
Appeal Decision

Inquiry held on 7 September 2021

Site visit made on 8 September 2021

by Grahame Kean B.A. (Hons), Solicitor HCA

an Inspector appointed by the Secretary of State

Decision date: 27th May 2022

Appeal Ref: APP/Y3940/C/19/3225770

Land at Rambling Rose, off Southampton Road, Clarendon, Salisbury SP5 3DG

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeal is made by Mr David Cooper against an enforcement notice issued by Wiltshire Council.
 - The notice was issued on 27 February 2019.
 - The breach of planning control as alleged in the notice is: Without planning permission, the material change of use of Land from agriculture to a mixed use of agriculture and residential purposes.
 - The requirements of the notice are:
 - 5.1 Permanently cease the occupation of the land for all residential and ancillary residential purposes.
 - 5.2 Permanently remove all residential and associated items ancillary to the residential use of the Land, including all ancillary items such as (including, but not limited to) domestic storage and effects, fixtures and fittings, kitchen facilities, domestic goods and appliances in the building shown as cross hatched on the attached plan.
 - The period for compliance with the requirements is 6 months from the date this Notice takes effect.
 - The appeal is proceeding on the grounds set out in section 174(2) (a) and (d) of the Act.
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Formal Decision

1. The appeal is allowed, and the enforcement notice is quashed.

Preliminary matter and matters concerning the notice

2. The planning merits of the deemed application were considered on the basis of the written representations submitted. The evidence concerning the ground (d) appeal was examined at the Inquiry.
 3. The allegation in the enforcement notice (notice) should include “the” before “Land” since it is clearly intended that the land affected is, as elsewhere referred to in the notice, “the Land” edged red on the plan attached to the notice. However as the notice is quashed there is no need to amend it.
 4. The notice alleges a material change in land use, but the parties’ cases were on the use of the building cross-hatched on the attached plan. I sought views on whether or how the notice might be amended but none were suggested. No residential use was targeted by the Council other than was ancillary to the main residential use of the building, so for ground (d) the notice stands or falls on the use of the building.
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Background

5. The Council issued the notice, believing the residential use of the Land to be unauthorised for reasons examined below on ground (d). It considered planning permission should not be granted for such use as it was intentional unauthorised development, unsustainably located outside a settlement boundary, and a use for gypsy and traveller accommodation would conflict with development plan policy, and none of these objections could be overcome by planning conditions.
6. I should also record that it appears an earlier enforcement notice became effective in relation to the appeal site, seeking to prevent the stationing or storage of caravans without stating for what purpose. It is not directly relevant to this appeal.

Ground (d)

7. An appeal on this ground succeeds if at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters. There is no dispute that the building, known as the Barn, was erected on the appeal site more than 4 years prior to the notice and is immune from enforcement action and not required to be removed.
8. The normal rule, in s171B(1) is that a building or other operational development may not be enforced against after the end of four years beginning with the date on which the operations were substantially completed. By s171B(2) the change of use of a building to use as a single dwelling also has a 4 year immunity period if so used continuously for that period. "Building" includes "any part of a building" and in this appeal it is the use of the appellant's half of the Barn that is in question.
9. The relevant issues in dispute on this ground are firstly, whether the Barn had the characteristics of a dwelling, when its change of use as a dwelling began and whether it has been used as such continuously for 4 years. Secondly, if those conditions are met, it is disputed whether the residential use of the Barn may yet be enforced against on public policy grounds, in light of what the Council alleges to be the appellant's deception as to its true use.

