C1/2004/2527

Neutral Citation Number: [2005] EWCA Civ 835
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
THE QUEEN'S BENCH DIVISION
(MR JUSTICE KEITH)

Royal Courts of Justice
Strand
London, WC2

Tuesday, 14th June 2005

B E F O R E:

THE VICE-CHANCELLOR

LADY JUSTICE ARDEN

LORD JUSTICE KEENE

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KEMNAL MANOR MEMORIAL GARDENS LTD

-v-

THE FIRST SECRETARY OF STATE &
THE LONDON BOROUGH OF BROMLEY

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(Computer-Aided Transcript of the Stenograph Notes of
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MR J CLAY (instructed by Messrs Brachers) appeared on behalf of the Applicant
MR P BROWN (instructed by Treasury Solicitors) appeared on behalf of the Respondent

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J U D G M E N T

1. THE VICE-CHANCELLOR: Lord Justice~Keene will give the first judgment.

2. LORD JUSTICE KEENE: This is an appeal against the decision of Keith J by which he dismissed an application by the appellant under section 288 of the Town and Country Planning Act 1990 ("the 1990 Act") against the decision by a planning inspector appointed by the first respondent.

3. It concerns a proposal for a cemetery and crematorium in the metropolitan green belt adjoining the A20 Sidcup bypass in the London Borough of Bromley. The Borough Council had refused planning permission for the proposed development and the appellant had appealed under section 78 of the 1990 Act.

4. The site amounts to some 30 hectares of land, all within the metropolitan green belt; a part of it, the smaller part, is known as Flamingo Park. That consists of a privately owned sports ground and playing fields, including a large sports pavilion, and disused tennis courts now used for car parking. The playing fields are in active use at weekends and are used for car boot fairs about 14 times a year. The pavilion is also used for functions of various kinds.

5. The southern part of the site is much the larger part. It was once the estate of Kemnal Manor, which has now been demolished and this part of the site is mostly overgrown woodland, parkland and ornamental grounds.

6. The estate lies within the Chislehurst conservation area and a part of the grounds is proposed to be designated for a site of importance for nature conservation. The estate is unmanaged and is used for informal recreational purposes by local residents, even though there are no public rights of access.

7. The proposal by the developer was to demolish the pavilion and to replace it with a new building to be used as a chapel and crematorium. There would be a car park, a new access from the A20 in addition to the existing one, allowing a one-way traffic system to be created, a garden of remembrance, and then the remainder of the site, except for those areas where woodland is to be protected, would be used as burial grounds including some woodland burial grounds.

8. The application for permission was an outline one with all matters, except siting and access, reserved. But the illustrative drawings submitted by the appellant showed that the crematory, with its six cremators, would be in the basement of the proposed building and two chapels, catering for both cremations and funerals, would be on the ground floor with waiting and other rooms and some offices. There would be other offices and function rooms on the first floor.

9. No chimney stack was shown as such on the elevation plan, but the position of the flue indicated that it would probably stand separately at the rear of the building. The inspector noted that it would need to be a minimum of 12 metres high, or 3.5 metres above the height of the building, in order to comply with the guidelines on the siting and planning of crematoria.

10. Section 54A of the 1990 Act required a decision on the application to be made in accordance with the development plan, unless material considerations indicated otherwise. The development plan for the area was the London Borough of Bromley Unitary Development Plan which, by policy G2, effectively incorporated national policy on development in the green belt, as set out in Planning Policy Guidance Note number 2, which I shall call PPG2. Thus it provided that, except in very special circumstances, permission would not be given for inappropriate development in the green belt.

11. Policy L-11 resisted the loss of private recreational open space and encouraged its community use. Policy L-12 resisted the loss of public playing fields, which the supporting text indicated included privately owned playing fields in public use.

12. The national policy context of most relevance is to be found in PPG2 on green belts and in PPG17 on planning for open spaces, sport and recreation. Paragraph 3 of PPG2, in so far as is material for present purposes, states:

> "3.1 The general policies controlling development in the countryside apply with equal force in green belts but there is, in addition, a general presumption against inappropriate development within them. Such development should not be approved, except in very special circumstances ...
>
> "3.2 Inappropriate development is, by definition, harmful to the green belt. It is for the applicant to show why permission should be granted. Very special circumstances to justify inappropriate development will not exist unless the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations. In view of the presumption against inappropriate development, the Secretary of State will attach substantial weight to the harm to the green belt when considering any planning application or appeal concerning such development."

13. Paragraphs 3.4 to 3.6 inclusive deal with new buildings in the green belt. The first of those paragraphs provides that:

> "The construction of new buildings inside a green belt is inappropriate unless it is for the following purposes ..."

14. Then a number of purposes, such as agriculture and forestry, are set out. One of those stated purposes reads as follows:

> "Essential facilities for outdoor sport and outdoor recreation, for cemeteries, and for other uses of land which preserve the openness of the green belt and which do not conflict with the purposes of including land in it (see paragraph 3.5 below)."

