*397 Secretary of State for the Environment, Transport and the Regions v Hughes

Positive/Neutral Judicial Consideration

Court
Court of Appeal (Civil Division)

Judgment Date
19 January 2000

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Court of Appeal

(Kennedy , Thorpe and Mance L.JJ.):

January 19, 2000

Town and country planning—Application for planning permission—Replacement dwelling—Abandonment of residential use—Intention of owner—Objective testing

After the owner of the Challenge, Childersgate Lane, Sutton-St-James, Lincolnshire ("the property") left in 1963, it remained in his ownership but was occupied and fell into decay. Mr Hughes "H" bought the property in 1990 and sought planning permission to erect a replacement dwelling on the site. The policy of the local planning authority was to only allow dwellings to be replaced where the residential use had not been abandoned. Planning permission was refused and an appeal against that refusal was dismissed. In her decision letter the inspector described the property as in a ruinous state with its roof and part of its walls missing. She did not regard its use for an unidentified period for the storage of some corn and animal feed as conclusive evidence of another use. She accepted that it had always been the intention of the appellant to live at the property. She recited evidence that the previous owner had attempted to let the bungalow; that the premises had been bought as a dwelling house at a price to reflect this; and that previous applications had been made for a replacement dwelling on the site. She concluded however that its physical condition and the period since it was last used as a residence indicated that its residential use had been abandoned. H applied successfully to quash that decision on the basis that the inspector was not entitled to find the use to have been abandoned. The court considered it impossible to hold that whilst the owner had ceased a use with an intention to resume it, he had nevertheless abandoned it. The Secretary of State appealed to the Court of Appeal.

Held, allowing the appeal, that in evaluating the physical condition of the building, the length of time for which it had not been used for residential purposes, whether it had been used for any other purposes and the intentions of the owner, the inspector was entitled to conclude that residential user had been abandoned. Although she determined the issue of intention in favour of H, the intentions of the successive owners, although relevant, were not and could not be decisive, because at the end of the day the test must be the view to be objectively taken by a reasonable man with knowledge of all the relevant circumstances. It would not be right to elevate the intentions of the owners to a paramount status, or conversely to subordinate other relevant considerations to intention.

Cases referred to:

(1) *Castell-y-Mynach Estate v. Secretary of State for Wales [1985] J.P.L. 40* .
(2) *Hartley v. Minister of Housing and Local Government [1970] 1 Q.B. 413* .

Appeal against the decision dated April 14, 1999 of Malcolm Spence, Q.C. , sitting as a Deputy High Court Judge, allowing an application to quash a decision of the Secretary of State pursuant to the Town and Country Planning Act 1990, s.288 , whereby the Secretary of State dismissed an appeal against a refusal of planning permission by South Holland District Council for a replacement dwelling on land at the Challenge, Childersgate Lane, Sutton-St-James, Lincolnshire.

Representation

Alice Robinson for the appellant.
Anthony Anderson , Q.C. and Christopher Boyle for the respondent.

Kennedy L.J.:

This is an appeal by the Secretary of State from a ***398*** decision of Mr Malcolm Spence, Q.C. sitting as a Deputy High Court Judge, who on April 14, 1999 allowed an application by Mr Hughes that the decision of an inspector appointed by the Secretary of State be quashed. The Secretary of State submits that the decision of the inspector should be restored.

The relevant facts are simple, and with one qualification they are not in dispute. Mr Giddings used to live at The Challenge, Childersgate Lane, Sutton-St-James,

Lincolnshire. In 1963 he bought another property and The Challenge has not been occupied since 1963 to 1964. Mr Giddings considered letting that bungalow, but he did not do so because the amount of return which he could expect [to] get on it, in his judgment, was not sufficient to make that an economic proposition, and it fell into decay. Apparently thieves stripped all the slates from the roof in 1986, prior to which it had been dry and weatherproof and used to store the odd sack of corn or animal feed.