Whether the conditions in s171B(2) are met

10. The usual test for the existence of a single dwelling in this context is found in *Gravesham*¹, ie that the structure affords to those who use it the facilities required for day-to-day private domestic existence. It is a matter of fact and degree for the decision maker.
11. The Barn was constructed in the mid-seventies with breeze block walls and corrugated sheet roof. An inner leaf of concrete blocks was erected and cavity wall insulation installed in 2002. New windows and a septic tank were installed in 2009 and an internal dividing wall was built around 2011/2012.
12. In his statutory declaration the appellant states that he began to use his half of the building as his main residence in early 2012, the other half being used for storage by his brother. The appellant states that he has always preferred his own space and chose not to live in the structure (known as the Twin Unit on a separate plot) with his partner and daughter but moved into the Barn where there were separate kitchen facilities and used the outside toilet and bathroom facilities on his brother's side of the land. In 2016/17 he converted a log store to provide his own bathroom.

¹ *Gravesham BC v SSE & O'Brien* [1983] JPL 306.

13. The appellant's half of the Barn comprises a single room some 6m x 6m with a kitchen, sitting area and bed. I saw that it was structurally sound and has been converted to residential use. It is connected to mains water and electricity, drainage and has a log-burning stove. There is a toilet and shower provided in an adjacent outbuilding. There is no toilet or bathroom in the Barn but there is hot and cold running water and a sink. *Gravesham*, decided in 1982, stated that the absence of an indoor toilet and bathroom did not necessarily disqualify a structure from being a dwelling house. I agree that this principle applies here, despite the fact that it is less common nowadays to find dwellings without indoor bespoke facilities, and that although cultural differences in Gypsy families might normalise the use of facilities in a day block or similar, that does not apply to the particular issue in dispute here. The information as to externally sited washing machines is not especially relevant in my view, given that there was running water in the Barn.
14. A claim of ten years' continuous use of the Barn as primary living accommodation (ie that extended back to around 2009) would contradict an earlier declaration made by the appellant. However the appellant's case is that he has lived in the Barn as his main residence from the beginning of 2012 until the present and made no secret of living there or ever denied access to Council officers. If so, his occupation would meet the requirement of continuous residential occupation as a single dwelling house more than 4 years before the enforcement notice was issued.
15. The appellant's earlier statutory declaration made in April 2016 supported his application for a certificate of lawfulness of existing development (LDC) of the Twin Unit. The salient parts are as follows. The wider site was divided among the appellant and his siblings on his father's death over 40 years ago; family members have always lived on parts of the site at various times over the years; the appellant always used "the site" as somewhere to stay, increasingly so from the mid-eighties due to marriage difficulties; and as he states, on separating with his wife he had "*used Hillbilly Acre and the adjoining plot known as Rambling Rose as my base from which I travelled for work continuously since around 1987*".
16. It also emerges from the earlier declaration that he was very concerned for the welfare of his new partner and his daughters about significant health and financial difficulties affecting them. This concern culminated in his decision to provide accommodation for his family in 2009 which eventually became the Twin Unit, into which he said he moved, with them, in early 2010.
17. Unlike in the later declaration submitted for this appeal, he stated that he had tried to remember events and dates as far as he was able but "*there might be mistakes particularly as to exact dates when some of the earlier events occurred.*" I therefore draw an immediate distinction, all other things being equal, between the weight to be attached to the accuracy of dates stated in the 2016 declaration which I consider has to be substantially less than the declaration he has made for the purposes of this appeal before me, which contains no such qualification.
18. There is a certain amount of corroboration for the appellant's long standing residential occupation of the Barn in other statutory declarations made in the present appeal, the substance of which was repeated on oath at the inquiry. As far as his partner, AC was concerned, the appellant used to go over and stay in the Barn and if anything, that could have been earlier than 2012. AC referred to the appellant's use of alcohol, that being one reason why she always had her own place, the fact that she was teetotal and that it was difficult for her to keep track of him when he was having a bad day.

