Neutral Citation Number: [2021] EWHC 2392 (Admin)

Case No: CO/1101/2021

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**PLANNING COURT**

**In the Matter of an Appeal under section 289 of the Town and County Planning Act 1990**

Cardiff Civil and Family Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 27/08/2021

**Before** :

**HIS HONOUR JUDGE JARMAN QC**
Sitting as a judge of the High Court
**Between :**

| | |
|---|---|
| **LESLEY ANNE HEDGES** | **Appellant** |
| **- and -** | |
| **(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT** | **Respondents** |
| **-and-** | |
| **(2) CORNWALL COUNCIL** | |

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**Mr Matthew Fraser** (instructed by **Stephens Scown Solicitors**) for the **appellant**
**Mr Jack Smyth** (instructed by **Government Legal Department**) for the **first respondent**
The second respondent did not appear and was not represented

Hearing dates: 25 August 2021
- - - - - - - - - - - - - - - - - - - - -

# Approved Judgment

This judgment is handed down remotely via CVP and is deemed to be handed down at 10am Friday 27 August 2021. It will be sent to the parties and to Bailli for publication.

**HH JUDGE JARMAN QC:**

1. This is an appeal by Mrs Hedges under section 289 of the Town and Country Planning Act 1990 (the 1990 Act) against the decision dated 26 February 2021 of an inspector appointed by the first respondent (SoS) dismissing her appeal against an enforcement notice (the notice) issued under section 172 of the 1990 Act. The notice was issued by the second respondent as local planning authority (the council) on 10 October 2019 and related to a field which Mrs Hedges owns with her husband at Pleasant Streams Barn, Lower Sticker, St Austell (the land). The breach of planning control on the land alleged in the notice was "Without planning permission, the material change of use of the land from a field used for agricultural purposes to holiday use for the stationing of caravans and tents."

2. The notice required the cessation of the use of the land for the stationing of caravans and tents for holiday purposes and the removal of all caravans and tents and all associated infrastructure within 2 months.

3. Only one ground of appeal before the inspector is now relevant and that is that under section 174(2)(d) of the 1990 Act at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters. That ground refers back to the time limits for enforcement set out in section 171B, which in the case of change of use is four years from the date of breach in the case of change of use to a single dwelling (subsection (2)) or ten years in any other case (subsection (3)). It was common ground before the inspector and before me that the unlawful use of the land referred to in the notice had continued uninterrupted since 2010. The narrow disputed period was and is from 10 October 2009 (or earlier) until the end of 2009. Mrs Hedges' case was and is that the use commenced in July 2009 and she relied on evidence in support.

4. In considering whether any unlawful use had taken place of the land in 2009, it is necessary to have regard to Class B of Part 4 of Schedule 2 to the Town and Country Planning (General Permitted Development) Order 1995 (the GDPO) as it was in force at the time. Class B permitted temporary uses in the following terms:

> "The use of any land for any purpose for not more than 28 days in total in any calendar year, …, and the provision on the land of any moveable structure for the purposes of the permitted use."

5. An exception to the permitted use under Class B is if the use of the land is for a caravan site. Accordingly at paragraph 9 of his decision letter the inspector said:

> "The use for the permitted 28 days for tent camping would not therefore have been a breach of planning control subject to enforcement. However, the use of the land for tents and caravans would have been a breach. Therefore, it is necessary for the appellants to show, in addition to the use commencing prior to the relevant date, that the land was used for tent camping purposes for a period in excess of the permitted development rights in 2009, or that it was used for a sustained period for tent and caravan camping."

6. The ambit of the appeal before me is a narrow one encompassing only one ground which was given permission to proceed by HH Judge Gore QC, sitting as a judge of the High Court. That ground is that the inspector required evidence of actual use of the land as a campsite in order to give rise to a material change of use, whether for the purposes of proving more than 28 days or otherwise, and that such a requirement is contrary to case law which discourages a focus on actual use and requires the evidence to be considered in the round. As refined by Mr Fraser, on behalf of Mrs Hedges, in the hearing before me, the argument is that the inspector in considering whether the material change of use took place before 10 October 2009 so as to continue for 10 years before the date of the notice, failed to take into account factors other than actual use, such as the presence of mobile toilet and shower facilities on the land, signs, advertisements and bookings, which point to the land being used as a campsite from July 2009, or at least by October 2009.