In 1990 the building, such as a it was, was bought by Mr Hughes, who sought planning permission to erect a replacement dwelling on the site. The local authority in 1991, and an enforcement officer in 1992, both described the then existing building as beying “beyond repair” and the inspector in 1998 described it as “now in a ruinous state with its roof and part of its walls missing”, in part, as she was careful to point out, as a result of work undertaken by Mr Hughes since he acquired the property with a view to replacing it.

The problem which confronted Mr Hughes was that the application site was in an area where the planning authority followed the practice of only permitting dwellings to be replaced where residential use had not been abandoned. Four criteria were considered to be relevant, namely:

1) the physical condition of the building;
2) the length of time for which the building had not been used for residential purposes;
3) whether it had been used for any other purposes; and
4) the owner's intentions.

In this case, it is accepted that the planning authority was entitled to follow its practice, and that the four criteria were the revelant criteria. As the inspector put it in her decision letter:

> “You agree that these criteria, which are aimed at establishing whether the residential use has been abandoned, are the relevant considerations.”

Planning permission was in the event refused, and there was an appeal to the Secretary of State, so an inspector was appointed and she conducted a hearing on October 15, 1998. By that date, Mr Giddings had died. In her decision letter of October 23, 1998 the inspector set out her findings as to the physical condition of the building and the period since it was last used as a residence, which findings reflect the history which I have already set out.

As to the third criteria, the inspector said that its use for an unidentified period for the storage of the odd sack of corn and animal feed "is not conclusive evidence of another use".

Turning to the final criterion, the inspector accepted that it had always been Mr Hughes' intention to live in the property and in paragraph 9 of her decision letter she said:

> "Therefore, whilst the last 2 criteria could be satisfied, my findings on ***399*** the first 2 criteria point strongly against your arguments that residential use of the site has not been abandoned."

As I have said, there was then an application to the High Court, and before the Deputy Judge the issue was whether, having regard to the authorities, the inspector was entitled to find, as she did, that residential use had been abandoned. The deputy judge held that she was not so entitled. His decision is conveniently encapsulated in the penultimate sentence relied upon by Mr Anderson, Q.C. in the course of his submissions, which sentence reads:

> "It is impossible to hold at one and the same time that the owner has ceased a use with an intention to resume it, but has nevertheless abandoned it."

In fact, the inspector made no specific findings as to Mr Giddings' state of mind. The Deputy Judge recorded counsel for the Secretary of State conceding that there was no evidence that Mr Giddings intended to abandon residential use, and having regard to the material which was before the inspector, one can see why that position seemed to have been adopted. There was in reality a statement from Mr Giddings and a record of an interview with an enforcement officer, both of which took place some time before the matter came to the inspector. Miss Robinson (for the Secretary of State) now contends that the Deputy Judge may have misunderstood her position. All she accepted was that there was some evidence that Mr Giddings did not intend to abandon—that evidence being the fact that he considered letting and the fact that he sold the building to Mr Hughes as a residential building—but at this stage nothing of any great consequence seems to me to turn on that misunderstanding of the Deputy Judge as to the state of mind of Miss Robinson. In relation to the question of abandonment, what matters, as it seems to me, is the weight to be given to the various factors, which include the intentions of the owner. The Deputy Judge, as I read his decision, regarded that factor as decisive. The question which we have to resolve in this appeal is whether he was right to do so.

Everyone agrees that the first and most important authority to be considered in relation to this branch of the law is the decision of this court in the case of *Hartley v. Minister of Housing and Local Government [1970] 1 Q.B. 413* . That case concerned a petrol station, with an area to display and sell cars. Car sales activities ceased in 1961 because the owner died and his widow did not regard it appropriate for her young and inexperienced son to be involved in car sales. Those sales were resumed in 1965 when a new owner acquired the site. The question in the action was whether that 1965 resumption amounted to an unauthorised change of use. The Minister and the Divisional Court held that it did, and in the Court of Appeal Iain Glidewell, Q.C. , as he then was, for the appellant site owner submitted at page 419 of the report:

> “The intention is an essential element; and here the evidence supports the view that though the widow, because of her son's youth and inexperience, told him not to sell cars, she would have liked the car sales to continue since the demand was there; so the evidence is that the car sales use was only temporarily suspended until such time as the then owners felt able to resume it.”

