FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 10
XA125/19

Lord President
Lord Menzies
Lord Pentland

OPINION OF THE COURT

delivered by LORD MENZIES

in appeal under section 239 of the Town and Country Planning (Scotland) Act 1997 by

ALASTAIR MACINTYRE AND OTHERS

Appellants

against

THE SCOTTISH MINISTERS

Respondents

_____

Appellants: Burnet QC; DAC Beachcroft Scotland LLP (for Levy & McRae, Solicitors, Glasgow)
Respondents: N McLean (sol adv); The Scottish Government Legal Directorate

2 February 2021

The Issue

[1] The issue in this statutory appeal is whether the proposed use of a house as a dwelling house by not more than four looked after children living together with 24 hour care provided by two adult staff falls within Use Class No. 9 of the Schedule to the Town and Country Planning (Use Classes) (Scotland) Order 1997 ("the Order").

Background

[2] In March 2019 the Church of Scotland, through its Social Care Council (known as CrossReach) made an application to Stirling Council for a certificate of lawfulness of a proposed use or development in terms of section 151 of the Town and Country Planning (Scotland) Act 1997. The application related to Drumbrock House, Old Mugdock Road, Strathblane. This property was being renovated and upgraded having been unoccupied for some time. It would have four bedrooms upstairs and a communal living room and dining kitchen on the ground floor. It sits in relatively large garden grounds within a quiet residential area. The appellants, who live next door to Drumbrock House, objected to the application and expressed serious concerns about the proposal. By notice dated 19 June 2019 Stirling Council refused the application by the Church of Scotland.

[3] The Church of Scotland appealed against the decision by Stirling Council to the Scottish Ministers. By decision dated 16 October 2019 the reporter appointed by the Scottish Ministers allowed the appeal and granted a certificate of proposed lawful use. It is against this decision that the appellants have appealed to this court in terms of section 239 of the 1997 Act.

The relevant legislation

[4] The Town and Country Planning (Scotland) Act 1997 includes the following provisions.

[5] Section 26(2) provides as follows:

> "2 The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land - …
>
> (f) in the case of buildings or other land which are used for a purpose of any class specified in an order made by the [Scottish Ministers] under this section, the use of the buildings or other land or, subject to the provisions of

the order, of any part of the buildings or the other land, for any other purpose of the same class;".

[6] Section 151 provides as follows:

"151 Certificate of lawfulness of proposed use or development

(1) If any person wishes to ascertain whether –

(a) any proposed use of buildings or other land, or

(b) any operations proposed to be carried out in, on, over or under land,

would be lawful, he may make an application for the purpose to the planning authority specifying the land and describing the use or operations in question.

(2) If, on an application under this section, the planning authority are provided with information satisfying them that the use or operations described in the application would be lawful if instituted or begun at the time of the application they shall issue a certificate to that effect, and in any other case they shall refuse the application.

(3) A certificate under this section shall –

(a) specify the land to which it relates,

(b) describe the use or operations in question (in the case of any use falling within one of the classes specified in an order under section 26(2)(f), identifying it by reference to that class),

(c) give the reasons for determining the use or operations to be lawful, and

(d) specify the date of the application for the certificate. …".

[7] The Town and Country Planning (Use Classes) (Scotland) Order 1997 provides in Article 3 as follows:

"3- Use Classes

(1) Subject to the provisions of this Order, where a building or other land is used for a purpose in any class specified in the Schedule to this Order, the use of that building or that other land for any other purpose in the same class shall not be taken to involve development of the land.

(2) References in paragraph (1) to a building include references to land occupied with the building and used for the same purposes.

(3) A use included in and ordinarily incidental to any use in a class shall not be precluded from that use by virtue of being specified in another class.
…".

Paragraphs 8 and 9 of the Schedule to the Order provide as follows:

> "Class 8. Residential institutions
>
> Use –
>
> (a) for the provision of residential accommodation and care to people in need of care other than a use within class 9 (houses);
>
> (b) as a hospital or nursing home; or
>
> (c) as a residential school, college or training centre.
>
> …
>
> Class 9. 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;
>
> …".

[8] The broadly equivalent provisions applicable in England are to be found in Article 2 and paragraph 3 of the Schedule to the Town and Country Planning (Use Classes) Order 1987/764. These are as follows:

> "Class C3. Dwellinghouses
>
> Use as a dwelling house (whether or not as a sole or main residence) by –
>
> (a) a single person or by people to be regarded as forming a single household;
>
> (b) not more than six residents living together as a single household where care is provided for residents; or
>
> (c) not more than six residents living together as a single household where no care is provided to residents (other than a use within Class C4).
>
> Interpretation of Class C3
>
> For the purposes of Class C3(a) "single household" is to be construed in accordance with section 258 of the Housing Act 2004."

