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[HOUSE OF LORDS]

* FEDERAL STEAM NAVIGATION CO. LTD.
AND ANOTHER . . . . . PETITIONERS

AND

B DEPARTMENT OF TRADE AND INDUSTRY . RESPONDENTS

1973 Nov. 15 Lord Cross of Chelsea, Lord Simon of Glaisdale and Lord Salmon

Petition for leave to appeal to the House of Lords from the decision of the Court of Appeal (Criminal Division) in *Reg.* v. *Federal Steam* C *Navigation Co. Ltd.; Reg.* v. *Moran* [1973] 1 W.L.R. 1373.

The Appeal Committee allowed the petition.

F. C.

D

[QUEEN'S BENCH DIVISION]

* PILKINGTON *v.* SECRETARY OF STATE FOR THE ENVIRONMENT AND OTHERS

1973 Oct. 18, 19 Lord Widgery C.J., Bridge and May JJ.

E

Town Planning—Planning permission—Subsequent planning permission—Conflicting planning permissions relating to same land granted on different dates—Later permitted development implemented—Whether development sanctioned in earlier permission capable of implementation

In October 1954, the owner of land was granted planning F permission to build a bungalow on part of it (site B). The permission contained a condition that the bungalow should be the only dwelling to be built on that land. After he had built a bungalow on site B, the owner discovered the existence of an earlier planning permission, granted in May 1953 to his predecessor in title, to build a bungalow and a garage on another part of the same land (site A). That permission contemplated the use of the rest of the land as a smallholding. G The owner began to build a bungalow on site A although he had already built a bungalow on site B. In October 1971 the local planning authority served on him an enforcement notice which recited the commencement of the erection of a bungalow on site A without planning consent as a breach of planning control and required the restoration of site A to its original condition.

The owner appealed to the Secretary of State who took the H view that the later permission was inconsistent with, and alternative to, the earlier, so that when the later permission was implemented, the earlier became incapable of implementation; and he dismissed the appeal.

On appeal by the owner:—

Held, dismissing the appeal, that though a landowner was entitled to make, and the planning authority was required to

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[Reported by P. R. K. MENON, ESQ., Barrister-at-Law]

deal with, any number of applications for planning permissions for development of the same land even though they were mutually inconsistent, two permissions could not stand in respect of the same land where, as in the present case, the sanctioned development of one bungalow in the centre of the whole of the land had been carried out so that the development authorised in the earlier permission was no longer capable of implementation.

Per curiam. It is no part of the duty of the local planning authority to relate one planning application or one planning permission to another to see if they are contradictory. They should regard each application as a proposal for a separate and independent development, and they should consider the merits of the application on that basis (post, p. 1531G–H).

The following cases are referred to in the judgments:

Ellis v. *Worcestershire County Council* (1961) 12 P. & C.R. 178.

Garland v. *Minister of Housing and Local Government* (1963) 67 L.G.R. 77, C.A.

Lucas (F.) & Sons Ltd. v. *Dorking and Horley Rural District Council* (1964) 62 L.G.R. 491.

Miller-Mead v. *Minister of Housing and Local Government* [1963] 2 Q.B. 196; [1963] 2 W.L.R. 225; [1963] 1 All E.R. 459, C.A.

The following additional cases were cited in argument:

Heyting v. *Dupont* [1963] 1 W.L.R. 1192; [1963] 3 All E.R. 97.

Kent v. *Guildford Rural District Council* (1959) 11 P. & C.R. 255, D.C.

Slough Estates Ltd. v. *Slough Borough Council (No. 2)* [1969] 2 Ch. 305; [1969] 2 W.L.R. 1157; [1969] 2 All E.R. 988, C.A.

APPEAL from the Secretary of State for the Environment.

On October 29, 1971, the Fulwood Urban District Council, the second respondents, as agents of the local planning authority, the Lancashire County Council, the third respondents, served on Richard Pilkington, the owner and occupier of land situate at Walker Lane, Fulwood, an enforcement notice alleging a breach of planning control, which was stated to be the "commencement of erection of a detached bungalow and garage in Walker Lane, Fulwood without planning consent having been granted"; and the notice required the removal of all works and restoration of the site to its original condition.

