Case No: CO / 9889 / 2009

Neutral Citation Number: [2010] EWHC 1766 (Admin)
IN THE HIGH COURT OF JUSTICE
LEEDS ADMINISTRATIVE COURT

Leeds Combined Court
1 Oxford Row
Leeds
West Yorkshire
LS1 3BG

Date: Wednesday 24th March 2010

Before

MR JUSTICE LANGSTAFF

- -

Between:

COUNCIL OF THE BOROUGH OF STOCKTON ON TEES **Claimant**
- and -

SECRETARY OF STATE FOR COMMUNITY AND LOCAL GOVERNMENT **Defendant**

- -

(DAR Transcript of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7404 1424
Official Shorthand Writers to the Court)

- -

Mr Ponter appeared on behalf of the **Claimant**.

Mr Morshead appeared on behalf of the **Defendant**.

- -

Judgment
(As Approved)

MR JUSTICE LANGSTAFF:

1. This is a statutory appeal pursuant to Section 288 of the Town and Country Planning Act of 1990. It is brought by the local planning authority, who seek to set aside a decision of a planning inspector reached on 27 July 2009. The Inspector determined that land, in respect of which planning permission had been granted with conditions in 1961, used as a site for 80 seasonal chalets and caravans, was still capable of rendering lawful the use of the same site for 80 caravans in 2009, notwithstanding that for several years the use as a caravan park had simply ceased.

2. It was submitted to him by the appellant authority that this constituted abandonment. The consequence was that the applicant, for what was in this case a certificate of lawful use, required fresh planning permission which they would refuse. The planning inspector recorded the facts, so far as relevant, and his decision on the matter, which is relevant to this appeal from paragraphs 15 to 19 of his decision letter. He noted that the land was no longer in active use as a caravan site following a period of decline; all the structures on it had either been removed or destroyed, fallen into dereliction or otherwise disappeared in the dense woodland and undergrowth on the land.

3. He noted, however, that there had been no other use to which the land had been put; there had been no revocation of any planning permission; simply the lack of continuous use as a caravan site. In paragraph 18 he said this:

> "In this case, the use permitted by the 1961 permission has simply dwindled away such that it is now very many years since there was any appreciable use as a caravan site. Nevertheless, the 1961 planning permission was implemented, it has not been revoked and it has not been superseded by the use of the site for a different permitted or lawful purpose. The permission may therefore be relied upon for the use of the land as a caravan site for up to 80 caravans, subject to the use being undertaken in accordance with the 1971 [he must have meant 1961] permission."

   And he therefore granted a certificate of lawfulness.

4. The appeal before me gives rise to a point of law which is easily stated but less easily resolved. It is essentially whether, in a situation in which there has been planning permission for a lawful change of use, and that planning permission has been implemented in that there has been such a change of use and the site is no longer used for its former purpose, the owner of the land requires a new planning permission should he wish to resume the formerly permitted use.

5. Mr Ponter, who appears for the local authority, submits in essence upon a proper construction of the relevant law and authorities, and in particular upon reliance on *obiter* observations of Wilkie J in the case of James Hay

Pension Trustees Ltd v The First Secretary of State and Others [2005] EWHC 2713 (Admin) and a decision of HHJ Mole in the case of M&M (Land) Ltd v Secretary of State for Communities and Local Government [2007] EWHC 489 (Admin), that the position is that a planning permission, once granted, may be considered spent if it is for a change of use and there has been that change of use, such that thereafter the use which is lawfully carried out may be discontinued and therefore a fresh planning permission required. For the Secretary of State Mr Morshead contends that there is no such principle in planning law as to regard a planning permission as spent and having no continuing effect once the development has been started or achieved, and that, upon proper application of the principles expressed by Lord Scarman, with whom their other Lordships agreed in the case of Pioneer Aggregates (UK) Limited v the Secretary of State for the Environment and Others [1985] AC 132, as interpreted by other cases since, the answer has to be that the planning permission could not in this case be abandoned and therefore it remained effective.