15. Paragraph 3.5, there referred to, states:

> "Essential facilities (see second indent of paragraph 3.4) should be genuinely required for uses of land which preserve the openness of the

green belt and do not conflict with the purposes of including land in it. Possible examples of such facilities include small changing rooms or unobtrusive spectator accommodation for outdoor sport, or small stables for outdoor sport and outdoor recreation."

16. The inspector who conducted the public inquiry into the planning appeal identified the two main issues in his decision letter as follows:

> "Firstly, whether the proposal amounts to inappropriate development in the green belt, and if so, whether there are any very special circumstances sufficient to overcome the presumption against such development. Secondly, the effect of the proposed development on planning policies intended to preserve local sport and recreational facilities."
>
> He dealt with the two main issues in that order.

17. Because a significant part of the appellant's attack on the inspector's decision concerns the inspector's reasoning, it is necessary to set out substantial parts of the decision letter in this judgment.

18. On the green belt issue, the inspector stated as follows at paragraphs 11 to 13 inclusive of the decision letter:

> "11. The appellant reasoned that as the building would have a smaller footprint and mass than the existing building and the crematorium would not take up any above ground space, it would therefore not physically harm the green belt or the purposes of the green belt. The building could also be regarded as being essential for the use of the site as a cemetery as permitted by Planning Policy Guidance: Greenbelts (PPG2). And its size and that of the car parks etc, would be entirely dictated by the maximum anticipated congregation size, which could equally be for a burial as for a cremation. However, whilst cemeteries are appropriate development in the green belt, crematoria are not. Inappropriate development is by definition harmful to the green belt and contrary to policies to protect it unless very special circumstances exist.
>
> "12. Moreover, the proposed development needs to be considered as a whole. It was accepted that 72% of all deaths involve a cremation-based funeral, and that the viability of the proposal was dependent upon the provision of a crematorium. I also note that, whilst in the appeal referred to by the appellant, my colleague Inspector allowed the appeal to approve the details of a chapel for a cemetery in the green belt on a site at Halstead (APP/G2245/A/98/293974 and 293981), the Secretary of State earlier dismissed an appeal for a crematorium and chapel on the same site (APP/G2245/A/94/237563-4) on the grounds that it was inappropriate. For the above reasons I conclude that this proposal would also be inappropriate development.

> "13. The number of cremators in the illustrated plan were higher than, and the number of chapels the same as, that of Eltham, the busiest of the nearby crematoria with a peak capacity of 150 cremations a week and a funeral every 15 minutes when operating at this level. It seems to me therefore that there was the potential for a significant increase in day-to-day activity on this site as a result of the comings and goings of funeral processions and visitors to the cemetery and Garden of Remembrance. And that this would be much greater than the occasional disruption the current use of the appeal site for boot fairs caused. In addition, a new access road needed to be constructed, together with a walled Garden of Remembrance and a chimney stack for the crematorium as well as a substantial landscaping scheme. In my view, cumulatively, these would cause a reduction in the openness of the site and encroachment into the countryside. Nor would this be offset by the restoration of the Estate or improved opportunities for public access. I consider the development would therefore be injurious to the green belt."

19. Then the inspector turned to consider whether there were any "very special circumstances" in this case that would outweigh the presumption against inappropriate development. He dealt first with the appellant's arguments based on the need for more crematoria capacity. He covered this at some length before concluding at paragraph 20 that such need had not been proven.

20. He then considered the landscape improvements which would be achieved in comparison to the existing neglected state of the site, but he did not regard that particular gain as significant.

21. He concluded at paragraph 22 on this issue:

> "... none of the matters raised in support of this proposed development either individually or cumulatively amount to very special circumstances sufficient to overcome the presumption against inappropriate development in the green belt set out in national and local planning policies."

22. The challenge in this appeal to that decision raises issues both as to the green belt aspect of the case and as to the way in which the inspector dealt with the objection concerning playing fields and recreational facilities.

23. It is convenient to take the matters raised in this appeal on the green belt issue first. Indeed, the outcome of the appeal on that issue could prove to be decisive. I share the view expressed by Carnwath LJ, when this court granted permission to appeal, that success for the appellant on the open space and playing field issue would not be sufficient to turn the case in its favour, since a valid green belt objection to the development would, by itself, warrant a refusal of permission.

24. Nonetheless, this court took the view that there was a properly arguable point on the green belt issue. That point was whether the inspector had adequately dealt with the issue of whether a crematorium was appropriate development in green belt policy terms.

Carnwath LJ noted that the inspector had dismissed that possibility in one sentence at the end of paragraph 12, which I have set out earlier in this judgment, and that the consideration of the effect of the development on the openness of the green belt, in paragraph 13, arguably could not be prayed in aid to make good any deficiency in the inspector's earlier reasoning.