The owner appealed to the Secretary of State for the Environment against the enforcement notice. The Secretary of State dismissed the appeal. The owner appealed to the court.

The facts are stated in the judgment of Lord Widgery C.J.

George Dobry Q.C., H. H. Andrew and *R. J. A. Carnwath* for the owner.

Iain Glidewell Q.C. and *Alistair Dawson* for the local planning authority.

LORD WIDGERY C.J. This matter comes before the court as an appeal under section 246 of the Town and Country Planning Act 1971 against a decision of the Secretary of State for the Environment which was communicated to the parties in a decision letter of August 15, 1972, whereby the Secretary of State dismissed an appeal brought by the present appellant, Mr. Richard Pilkington, against an enforcement notice which had been served on him by the Fulwood Urban District Council, acting as agents for the Lancashire County Council. The case does give rise to considera-

A tion of quite important points relating to the effect of the grant by a planning authority of two or more conflicting planning permissions.

The argument has ranged over a very wide field, but in my judgment the relevant facts can be put quite shortly. There is at Fulwood a public highway called Walker Lane, and adjoining that public highway and fronting upon it is a strip of land, the dimensions of which are not given, but which one can adequately describe by saying that it would physically B accommodate three houses with adequate gardens if divided into three separate areas. There have been a very large number of planning applications made over the years in respect of this strip of land, but again it seems to me that there are only two, and possibly a third, to which any real attention must be given, and I start with the permission granted in 1953 to Mr. Pilkington's predecessor in title as owner of this land.

C This first relevant permission has the reference number 4/1/601, and it was the subject of an application for permission made on May 4, 1953. The permission granted is dated May 28, 1953. It names the then owner as the applicant for permission; it describes the land to be developed as being in Walker Lane, and it describes the development for which permission is granted as the erection of a bungalow and garage and the use of the land as a smallholding. The particulars of the decision to grant D permission are contained in the application and plans upon which the permission is based.

When one looks at the relevant plan, it shows that what was then contemplated was a bungalow to be built at the northern end of this strip of land, the end which has been referred to throughout the argument as site A. For convenience in argument, the strip of land has been notionally E divided into three plots; site A is the northernmost of the three, and the permission number 601 contemplated the building of a bungalow on site A, and also showed the rest of the entire site as being coloured, and thus within the application which was being made. The reference to a smallholding in the permission in my judgment clearly contemplates that the coloured land, that is to say the entire strip to which I have first referred, is embraced in the application, and that the intention is to use F that land as a smallholding.

I fully appreciate the argument put before us by Mr. Dobry that using land as a smallholding does not require planning permission, and it is perfectly true to say that the development which was contemplated in permission 601 was the building work of erecting a bungalow, but it is well known that a decision to allow building work to take place is affected by the setting in which the building will lie, and it is also affected by such G considerations as the extent of the curtilage intended to be provided and the use to which other land occupied with the building should be put. Therefore I think it quite wrong to say that permission 601 merely permits the building of a bungalow. It permits the building of a bungalow in the setting contemplated by the application, namely, as a dwelling house upon a smallholding.

H That permission was not implemented; one does not know why. In due course the whole of the land was transferred, as I understand it, to Mr. Pilkington, and of the numerous applications which he made for permission to develop the land the most relevant one is 4/1/756. That was a permission granted on October 28, 1954, and like its predecessor, number 601, it describes the land to be developed as Walker Lane, Fulwood. It describes the nature of the development as being the erection of a bungalow, and it says the development is to be carried out in accordance

with the application and plans. When one looks at the appropriate plan in respect of this development permission, one finds that it was for the erection of a bungalow not on the part of the land which I have called site A, but in the middle of the land on the part which has been referred to as site B. Again it shows the whole curtilage as being associated with the permission. It therefore shows that the bungalow permitted to be built will be in the middle of the whole site, and have the whole site as part of its curtilage, and in case it is necessary to make that point even more vivid, the permission itself contains a condition in these terms: "The bungalow shall be the only dwelling to be erected upon the area of land edged red on the submitted plan." That certainly drives home the point that the permission comprised in number 756 was for a bungalow on site B, but that the whole of the site to which I originally referred is comprised in the permission in that that bungalow is intended to have the rest of the site as its curtilage.