6. The starting point for both arguments is Section 75 of the Town and Country Planning Act 1990. That, headed "The Effect of Planning Permission", provides as follows:

> "(1) Without prejudice to the provisions of this Part as to the duration, revocation or modification of planning permission, any grant of planning permission to develop land shall (except in so far as the permission otherwise provides) inure for the benefit of the land and of all persons for the time being interested in it."

7. The Pioneer Aggregates case was one which concerned the extraction of minerals from land. The company extracted limestone from the quarry from 1950 when planning permission was granted for that purpose until 1966. The company then wrote to the local authority giving notice that it would cease quarrying at the end of that year. Some twelve years later a new owner of the site wished to resume quarrying. He enquired of the planning authority whether planning permission would be necessary. The planning authority contended that the 1950 provision had been abandoned or, alternatively, on a construction of it, the permitted development had been completed and could not be resumed without the grant of a fresh permission. An enforcement notice was served when the company provoked it by some token quarrying.

8. The principle which was at stake was expressed in these terms by Lord Scarman at page 136F:

> "whether a planning permissions for the development of land can be abandoned by act of a party entitled to its benefit."

9. He went on to answer that question at page 145G in the negative:

> "There is no principle in the planning law that a valid permission capable of being implemented according to its terms can be abandoned."

10. He expressed his reasoning as follows. He noted (page 140 D) that earlier courts had refused to accept a principle that a planning permission could be extinguished merely by conduct and he expressed his agreement (140F) with that principle. That is set against general observations (see 139D to F). He expressed his conclusion in these terms: that there was no such general rule in planning law, but in certain exceptional situations not covered by legislation the courts had held that a landowner, by developing his land, could play an important part in bringing to an end a valid planning permission or making it incapable of implementation. This was his first reference to the capability of implementation of a valid planning permission. It was in the context of practical inability to do that which the planning permission permitted.

11. His reasoning for reaching that conclusion, at page 140 and page 141, was that the principle of abandonment was a common law principle which had no part to play in a scheme which was entirely statutory; that, where the statutory code was silent or ambiguous, resorting to principles of land law might be necessary, but such cases would be exceptional. He thought that the implication of this reasoning (see page 141 H) was that only the statute or the terms of the planning permission itself could stop the permission enuring for the benefit of the land and all persons for the time being interested in it.

12. At 142G to H:

> "Viewed as a question of principle, therefore, the introduction into the planning law of a doctrine of abandonment by election of the landowner (or occupier) cannot, in my judgment, be justified. It would lead to uncertainty and confusion in the law, and there is no need for it. There is nothing in the legislation to encourage the view that the courts should import into the planning law such a rule..."

13. He went on to identify that the authorities, at first sight and before analysis, might suggest three classes of exception. The first class he identified (page 143 B to F) was, he observed, concerned not with planning permission but with existing use. I note that an existing use, which has the benefit of being lawful by the length of time for which it is being used, is a different beast from a use which derives from planning permission. This is not only generally so but was specifically recognised by Sullivan J in the case of R (Fairstate Ltd) v First Secretary of State and another [2004] EWHC 1807 (Admin) (see paragraphs 23 and 24).

14. Returning to Pioneer, Lord Scarman made the point that, in existing use cases, an existing use which had been deliberately ended before a resumption arose was not one

which was existing at the date of resumption; and accordingly the resumption was a material change of use and thus required planning permission. That was an issue of fact.

15. A second class of case is immaterial for present purposes: that of the "new planning unit". Then he said this (144 B to F):

> "The third class of case comes nearer to the facts and law of the present appeal. These cases are concerned not with existing use rights but with two planning permissions in respect of the same land. It is, of course, trite law that any number of planning permissions can validly co-exist for development of the same land, even though they be mutually inconsistent. In this respect planning permission reveals its true nature -- a permission that certain rights of ownership may be exercised but not a requirement that they must be.
>
> But, what happens when there are mutually consistent permissions (as there may well be) and one of them is taken up and developed? The answer is not to be found in the legislation ..."