The reporter's decision

[9] The reporter observed that it was important to note that in this case the appeal was

not assessed on its planning merits but rather on whether the intended use would be lawful. She stated (at paragraph 3):

> "Whilst neighbours raise other issues the determining issue in this case is whether the proposed use, to accommodate 4 children living together but cared for on a 24 hour basis by non-resident care workers, falls within the terms of Use Class 9. In the event that the proposed use would constitute a material change of use away from Class 9 then a certificate of lawful use could not be issued."

She found nothing conclusive to indicate that the children, who would live together and share communal facilities, could not be defined as residents living together as a household. However, the difference between the view of the Council and the Church of Scotland arises given the nature of the associated care provision. This would be provided on a shift basis and each shift would have three staff members with a wakened nightshift and a staff member sleeping over each night. The submissions indicate that internal rearrangement of the utility space downstairs would provide for a staff office and a single sleepover room with en suite facility. The Council took the view that the proposed care provision would add three additional occupants on a 24 hour basis bringing the total to seven and consequently outwith the terms of Class 9. Its decision also made reference to the professional nature of the care provision. The Church of Scotland relied on the fact that whilst there would be a sleepover facility for one carer, the staff members would not be residents. The reporter considered the pivotal question was whether the proposed staff members would be defined as "residents" and whether the presence of carers would amount to a material change of use. It was a matter of fact that the proposed care provision would have the effect of bringing the combined number of people living and working at the house to six during the night and seven during the day.

[10] The reporter noted the guidance in Scottish Government Circular 1/1998: Town and Country Planning (Use Classes) (Scotland) Order 1997. This states that:

> "In the case of small residential care homes or nursing homes, carers and residents will probably not live as a single household. That use will, therefore, fall into the residential institutions class, regardless of the size of the home".

It goes on to say that planning authorities should include "any resident staff in the calculation of the number of people accommodated". She accepted a degree of difficulty in interpretation between the terms of the Order and the wording of the Circular. She noted that the Order made a distinction between the residents living together as a household and the care being provided for those residents. She went on to observe:

> "Applying that distinction in this case indicates to me that the care providers can be considered separately from those resident at the property. The carers would not be resident as they would only attend the premises to work on a shift basis. The house would not be their residence even although the care would be provided on a 24 hour basis. Consequently, there would be 4 residents living together as a household where care would be provided for those residents."

She concluded that the planning authority's reasons in concluding that the proposed use would be unlawful are not well founded, and she found that the certificate should be granted.

Appeal to this court

[11] The appellants challenge the reporter's decision on three grounds, which are contained in paragraphs 9-11 of the appeal. These may be summarised as follows:

1. The reporter misunderstood, misinterpreted and/or misapplied the terms of the Order and the guidance in the Circular. She did not address the terms of paragraph 36 of the Circular, nor did she follow either of the approaches mentioned therein. If she regarded the carers as non-resident and/or not part of the household, the guidance indicates that the property is not being lived in as a single household and should be categorised as Use Class 8. If the carers are regarded as residents

and/or part of the household then they should be counted in the calculation and the number of residents would exceed that permitted in Use Class 9. The carers required to be present and they should therefore be included in the number of residents for the purposes of Use Class 9. The reporter erred in law.

2. The reporter failed to have regard to a relevant material consideration. She failed to take into account that the proposed use was for four children aged 8-14. She failed to give adequate reasons as to why children of that age could be regarded as functioning as a single household. The reporter did not take into account, *et separatim* failed to explain whether or not she considered it relevant to assess whether the children were capable of forming a single household or to be regarded as the only residents in the property in the absence of carers. In so failing the reporter erred in law.

3. The reporter failed to consider or to give adequate reasons for rejecting the submissions of the first appellant. The informed reader was left in real and substantial doubt as to whether or not the reporter has taken into account the representations of the appellant.

Submissions for the appellants

[12] Senior counsel for the appellants adopted his written note of argument and invited the court to quash the reporter's decision. The concept of people living together "as a family" or "as a household" are important elements in understanding the scope of Use Class 9. Persons living together as a family or household are regarded differently from residents in care homes where non-resident professional carers look after the residents. Children without adult supervision do not constitute a separate "household" in the absence

of carers. Children need to be looked after. They cannot run a house. They cannot be expected to deal with all the matters that go to running a home. As a matter of principle and approach children in residential care are regarded as needing full time care from an adult, someone to look after them, someone to run their lives for them and someone to make sure that the household operates as it should. Living together in a "household" in the context of Use Class 9 means more than merely the number of bodies – *North Devon District Council* v *First Secretary of State* [2004] 1 P & CR 38 at paragraphs 12 and 16. What constitutes a "household" is a question of fact and degree – *R (on the application of Crawley Borough Council)* v *Secretary of State for Transport and the Regions, Eve Helberg* [2004] EWHC 160 (Admin) at paras 31-34; *R (on the application of Hossack)* v *Kettering Borough Council* [2002] JPL 1206.

