Order 1977 . The question was, accordingly, whether the building was a "dwelling-house" within the Order of 1977 so that the permission granted by Class I of Schedule 1 applied to it. The Secretary of State, after the matter had been remitted to him by the court for futher consideration, expressed the view that the building was a dwelling-house. The local planning authority appealed.

Held, dismissing the appeal, that whether a building was or was not a "dwelling-house" for the purposes of the Order of 1977 was a question of fact; that a distinctive characteristic of a dwelling-house was its ability to afford to those who used it the facilities required for day-to-day private domestic existence; that not every case was to be determined by having regard only, or even primarily, to the use to which a building was in fact put, nor was the duration or frequency of the user always relevant, and, in general, little, if anything, turned on it; that, if the terms of the planning permission enabled private domestic facilities of the type referred to to be provided, and if such facilities were used and the building thereby acquired the characteristics of a dwelling-house, the description of it in the planning permission as a "weekend and holiday chalet" could not deprive it of what it had, nor was the restriction on user during the winter months any more effective to deprive it of its essential character; and that the Secretary of State had approached the question as he should have done, given the various factors the attention that they had deserved and isolated the vital criterion and concentrated on it and his decision could not be faulted.

Scurlock v. Secretary of State for Wales (1976) 33 P. & C.R. 202, D.C., considered .

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Appeal from the Secretary of State for the Environment.

The facts are stated by McCullough J.

Representation

Stephen Aitchison for the appellants, the Gravesham Borough Council.

Simon D. Brown for the first respondent, the Secretary of State.

The second respondent, Michael W. O'Brien, did not appear and was not represented.

Cur. adv. vult.

McCullough J.

November 8. What is meant by a “dwelling-house” in Class I of Schedule 1 to the Town and Country General Development Order 1977 ? The question has arisen in this appeal by the Gravesham Borough Council, under section 246 of the Town and Country Planning Act 1971 .

The building in question is on land owned by Mr. O'Brien at Culverstone. He has added an extension in respect of which the council have taken enforcement proceedings. He contends that the building, as originally constructed, was a dwelling-house and that permission for the extension was given by the General Development Order. The council say that it is not a dwelling-house. The matter has already been considered twice by the Secretary of State. On the first occasion he said that it was not a dwelling-house; on the second he said that it was.

It was built in or soon after 1968 under a permission for a “weekend and holiday chalet.” It was subject to three conditions, two of which are material, namely: “(i) the chalet shall not be used for the purposes of human habitation between November 1 of any year and February 28 in the following year, and (ii) during the periods when the chalet is not used for human habitation, furniture and other household effects may be stored there.”

It is a single-storey building of brick with a pitched, tiled roof, 9 feet to the eaves and 15 feet to the ridge. The external measurements are roughly 20 feet 3 inches by 17 feet. It had three rooms: a living-room with a fireplace, a kitchen and a bedroom. There was neither a bathroom nor a w.c. The kitchen and bedroom were later combined to make a room 15 feet 2 inches by 8 feet 4 inches. The living-room was 15 feet 2 inches by 14 feet 2 inches.

The building stands on a plot of about a third of an acre in a wooded area, largely used for recreation and leisure. In the vicinity are other plots on some of which are chalets of wood or brick and on others of which are caravans.

The extension was built in or before 1975. There was a dispute about the date, but it is not material to the question now in issue.

On January 7, 1977, the council served an enforcement notice on Mr. O'Brien. That alleged that the extension had been built without planning permission and required its removal. Mr. O'Brien appealed, under section 88(1) and (2) of the Act of 1971, on grounds (*a*), (*b*) and ***144*** (*c*). Mr. R. H. Moody, an inspector, held a local inquiry. Amongst those who gave evidence was Mr. O'Brien's mother-in-law, who said that they only used the building during weekends between May and October and for the summer holiday. For Mr. O'Brien, it was argued that the chalet was a dwelling-house and that permission for the extension was granted by the Order. The council did not accept that.

The inspector's conclusion was expressed in half a sentence: “… having regard to the specific terms in which the 1968 planning permission was granted, the original building cannot reasonably be considered to have been a dwelling-house within the meaning of Schedule 1 to the Order of 1977 ….” He also said that it had not been shown that the extension had been erected more than four years before the service of the enforcement notice and that planning permission for it should not be given.

The Secretary of State simply said: “These conclusions are accepted.”

Mr. O'Brien then appealed to this court on the ground that insufficient reasons had been given by the Secretary of State for his decision. The Secretary of State accepted that, and, by consent, the matter was remitted to him for further consideration.

