Cocktails Ltd v Secretary of State for Communities and Local Government

Case No: C1/2008/0584

Court of Appeal (Civil Division)

11 November 2008

[2008] EWCA Civ 1523

2008 WL 4820333

Before: Lord Justice Pill Lady Justice Arden and Lord Justice Longmore

Date: Tuesday, 11th November 2008

On Appeal from the High Court of Justice Queen's Bench Division Administrative Court (Mr Justice Mitting)

Representation

Mr T Buley (instructed by Wilson Barca LLP) appeared on behalf of the Appellants.

Ms S Davies (instructed by the Treasury Solicitor) appeared on behalf of the Respondents.

Judgment

Lord Justice Pill:

1 This is an appeal against a decision of Mitting J on 21 February 2008 dismissing a claim by Cocktails Ltd ("the appellants") under section 288 of the Town and Country Planning Act 1990 ("the 1990 Act"). The appellants have sought to quash a decision of an Inspector made on behalf of the Secretary of State for Communities and Local Government ("the Secretary of State") on 11 October 2006 whereby he dismissed an appeal against a decision of the Redcar and Cleveland Borough Council ("the council") to decline to issue a certificate of lawful use or development ("LDC") on land known as Unit B2, Commerce Way, Skippers Lane Industrial Estate, Middlesbrough ("the appeal site"). The use for which the LDC was sought was Class A1 Retail. At the material time, Part 3 of Schedule 2 to the Town and Country Planning General Permitted Development Order 1995 ("the 1995 Order") permitted the change of use of a building "from a use for the sale or display for sale of motor vehicles" to use within Class A1 shops, Schedule 1 Part 1 to the Use Classes Order 1987 ("the 1987 Order").

2 On 22 January 1997 planning permission had been granted by the council in relation to the appeal site:

> "The Council as the Local Planning Authority HEREBY GRANT PLANNING PERMISSION for the development proposed by you in your application received on: 12/12/96.
>
> Details: CONVERSION OF INDUSTRIAL UNIT INTO A FRANCHISED MOTOR DEALERSHIP"

The location was identified, and conditions were imposed.

3 Until 2004, the appeal site was used by South Cleveland Garages for the purposes of a Suzuki motor dealership. On 18 April 2005 the appellants began retail trading on the appeal site as a registered sex shop. That is within Class A1 shops in the 1987 Order. The issue is whether the use granted by the 1997 permission was "a use for the sale or display for sale of motor vehicles". If so, use as a sex shop was lawful, and the appellants were entitled to the LDC they sought

because the use was within Class A1 shops of the 1987 Order. A fresh planning permission was not required. A subsequent amendment to Class A1 is not material in the present appeal.

4 The case turns on the meaning of the expression “franchised motor dealership”. The appellants' submission is that the expression connotes a use of the site for the sale and display for sale of motor vehicles. They accept that a substantial part of the site was in fact used for activities other than the sale of motor vehicles. In particular there was a substantial vehicle workshop. The appellants submit that activities in the workshop and in office and staff facilities on the appeal site were ancillary to the main use of the site for the sale of motor vehicles. Otherwise they would have been independent uses which gave rise to a mixed use of the site, and the permission granted was not for such a mixed use. The appellants accept that if, as the Secretary of State contends, the permission granted was for a mixed or composite use, only one element of which was for the sale and display for sale of motor vehicles, they cannot place reliance on the GPDO : see *Belmont Riding Centre v First Secretary of State [2004] JPL 593* , to which I will refer again.

5 The appellants submit that the natural meaning of the expression “franchised motor dealership” is an arrangement to allow for the sale and display for sale of motor vehicles. Other activities on site, such as repair and offices, may well be lawful so long as they are carried out in conjunction with that main use and are ancillary to it. That conclusion is reinforced, it is submitted, because, on the Secretary of State's construction, if the occupier sought to use the appeal site only for the repair of vehicles, that would be permitted; and that cannot have been the intention, it is submitted, of the local planning authority.