16. He went on to conclude that in such a case, where for instance there was permission for the building of house A on land and later permission for house B on the same land, then if house B were to be built, the earlier planning permission in respect of A could no longer stand. Thus he commented put at page 144:

> "The Divisional Court held that the two permissions could not stand in respect of the same land, once the development sanctioned by the second permission had been carried out. The effect of building on Site 'B' was to make the development authorised in the earlier permission incapable of implementation."

Again, the reference to capability of implementation is a reference to the practical ability to use the land as had been envisaged by the grant of planning permission, by reference to which the application is made.

17. What Mr Ponter emphasises is that, when the conclusion to which Lord Scarman came is examined, it contains the words "capable of being implemented" as the answer to the question he first posed:

> "there is no principle in planning law that a valid permission, *capable of being implemented* according to its terms, can be abandoned."

That, he suggests, is a reference to a permission which has not yet resulted in the development to which it refers being carried out. He submits that, on the facts of Pioneer, itself every shovel of gravel that was extracted from the limestone quarry was in itself a further act of development. Thus, assuming there was limestone remaining to be quarried, the planning permission remained capable of being implemented. But if the planning permission was simply for a change of use, he contended, it would be implemented, and fully so, at the moment that change of use had been effected. For his part, Mr Morshead contends that the words have to be understood in relation to the question posed and the way in which there had been references to the capability of implementation which, he submits, in that context, plainly gave rise to the qualification, if it be one, of the principle which Lord Scarman went on to express. This throws up starkly the debate between counsel before me

18. When Wilkie J considered the case of Hay, what he was concerned with was an appeal against an enforcement notice relating to use of the land as a vehicle servicing base, builders' yard and for storage. He determined the issue before him upon one of the issues raised by the parties. The question of abandonment of the use of land authorised by planning permission was not a matter which was critical to his decision; what he said about it was therefore *obiter*. At paragraph 38, however, he indicated that he would turn to that issue for the sake of completeness. He set out the contentions for the claimant and then the contentions made for the Secretary of State, which are diametrically opposed to the contentions which the Secretary of State makes before me, I am told, having now given the full and proper consideration of the issue which by implication he did not give to his argument in Hay.

19. He drew attention to the words of Lord Scarman in Pioneer and the defendant's distinction of that case from the facts of the case before him. . He said that:

> "...the development in the present case was implemented, or completed, as soon as the change in use was made. Accordingly, this present case does not fall within the terms of the general principle as stated by Lord Scarman in Pioneer."

20. He also referred to the case of Cynon Valley BC v The Secretary of State for Wales [1986] JPL 760 in support of that contention. He noted the defendant's argument that in that case the court had held that a planning permission granted in 1969 for use as a light industrial building was spent as soon as the change was complete, and that the general principles stated in Pioneer did not extend where the development was completed or spent. He commented:

> "In the case of development in the form of making a change of use, the Court of Appeal in Cynon Valley has indicated that the development is completed, or spent, as soon as the change is made. Accordingly, the defendant argues that

> the concept of abandonment can, in law, apply to a change of use once the change of use has been made."

21. The decision of HHJ Mole in M&M regards Cynon in similar terms. At paragraph 16 he considered that a planning permission has a single operation unless it is a planning permission of the sort that concerned the House of Lords in Pioneer Aggregates and, if it has a single operation, it will not have a continuing effect, and it therefore followed logically that a permitted use could be abandoned. He adopted the approach of Wilkie J in James Hay.

22. This therefore takes the argument back to the Court of Appeal's decision in Cynon. That was decided in 1986 reported in [1986] JPL 760. The case concerned the use of premises with planning permission as a fish and chip shop from 1958. The use changed in 1962 to use as a laundry; there was no planning permission for that change of use. In 1969 there was a change to light industrial use. That was permitted by general development order. In 1970 use as a laundry was resumed. That was unlawful. In 1978 the premises were acquired by an owner who wished to continue retailing fish and chips, but she let the premises to someone who carried on the business of an antique shop. It remained her intention to use the premises for the sale of hot takeaway foods as soon as she was able to do so. When she sought to recommence the use of the business for this purpose she was told she required fresh planning permission and, when she applied for it, that was refused. She appealed. The inspector held that no development requiring planning permission was involved because resumption of the fish and chip use -- which included use as a Chinese takeaway, which is what she proposed to use it as -- was permitted by, in effect, the earlier planning permission.