[13] If carers are regarded as residents or part of the household their presence should be included in the calculation of the number of members of the household. If they are not, and care is provided to children by non-residential carers, the appropriate classification of the use is as a "residential institution" under Class 8.

[14] With regard to the appellants' first ground of appeal, senior counsel pointed out that the certificate issued by the reporter stated that the reason for it was that:

> "As the 4 looked after children would live together as a single household and as the care provided would be on a non-resident basis, the proposed use would fall within the current use as a dwelling house under Class 9 …".

In stating this, the reporter misunderstood, misinterpreted and/or misapplied the terms of the Order and the Circular. Paragraph 36 of the Circular distinguishes between small residential care homes where the carers and residents will probably not live as a single household (and will therefore fall within Use Class 8) and instances where carers are resident and should therefore be counted in the calculation of the number of residents. The

reporter has followed neither of these approaches. If she regarded the carers as non-resident and/or not part of the household, the guidance indicates that the property is not being lived in "as a single household" and should be categorised as Use Class 8. If the carers are regarded as residents and/or part of the household then they should be included in the calculation of the numbers of residents, which would then exceed that permitted in Use Class 9. At paragraph 8 the reporter found that the combined number of people living and working in the house was six during the night and seven during the day. At paragraph 7 she found that the care providers would fulfil the parental role in the household to allow it to function as a household. She therefore found that in order to function as a household the carers required to be present. On either basis the use properly fell within Class 8. The reporter erred in law in her approach.

[15] With regard to the second ground of appeal, the reporter failed to have regard to a relevant material consideration, namely that the proposed use was for four children aged 8-14. Separately she failed to give proper, adequate and intelligible reasons as to why children of that age could be regarded as functioning as a single household; reference was made to *North Devon District Council* (*supra*) at paragraphs 16-19 where the age of the children was one of the major issues that led the court to conclude that they could not form a separate household in the absence of carers.

[16] Senior counsel accepted in answer to questions from the court that the interpretation for which he was arguing required Class 9(a)(ii) to be read as if it stated "not more than five residents living together in a single household", although the words "in a single household" were not actually mentioned. However, they were used in the application, and in the reporter's decision, and in the guidance in the circular. Properly construed, they should be read into the Order.

[17] Turning to his third ground of appeal, senior counsel submitted that it was not clear whether the reporter took into account the appellants' representations as to the proper interpretation of Use Class 9. The reporter referred at paragraph 3 of the decision to "neighbours" having raised other issues, but it was not clear whether she took account of the representations made on behalf of the appellants. The informed reader was left in real and substantial doubt as to whether the reporter had done so.

[18] In conclusion, senior counsel submitted that the guidance in relation to both the English and Scottish legislation makes the point that if there is not a single household, it does not matter how many people are in care. Paragraph 36 of the Scottish Circular only made sense if the concept of living in a single household was important. What would be the rationale for deciding that Use Class 9 comprehended five children living in a dwelling house supported by external carers, and only three children living there with resident carers? The statutory scheme was attempting to allow for a small family type arrangement; this was why carers had to be included in the numbers of residents. The reporter fell into error by including the carers for the purpose of making this a household, but excluding them when counting the numbers of residents.

[19] When the court asked what was the proper definition of a resident, and when did a carer become resident, senior counsel replied that this was a matter of judgement for the reporter; in order to form a household there needs to be a resident adult – a household cannot comprise just children. He submitted that four children with external care would clearly fall within Use Class 8; if the carers were staying in the house all night they could be regarded as resident, but if they were necessary to allow the household to function as a household they had to be included in the numbers. The reporter could not have it both ways.

Submissions for the respondents

[20] Mr McLean invited the court to refuse the appeal, and adopted his note of argument. What constitutes a household for the purposes of the Order is a question of fact and degree in every case – *R (on the application of Crawley Borough Council)* (*supra*) at paragraph 34; *R (on the application of Hossack*) (*supra*) at paragraphs 10 and 28. Whether or not a use falls within Class 9 is a matter of planning judgement, and so the court should only intervene if the decision is one which can be said to be *Wednesbury* irrational.