6 On that issue, reference was made to the case of *Wipperman v Barking LBC [1965] 17 P & CR 225* , later cited with approval in this court in Philglow Limited v Secretary of State for the Environment & Another [1984] P & CR. In Wipperman the land had been used for storage of materials and car-breaking. The car-breaking ceased, and the storage continued. Widgery J, giving a judgment in the Divisional Court with which Lord Parker, CJ and Ashworth J agreed, said:

> “It seems clear to me that if nothing had occurred following the occupier's entry except the suspension of the car-breaking use, the storage use being maintained at its former intensity, no question of a material change of use could be said to have arisen. Merely to cease one of the component activities in a composite use for land would not by itself, in my judgment, ever amount to a material change of use. What has happened here, according to the evidence, is not merely a cessation of the car-breaking activity but the use of the land as a whole for storage, in other words, as the Minister has pointed out in his letter, one now has the entirety of the land used for one of the two component uses to which the land was formerly subjected.
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> In my judgment, as a matter of law there can be a material change of use if one component is allowed to absorb the entire site to the exclusion of the other, but whether or not there is a material change of use is a matter of fact and degree. If the car-breaking business had been so trifling as to be almost *de minimis* , I would have thought that as a matter of fact and degree that for the area formerly used for car-breaking to be taken over for storage could not amount to a material change of use of the land as a whole. But whether or not in the circumstances of the particular case there was a material change of use would be essentially a question of fact and degree.”

7 In support of what he made clear was his only submission, namely that this was a permission for the sale and display of vehicles to which the workshop use was ancillary. Mr Buley, for the appellants, draws attention to the anomaly which he submits would follow if the Secretary of State's interpretation of the expression is correct. Mr Buley has made clear that he is not taking a freestanding point (the Inspector held, and the finding is not challenged, that the site was a single planning unit) that the site can be treated as two areas, on one of which sale and display of vehicles was clearly contemplated at all times and the use proposed is a use only on that part of the unit formerly used for the sale and display of vehicles. That is because of Belmont and no doubt other reasons.

8 In Belmont the basis of the application for an LDC was that there was an existing riding centre use on the site, and that a change to use as a health and fitness centre would not require

planning permission since it would fall within the same use class, Class D2, in the 1987 Order. The Inspector held, and his decision was upheld by Richards J in the High Court, [2003] EWHC 1895 (Admin), on the factual basis that there was no significant riding centre use. However, Richards J went on to consider a second reason why the application had to fail. Paragraph 31:

> "Even if the Inspector was wrong to reject the contention that the former riding centre still existed, his alternative basis for dismissing the appeal is in my judgment unassailable. If the riding centre activities existed, they existed as part of a mixed use across the whole planning unit including the application area — a mixed use consisting of residential, equestrian and agricultural uses or activities. That there was a mixed use was found by Mr Baldock and was common ground before the present Inspector. I accept Mr Strachan's submission that such a mixed use does not fall within the Use Classes Order , and cannot therefore benefit from the exception in s.55(2)(f) [of the 1990 Act]. Belmont's argument that there is no material change if one component of the mixed use falls within Class D2 and is replaced by another use within Class D2 is unsustainable. In examining use classes the focus must be on the relevant use for the purposes of s.55, which in this case is the mixed use as a whole, rather than on individual components of a mixed use. A change in components will involve a change in the mixed use itself, and, subject to the question of materiality, will amount to a development."

9 Thus Mr Buley's single submission on behalf of the appellants is that already stated. He relies on the definition of "dealership" found in Chambers' Dictionary:

> "1. A business which buys or sells things.
>
> 2. A business licensed to sell a particular product by its manufacturer."

He submits that a use of the site for such purposes is plainly a use for the sale or display for sale of motor vehicles. If that is the correct construction of the planning permission, the appellants are entitled to succeed.

10 In his decision letter, the Inspector carefully considered the evidence before him, including evidence as to the meaning of the expression "franchised motor dealership." He noted that the latest Mintel Report on car retailing defined franchise dealers as:

> "Specialist companies awarded a contract by a car manufacturer to sell and service that particular brand of car."

Mintel RA is a firm providing "industry-leading market intelligence", and while we have no evidence of this, it appears that they were commissioned by the or a trade association in this area to provide a report. The Inspector stated at paragraph 12:

> "The 2004 Mintel Report confirmed that the retail sale of new cars was largely by franchise dealers who carried out 90% of the post-sales servicing within the first 3 years. Surveys carried out for the Appellants showed that 100% of the 50 Suzuki dealerships and 50 other franchised motor dealerships in the North East of England had workshops, with the overwhelming majority offering servicing, repairs and MOTs in addition to sales. Workshops were an integral part of franchise dealerships within the UK."