19. AC referred to the appellant's use of a bowl in the Barn for ablutions prior to the shower being installed in the outbuilding. (The appellant referred to a steel tub but both may have been used, and in my view this discrepancy is not significant).
20. AC was clear that the plots were separate properties. The Twin Unit, into which she states she moved with daughter C, when it was finished, belonged to her, albeit on land owned by the appellant. C gave evidence that when she moved into the Twin Unit there were 2 bedrooms, "*one for me and Mum in the other room*" and that the appellant was living in the Barn as "*he always liked his own space*". C's description of the toilet/washing facilities makes sense considering they are in the appeal site across the hardstanding (clearly not in the Barn itself) away from the Twin Unit.
21. According to another daughter J, the Barn was where the appellant had a bed to sleep in, there was no specific time when he lived there, he used it over the years. J stated that the appellant's use of alcohol caused friction and he was not staying at the Twin Unit full time, that was built for AC and her sister. The Barn was his "*safety net, his quiet place.*" According to another sibling M, it had always been "*Dad's shed and Mum's chalet*" and there had always been a sink in both places with running water and food and drink. She further stated when asked that "*his main day residence was with Mum but he always had his own shed.*"
22. It is not maintained by the appellant that he continued to live in the Twin Unit until its removal from the plot on which it stood in late 2016. The photographs of the Barn and the Twin Unit are of some use when evaluating their residential use at the time they were taken. However they do not clearly demonstrate overnight residential use by a particular person or persons, or that the use was mainly an equipment store, as seems to be suggested variously by witnesses, depending on which structure was being considered. Nevertheless the images of the Barn taken some years prior to the issue of the notice might have put the Council on notice to make a more thorough investigation of its use at the time.
23. I am doubtful that the Council properly understood in 2016 that it was the appellant's partner principally who would be made homeless by removal of the Twin Unit and as a result she would be prevented from applying as homeless to the Council. Certainly the appellant would seem to have contributed at least to the belief of his advisors at relevant times in the past, that he was living in that structure. However, as the Council accepts, it is established that for a change of use to a single dwelling house under s171B(2) the use need not be carried on by someone whose only or main residence is that dwelling house (and various examples are cited in *Gravesham*).
24. I am satisfied from the evidence that the Barn afforded the facilities required for day to day living from around 2012. The issue then is whether the appellant used it simply as a day room or whether it had a continuous residential use throughout the relevant 4 year period, ie from February 2015 to February 2019. In this connection the court in *Grendon*² held that regard should be had, to an appropriate degree in each case, to both the physical state of the premises and their user, actual, intended and/or attempted.
25. I disagree that the use of the Barn was essentially that of a day room. It is accepted that there were facilities to store and prepare food, rest and sleep, and it provided the necessary degree of shelter for these purposes. Washing facilities are provided in the nearby log store and whilst this store contains a large freezer for

² *Grendon v The First Secretary of State and Cotswold DC* [2006] EWHC 1711 (Admin).

food, the lack of space for this item in the Barn which is criticised, could have been rectified if it were thought more convenient to daily life to replace some of the larger "living room" type of furniture to create storage room for personal effects and comestibles.