In his second decision letter, dated March 31, 1982, he expressed the view that the building was a dwelling-house. I summarise the steps in his reasoning on this occasion as follows. (i) Neither

the description of the building in the permission as a “weekend and holiday chalet” nor the imposition of a condition restricting its use to certain months of the year has any effect on the question whether the building erected in pursuance of the permission is a “dwelling-house” for General Development Order purposes. (ii) The dictionary definition of “dwelling-house” is not the criterion. (iii) The criterion is whether, as a question of fact, the building is constructed or adapted for use as a dwelling-house as normally understood, that is to say, as a building that provides for the main activities of “day-to-day domestic existence.” (iv) The absence of a bathroom and inside toilet does not necessarily prevent a building that is used for residential purposes from being a dwelling-house. (v) Having regard to the accommodation and facilities provided, the building, as originally constructed, could be said to provide for the main activities of “day-to-day domestic existence” and, therefore, satisfies the test in (iii).

The council now appeal under section 246 of the Act. Mr. Aitchison submits that the Secretary of State excluded from his consideration the use to which the building was in fact put and that that was contrary to the decision in *Scurlock v. Secretary of State for Wales* . [2] He also submits that he wrongly excluded from his consideration the fact that the building was not built to be used for occupation the year round and that it could not legitimately be so used. Both factors ***145** were material because dwelling involved a degree of permanence that this building could not provide. The permission was for weekend and holiday use during eight months. Therefore, the approach in paragraph (i) was wrong.

Mr. Brown accepts that Scurlock obliged the Secretary of State to have regard to the actual use to which the building was put, but disputes the submission that he excluded it from his consideration. He submits that the Secretary of State was correct in his approach in paragraph (i).

The starting point for the resolution of this dispute must be the Order itself. There is no definition of “dwelling-house” as such. The subject-matter of Class I of Schedule 1 (extensions and alterations to dwelling-houses) shows that this part of the Order is concerned with the size, shape, appearance and position of buildings. Contrast other fields such as rating, rent control and protection from eviction, where the term “dwelling-house” relates essentially to a unit of occupation. Thus, whatever else may be the attributes of a dwelling-house, it is a building of a particular kind.

Nor does the Act contain a definition of “dwelling-house.” The nearest approach to one is the statement in article 2(1) of the Order that the expression does not include a building containing one or more flats or a flat contained within such a building. This does not resolve the present problem. Mr. Aitchison sought some support for his submission in the fact that a hotel was not similarly excluded, but I derive no assistance from this since, whatever the attributes of a dwelling-house may be, no one would call a hotel a dwelling-house.

In using a simple word in common usage and leaving it undefined, Parliament realistically expected that, in the overwhelming majority of cases, there would be no difficulty at all in deciding whether a particular building was or was not a dwelling-house. The use in a statute of almost any word in common usage may give rise to difficulties of interpretation in a very small number of cases, but the problems are both fewer and less troublesome than those that are apt to result when the statute defines the word. The good sense of this is such that I do not intend to resolve the issue that arises in this appeal by attempting to define what Parliament left undefined.

The more helpful approach, in my opinion, is to consider a number of buildings that quite clearly are dwelling-houses and others that equally clearly are not and to see whether this throws up any indication of what ought and what ought not to be taken into account.

Consider a building that anyone would acknowledge was a dwelling-house. If it is not being lived in because, for example, the occupants are on holiday or because they have two houses and spend half the year in each, it remains a dwelling-house. Take a common situation where a family has a second house in the country that is only visited at weekends, in the summer months and for a summer holiday. That is clearly a dwelling-house. So the intention to use ***146** one's house, or the practice of using it throughout the year, is not essential.

If a house is empty pending its sale or because its owner cannot, or does not want, to let it, it is still a dwelling-house. So emptiness is not fatal.

If it cannot be occupied because it is flooded, or is undergoing extensive repair, it is still a

dwelling-house. So, too, a second home in a remote mountainous district, cut off by snow every winter. So an ability to use it whenever one wants to is not an essential either.

Suppose that there is a national emergency and an order is made prohibiting the use of houses in a particular area for the duration of the emergency: they would nevertheless remain dwelling-houses. So even an inability to use a house lawfully does not necessarily prevent it from being a dwelling-house.

Leaving aside extraordinary events like floods and national emergencies and repairs so extensive that the occupant has to move out, is it a characteristic of every dwelling-house that the owner or occupier could live in it permanently if he wanted to? I think not.

Suppose that a London-based company requires a succession of employees to be based one at a time for four months in a location far distant from London. Suppose that the company buys a house and makes it available to each employee and his family for his tour of duty. It would still be a dwelling-house. Take a holiday cottage subject to time-share with a number of owners each enjoying the right to occupy it for two particular weeks each year. That would still be a dwelling-house.

What have these examples in common? All are buildings that ordinarily afford the facilities required for day-to-day private domestic existence.

This characteristic is lacking in hotels, holiday camps, hostels, residential schools, naval and military barracks and similar places where people may eat, sleep and perhaps spend 24 hours a day. Quite clearly, none of these is a dwelling-house.

Mr. Aitchison has emphasised the “dwelling” in “dwelling-house” and has stressed that to dwell is to remain or reside. Comparatively few of those living in the buildings last mentioned ordinarily stay for long enough to be regarded as residing there. He submits, therefore, that a capacity to provide permanent accommodation is the essential character of a dwelling-house.

In my judgment, however, its more distinctive characteristic is its ability to afford to those who use it the facilities required for day-to-day private domestic existence.