11 That finding, submits Mr Buley, establishes no more than that workshops were, ordinarily, incidental to the main use. The Inspector decided that there was such lack of clarity and ambiguity about the description of the permission as to allow him to consider the documents, including plans, which constituted the planning application, in order to assist in determining its meaning. The application was for "garage, showroom and workshop." In the application, the areas of floor space to be devoted to the various activities were stated to be 230 square metres industrial floor space, 160 metres retail use, 70 square metres for offices, 90 square metres for storage. To the question in the application, "Give a description of the processes to be carried on and of the end products and the type of plant or machinery to be installed.", the answer was: "Car

showroom, car maintenance workshop". This part of the application form, as the question suggests, refers to applications involving industrial development. The Inspector concluded:

> "29. The Appellants' evidence did not explore the scale and nature of the workshop activities carried out either at this site or elsewhere at 'dealerships'. There was no available information on turnover from the types of work discussed above — preparations for sale, servicing of cars sold from the site, servicing/repairs to other Suzuki brand vehicles or more general vehicle repairs. In the absence of such information, I do not consider it reasonable to conclude that activity within the workshop was functionally linked to vehicle sales. The fact that the same staff, equipment and tools were used to carry out preparatory checks and works before vehicles were sold, as were used thereafter on warranty works or general repairs, would not make the latter component part of the selling process. Rather, it would suggest that the workshops were there to provide a facility directed to a wide range of customers as a separate main use.
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> 30. From the size of the facility, the scale of workshop activity would have been likely materially to exceed what might be treated as one subordinate to the business of selling vehicles. It would not have been 'ordinarily incidental' to the sales process for the reasons discussed above, and not thereby ancillary to vehicle sales. The workshop component would have had a sufficient impact upon the overall character of the use within the planning unit. To the outside observer, the premises, viewed from the Skippers Lane frontage, would have looked like a car showroom. From the return frontage along Commercial Way they would have had the clear appearance of an industrial unit.
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> 31. My conclusion is that the 1997 planning permission authorized a mixed use of the site. This would have comprised at least the vehicle sales and workshops used for servicing and repairs."

12 The judge upheld that conclusion. He, too, cited the Mintel Report. He did not find ambiguity in the expression "franchised motor dealership". The judge did, however, consider himself entitled to assess the terms of the planning application, which had in his view been incorporated into the permission, when considering the meaning of the permission. The judge concluded:

> "10. I accept that in cases where other activities are truly supportive of or ancillary to the main activity permitted, then it does not create a mixed use. The main activity remains the permitted use, and everything else is ancillary to it. But on a true analysis of the business of a franchised motor dealer, or of the operator of the unit in which the car showroom and a workshop are to exist, the one activity is not dependent upon or necessarily ancillary to the other. The servicing, maintenance and repair of cars in a franchise car dealership will be performed on cars that have not been sold by the dealer. Of necessity, therefore, the activity of service, maintaining and repairing such cars is not ancillary to the business of selling cars. The balance within a particular franchised motor dealer's business may vary from dealer to dealer. One may derive most of his profits and conduct most of his activities by selling motor cars; another may derive a much larger share of his profit and devote a much greater proportion of the efforts to the servicing, maintenance and repair of motor cars. Both remain within the description [the balance may also depend on the economic climate]. I do not accept that merely because a franchised motor dealership had not been carried on without there being a facility for selling a particular manufacturer's cars, so the activities of servicing, maintaining and repairing cars manufactured by that manufacturer are necessarily or in the ordinary event actually ancillary to the business of selling cars.
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> 11. For these simple reasons, I am satisfied that the use permitted by this permission was not that described in schedule 2 part 3A of the General Permitted Development Order for the use or display for sale of motor vehicles."

Mr Buley has submitted that the judge has been inconsistent in approach to the issue, including in that paragraph. I do not propose to consider those submissions in further detail. Essentially, the question is whether the Inspector's findings as to the meaning of the planning permission were correct or revealed an error of law.

13 Thus, though for different reasons, both the inspector and the judge had regard to the terms of the planning application. The appellants submit that they ought not to have done so. Mr Buley submits that the circumstances were not within the principles stated by Keene J in *R v Ashford Borough Council, ex parte Shepway District Council [1999] PLCR 12* , also cited by the judge. Keene J set out guidance by way of principles which he stated. I cite them from page 19, without citing the authorities:

> "1. The general rule is that in construing a planning permission which is clear, unambiguous and valid on its face, regard may only be had to the planning permission itself, including the conditions (if any) on it and the express reasons for those conditions…
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> 2. This rule excludes reference to the planning application as well as to other extrinsic evidence, unless the planning permission incorporates the application by reference. In that situation the application is treated as having become part of the permission. The reason for normally not having regard to the application is that the public should be able to rely on a document which is plain on its face without having to consider whether there is any discrepancy between the permission and the application…
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> 3. For incorporation of the application in the permission to be achieved, more is required than a mere reference to the application on the face of the permission. While there is no magic formula, some words sufficient to inform a reasonable reader that the application forms part of the permission are needed, such as ' … in accordance with the plans and application … ' or ' … on the terms of the application … ', and in either case those words appearing in the operative part of the permission dealing with the development and the terms in which permission is granted. These words need to govern the description of the development permitted…
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> 4. If there is an ambiguity in the wording of the permission, it is permissible to look at extrinsic material, including the application, to resolve that ambiguity…"