In due course Mr. Pilkington, having obtained permission under 756, implemented it; a bungalow which is called Jamar was duly built on the area of site B and later a further bungalow was built on site C pursuant to another planning permission, which is number 1469 for purposes of reference. The fact that the planning authority permitted a further bungalow, one known as Westwinds, to be erected on site C is a little surprising at first blush, because to allow that to be done seems to me to ignore the condition attaching to plan 756 which had contemplated only one bungalow on the whole site. But I agree with the Secretary of State that it was perfectly open to the planning authority to authorise the erection of a bungalow on site C under permission number 1469, and the fact that that was done is not really a relevant fact in the issues which we have to decide today.

To bring the matter up to date, Mr. Pilkington having erected the bungalow in accordance with permission number 756 must have had the existence of permission 601 brought to his attention. I say that because it is common ground that he did not know about permission 601 when he acquired the land, but at some time it is evident that he learnt of it, and he reached the conclusion that the existence of permission 601 allowed him, if he wished, to build a bungalow on site A notwithstanding that by this time Jamar was erected on site B and Westwinds on site C. So the problem presented to the Secretary of State, and now to us, is whether Mr. Pilkington was entitled to use this aged permission, if I may so describe number 601, in the circumstances which had happened, in order to justify the erection of a building on site A.

The matter was brought to a head by his beginning the work of erection of this bungalow and the service on him of an enforcement notice by the planning authority in consequence of what he had done. The enforcement notice is dated October 29, 1971, and the recital of breach of planning permission in the notice is

> "commencement of erection of detached bungalow and garage in Walker Lane, Fulwood without planning consent having been granted."

Among the points taken by Mr. Dobry in the course of a wide ranging argument over the law affecting cases of this kind was that the notice was bad anyway because it failed to specify the land on which the development was said to have taken place. He drew attention to the absence of any

A plan with the enforcement notice which would have identified the particular piece of land. I may say at once to get the point out of the way, that for my part I can see nothing in this argument. No one can have had the slightest doubt that the notice related to this half-developed bungalow on site A, because there is no suggestion that Mr. Pilkington was building or attempting to build any other building in Walker Lane.

There is the notice, and the way in which the planning authority have B sought to describe the breach of planning control which prompted the service of the notice. Receiving the notice Mr. Pilkington maintained the view that he had got planning permission for the erection of a bungalow on site A, and the permission on which he relied was number 601. The case when it came before the Secretary of State for decision raised in the view of the Secretary of State and I must say in my view also, a point C shortly stated, namely, whether having implemented the permission contained in number 756, it was open to the occupier to claim the right to implement the permission contained in number 601 also.

The Secretary of State having stated the facts dealt with his own view of the matter extremely briefly. He says:

> " The view is taken that planning permission 756 was inconsistent with and alternative to permission 601 and that when the former per- D mission was implemented, the latter became incapable of implementation."

The question for us is whether as a matter of law the Secretary of State was justified in reaching that conclusion.

There is, perhaps surprisingly, not very much authority on this point E which one would think could often arise in practice, so I venture to start at the beginning with the more elementary principles which arise. In the first place I have no doubt that a landowner is entitled to make any number of applications for planning permission which his fancy dictates, even though the development referred to is quite different when one compares one application to another. It is open to a landowner to test the market by putting in a number of applications and seeing what the attitude of the F planning authority is to his proposals.

Equally it seems to me that a planning authority receiving a number of planning applications in respect of the same land is required to deal with them, and to deal with them even though they are mutually inconsistent one with the other. Of course, special cases will arise where one application deliberately and expressly refers to or incorporates another, but we are not concerned with that type of application in the present case. G

In the absence of any such complication, I would regard it as the duty of the planning authority to regard each application as a proposal in itself, and to apply its mind to each application, asking itself whether the proposal there contained is consistent with good planning in the factual background against which the application is made.