[21] In answer to the first ground of appeal, the reporter had correctly applied the terms of the Order, the Circular and the 1997 Act. She considered whether the proposed staff members would be defined as "residents" (paragraph 7) and concluded, exercising her planning judgement, that "the carers would not be resident as they would only attend the premises to work on a shift basis. The house would not be their residence even although the care would be provided on a 24 hour basis". The reporter having concluded there were no resident care staff did not need to include them within the number of people accommodated.

[22] In any event, *esto* the staff member sleeping at the property each night ought to be considered a resident, Class 9 of the Order provides for five residents living together. Accordingly, even if the reporter erred in her assessment of the number of residents, the proposed use fell within Class 9.

[23] With regard to the second ground of appeal, whether the children at the property could be regarded as a household for the purposes of the Order is a matter of fact and degree, requiring the reporter to exercise her planning judgement. It was to be noted that, in

contrast to the equivalent provision in England, the care of children is not excluded under Class 9 of the Order.

[24] The reporter undertook a site visit for the purpose of assessing whether the children could form a household. She observed that although being renovated the overall character of the property would not change. She reached the view that once occupied the property would be functioning as a household because: (1) the children would be living together in the property; (2) the children had a kitchen to cook in and a single dining room; (3) they would be involved in the household chores and tasks; and (4) the property would have the physical appearance of a house and would function as such. It would not have laundry, a catering kitchen, storage or any extent of staff or office accommodation typically associated with an institutional environment. There would be a staff office and an en suite sleepover room downstairs. She found nothing conclusive to indicate that the children, who would live together and share communal facilities, could not be defined as residents living together as a household. She was entitled to reach this view on the basis of her planning judgement.

[25] With regard to the third ground of appeal, the reporter gave proper and adequate reasons for her decision and dealt with the determining issues in an intelligible way. It is clear that she was aware of the representations made by the appellants; in any event, these representations were not of assistance in resolving the main or determining issues in the appeal. Even if the reporter gave inadequate reasons, the court should exercise its discretion not to reduce the decision.

[26] In all the circumstances, the court should refuse the appeal.

Discussion and decision

[27] The reporter was correct to note (at paragraph 3 of her decision) that in this case the

appeal is not assessed on its planning merits, but rather on whether the intended use would be lawful. She was also correct to identify the determining issue in this case as being whether the proposed use, to accommodate four children living together but cared for on a 24 hour basis by non-resident care workers, falls within the terms of Use Class 9. The determination of that issue involves a proper construction of Class 9 of the Order, applied to the facts of the present case. This does not appear to us to be an exercise involving planning judgement. It involves the interpretation of the law, and the application of it to the facts found by the reporter to be established.

[28] The relevant facts regarding the proposed use can be stated shortly. It is proposed that four children aged between 8 and 14 would be accommodated in the property, living together but cared for on a 24 hour basis by non-resident care workers. There are four bedrooms in the property, so each child would have sole occupancy of a bedroom. They would share communal facilities. Care would be provided on a shift basis, each shift would have three staff members with a wakened nightshift and a staff member sleeping over each night. The internal rearrangement of the utility space downstairs would provide for a staff office and a single sleepover room with en suite facility.

[29] On the basis of these facts, the Church of Scotland sought a certificate that the proposed use fell within Class 9 of the Order, and more particularly Class 9(a)(ii), namely "Use (a) as a house, other than a flat, whether or not as a sole or main residence, by … (ii) not more than 5 residents living together including a household where care is provided for residents".

[30] The word "including" is of importance in the construction of this provision. It makes it clear that what is provided for is a class, and a sub-class. The primary use is by not more than five residents living together. It then makes provision for a sub-class, by including a

household where care is provided for residents. What it does not do is require that the use must be by not more than five residents living together in a single household. Indeed, the term "single household" is nowhere mentioned.

[31] As can be seen from the provisions applicable in England (set out above), they are different from the Order in several important respects. Most importantly, the concept of a single household lies at the root of Class C3 of the English provision, and it is mentioned in each of the sub-paragraphs of the Class. It should also be noted that "care" is defined in paragraph 2 of the English Order as meaning "personal care for people in need of such care by reason of old age, disablement, past or present dependence on alcohol or drugs or past or present mental disorder, and in Class C2 also includes the personal care of children and medical care and treatment."

[32] References to care in Class 3 of the English Order do not therefore include the personal care of children. There is no such exclusion in the Scottish Order, Article 2 of which provides that "care" means "personal care including the provision of appropriate help with physical and social needs or support; and in Class 8 (residential institutions) includes medical care and treatment". There is no exclusion of care for children.