There is a fifth statement, which is not material for present purposes. Keene J considered the wording of the permission in that case and decided not to permit incorporation of the application. At page 21, Keene J added:

> "However, one notes that the way in which this Planning Authority chooses to frame its planning permissions is to set out near the beginning of the document a 'description and location of application', expressly stated to be such. It is clear that then embraces a description of the application. The content of the application is described immediately before the words indicating that permission has been granted."

14 For the Secretary of State, Ms Davies submits that the inspector and the judge reached the correct conclusion. Had the permission been intended to be for "the sale or display for sale of motor vehicles", a grant in those terms could have been made. Counsel supports the Inspector's view that, in considering the meaning of the disputed expression, reference could be made to the application form and plans, which pointed towards a mixed use. She submits that the reference to the application is a part of the actual grant of planning permission; it is not a mere reference to the application such as that made at the head of the document. It is a statement that planning permission is granted for the development "proposed by you in your application received on 12 December." Ms Davies further submits that permission was granted for a mixed or composite use. If the intensity of one of the activities in that mixed use declined or disappeared in circumstances considered in Wipperman , a decision as to whether there had been a material change of use would need to be decided on the particular facts as they emerged. That, she submits, is irrelevant to a decision as to what permission was granted in 1997. (In this case, there is no suggestion in any event that, relative to each other, the sale of motor vehicles and the repair and maintenance of motor vehicles diminished or intensified between 1997 and 2004).

15 What had to be decided in this case was the meaning of the expression "franchised motor dealership". As the fact-finder, the Inspector's task was to decide it. Any difficulty in doing so is less because of the ambiguity in the usual sense, but in determining, on the evidence, what the expression means. The Inspector had regard to the evidence of practice in the trade, and in my

view was entitled to attach weight to that evidence. Having cited the evidence and stating the factors to which he had regard, the Inspector concluded that this was a mixed or composite use, and that the servicing component could not be considered ancillary to that of sales. He stated that consideration of the application confirmed him in that view.

16 The judge found no ambiguity. He too set out the factors which he found relevant, though it was the approach of the Inspector, as the fact-finder, which in my view is the crucial one in this case. Though he referred to them for a different reason, the judge too found that the contents of the application confirmed the meaning upon which he had decided.

17 In my judgment, the Inspector was entitled to come to the conclusion he did. I am not persuaded by Mr Buley's helpful submissions that the workshop and servicing use could properly be regarded in this case as ancillary to a use for the sale and display of vehicles for sale. The appellants need to establish that to succeed. They can take advantage of the development order only if the present use and the use relied on come within the same use class. In my judgment, the Inspector's conclusion that the use did not come within that use class was a proper one in the circumstances, and betrayed no error of law.

18 Whether it was right to have regard to extrinsic evidence is not central to my decision. However, in my judgment the fact-finder was entitled to have regard to it. First, I accept the submission of Ms Davies that, within the principles stated by Keene J, there was an incorporation of the application into the permission in the form in which it was granted. I would also hold that, on the particular facts of this case, the Inspector was entitled to have regard to extrinsic evidence. What he needed to determine was the meaning of a trade or technical term. While not an ambiguous expression its meaning is not immediately obvious. What the true meaning is will largely depend, in my view, on the use to which it is commonly put in the trade concerned. That appears to me to be analogous to ambiguity as contemplated by Keene J. It is not obvious what the expression means and, if it is a trade expression such as this, reference to extrinsic material including the application documents is, in my judgment, legitimate to establish its meaning.

19 Reference could of course have helped the appellants if, for example, the planning application had requested only display facilities and not a workshop; there might then have been cause to rethink whether the expression was used by the council in its ordinary trade sense. In the event, the content of the application confirmed the construction of a mixed or composite use.

20 Thus I agree with the judge that, on the evidence, the Inspector was entitled to conclude that permission was granted for a composite use: sale and workshop for service. The appellant cannot, in those circumstances, rely on the 1995 Order to establish that use as a sex shop is a lawful use.

21 For those reasons, I would dismiss this appeal.

Lady Justice Arden:

22 I agree that this appeal must be dismissed. I also agree with my Lord, Pill LJ, that the planning application was incorporated by reference into the planning permission because it formed an integral part of the development for which permission was given: see *R v Ashford Borough Council ex parte Shepway District Council [1999] PLCR 12* at 27. Thus the planning permission must be read as a whole, including the application.