I do not regard it as part of the duty of the local planning authority H itself to relate one planning application or one planning permission to another to see if they are contradictory. Indeed I think it would be unnecessary officiousness if a planning authority did such a thing. They should regard each application as a proposal for a separate and independent development, and they should consider the merits of the application upon that basis. What is the consequence here? The fact that application 756 related to a bungalow central in the site, and the fact that it contemplated only one bungalow on the whole site, and the fact that that

permission has now been implemented, means in my judgment that one must look back at permission 601, and see whether in fact that development there contemplated can now be carried out consistently with the development sanctioned in the implemented application number 756.

For this purpose I think one looks to see what is the development authorised in the permission which has been implemented. One looks first of all to see the full scope of that which has been done or can be done pursuant to the permission which has been implemented. One then looks at the development which was permitted in the second permission, now sought to be implemented, and one asks oneself whether it is possible to carry out the development proposed in that second permission, having regard to that which was done or authorised to be done under the permission which has been implemented.

Accordingly, one now looks back at permission 601 to see whether the development there contemplated is a practical possibility having regard to what has been done or may be done under number 756. I have no doubt in my mind that it is quite clear that the development contemplated by number 601 cannot now be carried out. As I endeavoured to explain earlier, the development contemplated by number 601 was the building of a bungalow, but the building of a bungalow in a particular site as ancillary to the smallholding which was to occupy the rest of the site. It is not now possible to build a bungalow on number 601 subject to those terms, and it does not follow in the least that if the local planning authority had been asked to give permission for a bungalow on site A that they would have done so if they had known that the remainder of the site was not to be made available for the smallholding which was clearly in contemplation all the way through.

I find that if one looks at the development sanctioned by number 601 and asks oneself whether that can now be carried out having regard to the activities pursuant to permission number 756, it seems to me the answer must be no, and I think that if that is the position the effect is that permission 601 is no longer capable of being implemented.

Whether or not it should be regarded as in suspense and possibly available at a future time should the development carried out pursuant to number 756 be removed is something which I do not feel compelled to express an opinion about. What I am clear about is that it is not now possible to implement number 601 for the reasons I have endeavoured to give.

It was said in the course of argument that any such decision is unfair to future purchasers. It was said that this decision as to the effect of conflicting planning permissions may operate to the detriment of a future purchaser who buys land and finds there is some shadow over it from some other permission of which he was unaware at the time of purchasing. I am unimpressed with this argument because an intended purchaser who is interested in permissions affecting the land can find out by looking at the proper register; if he looks at the register the position will be clear to him when he buys. If he does not look at the register he is no doubt content to take the land and take whatever planning permission he can persuade the local planning authority to grant.

My views on this matter are not based on any election on the part of Mr. Pilkington; they are not based on any abandonment of an earlier permission, and they do not in any way depend on the fact that the building on site A may have been a breach of the condition in number 756. I base my decision on the physical impossibility of carrying out that

which was authorised in number 601. I mention this because I do not regard the case as one in which the Secretary of State's decision depends on the condition in number 756. Had it done so and had it been necessary for the Secretary of State to rely on the condition in that permission, we should have had to consider the point put before us by Mr. Dobry that that was not the basis on which the enforcement notice had been framed.

It has been recognised for many years that if the planning authority allege development without permission they cannot support the notice by showing a breach of condition; if they make a mistake in their choice the notice is bad and irremediable. That is a doctrine which has its roots in the Town and Country Planning Act 1947, an Act which not only gave the Secretary of State no power to amend the notice but indeed gave no power of appeal to the Secretary of State at all; and it is, I think, for consideration another day, though not today, whether that principle has survived the changes in legislation which have occurred meanwhile, in particular whether it has survived the right of the Secretary of State to amend the notice where this can be done without injustice, and whether it has survived the language now used in the section dealing with appeals of this character, that is to say, section 88 of the Town and Country Planning Act 1971, which in subsection 1 (*b*) has put breach of condition and development without permission in one sentence, with perhaps some suggestion that now the two should be treated as interchangeable.