23. The case came before the Court of Appeal, Stephen Brown, Mustill and Balcombe LJJ. Balcombe LJ gave the judgment of the court. He noted the statutory provisions and the effect of the decision in Pioneer Aggregates, such that a valid planning permission capable of implementation according to its terms could not be abandoned. He turned (see 7F) to ask whether, since the planning permission could not have been abandoned, it was fully implemented or spent once the initial change of use took place in 1958 or thereabouts. There were rival submissions as to that. The court preferred the submissions which were made for the local authority that it was (see page 12 at letter H). In particular, they said:

> "We accept Mr Kelly's submission that, where the development for which planning permission is required is a material change of use, the permission is to change from use A to use B and is not merely a permission to use the property for use B for the indefinite future. We appreciate that most, if not all, planning permissions are expressed in the latter form, but that is no guide to the true construction of the 1971 Act."

24. It was persuaded that perusal of the decision of the House of Lords in Young led to an endorsement of the passage cited from the judgment of the Court of Appeal in that

case. That was a case in which there had been a number of changes of use. Planning permission had originally been given for use as light industrial use by reason of the general development order in 1969. There was a subsequent change of use in 1970 for use as a laundry and in 1977 to storage and processing. Neither were held lawful because each required planning permission. Balcombe LJ commented:

> "There is implicit in this reasoning a conclusion that the planning permission granted in 1969 for use as a light industrial building was spent once the change was complete and did not cover the further change to light industrial use in 1977. The rest of Lord Fraser's speech, dealing with the construction of Section 23(9), follows on that implied assumption. Indeed, there would be no point in considering the effect of that Section if the 1977 development was already covered by the 1969 permission."

But they considered that meant that Lord Scarman's classification in Pioneer Aggregates had to be significantly qualified. This is the comment that was made:

> "This seems to us inescapable from the decision in Young and we are encouraged in reaching this conclusion and it follows the express finding of the Court of Appeal in Young's case."

25. Accordingly, in a case in which there had been a change of use on the facts which was not permitted by any planning permission, to resume the use which had been permitted would require fresh permission. It was argued persuasively before me by Mr Morshead that the reference at page 14 F to G drew a conclusion that the planning permission granted in 1969 for use as a light industrial building was spent "once the change was complete" and was a reference not to the change from previous use permitted by the planning permission from the moment that that development first began, but was a reference in the context to the change of use in 1970 and in 1977, when the new use started. Indeed, it is open to that possible conclusion, although I am bound to say that the wording does appear to be more consistent with the interpretation which Mr Ponter would urge me to give to those words, and that the change of use permission was spent once the change was complete from one use to another. But the point that was there being addressed was rather different. What was being considered, as it seems to me, was the question whether the planning permission, which was granted in 1969 for use as a light industrial building, was open to change from one form of light industrial use to another with the intervening change in respect of the laundry.

26. Such further authorities as I have been referred to establish these propositions. In the case of Swale Borough Council v First Secretary of State & Anor [2005] EWCA Civ 1568 the Court of Appeal were concerned with an application for a certificate of lawful use which had been refused and an enforcement notice issued, in respect of

which there was an appeal. In the course of his judgment Keene LJ made passing reference to the principles of abandonment. He said this:

> "The concept of abandoning the use is, in my judgment, best confined to the topic of established use of rights where it is a well recognised concept: see Hartley v Minister of Housing and Local Government [1970] 1 QB 413."

