EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 6
XA60/19

Lord Brodie
Lord Drummond Young
Lord Malcolm

OPINION OF THE COURT

delivered by LORD MALCOLM

in the appeal

by

MICHAEL GERARD CAMERON

Appellant

against

THE SCOTTISH MINISTERS

Respondents

in respect of a decision of a reporter appointed by the Scottish Ministers dated 25 April 2019

Appellant: O'Carroll; Anderson Strathern
Respondents: McLean (sol adv); Scottish Government

30 January 2020

[1] This is an appeal against the decision of a reporter appointed by the Scottish Ministers dated 25 April 2019 which upheld an enforcement notice issued by Scottish Borders Council. The notice concerned a breach of planning control in respect of a property "Greenloaning" (sometimes known as Linton Lodge) in West Linton; the basis being a material change of use from a residential dwelling to "short-stay commercial visitor

accommodation", and this in the absence of the necessary planning permission. The proprietor, Mr Michael Cameron (the appellant), appealed against the notice on various grounds, but none were successful. The only one insisted upon before this court is that any breach of planning control occurred more than 10 years before the date of the notice, namely 9 November 2018, and thus enforcement action could not be taken, all in terms of section 124(3) of the Town and Country Planning (Scotland) Act 1997. It is contended that the reporter erred in law in that, in the whole circumstances, he was bound to uphold this challenge to the notice.

[2] In his decision the reporter noted that the property can accommodate up to 30 people in 8 bedrooms. It is being used for the provision of short- stay accommodation, which is a *sui generis* use not covered by any of the use classes - see Town and Country Planning (Use Classes) (Scotland) Order 1997. This amounted to a material change of use, having regard to the subjects previous role as a dwellinghouse under class 9. In terms of section 26 of the 1997 Act, this was development which should have been the subject of an appropriate planning consent.

[3] With regard to the proposition that any breach of planning control occurred before 9 November 2008, and thus enforcement action was no longer available, the reporter examined the evidence before him as to the use of the property in 2008. He concluded that, as at 9 November 2008, it remained the appellant's main residence. There was conflicting evidence as to the extent to which up to 6 bedrooms had been let in the course of that year. In response to a procedure notice the appellant spoke of 2 weeks hire in April, 4 weeks in July, 4 weeks in August, and 2 weeks in October. In another response reference was made to lettings totalling 9 weeks.

[4] The reporter's key finding was "that the use of the property for letting between April 2008 and 9 November 2008 was ordinarily incidental to its use as a house" (paragraph 10). As at 9 November 2008 the lawful use was as a house, and thus the material change of use occurred less than 10 years before the date of the enforcement notice. The reporter discussed the evidence as to when the subjects stopped being the appellant's main residence - see paragraph 11. He had told Scottish Borders Council, the planning authority, that this occurred in 2009, though he suggested 2010 to the reporter. His evidence was that as from October 2010 the whole subjects were available "year-round" for letting for self-catering purposes.

[5] Paragraph 15 of the reporter's decision is in the following terms:

> "In conclusion, before 9 November 2008 the availability of 'Greenloaning' for holiday letting, and its limited use for 12 weeks, was ordinarily incidental to its main use as a house. Some 2 or 3 years after 9 November 2008 it ceased to be the appellant's main residence. From 2010 'Greenloaning' was continually promoted and used as self-catering accommodation for short-stay lets. On the balance of probability and on the basis of the evidence before me I find that the unauthorised change of use of the house occurred between 9 November 2008 and 9 November 2018. The council is not time-barred from taking enforcement action under section 124(3) of the 1997 Act and the appellant's appeal under ground (d) fails."

[6] Before this court, and as per the note of argument, the appeal was presented on the following basis. The reporter was obliged to follow the terms of the Use Class Order. Class 9 is in the following terms:

> "**Houses**
> Use-
> (a) as a house, other than a flat, whether or not as a sole or main residence, by-
>   (i) a single person or by people living together as a family, or
>   (ii) not more than five residents living together including a household where care is provided for residents;
> (b) as a bed and breakfast establishment or guesthouse (not in either case being carried out in a flat), where at any one time not more than two bedrooms are, or in the case of premises having less than four bedrooms one bedroom is, used for that purpose."

