BHL v (1) St Albans City and District Council, (2) Verulam Residents Association [2016] UKUT 0232 (AAC)

MISC/ 2004/2015

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Decision

1. **This appeal by Banner Homes Ltd ("the appellant") does not succeed**. In accordance with the provisions of the Tribunals, Courts and Enforcement Act 2007 I confirm the decision of the First-tier Tribunal sitting at Field House (London) made on 16th April 2015 under reference CR/2014/0018. This dismissed the appellant's appeal against the decision of St Albans City and District Council ("the local authority") to list the relevant land as an asset of community value.

Hearing

2. I held an oral hearing of this appeal on 3rd May 2016 at Field House (London). The appellant was represented by Douglas Edwards QC and Caroline Daly of counsel, instructed by Pitmans LLP, solicitors. The local authority was represented by Robin Hopkins of counsel. I am grateful to them for their assistance. The second respondent, Verulam Residents' Association ("VRA"), was in attendance at the hearing but did not address any written or oral arguments to the Upper Tribunal.

The legal framework

3. The Localism Act 2011 requires each local authority to keep a list of land (including buildings) in its area which is of community value. The effect of listing (which usually lasts for five years) is that generally speaking an owner of listed land wishing to sell it must give notice to the local authority after which any community interest group has six weeks in which to ask to be treated as a potential bidder. If any such group does so the sale cannot take place for six months, during which the group may come up with an alternative proposal. At the end of the six months it is up to the owner whether to sell and to whom and on what terms. There are arrangements to compensate owners who lose out financially in consequence of the listing.

4. Listing under the 2011 Act does not in itself prevent land being developed but as a matter of planning policy any necessary permission is likely to be refused while land is listed. There might also be other restrictions, such as the effect of green belt policy.

5. So far as concerns the present appeal the relevant parts of sections 87 and 88 of the 2011 Act provide as follows:

> 87(1) A local authority must maintain a list of land in its area that is land of community value.
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> (2) The list maintained under subsection (1) by a local authority is to be known as its list of assets of community value.

…

88(1) … a building or other land in a local authority's area is land of community value if in the opinion of the local authority –

> (a) an actual or current use of the building or other land that is not an ancillary use furthers the social wellbeing or social interests of the local community, and
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> (b) it is realistic to think that there can continue to be non-ancillary use of the building or other land which will further (whether or not in the same way) the social wellbeing or social interests of the local community.

88(2) … a building or other land in a local authority's area that is not land of community value as a result of subsection (1) is land of community value if in the opinion of the local authority –

> (a) there is a time in the recent past when an actual use of the building or other land that was not an ancillary use furthered the social wellbeing or social interests of the local community, and
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> (b) it is realistic to think that there is a time in the next five years when there could be non-ancillary use of the building or other land that would further (whether or not in the same way as before) the social wellbeing or social interests of the local community.

Background and procedure

6. This is the first effective assets of community value appeal to the Upper Tribunal, and there is no direct authority higher than the First-tier Tribunal on the points raised in the grounds of appeal.

7. The appeal concerns land in the area of the local authority known as Bedmond Lane Field (which is 4.83 hectares or about 12 acres in size). It is owned by the appellant. The appellant would like to build on it but, as the First-tier Tribunal found (paragraph 2 of its decision) "since it falls within the metropolitan green belt, it is apparent that (absent a change in planning policy concerning the green belt) such development is unlikely within the near future". The First-tier Tribunal further found (paragraph 3):

> 3. Until 2014 the field had for some 40 years been used by local residents for recreational use, such as walking, exercising dogs, informal play (by local children) and photography of local flora and fauna.

8. There are and were two public footpaths running across the field but the above uses took place on the field away from the footpaths. There is no evidence that (apart from some discussions in the late 1990s) the above uses were carried out with any

permission or licence from the appellant (or any previous owner), or that any action was taken to prevent such uses prior to the events to which I refer below.

9. On 2nd December 2013 VRA nominated Bedmond Lane Field to be listed as an asset of community value and on 16th March 2014 the local authority agreed to do this. The procedure at that stage did not involve the participation of the appellant but on 30th March 2014 the appellant requested a review by the local authority of the decision. The review took place on 26th September 2014 and the local authority decided to maintain the listing.