26. It is said that the appellant went off to work away from the area from time to time and for substantial periods. This would be unsurprising in the lifestyle of a Romani Gypsy such as he. The nature of his activities is documented in some of the papers submitted by the Council pursuant to its point about deception (see below). I am mindful that (per McCullough J in *Gravesham*) the intention to use one's house, or the practice of using it, throughout the year, is not essential.
27. By the same token if one recognises (which I do) that the living arrangements between the appellant on the one hand and his partner and children on the other, have as a prevailing characteristic, that he has always preferred his own space but used both the adjoining plot and Rambling Rose, it is not necessary to meet the conditions in s171B(2) for the residential use of the building in question to be carried on by someone whose only or main residence is that building.
28. Nor does the evidence persuade me that there was that degree of integration of living between the two plots from which it could be inferred that life on one unit was ancillary to the other, ie generally between the two and not just in relation to birthdays or events. Observing the appellant closely when giving evidence, it was clear to me that he had considerable insight into the effects on others in his family that flowed from certain aspects of his lifestyle that were referred to, and that it could cause considerable dysfunction in family life unless he were able to maintain a base of his own to which he could return.
29. The Council emphasised the *Maxwell* case³ which warns against applying a presumption of continuance of a use. I agree, and of course that is something to consider only if and when the change of use is established in the first place, not particularly easy if an irregular pattern of occupation commences and continues throughout the claimed period. The occupation for residential purposes must be or become such as would constitute the change of use from the previous use of the building in question, and then continue in the same vein for the requisite period.
30. An example might be a second home, a well-appointed holiday cottage in Cornwall say, that is occupied periodically and not even at regular intervals, but a more modest base, a building comprising a single room of one's own, is no less a candidate for consideration. It could be, as I think was probably the position here, a dwelling to which (converse to the function of a holiday home or camping site) one returned to live. Thus the appellant ventured forth for work, or oftentimes cohabited in a more proximate familial setting to the extent that was conducive to his well-being and that of others.
31. McCullough J said in *Gravesham* that he found as less distinctive the test of whether the essential character of a dwelling was its capacity to provide a permanent home, and few people in hotels, holiday camps etc "*ordinarily stay for long enough to be regarded as residing there.*" But if the Barn was not a dayroom I also disagree with the Council in saying it was akin to a camping or caravan site. Overall the picture that emerges from the evidence is that the appellant did travel for periods but returned to his base at the Barn, albeit there were periods when he undoubtedly spent time mainly during the day with his family on the adjoining plot.

³ *London Borough of Islington v SSCLG and Maxwell Estates Limited* [2019] EWHC 2691.

32. Therefore, having inspected the Barn and listened to and read the relevant evidence, I am satisfied on the balance of probabilities that the building possessed the facilities required for daily domestic life since at least February 2015, and that since that time the appellant lived there having established a continuous and frequent, albeit not regularly timed, mode of residential occupation.
33. I have considered carefully the submitted information on Council tax records. It might suggest that the appellant contrived to establish his residence at the Barn after the Twin Unit had to be removed from the adjacent plot. Therefore, one might infer that he had not resided there hitherto but that is supposition for it might equally be the case that he had avoided paying Council tax on the Barn until his occupation became clear to others. That too is supposition. I am unable to make any sensible inference of fact one way or the other.
34. I conclude on the first main issue that the appellant has proved on the balance of probability that the use of the Barn changed to use as a single dwelling house by at least February 2015 and that such use continued for at least 4 years after the date of change, without any substantial interruption.

Whether the claim of immunity is defeated under the Welwyn principle

35. As set out in the *Welwyn* case⁴ and summarised at paragraph 56 of the judgment, there are, as the Council submits four factors that if established, would remove an immunity claim from the scope of s171B(2). These are: there must be positive deception in matters integral to the planning process; such deception has to be directly intended to undermine the planning process; it did undermine that process; and the deceiver would profit directly from the deception if the normal limitation period were otherwise to apply.
36. There are other notable features of the decision in *Welwyn*, including, as pointed out by the appellant, that only truly “egregious” cases should be regarded as subject to the principle, which should be invoked only in exceptional circumstances. That observation was expressly made as matters then stood in April 2011, pending statutory amendments which were to establish the “planning enforcement order” (PEO). This is a process whereby an authority can act against a perceived breach of planning control even although the time limits might have expired.
37. In the later decisions of *Bonsall and Jackson*⁵ the Court of Appeal was clear that the PEO procedure is narrower than the Welwyn principle and applies where an apparent breach of planning control was deliberately concealed, whereas the latter extends to dishonesty or criminality, not necessarily deliberate concealment. And yet the Welwyn principle applies “*only to particularly serious cases, whereas the PEO procedure applies where an apparent breach of planning control has ‘to any extent’ been deliberately concealed*” (paragraph 45).
38. However insofar as the appellant argues that the present alleged deception discloses no exceptional circumstances, and on that account alone the Welwyn principle cannot apply, I do not agree. No good reason is given why the Council’s allegations, if correct, should not be regarded as a particularly serious case in which the appellant should be deprived of the statutory protection in s171B(2).