It was submitted on behalf of the appellant that if a new use of land falls outwith a class as defined, it is to be taken as development requiring planning permission. Ordinarily a reporter would be entitled to exercise his discretion and planning judgment in determining whether and when a material change of use occurred. However, in the present case, such a discretion had been removed by Parliament. Paragraph 9(b) prescribes a limited permissible deviation from use as a dwellinghouse. The purpose was to allow householders to earn an income from accommodating guests on a small scale. It follows that anything beyond that small scale requires planning consent. The reporter's findings demonstrate that before 9 November 2008 the two bedroom limit was breached. It followed that the property could no longer be described as being used as a "house". As no planning permission was sought or obtained for this, the breach of planning control occurred more than 10 years before the enforcement notice.

[7] It was contended that the terms of paragraph 9(b) preclude the conclusion that "as a matter of fact and degree … the use of the property for letting between April 2008 and 9 November 2008 was ordinarily incidental to its use as a house". The concept of intensification of an incidental use leading to a material change of use has no place in the present circumstances. The material change of use occurred in April 2008 when more than two bedrooms were given over to short-term commercial gain.

[8] It was also submitted that the reporter erred in considering it relevant to decide when the subjects ceased to be used as a house by the appellant, and also in failing to identify when the material change of use occurred.

[9] Counsel for the Scottish Ministers objected that the main argument before this court was not presented to the reporter, and thus it could not be founded upon in criticising his decision - see *Taylor* v *The Scottish Ministers* 2019 SLT 681, per Lord President (Carloway) at

paragraphs 34/35. There is force in this, but nonetheless we will address the merits of the submission.

[10] The appellant proceeds upon the basis that if a householder who is absent from his property for a period chooses to let it on a short-term basis, then, no matter how short that period is, and unless the bedroom limit in paragraph 9(b) is observed, he has breached the bed and breakfast establishment/guesthouse provision, and has thereby allowed a material change of use to occur for which planning permission would be required. In the court's view this is an erroneous approach to the Use Class Order, and also to the content and context of the reporter's decision. Before him, and in our view quite rightly, it was not contended that at any time the property was being used as a "bed and breakfast establishment or guesthouse". The issue was whether there had been a breach of planning control through its use for short-stay commercial visitor accommodation of a kind which in recent years has become a relatively frequent phenomenon - though it has been known of for long enough, for example if a major sporting event is taking place in the local area which attracts visitors from far and wide. Class 9 distinguishes between properties being used as a residence (paragraph (a)), and those which are set-up as a bed and breakfast establishment or as a guesthouse (paragraph (b)). Greenloaning fell into the former category until the material *sui generis* change of use occurred. In these circumstances the terms of paragraph 9(b) were of no relevance to the issues before the reporter.

[11] The court detects no flaw or legal error in the reporter's analysis and reasoning as summarised earlier. It is well established that a use which is incidental to a primary use is subsumed into that primary use. Furthermore, if such a use intensifies to become the main or only use of the subjects, in general that will amount to a material change of use requiring planning permission. These are all issues of fact and degree for the reporter: *City of Glasgow*

District Council v *Secretary of State for Scotland* 1997 SCLR 711; *Moore* v *Secretary of State for Communities and Local Government* [2012] EWCA Civ 1202 at paragraphs 27 and 33; and *Edward* v *The Scottish Ministers* 2001 SCLR 338.

[12] It was accepted by the appellant that he regarded the house as a residence until after 9 November 2008 - see his email of 13 September 2018 to Scottish Borders Council, where he said:

> "The property stopped being used as a main residence in 2009. Previously it had been rented out for both the Edinburgh film festival and main festival plus over the holiday periods from May 2008. The house is strictly on a self-catering basis and does not do either serviced accommodation or nightly booking. We feel the Airbnb model is more problematic with the potential of different groups staying every night of the week. The house can be booked for a minimum of 3 nights at the weekend and up to 1 or 2 weeks in duration."

Whether the lettings in 2008 were or were not ordinarily incidental to the use of the property as a residence was a matter well within the exclusive planning judgment of the reporter. Furthermore it was not necessary for him to identify exactly when the material change of use occurred, so long as he was satisfied that it fell within the 10 year period. In addition, in our view it was relevant and appropriate for the reporter to consider the issue of when the subjects ceased to be used as the appellant's residence.

[13] For completeness it is noted that the appeal document makes reference to use class 7 "Hotels and Hostels", however, for the reasons given above, we see no relevance in its terms so far as the issue before the court is concerned. For the above reasons the appeal is refused.