10. In early September 2014 the appellant erected fencing along the entire length of the footpaths interspersed with notices stating "private land no unauthorised access". The appellant's evidence was that this was done partly as a result of concerns regarding liability to trespassers. Before the fencing was complete "some fences were interfered with and damaged in a number of places so as to allow trespassory access". Repairs were carried out on 12th September 2014 but on 20th January 2015 it was again found that the fencing had been interfered with and damaged, including several sections where the wire mesh had been cut and rolled back. They were repaired again and remain in place. No culprit has been identified. The local authority has accepted that the appellant was entitled to take these actions and to exclude the public from the land beyond the footpaths.

11. In 2014 the appellant also applied for planning permission to change the use of the field from agricultural use to the keeping of horses. Permission was refused and a subsequent appeal was dismissed on 3rd June 2015. A further application for planning permission had been made on 21st May 2015. I have been given a great deal of evidence and paperwork in relation to these planning applications but in the main these matters are not relevant to my decision on whether the decision of the First-tier Tribunal was made in error of law on the date on which it was made. At that time officials had recommended against the first application for permission, permission had been refused and an appeal was pending. I do note that "The fences remain in place and the Appellant has confirmed that its intention to maintain exclusion to the land, other than the public footpaths, remains firm". (The extracts quoted in this and the previous paragraph are from the skeleton argument of 19th April 2016 from Mr Edwards and Ms Daly.)

12. Meanwhile, on 5th November 2014 the appellant appealed to the First-tier Tribunal against that decision. The First-tier Tribunal panel, consisting of Judge Peter Lane, the President of the General Regulatory Chamber of the First-tier Tribunal, heard the appeal on 4th March 2015 and issued its full decision and reasons on 16th April 2015. It dismissed the appeal and upheld the listing decision that had been made by the local authority. In doing so Judge Lane rejected an argument put forward by the local authority to the effect that viewing the site from the footpaths without physical use of it could amount to an "actual use". This point has not been raised in the appeal to the Upper Tribunal and I make no further reference to it.

13. The appellants applied to the First-tier Tribunal for permission to appeal further to the Upper Tribunal. Two grounds were advanced, referred to at the hearing before me

as the "[statutory] construction point" and the "future use point". On 29th May 2015 Judge Lane gave permission to appeal to the Upper Tribunal on the first ground but not on the second ground. On 10th August 2015 I gave permission to appeal on the second ground as well and directed submissions. On 15th December 2015 I directed that there be an oral hearing of the appeal but it was not possible for this to be listed until 3rd May 2016.

The statutory construction point

14. This point concerns the meaning of the phrase "actual use" in section 88(2) (a) of the 2011 Act. From September 2014 (and therefore at the time of the First-tier Tribunal decision) there was no relevant current use within the meaning of section 88(1)(a).

15. The appellant argued that the phrase "actual use" in section 88(2)(a) must be read as referring exclusively to lawful use. This is because of the principle of interpretation of legislation known by the Latin tag *in bonam partem* (in good faith). A number of cases were cited but the leading modern authority on this doctrine is the decision of the Supreme Court in Welwyn Hatfield Borough Council v Secretary of State for Communities and Local Government and another [2011] UKSC 15, [2011] 2AC 304 ("Welwyn Hatfield").

16. In Welwyn Hatfield a builder obtained planning permission to construct a hay barn on open land in the Metropolitan green belt, subject to the condition that it was to be used only for the storage of agricultural products. At the end of July 2002 he completed a building which had the external appearance of a hay barn but which was fitted out internally as a single dwelling house. On 9th August 202 he and his wife moved into the building and lived there undetected for four years. The builder had deliberately deceived the planning authority when applying for permission, had always intended that the building be used as a dwelling house, and had carried out a planned and deliberate deceit over an extended period to establish immunity from enforcement action.