⁴*Secretary of State for Communities and Local Government and another (Respondents) v Welwyn Hatfield Borough Council (Appellant)* [2011] UKSC 15.

⁵ *Jackson v Secretary of State for Communities and Local Government; Bonsall v Secretary of State for Communities and Local Government* [2015] EWCA Civ 1246.

39. This “exceptionality” point is not precisely defined or developed and, in my opinion, it is likely that if the four factors are clearly present as described above, they will together constitute the necessary seriousness or exceptional nature of the wrong doing. Various adjectives might be used to describe the extent of concealment, eg clearly, blatant or conspicuous, which would inform the concept of “egregiousness”. So, in other words the matter could be put as it was in *Bonsall and Jackson*, viz. that “*the extent of concealment may be insufficient, or arguably insufficient, to engage the Welwyn principle*” (paragraph 48, my emphasis).
40. Then the appellant says I should address whether the European Convention on Human Rights (ECHR) applies in his favour. Article 8 protects home and family life, therefore he argues that to deny the statutory right of immunity from enforcement after 4 years would violate his rights, because if the notice were upheld it would interfere with the home and family life of him and his family.
41. The short answer to this point is that although the Supreme Court did not address the ECHR in *Welwyn*, the court noted in *Bonsall and Jackson* (paragraph 47) that it was not argued before it that *Welwyn* was in breach of ECHR but:
- “...although the Supreme Court did not lay down anything about procedures, the principle established in Welwyn is perfectly capable of being applied in a Convention-compliant manner”* (and if the principle were to be applied in violation of a ECHR provision, a remedy would lie by) “*an appeal under section 174 or, more probably, by way of judicial review*”.
42. Surprisingly, the Court of Appeal had before them a “*helpful joint note*” from counsel after the hearing ended, as to the “*appropriate procedure*”. This begs the question whether a view was reached anywhere as to whether a ground (d) s174 appeal was in fact the appropriate forum in which to consider the effect of the ECHR in this way, but of course concealment issues do only arise on such grounds.
43. It is sometimes said that the so-called “legal grounds” and LDC cases do not allow for the effect on individuals and their rights. I did not ask the parties for authority but it seems to be limited to an LDC case on existing development (*Massingham*⁶) and on ground (c) (*Blackburn*⁷). In the former, the issue/refusal of an LDC was held not to create or remove rights but was declaratory of existing rights. In *Blackburn Sullivan J*, as he then was, held that allegations as to violation of the claimant's human rights were irrelevant in an enforcement notice appeal that was concerned only with the legal ground (c). There may be other decisions.
44. Issues in a legal ground (d) appeal can be closely related to those in LDC cases but I would hesitate before extending by analogy the reasoning in *Massingham* to a case where ECHR matters are potentially at issue that would exclude the normal time limits in s171B(2), if the result would be a clear violation of those rights.
45. The Planning Practice Guidance advises that the ECHR as incorporated into the Human Rights Act 1998 are relevant in deciding whether to take enforcement action. Such advice may point to a pre-emptory challenge by judicial review (JR) to a decision to enforce, rather than to take the point on appeal under s174. One thinks of an appellant's nullity claim which in reality is a validity issue, say for lack of authority to issue the notice. Therefore it is said that should be pursued on a JR but there is no authority of which I am aware that compels recourse to the JR procedure, rather than an appeal to the Secretary of State.