27. In Fair State, to which I have already referred, Sullivan J was concerned with a submission (see paragraph 15) that the principles set out by Lord Scarman in Pioneer applied also to an established use which had become immune from enforcement action under the 10-year rolling provision in Section 171B of the Town and Country Planning Act. The submission was that that should be equated with planning permission in that respect. It was there that he said, in passages to which I referred by number earlier:

> "23. In the Pioneer case, the House of Lords was considering the question whether or not a planning permission which was capable of implementation could be abandoned. It was concluded that such a permission could not be abandoned, but it is clear from the speech of Lord Scarman that he accepted that a use which had become immune from enforcement action could, in certain circumstances, be abandoned (see page 143B.)
>
> 24. Moreover, Mr Lewis at one stage accepted the proposition in Panton that a use which has become immune from enforcement action is capable of being abandoned. Thus it is plain that a use which has become immune and a use which has the benefit of a planning permission are not identical for all purposes under the 1990 Act."

28. There is no sense there, submits Mr Morshead, nor is there any sense in the earlier extract from the judgment of Keene LJ, that a planning permission is spent or exhausted or, to use the words that Lord Scarman used, that it is "no longer capable of being implemented" simply because there had in fact been the start of a change to another use. He supports that by reference to the words from Cynon which I have earlier cited, that, where there is permission for material change of use, the permission is to change from use A to use B and is not *merely* a permission to use the property for use B for the indefinite future. Plainly Balcombe LJ contemplated that that would normally be the effect of a planning permission.

29. Against this background of authority, what Mr Ponter submits is that, in accordance with M&M (Land) and the decision of Wilkie J in Kaye, relying as they do upon the interpretation he prefers of Cynon, a planning permission is to be regarded as spent or incapable of implementation in the sense in which Lord Scarman used it in Pioneer. Therefore, he submits, where there has been non-use of land for the originally

permitted purpose for a significant period of time, in circumstances capable of supporting the common law concept of abandonment, a fresh planning application will be required. The planning inspector was therefore wrong.

30. Mr Morshead, interpreting Pioneer as I have noted, deriving no assistance from Cynon save by reference to the word "merely" which I have mentioned, but denying any assistance given thereby to the claimant and contending that M&M and James Hay are wrong in the principles they express (Hay wrong in the results so far as it deals with abandonment though M&M right in the result so far as the case is concerned) makes the overview points that there are no authorities in which it has been held that planning permission has been abandoned by mere non-use. Indeed, he notes, that is specifically what the House of Lords recognised as a general proposition would not be the case. Cases in which the abandonment of a use has given rise to an argument that new planning permission is required are cases in which the use concerned has not been one authorised by planning permission but has been one which was an established use which therefore, within the terms that Lord Scarman applied to it, was plainly open to abandonment.

31. He argues that, as a matter of principle, if one can abandon planning permission by non-use, there is, in effect, no rule against the abandonment of planning permission, but the exception -- if this be an exception recognised in the appellant's argument -- would completely "swallow up the rule", as he put it. There is no reason in principle to attract what is a further exception to the Pioneer decision. He points out that the observations of Wilkie J are technically *obiter*. He argues that, in any event, they are founded upon a misapprehension of that which Cynon truly required.

Discussions

32. In my view the starting point has to be the general principle in Pioneer in the light of the statute. There is no obvious rule within the principle itself which Lord Scarman espouses that would support the local planning authority's arguments in this case. Its arguments do not fall within any of the three excepted classes of cases Lord Scarman recognised, nor do they fall within the factual circumstances which gave rise to the Cynon case. Everything, as it seems to me, depends for its force upon the argument which Mr Ponter addresses as to the meaning of the words "capable of being implemented". This is not the same expression as "spent". I note that there is no reference in the Act to planning permission being spent, nor is there any reference in authority, other than that to which I have been taken, to that as a matter of principle, and I accept the argument by Mr Morshead that if there were such a principle that it would have been easy as an answer to refer to it in resolving many of the cases which have otherwise troubled the courts as to the application of the abandonment of principles.

33. I accept what Mr Morshead has submitted about the context within which those words came to be said. It follows that I do not think that Lord Scarman here was speaking about a planning permission which had been granted but as to which no action had been taken to start the development to which it related.