That is, as it seems to me, the submission which appealed to the Deputy *400 Judge in the present case, but in *Hartley's* case it did not prevail. At page 420G, Lord Denning, the Master of the Rolls, said:

> "The question in all such cases is simly this: Has the cessation of use (followed by a non-use) been merely temporary, or did it amount to an abandonment? If it was merely temporary, the previous use can be resumed without planning permission being obtained. If it amounted to abandonment, it cannot be resumed unless planning permission is obtained. … Abandonment depends on the circumstances. If the land has remained unused for a considerable time, in such circumstances that a reasonable man might conclude that the previous use had been abandoned, then the tribunal may hold it to have been abandoned."

What matters is the view of "a reasonable man" and the wishes and intentions of the site owners are not, on that formulation, as it seems to me, to be regarded as decisive. At page 421, letter E, Widgery L.J. said:

> "The substance of the defence of the appellant in this case must be that although it seems there had been no car sales use from 1961 to 1965, yet on a fair and commonsense view of the facts, the proper interpretation of those facts was that the original phase 1 use for car sales had never come to an end. It is in connection with that argument that the question of abandonment arises.
>
> It has been suggested in the courts before, and it seems to me that it is now time to reach a view upon it, that it is perfectly feasible in this context to describe a use as having been abandoned when one means that it has not merely been suspended for a short and determined period, but has ceased with no intention to resume it at any particular time. It is perfectly true, as Mr Glidewell says, that the word 'abandonment' does not appear in the legislation. We are not concerned with the legislation at this stage but merely with the facts of the matter. I cannot think of a better word to describe a situation in which the land owner has stopped the

> activities constituting the use not merely for a temporary period, but with no view to their being resumed. If that has happened, then, as a matter of fact, the use has ceased."

For my part I accept that if that passage is read in isolation, without reference to the facts of the case, it might be thought that there can be no abandonment if the site owner has an intention to resume the earlier user. He cannot then have "no view to (his earlier activities) being resumed", but considered in context, I am satisfied that Widgery L.J., like the Master of the Rolls, was putting forward an objective test. The state of mind of the owner would no doubt be relevant when investigating the facts of the matter, but it would not necessarily be decisive.

Our attention has also been invited to other authorities, but the only one to which, as it seems to me, it is necessary to refer is the decision of Nolan J., as he then was, in *Castell-y-Mynach Estate v. Secretary of State for Wales [1985] J.P.L. 40* . The facts were in many ways similar to those in the present case. The relevant building ceased to be occupied as a dwelling in 1965, and then over a period of 16 or 17 years it was allowed to deteriorate to a near derelict and totally uninhabitable condition. Nevertheless, the evidence showed that at no time had the owners intended abandoning the rights of existing use, despite their decision not to relet for residential use. As in the present case, the four relevant factors were identified at the inquiry and, as ***401** the judge said, the issue was whether the building was abandoned or not. There, as in this case, counsel for the applicant emphasised the intentions of the owners. It was said that the Secretary of State "misdirected himself in going by the view of a reasonable man rather than apprising his mind of the crucial issue which was the true intention of the owners". As the judge said, the weight of any particular fact had to depend on the circumstances of the case.

Mr Anderson reminded us of part of that decision in which Nolan J. at page 41 said this:

> "What was decisive was that the argument before the inspector, reviewed by the first respondent, was conducted on the agreed basis that all four factors relevant to this matter were taken into account. The weight that any particular factor bore had to depend

> on the particular case. It was true that in this case the extreme state of disrepair seemed to have affected the mind of the first respondent, as it had done the inspector, more than anything else. However, that was not at all inconsistent with the view formed, whichever one of the four factors one looked at. The only strong evidence the other way was the expressed intention of the owners, which was repeated at the hearing. However, genuinely expressed and put forward, it appeared to have yielded to the weight of the other factors in the mind of the inspector. Therefore the judge could see no error of law on the grounds advanced by counsel in his first submission."