⁶ *Massingham v Secretary of State for Local Government Transport and the Regions* [2002] EWHC 1578 (Admin)

⁷ *Andrew Blackburn v First Secretary of State, South Holland District Council* [2003] EWHC 671 (Admin)

46. In any case the Welwyn principle may not arise until after the appeal is made, although here it was clear on the face of the notice that the Council had the appellant's alleged deception firmly in its sights some time previously.
47. The meaning of s171B(2) has in fact stayed the same despite the PEO procedure being enacted (cf *Bonsall and Jackson* at paragraph 43). It has always been subject to the implied limitation preventing the time limits from applying in cases of positive deception. Therefore in a sense the proper application of *Welwyn* is an integral part of a statutory scheme which itself has on a number of occasions been held properly to balance an individual's interests and the public interest in a way that is compatible with the ECHR.
48. Alternatively, if on the facts the Welwyn principle were to be properly engaged, the consequence being that an individual's rights under ECHR would be violated, the interference would still have to be weighed against the wider public interest in applying the principle.
49. I do not have detailed submissions on all these matters I have discussed, not least on how I should treat opposing principles of public policy. However it is unnecessary to consider those matters further for the following reason.
50. The particular feature of this appeal is that the alleged deception took place in the context of earlier matters on which the appellant was engaged, in order to show that he had lived in the Twin Unit for the necessary period to claim immunity from enforcement against that structure, and/or obtain an LDC for its use. Copious documentation was submitted relating to those particular matters and there is no doubt that during those times the appellant gave or allowed it to be understood that he would be homeless if the Twin Unit had to be removed.
51. I return to the strict ratio (ie the principle decided) in *Welwyn*, as found in Lord Mance's judgment at paragraph 56. Among other matters it stipulates in effect that the particular deception in matters integral to the planning process (in that case applying for and obtaining planning permission) must be "*directly intended to and did undermine the regular operation of that process*" (my emphasis).
52. Had the deception alleged by the Council been clearly directed toward the purpose of establishing immunity from enforcement action in regard to the Barn, that would have been a different matter and one that would have engaged the Welwyn principle. This is probably a mixed question of fact and law but in my view there is an insufficient nexus between the earlier proceedings and the present appeal from which a reasonable inference could be made that the appellant's actions or omissions in the former were designed to influence the outcome of the latter.
53. As his counsel says, it was quite possible that the appellant may have been economical with the truth as regards the full details of living arrangements when, several years ago he and his advisors were clearly focussed on a different case then being made in respect of his alleged longstanding and continuous occupation of the Twin Unit. However, to have conceived a plan at that stage to perpetuate a fraud on the Council as regards use of the Barn, is to ascribe to the appellant a degree of artfulness and subterfuge that, as I say having observed him giving evidence, and coping with cross examination, is hard to credit him with.
54. Therefore I find that the Welwyn principle does not apply to the facts of this case because the deception alleged, which was to do with occupation of the Twin Unit, was not directly intended to undermine the regular operation of the process now

sought to be made the subject of the principle, namely the appropriate immunity period applicable to occupation of the Barn for the purposes of s171B (2) of the 1990 Act.

55. I have considered two further matters in this context, firstly, the information about the Council tax and whether it should be inferred that there was a direct attempt to conceal the appellant's residential use of the Barn from a failure to register it until occupation of the Twin Unit had to cease. However for the reasons given above on the first main issue, it should not.
56. Secondly, the Council⁸ points to the appellant's refusal, when asked in 2017 to say to where he had been considering he would live, given the impending removal of the Twin Unit, but there was no positive act of deception.

Conclusion

57. For the reasons given above I conclude that the appeal should succeed on ground (d). Accordingly the enforcement notice will be quashed. In these circumstances the appeal under the ground set out in section 174(2)(a) to the 1990 Act as amended and the application for planning permission deemed to have been made under section 177(5) of the 1990 Act as amended does not need to be considered.

Grahame Kean

INSPECTOR

⁸ Closing submission, paragraph 40

APPEARANCES

FOR THE APPELLANTS:

Mr Marc Willers QC

Barrister, Garden Court
Chambers

He called:

David Cooper

Appellant

AC

Appellant's partner

C

Appellant's daughter

J

Appellant's daughter

M

Appellant's daughter

Phillip Brown

Planning agent

FOR THE LOCAL PLANNING AUTHORITY:

Scott Stemp

Barrister, No 5 Chambers

He called:

Mark Williams

Planning Enforcement Officer

Sean Williams

Planning Enforcement Manager