[33] It is therefore readily apparent that there are significant differences between the English and Scottish provisions. In the English provision, "care" is defined quite differently from the definition in the Scottish provision, and the term "single household" is construed in accordance with section 258 of the (English) Housing Act 2004. In the Scottish provision, the term "single household" is not used at all, and the word "household" is only used in the sub-class of Class 9(a)(ii). In view of these significant differences, we have not found any of the English authorities to which we were referred to be of any assistance to us.

[34] Class 9(a)(ii) of the Scottish Order governs the present appeal. It covers use "as a house, other than a flat, whether or not as a sole or main residence, by … not more than 5 residents living together". This includes a household where care is provided for residents. It does not apply only to use of a house by not more than five residents living together in a single household. The assessment is essentially an arithmetical calculation. The only question is the meaning of "residents", which is a term that is not expressly defined.

[35] In their submissions to this court, both parties devoted some time to the concept of a single household, and senior counsel for the appellants submitted that this was central to the proper interpretation of the Order. We consider that this is misconceived. If a house is used, whether or not as a sole or main residence, by five or fewer residents living together, we consider that it falls within Class 9. If it is used as a house, other than a flat, whether or not as a sole or main residence, by more than five residents living together, it does not fall within Class 9.

[36] We note that the reporter herself did touch in passing on the question of whether the children could be said to be living in a household. This may have been because of the way in which parties' submissions to her were presented, or it may have been because of the terms of Circular 1/1998. She indicated (at paragraph 11) that she found "a degree of difficulty in interpretation between the terms of the Use Classes Order and the wording of the Circular". We agree with this observation, and have sympathy with the reporter. Paragraph 36 of the Circular puts a gloss on the terms of the Order which is in our view quite unwarranted, and appears to proceed on the basis of a misinterpretation of the wording of the Order. It begins with the following statements:

> "The houses class groups together use as a house by a single person or any number of persons living together as a family and use as a house by no more than 5 persons living together as a single household … In the case of small residential care homes or

> nursing homes, staff and residents will probably not live as a single household. That use will, therefore, fall into the residential institutions class, regardless of the size of the home. The single household concept provides more certainty over the planning position of small group homes, which play a major role in the Government's community care policy aimed at enabling vulnerable people to live in touch with the community …".

[37] There is no support for these statements in the Order itself. There is no mention of a single household. There is no suggestion that use by no more than five persons living together must be as a single household. The single household "concept" is absent from the Scottish Order. This guidance might perhaps assist those looking at the English Order, but we can find no support for it in the Scottish Order.

[38] The guidance contained in a Government Circular such as Circular 1/1998 is just that – guidance. The terms of a circular published by the Government may amount to a material circumstance when a planning decision is being made involving the exercise of planning judgement. However, a Government Circular cannot supersede statutory provisions passed by the legislature, nor can it restrict, qualify or extend statutory provisions. Indeed, paragraph 1 of the introduction to the Circular correctly acknowledges that "where guidance is given amounting to an interpretation of the UCO, it should be borne in mind that only the courts can interpret the law authoritatively." As we have indicated, we do not agree with the guidance in its references to a "single household" in paragraph 36 of the Circular.

[39] The reporter in the present case did note the guidance in the Circular, but based her decision on her assessment of whether the use of the house, whether or not as a sole or main residence, would be by not more than five residents living together. She concluded that the care providers can be considered separately from those resident at the property. The carers would not be resident as they would only attend the premises to work on a shift basis. The

house would not be their residence even although the care would be provided on a 24 hour basis. Consequently, there would be four residents living together as a household where care would be provided for those residents.

[40] We consider that the approach taken by the reporter is consistent with and correctly applies the Order. We do not consider that the caring staff attending on a shift basis can properly be categorised as residents. Certainly, those members of staff who attend during the day would not in our view fall within the definition of a "resident", nor would a member of staff attending for the nightshift who is not provided with any bed or sleeping provision. We are inclined to the view that the single member of staff for whom a bed and en suite facilities are provided would also not fall to be categorised as a resident for the purposes of the Order. However, even if we are wrong in this, and that single member of staff is properly to be categorised as a resident, this would only bring the total number of residents to five, so the use would still fall within Class 9.

[41] For these reasons we do not consider that the reporter misunderstood, misinterpreted or misapplied the terms of the Order. We do not consider that she failed to take into account a material consideration, nor are we persuaded that there is any material lack of reasoning in her decision. We answer the questions of law in the appeal as follows: question 1 in the affirmative, and questions 2 to 5 in the negative. This appeal is refused.