17. Section 171B of The Town and Country Planning Act 1990 (as amended) provided limitation periods in respect of enforcement action for a breach of planning control. In general, where building (or certain other) operations were carried out without planning permission, or where there was a breach of planning control consisting in the change of use of any building to use as a single dwelling house, the limitation period was four years. For any other breach the limitation period was ten years. Section 191 (as amended) provided that any failure to comply with any condition or limitation, subject to which planning permission had been granted, was lawful if the limitation period had passed and there was no contravention of any enforcement notice or breach of condition notice then in force. A person could apply to the local planning authority for a certificate of lawfulness.

18. On 15th August 2006 the builder applied for a certificate of lawfulness. The authority refused to issue a certificate on the basis that the building was not a dwelling house and the limitation period was ten years. The Secretary of State (by inspector)

allowed the builder's appeal and granted the certificate. A High Court judge held that the four year period did not apply and allowed the authority's appeal. The Court of Appeal reversed the decision of the High Court. The Supreme Court reversed the decision of the Court of Appeal. The Supreme Court held that the construction of the building had begun and been completed as a dwelling house and not as a barn, therefore there was no change of use, and the four year period did not apply.

19. More relevant for the purposes of the present appeal the Supreme Court also discussed the doctrine *in bonam parte.* Lord Mance referred to the local planning authority's reliance on Halsbury's Laws of England (1995, volume 44(1) paragraphs 1450, 1453):

> 1450. *Law should serve the public interest.* It is the basic principle of legal policy that law should serve the public interest … Where a literal interpretation would seriously damage the public interest, and no deserving person would be prejudiced by a strained construction to avoid this, the court will apply such a construction. In pursuance of the principle that law should serve the public interest, the courts have evolved the important technique known as construction *in bonam partem* (in good faith). If a statutory benefit is given only if a specified condition is satisfied, it is presumed that Parliament intended that benefit to operate only where the required act is performed in a lawful manner.
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> 1453. *Illegality* … Unless the contrary intention appears, an enactment by implication … imports the principle of legal policy embodied in the maxim *nullus commodum capere potest de injuria sua propria* (no one should be allowed to profit from his own wrong). …

20. Lord Mance also referred to a number of authorities but added (paragraph 54):

> 54. Whether conduct will on public policy grounds disentitle a person from relying upon an apparently unqualified statutory provision must be considered in context and with regard to any nexus existing between the conduct and the statutory provision …

21. He concluded that even if sections 171B and 191 had been applicable to the facts of that case;

> 58. I would have concluded that their language could not have been intended to cover the exceptional facts of this case, where there was positive deception in the making and obtaining of fraudulent planning applications, which was directly designed to avoid enforcement action in respect of the building itself.

22. The other six Justices of the Supreme Court sitting on the appeal agreed. Lord Brown commented (paragraphs 73 and 80 to 81):

> 73... Clearly it would be impossible to superimpose upon the statutory scheme any sort of broad principle to the effect that no one guilty of wrongdoing can

> be allowed to benefit from the limitation periods of the 1990 Act. That indeed would be inconsistent with the plain intention of this legislation. Inevitably the breaches of planning control statutorily said to become immune from enforcement under section 171B involve a spectrum of wrongdoing. These range from cases at one end where the developer is simply unaware of the need for development permission to, at the other extreme, those intent on unpermitted development who plot a whole course of deception designed to circumvent planning control and escape enforcement. …
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> 80. [In this case the builder's] position [was that] his was a deliberate, elaborate and sustained plan to deceive the council from first to last, initially into granting him a planning permission and then into supposing that he had lawfully implemented it and was using the building for its permitted purpose. His conduct throughout was calculated to mislead the council and to conceal his wrongdoing … On any possible view the whole scheme was in the highest degree dishonest and any law-abiding citizen would be not merely shocked by it but astonished to suppose that, once discovered, instead of being enforced against, it would be crowned with success …
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> 81. Frankly the dishonesty involved in this case is so far removed from almost anything else that I have ever encountered in this area of the law that it appears to constitute a category of its own. …