34. That being the view which I take of the decision of the House of Lords, plainly that is binding upon me. So, too, is the decision in principle in Cynon, but this is not a case in which the principle there expressed is directly relied on by the appellant. It does not answer the question I am posed. Insofar as the decision of Wilkie J on this point is concerned, it is worthy of respect, though *obiter*, and has given me some hesitation; but I do not see how it can stand easily with the views Lord Scarman and the House expressed in Pioneer.

35. It follows that in this case, bearing in mind that it is a case in which there has been no use of the land other than that permitted by the planning permission first granted for use as a caravan site, I consider that the planning inspector was correct in law to come to the decision which he did. It follows that this appeal must be dismissed. I should not, however, leave this judgment without recognising the very considerable skill with which both counsel have addressed me, deploying their arguments with economy, efficiency and persuasion, and I am grateful to them both for their presentations.

MR PONTER: Thank you my Lord. I have just taken a very careful note of that last paragraph, honestly. But, my Lord, thank you for delivering judgment this afternoon, that is obviously extremely helpful to both parties
MR JUSTICE LANGSTAFF: I am afraid it makes the judgment rather less elegant than it might have been, and I am conscious of some of the deficiencies which may have to be ironed out when I get the case back for approval.
MR PONTER: Well, my Lord, for our part we are extremely grateful that you were able to help in that way. The question of costs arises, the parties have exchanged schedules. There was going to be a conversation over lunch to see if we needed to have any argument about it. I don't know if that has happened.
MR MORSHEAD (?): My Lord, we have had the defendant's costs schedule today, and I see it is in the amount of £7931. I assume my learned friend makes an application in that sum. My Lord, yes, it is short by two-and-a-half hours waiting time apparently. My instructing solicitor has done the sums and I think the suggestion is that £800 need to be added to that.
MR JUSTICE LANGSTAFF: Two and a half hours waiting time?
MR MORSHEAD: That is what it says here. Yes, I am not sure that ... well, anyway my Lord, if one adds one and a half hours…
MR JUSTICE LANGSTAFF: There has been a modest allowance in two and a half hours for the hearing. It has taken me probably ...
MR MORSHEAD: I think that may be the point ...
MR JUSTICE LANGSTAFF: ... hearing. There was a waiting time before that, so ... I think it probably does look as though nearly two hours waiting time.
MR MORSHEAD: That may be right. It may be that the two and a half hours is a reference to the waiting time and such slight extra time as has in fact taken place in disposing of the matter ...
MR JUSTICE LANGSTAFF: I'll hear what Mr Ponter says about that. Mr Ponter, it looks as though two hours additional waiting time is claimed and that is because of the events this morning, which meant it took some time to get into court.
MR PONTER: Well, my Lord, we .... where we were in the list…
MR JUSTICE LANGSTAFF: Yes.

MR PONTER: I do not have anything more to say about that, my Lord, and there is no dispute taken in respect of the sum claimed as far as the schedule is concerned either.
MR JUSTICE LANGSTAFF: Very well. So the addition of two hours .... £200, does VAT have to go onto that?
MR MORSHEAD: My Lord, no it doesn't.
MR JUSTICE LANGSTAFF: Thank you, that makes £8,331 costs assessed in those terms, in that sum.
MR PONTER: My Lord, obviously we have to digest your Lordship's judgment, but, that being said, I am able to say that clearly the matter is of some general importance, and simply on that basis I would ask at this stage for permission to appeal.
MR JUSTICE LANGSTAFF: Well, as it seems to me, the case is not, as I observed, entirely easy. It is a pity that I had to give the judgment extempore for other reasons. There are issues of law which seem to be arguable, given arguably conflicting obiter statements, and some other compelling reason why the case should be heard, because plainly it is a point, or may be a point, of some importance. I can see that. So you may have your permission to appeal.
MR PONTER: I am very grateful, my Lord.
MR JUSTICE LANGSTAFF: Thank you very much.
MR PONTER: My Lord, thank you.