7. Mrs Hedges did not submit affidavits or declarations to the inspector but did submit statements and documentary evidence in the form of invoices for the delivery of mobile toilet and shower facilities to the land in July 2019 and enquiries bookings and advertising in respect of camping on the land from then on.

8. At paragraph 11, the inspector accepted that precise and unambiguous evidence had been submitted to show that the facilities one would expect to see provided to serve the alleged use were on the site for a period in excess of 28 days starting from 16 July. In the following paragraph he said this:

> "In paragraph 1.8 of the appellant's response, the point is made that even if the evidence provided of bookings and actual use is not sufficient, the facilities to use the land as a campsite, that is the stationing of the mobile facilities, were available throughout a period in excess of 28 days. Therefore, the Council would have been able to take enforcement action against the use and thus, by extension, the use was continuous."

9. At paragraph 13 the inspector continued:

> "My finding on this point is that the Council would not have been able to take enforcement action against the use of the land for camping/caravanning in these circumstances if the land was not actually being used for this purpose. The presence of the mobile facilities does not equate to the use of the land, and its presence could easily have been seen as the temporary storage of the facilities, but in any case I consider that the mere presence of the mobile facilities on the land, without evidence of actual use, would not have enabled the Council to enforce against a material change of use of the land from its lawful agricultural use. So far as their presence was not related to agricultural use, their impact on the definable character of the use of the land would have been de minimus. It is, therefore necessary to go on to assess the submissions relating to the actual use of the land."

10. His conclusions on the evidence are set out in paragraph 27 of the decision letter as follows:

> "The appellants have put forward evidence to show that on the balance of probability, the use of the land for camping commenced sometime in July 2009. This was probably after the delivery of the shower and toilet facilities, around the 17 July. These facilities were, on the balance of probability, on the site for a period in excess of 28 days in that year. However, I have not been provided with sufficient evidence to show that, on the balance of probability, the land was so used for tent camping for a period in excess of 28 days during that year, or that it was used for tent and caravan camping for any sustained period.

11. These were findings of fact which were open to the inspector and are not challenged before me. What is challenged is the inspector's approach as to whether the facts as found by him amounted to a material change of use prior to 10 October 2009.

12. The case law relied upon by Mr Fraser is support of the appeal arises in the context of a material change of use into a dwelling house. In *Impey v Secretary of State for the Environment* (1984) 47 P & CR 157, which concerned a conversion of kennels into a dwelling house without planning permission, the Court of Appeal held that a physical conversion of the site is a factor to take into account in assessing whether and when a material change of use has occurred. To acquire immunity, it is necessary for the land to have the relevant use for the whole of the four or ten year period, such that the planning authority could at any time during that period have taken enforcement action: see *Thurrock BC v Secretary of State for the Environment, Transport and the Regions* [2002] EWCA Civ 22 and *Swale BC v First Secretary of State* [2005] EWCA Civ 1568. This is a question of fact for the planning authority. The absence of an occupier for a period of time, for example where a factory closes for holidays, does not interrupt the continuity of use.

13. In *Secretary of State for Communities and Local Government v Welwyn Hatfield Borough Council* [2011] UKSC 15, the Supreme Court considered an unusual set of facts where a building had been built with the external appearance of a hay barn, but internally fitted out for the builder and his family to live in as their home, for which there was no planning permission. They did so for four years and then applied for a certificate of lawful use. The focus in the Supreme Court was what use the building had before the family moved in.

14. Mr Fraser relies upon two passages in particular in the lead judgment of Lord Mance. The first is at paragraph 27:

> "The cases on abandonment show that use as a dwelling house should not be judged on a day by day basis, but on a broader and longer-term basis. Dwelling houses are frequently left empty for long periods without any question of abandonment or of their not being in or of use. A holiday home visited only yearly remains of and in residential use. Of course, such cases usually fall to be viewed against the background of previous active use. In the present case, the question is whether it is right

> to describe a dwelling house as having or being of no use as a dwelling house, when it has just been completed and its owner intends to occupy it within days. This too is not a question which can sensibly be answered on a day by day basis. It calls for a broader and longer-term view. Support for this is found in *Impey v Secretary of State for the Environment* (1984) 47 P & CR 157…"

15. After referring in greater detail to *Impey*, and other cases, Lord Mance continued at paragraph 29:

> " Too much stress has, I think, been placed on the need for "actual use", with its connotations of familiar domestic activities carried on daily. In dealing with a subsection which speaks of "change of use of any building to use as a single dwelling house", it is more appropriate to look at the matter in the round and to ask what use the building has or of what use it is. As I have said, I consider it artificial to say that a building has or is of no use at all, or that its use is as anything other than a dwelling house, when its owner has just built it to live in and is about to move in within a few days' time (having, one might speculate, probably also spent a good deal of that time planning the move)."