23. The appellant argued that the starting point in interpreting section 88 of the 2011 Act must be that parliament did not intend land or buildings used unlawfully through trespass to be capable of being listed as an asset of community value on the basis of such use. This interpretation must prevail unless there are clear words in the statute to indicate the contrary. Such contrary intention must be "discerned from the language used and rather than by reference to the facts of a particular case (as the First-tier Tribunal seemed to do here" (paragraph 29 of the skeleton argument of 19th April 2016). There was no such intention and it is difficult to see how use of land that involves regular and repeated commission of a tort can further the social wellbeing or social interests of a local community. There is no equivalent in section 88 of the words used in section 15 of the Commons Act 2006 in relation to the registration of town and village greens. In the case of section 15 there is an "as of right" requirement which covers trespassory use that is without stealth, force stealth or submission. That is not the case with section 88 of the 2011 Act.

24. The appellant argued further that if unlawful use could be a qualifying use, and the landowner erected fences and notices to exclude the public that were damaged and/or ignored, the normal actions of a landowner to protect their interests would have no legal effect and would leave them in an impossible position.

25. The First-tier Tribunal rejected the appellant's arguments. Caution must be employed when invoking public policy as an aid to statutory construction (as per Lord Neuberger in Barkas v North Yorkshire County Council & Another [2014] UKSC 31). In addition to the procedure under section 15 of the 2006 Act, courts have been willing to recognise rights such as easement by prescription even in respect of

criminal activities carried out during the relevant limitation period (Bakewell Management Limited v Barndwood & Others [2004] UKHL 14) or rights of registration as a proprietor notwithstanding that the occupier had been committing criminal trespass (Best v Chief Land Registrar & Secretary of State for Justice [2014] EWHC 1370 (Admin)).

26. The First-tier Tribunal pointed out that prior to any damage of the fencing the use of the field by the local community was entirely peaceful in nature with no evidence of criminal damage or other criminal activity (paragraph 34 of its Decision Notice).

27. The First-tier Tribunal declined to interpret section 88 of the 2011 Act so as to insert the word "lawful" after the word "actual". However, it said that this did not mean that there was *carte blanche* to use the provision in ways that would violate the *in bonam partem* principle. This was because of the requirement that the use of the land in question must further the social wellbeing or social interests of a local community. The First-tier Tribunal continued (paragraph 35)

> 35. … Furthermore, it would in any case be wrong to rule out any application of the *in bonam partem* principle to section 88, merely because, on the facts of this case, I have concluded that a particular technically unlawful use of the land is not *per se* outside the ambit of the section.

28. I agree with the argument of Mr Edwards for the appellant on this latter point. There can only be one proper construction of the provisions of section 88. Its interpretation and meaning do not depend on the particular circumstances or facts of a particular case (although its application might well do so). On this particular point the First-tier Tribunal was in error but that does not undermine my general endorsement of the right of the First-tier Tribunal to make the decision that it did make.

29. The local authority supports the decision of the First-tier Tribunal. It argued that taints of technical unlawfulness do not automatically block a listing under section 88, especially where there had previously been no objections to the conduct subsequently complained of. The appellant "effectively seeks to impose an inflexible bright-line rule for which there is no basis" (paragraph 27 of the skeleton argument of 15th April 2016). The *in bonam partem* principle does not necessarily bite where the conduct in question was not objected to, caused no harm, and nobody sought to gain any private rights or benefits. The concept of the social wellbeing or social interests of a local community accommodates the public considerations underlying the *in bonam partem* principle. If an unlawful use did not further those interests, then section 88 would not be satisfied.

Conclusions on the statutory construction point

30. The starting point on an issue of statutory construction must always be the actual words of the statute. Section 88(1)(a) of the 2011 Act uses the words "an actual current use". Section 88 (2)(a) uses the words "when an actual use". It would have been easy to insert into each of these provisions the word "lawful". No such word was inserted and there was no indication anywhere in the relevant provisions that any such

general limitation was intended. On the face of it the words in the statute are unambiguous. Thus the use need not be lawful unless there is some other way in which the law provides that it should be.