Whether a building is or is not a dwelling-house is a question of fact. In *Scurlock v. Secretary of State for Wales* , [3] the Secretary of State had to decide whether a building that was used partly for residential purposes and partly for business purposes was a “dwelling-house” ***147*** within the meaning of the Town and Country Planning General Development Order 1973 . He adopted a factual approach, and the Divisional Court held that that was right.

In that case, the Secretary of State looked at the use to which the building was put. Counsel for the appellant had submitted that the character of the building should have been determined by its nature rather than by its use, alternatively that some consideration should have been given to its nature as well as its use and that, of the two, its nature should have weighed the more heavily. Kilner Brown J., however, giving the first judgment with which Lord Widgery C.J. and Watkins J. agreed, said [4] : “… the Secretary of State has taken an entirely correct approach here. The evidence was assessed. It was a factual approach, and, speaking for myself, I cannot see that there is any error of law at all in the decision to which he came …”

In the light of this authority Mr. Brown has conceded that the Secretary of State should have had regard to the use to which the building was in fact put, but he asserts that the Secretary of State did have such regard. This assertion is based first on the phrase “a building which is used for residential purposes” in paragraph (iv) of my summary of the steps in his reasoning and on the submission that the Secretary of State's reasoning as a whole implies that he took user into account.

There is a distinction between the quality of user and its duration and frequency. Despite Mr. Aitchison's submission that the Secretary of State did not say as clearly as he should have done that he paid attention to user, I accept that it is implicit that he took into account the quality of the user (*i.e.* that people lived in the building), but it seems clear that he ignored, or, at any rate, regarded as insignificant, its duration and frequency (*i.e.* that they only did so in the eight months and then only at weekends and for a summer holiday), which is Mr. Aitchison's real complaint.

I am not convinced that Scurlock's case decided any more than that a factual approach was correct and that the particular dispute in question in that case was properly solved by looking at

the use or uses to which the building was put. I do not read it as saying that every dispute of this kind is to be resolved by having regard only, or even primarily, to the use to which a building is put. A case can be conceived in which user would, at best, be of only marginal relevance—for example, a wooden shed consisting of an office, w.c. and washbasin could hardly be turned into a “dwelling-house” for the purpose of the General Development Order because someone put furniture in it and lived there.

In Scurlock's case no question of the duration or frequency of the user arose, and I do not read the case as saying that that will always be relevant. There may well be cases where it will be, but a number ***148** of the examples that I have considered demonstrate that in general little, if anything, will turn on it.

Mr. Aitchison submits that the Secretary of State was wrong to ignore the description of the building as a “weekend and holiday chalet” in the permission under which it was built. In my judgment, however, if the terms of this permission enabled private domestic facilities of the type to which I have referred to be provided and if such facilities were used and the building thereby acquired the characteristics of a dwelling-house, the description could not deprive it of what it had.

Nor do I think that the restriction on user during the four winter months was any more effective to deprive the building of its essential character. If, for eight months, it was a dwelling-house, then it did not cease to be a dwelling-house in the other four. During those months it was a dwelling-house that was not being lived in. If the question is asked: “did not the embargo on its user in the four winter months prevent it from being a dwelling-house?” my answer would be “no.”

This appeal, being brought under section 246 of the Act, can only succeed on a point of law. The law obliged the Secretary of State to adopt a factual approach. He did (see his reference to “as a matter of fact” in paragraph (iii) of his decision letter).

I am not clear whether he was saying that as a matter of law the description in the permission and the conditions attached to the permission were irrelevant or whether he was saying that, on the facts of the case, they did not affect the matter one way or the other. The same holds true of his attitude to the duration and frequency of the user. Whichever it was, however, the distinctions have no real difference.

The reality is that the Secretary of State approached the question as he should have done; he gave the various factors the attention they deserved, and he isolated what, in my judgment, was the vital criterion and concentrated on it. What is more, although it is not strictly within my province to say so, he arrived at what I regard as the only possible conclusion.

I would, therefore, dismiss this appeal.

Representation

Solicitors— Sharpe, Pritchard & Co. for G. H. Ramage, Borough Secretary, Gravesham Borough Council, Gravesend; Treasury Solicitor .

[*Reported by Michael Gardner, Barrister* .]

Appeal dismissed with costs. Leave to appeal refused.

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1. Town and Country Planning General Development Order 1977, art. 3(1) : “Subject to the subsequent provisions of this Order, development of any class specified in Sched. 1 to this Order is permitted by this Order and may be undertaken upon land to which this Order applies, without the permission of the local planning authority or of the Secretary of State: Provided that the permission granted by this Order in respect of any such class of development shall be defined by any limitation and be subject to any condition imposed in the said Sched. 1 in relation to that class.” Sched. 1, Class I : “ *Development within the curtilage of a dwelling-house* .”

2. *(1976) 33 P. & C.R. 202, D.C.*

3. *(1976) 33 P. & C.R. 202* .

4. *Ibid.* at p.205.