16. In *Islington LBC v Secretary of State for Housing, Communities and Local Government & Anor* [2019] EWHC 2691 (Admin) there was a change of use of a basement, from A2 use as part of an estate agent's office, to C3 residential use as a flat. The dispute was whether the change of use had occurred more than 4 years prior to the issuing of an enforcement notice, and had continued uninterrupted for the requisite 4 year period.

17. At paragraph 49, Lang J referred to the judgment of Lord Mance as follows:

> "I accept the Council's submission that Lord Mance was considering a different factual and legal issue to the issue in this appeal. The ratio in *Welwyn Hatfield* concerned those cases where operational development was carried out to create a dwelling house, not cases in which the use of a building was changed to use as a dwelling house. Lord Mance's reference in *Welwyn Hatfield*, at [27], to the question of whether a building was in residential use was in the context of considering whether that building was constructed as a dwelling house, and was drawn from the authorities on abandonment. In my view, that approach did not replace the test established in *Thurrock* and *Swale*, and the distinction drawn in those cases between cessation of an established use and cessation of an unauthorised use. In *Welwyn Hatfield*, the Supreme Court did not consider the test for establishing four years continuous use under section 171B(2) TCPA 1990. Neither *Thurrock* nor *Swale* was cited to the Supreme Court in argument or referred to in Lord Mance's judgment. There was

> no suggestion that the Supreme Court intended to overrule those decisions."

18. Lang J returned to that issue in *Bansal v Secretary of State for Housing, Communities and Local Government* [2021] EWHC 1604 (Admin), where she considered the question whether the subdivision of a single dwelling into two self-contained flats had occurred more than fours years before the relevant date and had continued since. At paragraph 60, she said:

> " However, as I said in *Islington LBC* (at [49]), in *Welwyn* Lord Mance was considering a different factual and legal issue, namely, the approach to take in determining when an initial change of use has occurred. The Supreme Court did not consider the test for establishing continuous use for the purposes of acquiring immunity from enforcement under section 171B TCPA 1990, as set out in *Thurrock* and *Swale*, and those cases have not been overruled. Therefore, I do not consider that the Appellant can rely upon the decisions in *Impey* and *Welwyn*, in the context of this appeal. In the light of the judgments in *Thurrock* and *Swale,* it was rational for the Inspector to require the Appellant to establish that both flats had been occupied as separate dwelling houses throughout the four year period, so as to demonstrate that the Council would have been able to take enforcement action during that time. It was not sufficient for the Appellant to establish that the Property had been physically converted into two flats, nor that the first floor flat was occupied throughout the four year period, as that would not have enabled the Council to take enforcement action against the Appellant in respect of the entire Property, for a material change of use from a single dwelling house to two dwelling houses."

19. Mr Fraser, submits that when those authorities are applied to the present case, it is clear that the inspector placed too much stress on the need for actual use and did not look at the matter in the round. It is not a matter of what weight the inspector gave to the other factors, which Mr Fraser accepts is a matter of planning judgment for the inspector, but rather a matter of materiality of the other factors. Mr Fraser accepts that had the inspector taken those other factors into account but placed little weight upon them, then there could be no complaint. Mr Fraser also accepts that the inspector referred to the other factors, but submits that he did so only to exclude them from consideration.

20. Mr Fraser submits that after July 2009, when the mobile facilities were delivered to the land, the land was usable for tent camping. Usability was a factor which, it was suggested in *Impey*, could be taken into account. The fact that on the 29th day there happened to be no tents on the land does not mean that there had been no material change of use of the land from an agricultural field to a site for tent camping. Everything was in place for tent camping in July 2009 and the material change of use occurred at that time.