Some doubt was expressed by Lord Denning M.R. in a recent case as to whether this rule should survive until today. In *Garland* v. *Minister of Housing and Local Government* (1968) 67 L.G.R. 77, Lord Denning M.R., having referred to *Miller-Mead* v. *Minister of Housing and Local Government* [1963] 2 Q.B. 196, made this observation. Speaking of a notice criticised for containing this fault he said, at p. 79:

> "It cannot be cured by amendment. I will assume that such is still the law, though I am by no means sure about it. The matter may some day have to be reconsidered."

Before I complete this judgment I ought briefly to refer to the two authorities to which I have had regard in reaching the conclusions already expressed. The first is a decision of Winn J. in *F. Lucas & Sons Ltd.* v. *Dorking and Horley Rural District Council* (1964) 62 L.G.R. 491. That was a rather exceptional case where planning permission had been granted for the erection of a substantial number of houses in conformity to a layout plan which had accompanied the application. Later a further permission was granted for the development of two houses on part of the land contemplated in the first permission, but in a manner inconsistent with the layout prescribed in the first permission. Winn J. had to consider whether, those two houses having been built in implementation of the second permission, it was still open to the owner of the rest of the land to develop it in accordance with the original permission. He came to the conclusion that it was, but as I understand his judgment, for the reason that he construed the first planning permission as authorising the carrying out of a number of independent acts of development, and taking that view it naturally followed that the implementation of the second permission did not deprive the owner of the rest of the land from carrying out the independent acts of development authorised on such part of the site as remained under his control.

More helpful I find the second authority to which we have been referred, and an authority on which the Secretary of State himself relied;

that is *Ellis* v. *Worcestershire County Council* (1961) 12 P. & C.R. 178, a decision of Mr. Erskine Simes Q.C. I refer to this for one passage which seems to me exactly to express the conclusion that I have independently reached in regard to the propriety of endeavouring to implement the second conflicting planning permission. He said, at p. 183:

> "If permission were granted for the erection of a dwelling house on a site showing one acre of land as that to be occupied with the dwelling house, and subsequently permission were applied for and granted for a dwelling house on a different part of the same area which was again shown as the area to be occupied with the dwelling house, it would, in my judgment, be impossible to construe these two permissions so as to permit the erection of two dwelling houses on the same acre of land. The owner of the land had permission to build on either of the sites, but wherever he places his house it must be occupied with the whole acre."

That exactly illustrates the principle upon which I would base my decision in this case and in the result I would regard the Secretary of State's decision as showing no error of law and I would dismiss the appeal.

BRIDGE J. I entirely agree.

MAY J. I agree.

Appeal dismissed with costs.

Solicitors: *Young, Jones, Golding, Patterson for L. H. Cartwright, Preston; P. D. Inman, Preston.*

[CHANCERY DIVISION]

* *In re* SMITH KLINE & FRENCH LABORATORIES LTD.'s APPLICATIONS

[1971 S. No. 5770]

1973 May 18, 21, 22, 23, 24; June 14 — Graham J.

Trade Mark — Registration — Distinctiveness — Colour — Pharmaceutical substances in capsule form—Whether colour combinations constituting trade mark—Whether distinctive of goods—Whether risk of confusion—Trade Marks Act 1938 (1 *&* 2 *Geo.* 6, *c.* 22), *ss.* 9, 11, 68 [1]

[1] Trade Marks Act 1938, s. 9: "(1) In order for a trade mark . . . to be registrable in Part A of the register, it must contain or consist of at least one of the following essential particulars:—(*a*) the name of a company, individual, or firm, represented in a special or particular manner; . . . (*e*) any other distinctive mark, but a name, signature, or word or words, other than such as fall within the descriptions in the foregoing paragraphs (*a*), (*b*), (*c*) and (*d*), shall not be registrable under the provisions of this paragraph except upon evidence of its distinctiveness. (2) For the purposes of this section 'distinctive' means adapted, in relation to the goods in