31. The doctrine of *in bonam partem* in relation to statutory interpretation may well be of great use and very relevant to a provision like section 191 of the 1990 Act where, in its absence, the most blatant and dishonest frauds could otherwise (after four years) be cloaked in legality. However, as Lord Mance said in Welwyn Hatfield (see above), whether conduct will on public policy grounds disentitle a person from relying upon an apparently unqualified statutory provision must be considered in context and with regard to any nexus existing between the conduct and the statutory provision. The context in relation to assets of community value is that the 2011 Act already defines the way in which the public benefit should be taken into account. This is by providing that an asset may only be listed if there is or was (as appropriate) and will be a use to further the social wellbeing or interests of the local community. Whether those facts are established is a matter for the local authority or, on appeal, for the First-tier Tribunal. That is the inbuilt protection against the type of behaviour seen in Welwyn Hatfield and some other cases. Further, In the case of assets of community value, listing provides purely public benefit and creates no private rights of the kind that were sought in Welwyn Hatfield. It would be against the whole policy and scheme of the relevant provisions of the 2011 Act for the creation of a public benefit to be undermined by the actions of unidentified private trespassers. It cannot be said that in a case such as the present that a literal interpretation would seriously damage the public interest. There are indeed clear words in the statute to indicate that the interpretation for which the appellant argues is incorrect. The present case is a million miles from the situation in Welwyn Hatfield which "appears to constitute a category of its own" (see above).

32. In addition, the landowner certainly has one remedy in this context, which is to challenge listing on the grounds of absence of any social wellbeing or social interests of the local community.

33. If there are conflicting public benefits – the protection of assets of community value and the prevention of illegality in a particular sphere – that is precisely the type of conflict that is for parliament to resolve. It is not for the courts to decide between them on the basis of doctrines of interpretation.

The Future Use Point

34. Section 88(2)(b) sets out as one condition for listing that "it is realistic to think that there is a time in the next five years" when there could be a relevant use of the building or other land.

35. The First-tier Tribunal noted that it was said on behalf of the appellant that it was not and never been its intention to grant rights of access or use of the land to any person other than their own employees, agents and contractors or to accept liability for any injury to those unlawfully accessing the land, particularly given its overgrown condition.

36. However, in paragraph 38 of its Decision Notice the First-tier Tribunal said:

> 38. I nevertheless find, as a fact, that the requirements of section 88(2)(b) are satisfied. Given the long history of peaceable socially beneficial (if formally unauthorised) use of the Field, and of the previous views of its owners, I do not consider that it is all fanciful to think that, in the next five years, there could be non - ancillary use of the land, along the lines that pertained up to September 2014. The timing of the decision to fence the footpaths – coming hard upon the listing under the 2011 Act – strikes me as material. Also of significance is the uncertain present planning position of the land, where a recent application for the grazing of horses has been refused. Whilst I note Banner Homes' current stated stance, it is not fanciful, given the history of the field, to think that Banner Homes may well conclude that their relations with the local community will best be served by restoring the *status quo* or by entering into some form of licence arrangement with the Residents' Association or similar grouping.

37. The appellant attacks this on two grounds. The first is that the First-tier Tribunal applied the incorrect test in considering whether the recommencement for use was "fanciful" rather that whether it was "realistic". It is argued that these terms are not synonymous and that the First-tier Tribunal has used a lower threshold than "realistic". The local authority argues that "not fanciful" is a "perfectly legitimate synonym for "realistic" and cites other legal contexts in which the words have been sued interchangeably.

38. In my opinion it is always wiser to use the statutory language. That is more likely to focus the mind and avoid the risk of error. However, in the present context I cannot envisage any empty space between what is "not fanciful" and what is "realistic" and the First-tier Tribunal was not in error of law on this point.

39. The other ground is that the First-tier Tribunal reached its decision "in spite of unchallenged evidence" given on behalf of the appellant as to the fencing and notices. Although findings of fact must be based on the evidence in a particular case, the question of what is realistic for the future is a matter of judgment for the local authority or, on appeal, for the First-tier Tribunal. It is not a matter for veto by the landowner. The First-tier Tribunal made a finding that was open to it on the particular facts of this case, especially in view of the history of use, and for reasons that it explained.

40. For the above reasons this appeal does not succeed.

H. Levenson
Judge of the Upper Tribunal
11th May 2016