When asked about that particular passage, Mr Anderson, as I understood him, submitted that the inspector was entitled to conclude that the genuinely expressed intentions were not the real intentions of the owners. That was not how I, for my part, would read it. I see no reason why in a situation such as that the inspector should be driven to the state where he must reject an intention which an owner puts forward. He may be in a state of mind where he does come to a conclusion, or she does come to a conclusion that the intention is not the real intention of the owner at the relevant time. But he may, as it seems to me, come to the conclusion that it is the real intention and was the real intention of the owner at the relevant time, but, nevertheless, cannot be regarded as a determinative matter.

At the end of his submission, Mr Anderson invited out attention particularly to the fact that in her decision letter the inspector did not deal expressly with the state of mind of Mr Giddings. That in the circumstances is hardly surprising. Mr Giddings was, as I have said, not before her, he having died before the time at which she became involved, and the appeal to the inspector put forward on behalf of Mr Hughes dealt with the owner's intentions in this way:

> "Again my vendor, after moving to another property, stated that he investigated letting this bungalow but in the event did not. It was sold to me, as my title deeds confirm, as a dwelling house and at a price which reflected a house, albeit in need of quite extensive repair. I always intended to occupy it, although my attempts to do so have been frustrated by the planning authority."

The inspector clearly accepted that paragraph and dealt with it. She dealt with the intentions of Mr Hughes. She recited the evidence that Mr Giddings had attempted to let the bungalow but in the event had not. She accepted ***402** that the premises had been bought as a dwelling house and at a price which reflected that, albeit in need of quite extensive repair; and indeed she referred to two other matters, namely the Community Charge and the previous applications which had been made for a replacement dwelling on the site, both of which had been refused, namely the application in 1986 to 1987 and the application in 1991.

For my part I am prepared to accept that in a perfect world it would have been better if the inspector had specifically addressed the state of mind of Mr Giddings, but clearly her determination proceeded upon the basis, as it seems to me, that Mr Giddings, insofar as he devoted his mind to the matter at all, did not at any stage come to the state of mind where he was saying, "I do not regard this property as ever being available for residential use", because he contemplated letting it, he at one stage apparently had attempted to get planning permission himself for a residential use and he eventually sold it.

So the intention factor, as one of the four factors which the inspector had to consider, was regarded as a factor which she determined, as she said, in favour of the applicant. In my judgment she was right to do so. It was a case where the approach which is now being advanced before us, as it was advanced before the learned Deputy Judge, is, I fear, not the right approach.

Evaluating all four factors, the inspector was, in my judgment, entitled to conclude, as she did, that residential user had been abandoned. That may not have been the intention of Mr Giddings any more than it was the intention of Mr Hughes; but the intentions of the site's successive owners, although relevant, were not and could not be decisive, because at the end of the day the test must be the view to be taken by a reasonable man with knowledge of all of the relevant circumstances. That is, as it seems to me, what the authorities suggest, and it is a conclusion which, as it seems to me, accords with commonsense otherwise a labourer's cottage which an emigrant and his family left 40 years ago, which has been in ruins for years, cannot cease to

be regarded as a residence so long as its owner in America or Australia cherishes the dream that some day he will return to live there. There has been in such a situation, in my judgment, a clear abandonment.

Contrast the situation where, for example, there has been a fire and the owner is simply getting together the means to replace the dwelling over a limited period of time, or to restore it to its former glory. The objective observer in the latter situation, not knowing of the owner's intentions, might temporarily conclude that the use of the property as a residence had been abandoned where in reality it had not, because the intention factor would be determinative the other way.

In the former situation, as it seems to me, the outcome must in reality be obvious. The place of an objective assessment in this branch of the law is an important one having regard to what was said by the Master of the Rolls in the case of *Hartley* . For those reasons I would allow this appeal and restore the decision of the inspector.