21. He also refers to a letter of a council officer to Mrs Hedges dated 15 September 2009 in which it is said that she could open the land for camping for 28 days during that year. The council's current published guidance suggests that mobile facilities on the land would count towards the temporary time limit even if there were no campers, whereas it's statement to the inspector refers to occupation, rather than use, in excess of 28 days.

22. Mr Smyth, for the SoS, submits that on a fair reading of the inspector's decision as a whole, he did refer to other factors, but placed little weight upon them. Mr Smyth reminded me of the warning in a number of authorities that the court should approach the decisions of planning inspectors in a simple rather than over legalistic way. One example is *Barwood Strategic Land II LLP v East Staffordshire Borough Council* [2017] EWCA Civ 893, where Lindblom LJ stated:

> "I would, however, stress the need for the court to adopt, if it can, a simple approach in cases such as this. Excessive legalism has no place in the planning system, or in proceedings before the Planning Court, or in subsequent appeals to this court. The court should always resist over-complication of concepts that are basically simple. Planning decision-making is far from being a mechanical, or quasi-mathematical activity. It is essentially a flexible process, not rigid or formulaic. It involves, largely, an exercise of planning judgment, in which the decision-maker must understand relevant national and local policy correctly and apply it lawfully to the particular facts and circumstances of the case in hand, in accordance with the requirements of the statutory scheme. The duties imposed by section 70(2) of the 1990 Act and section 38(6) of the 2004 Act leave with the decision-maker a wide discretion. The making of a planning decision is, therefore, quite different from the adjudication by a court on an issue of law."

23. Mr Smyth submits that the inspector did have regard to the other factors and to the arguments on behalf of Mrs Hedges in respect of them, but on a fair reading of his decision as a whole it is clear that he gave reasons for concluding that these were not sufficient to amount to a material change of use.

24. Furthermore, the authorities relied upon by Mr Fraser, and in particular the remarks of Lord Mance in *Welwyn*, should be read in the circumstances with which they were expressly concerned, namely change of use to a dwelling house. It is not surprising that such a change must be considered in the context of physical structures which have some degree of permanence, where use is not to be considered on a day to day basis. The present case is somewhat different, in that the material change of use must be considered in a context where a temporary change of use is permitted on a certain number of days and the structures concerned, whether it be tents or caravans or ancillary mobile facilities, have more transient characteristics.

25. In my judgment the inspector did have regard to the factors other than actual use and expressly referred to the case of Mrs Hedges on these in paragraph 12 of his decision letter. He explained his reasons in paragraph 13 by returning to the essential question of whether enforcement action could have been taken on the basis of a change of use

from an agricultural field without actual use for camping or caravanning. He explains his reasoning that without such use the mobile facilities may be seen as being stored. He then goes on to deal "in any case" with whether the presence of the mobile facilities on the land without such actual use would enable enforcement insofar as not related to agriculture, and would impact upon the definable of the use of the land, namely agricultural. He concluded that such impact was "de minimus." That is what prompted him to then go on to deal with actual use.

26. In my judgment that was a conclusion to which he was entitled to come. He did not overly focus on use on a day to day basis. To the extent that he did so focus, then on the particular facts of this case, he was entitled to do so. The reason for Lord Mance's warning about such focus in dwelling cases was that, dwellings are often left empty without any question of abandonment. That observation is not as apposite where the use in question is camping or caravanning.

27. Moreover, it is clear in my judgment that in the case of a dwelling, Lord Mance observed that such cases usually fall to be viewed against a background of previous active use. However, in the *Welwyn* case, the builder had just built the building to live in and was about to move in in a few days' time. It was in that context that Lord Mance made his comments about actual use and concluded that on those particular facts it was artificial to find any use of the building other than as a dwelling.

28. In the present case, there was no building. The previous use of the land had been agricultural. In considering when a material change of use occurred so as to provide a footing for enforcement action, regard also had to be had to the permitted temporary uses under the GPDO.

29. Accordingly, notwithstanding the focussed persuasiveness of Mr Fraser, the appeal is dismissed. I am grateful to both counsel for his focussed and helpful submissions. Each indicated that consequential matters have been or are likely to be agreed but to the extent that they are not can be dealt with on the basis of written submissions. I invite them to submit a draft order and any such submissions within 14 days of hand down of this judgment.