23 The alternative approach to the interpretation of the permission is to consider whether the term “franchised motor dealer” is ambiguous. In agreement with the Inspector, who agreed with the Inspector on ambiguity, in my judgment the term “franchised motor dealer” is ambiguous in at least one sense. It is not a case of there being a choice of available meaning, which is the usual meaning of ambiguity, so much as the fact that it is simply not a term which has any precise meaning in the English language. So the court has to determine the meaning of “franchised motor dealer” in this context. Inevitably the court has to look outside the permission itself to relevant extrinsic evidence.

24 One of the submissions of Mr Buley for the appellants was that the court could only look at evidence as to the meaning of “franchised motor dealer”. This would mean that it could not, for instance, look at extrinsic evidence which did not in terms refer to that expression. The judge, in his judgment, tested the meaning of this term, first by reference to ordinary parlance, and then by reference to the Mintel report, which confirmed the meaning which he came to as a matter of

ordinary parlance. In my judgment, he was entitled to do this. He would also have been entitled, in my judgment, to look at the planning application to see the matrix of fact in which the permission had come to be given in case that threw light on the matter. Although the application does not in terms use the words “franchised motor dealer”, it simply makes clear that there was to be a car showroom and a car maintenance workshop.

25 The appellant seeks to argue that if it can show that the activity of servicing Suzuki cars not sold by the motor dealership was ancillary to the business of a franchised motor dealer, then it can also show that that activity is ancillary to relevant use in Part 2 of Schedule 3 of the Town and Country Planning General Permitted Development Order 1995 as then in force, permitting a change of use of a building from a use for the sale or display for sale of motor vehicles to a use within Class A1 shops of the schedule to the Use Classes Order 1987 . I do not accept that argument. I would accept that the sale or display for sale of motor vehicles by a franchised motor dealer would be a sale or display of motor vehicles by itself, but the question is whether the activity is ordinarily ancillary to the sale or display of motor vehicles in general, not some specific type of such operation. It has not been suggested by the appellant that the servicing, repair or maintenance of vehicles is ordinarily incidental to the display for sale or sale of motor vehicles in general, and there is no evidence to that effect.

26 Reference was made to the decision of this court in *Harrods Ltd v Secretary of State for the Environment, Transport and the Regions [2002] JPL 1258* at paragraph 23 of the judgment of Schiemann LJ, as he then was, which refers to a test of whether the activity was generally associated with what goes on in the principal activity. If it was, it would be ancillary. But in my judgment, servicing, repair and maintenance of motor cars is not generally associated with what goes on in a car salesroom, and thus is not in general ancillary for the purpose of being brought within the General Permitted Development Order .

27 For these reasons, I too would dismiss this appeal.

Lord Justice Longmore:

28 To my mind the words “franchised motor dealership” mean an activity constituted by both the selling and the displaying for sale of franchised motor vehicles on the one hand, and repair, maintenance and servicing of franchised motor vehicles on the other hand. That is a mixed use, and thus not a use for the sale or display for sale of vehicles within the terms of Part 3 of Schedule 2 of the relevant General Permitted Development Order of 1995 . If there were to be any doubt about that matter, it is set at rest by the terms of the application of the planning permission, which was for “garage, showroom and workshop”. That planning permission was expressly granted “for the development proposed by you in your application received on 12 December 96.” The terms of the planning permission thus incorporated the terms of the application, and that is therefore a matter to which one can refer as per the dicta of Keene J, as he then was, in *R v Ashford Borough Council, ex parte Shepway District Council [1999] PLCR 12* , to which my Lord and my Lady have referred.

29 I have, for my part, been rather more doubtful whether the term “franchised motor dealer” is ambiguous within paragraph 4 of Keene J's dicta in that case; but I note that in paragraph 1 his main principle, which requires regard usually to be had only to the permission itself, applies where the planning permission is “clear and unambiguous.” Even if this planning permission is not ambiguous, it is not “clear”, since there is a *bona fide* dispute about the meaning of the term “franchised motor dealership”, and it may well be for that reason also it is permissible to have regard to the application as part of the context of the grant of permission.

30 It is unnecessary to decide whether the Mintel report to which the Inspector and the judge referred is a proper aid to construction of the planning permission, but since it was introduced by the appellants, they can hardly complain that the Inspector and judge had regard to it also.

31 In those circumstances, I agree that this appeal should be dismissed.

Order: Appeal dismissed.


Westlaw UK