Thorpe L.J.:

I agree with all that my Lord has said. The question for determination in this case was whether prolonged and gross neglect of a dwelling house by its owners amounted to abandonment. In determining that question, it was in my opinion, necessary for the inspector to have regard to all the relevant circumstances. It would not be right to elevate the intentions of its owners to a paramount status, or conversely to subordinate ***403** other relevant considerations to intention. The judge's approach led to a conclusion which seems to me to be quite unrealistic.

Mance L.J.:

I agree. The judge at pages 13 and 14 of the transcript of his judgment disclaimed any decision on the question whether an intention to abandon was to be measured objectively or subjectively; but the authorities which my Lord, Lord Justice Kennedy, has cited establish clearly that it is to be measured objectively. “The reasonable man” referred to by Lord Denning in *Hartley* and by Nolan J., as he was, in *Castell-y-*

Mynach is otherwise redundant. If the test were subjective, all one would need would be the local authority or the inspector to decide the subjective intention.

There seems to me an analogy here with the principle of election. All that election requires is knowledge of facts, and sometimes of the law, together with conduct manifesting objectively an unequivocal intention, regardless of subjective intention (see, for example, MacGillivray & Parkington on Insurance Law, 9th ed. at para. 10–108). But whether or not that analogy is correct for the principles in cases in this area appear to me clear.

In fact the Deputy Judge applied what was clearly a subjective approach. At page 15, for example, he said:

> "Nolan J. did not hold that if it is held that the owner did not intend to abandon the use, but to resume it, then one may go on to hold overall that there was an abandonment by virtue of the very poor condition of the building or the very long period of non-use. Indeed, in my judgment, so to hold would be tautologous because, as I have said, the very word 'abandon' involves cessation with no intention to resume."

In the initial words there, referring to the question whether an owner intended to abandon the use, the Deputy Judge was thinking of a subjective intention. It could only be, as he put it, tautologous to hold that there was an abandonment where there was no such subjective intention if abandonment is also to be measured subjectively. The same point emerges throughout the rest of page 15 and right at the end of his judgment on page 17 where he concluded:

> "However, it is impossible to hold at one and the same time that the owner has ceased a use with an intention to resume it …"

That is clearly a reference to a subjective intention,

"… but has nevertheless abandoned it."

That only makes sense if a test is subjective. In fact it is objective.

Seeking objectively to ascertain the relevant intention by reference to the matters recited in the inspector's report, the only reservation that can be made is the one to which my Lord has referred, namely that the inspector did not make due reference to the prior owner's (Mr Giddings') subjective intention as a factor, among other factors. That refers to Mr Giddings' subjective intention in the period 1963 to 1990.

In respect of that period the inspector did deal fully with the objective facts. She also dealt with the present owner's intentions from the time of his purchase in 1990.

Despite the reservation I have identified, the inspector clearly had in mind therefore the circumstances shown by the evidence before her, bearing directly on Mr Giddings' subjective intention. She referred to his prior ***404** unsuccessful planning application in 1986/1987, his purchase of another property as early as 1963, the absence of occupation since and the fact that he considered letting the bungalow but did not do so. There was little if anything more that could have been adduced or said about Mr Giddings' intention since he had, by the time the inspector was considering the matter, sadly died. All that was available from him was a written statement, which carries matters no further except to show that the reason why he did not let was that this would have imposed on him obligations which he was not prepared to undertake. That too does not assist the present applicant's case. While it may be that the inspector could have been more specific in addressing the prior owners' intention, it seems to me that on the material before her she was bound to come to the conclusion which she did about abandonment.

Assuming that Mr Giddings at every stage wished to resume occupation, he never did anything positive in that direction except make the unsuccessful planning application not pursued in 1986/1987. The objective inference of abandonment on the material

before the inspector was overwhelming. I see no basis for setting aside the inspector's decision and would allow this appeal accordingly.

Order: Appeal allowed. Section 18 order as to costs in the appeal and in the court below.

Representation

Solicitors— Treasury Solicitor ; Mossop & Bowser , Holbeach.

Order

Reporter —Scott Lyness.

Costs in the appeal and in the court below. ****405***