25. That, indeed, is the way in which the point is put in ground 1 of the appellant's notice and which has been developed by Mr Clay on behalf of the appellant today. He contends that the reasoning of the inspector on the appropriateness issue is fundamentally flawed. He emphasises that the major part of the development, in terms of land use -- namely the change of use to cemetery use -- is an appropriate use in the green belt and that the above ground parts of the new chapel building were to be used for services both for the cemetery and for the crematorium. Only the basement area, where the cremators were to be located, and the chimney stack for the flue, would be exclusively used for non-cemetery purposes.

26. Consequently, it is submitted that the inspector's reasoning failed to identify what part of the buildings were not essential for cemetery use and then to consider the question of harm in relation to those elements. Mr Clay submits that only a small component of the whole proposal was inappropriate to the green belt and that that component caused no material harm to the objectives of the green belt.

27. To an extent, Mr Clay concedes that the proposal was, in part, inappropriate development in the green belt, but he argues that the inspector failed to give adequate reasons for finding that the development, as proposed, was to be treated as inappropriate. It is contended that one cannot properly conflate the points made by the inspector at paragraph 13 of his decision letter with paragraphs 11 and 12, because in paragraph 13 the inspector was dealing with the effect which this particular development would have on the openness of the green belt, not with the nature of the proposed development as such and its appropriateness or inappropriateness as development in the green belt. It is stressed that when one is dealing with the issue of appropriateness, one is concerned with the matter of principle and policy concerning the nature of the proposal, rather than with the particular characteristics in the given case.

28. It seems to me that the critique advanced by Mr Clay of the inspector's reasoning upon this aspect suffers from the very shortcoming which he asserts is present in that reasoning. Mr Clay rightly distinguishes between whether the development is appropriate in the green belt and how much harm to the green belt a particular proposal would do. That is a proper distinction to make, as was recognised in Vision Engineering Ltd v Secretary of State for the Environment [1991] JPL 951. But to criticise the inspector for not considering how much harm the elements of the proposed buildings, not essential for a cemetery, would do, is to move into the very territory of the second of those two questions, and not the first; the first being simply one of the appropriateness in principle of the development in the green belt.

29. If one considers how the inspector dealt in his decision letter with the issue of inappropriateness, one does have to remember how that issue was approached by the parties to this planning appeal. The courts have said many many times that a decision

letter is to be read in that context. (See, for example, Seddon Properties Ltd v the Secretary of State for the Environment [1978] 42P&CR 26 at 28.) As it was put more recently, in South Bucks District Council and another v Porter [2004] UKHL 33 and [2004] 1 WLR 1953 by Lord Brown of Eaton-under-Heywood, at paragraph 36:

> "... Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced."

30. In the present case, as is pointed out by Mr Paul Brown in the written argument lodged on behalf of the First Secretary of State, it was in effect conceded by the appellant at the planning inquiry that the proposed development would, in part, be inappropriate development in the green belt. Its planning witness, Mr Robinson, stated in his proof of evidence at paragraph 7.5 that in his view:

> "... a substantial proportion of the proposed crematorium building can be regarded as being appropriate development within the scope of the advice in PPG2."

That clearly implies that a proportion of the proposed building would not be appropriate development in those terms.

31. Lest there be any doubt that Mr Robinson was conceding that part of it would be inappropriate, he accepted in the following paragraph that there was an obligation on the appellant to show very special circumstances to justify the additional features not required for the cemetery use.

32. Moreover, in his closing address at the inquiry, Mr Clay himself defined the green belt issue in these terms:

> "Whether there are very special circumstances, including the need for cemetery and crematorium facilities which outweigh the harm by reason of inappropriateness which would be caused to the green belt."

33. So the inappropriateness of the development, at least in part, was patently accepted. That is the context in which the inspector's decision letter has to be read. In so far as, therefore, the inspector was dealing with this policy issue of appropriateness, he was entitled, in my view, to take the matter very shortly indeed. There was scarcely any issue about it.

34. At this stage of the analysis, it was not appropriate to try dividing the development proposal up into segments, into those parts which would be appropriate and those which would be inappropriate. At this stage of dealing with the matter as a question of green belt policy, this was to be treated as a single development proposal and, as the inspector pointed out at paragraph 12, the crematorium aspect was in no sense insignificant. Indeed, it might be regarded as fundamental for the whole project. He noted that "72% of all deaths involved a cremation based funeral." I would emphasise that a development is not to be seen as acceptable in green belt policy terms merely because part of it is

appropriate. That would be the fallacy committed by the curate when tackling his bad egg.

35. The real issues about the green belt were how harmful this particular development would be to the objectives of the green belt and whether there were very special circumstances which would justify permission being granted, despite the inappropriateness of the development and the harm which it would cause. The inspector dealt with the first of those two matters in paragraph 13 referring, amongst other things, to the intensity of activity, the new access road, the walled Garden of Remembrance and the chimney stack for the crematorium. He found that the development would be "injurious" to the green belt. That was a finding of fact and not something with which this court would interfere.

36. It is true that the inspector did not expressly compare the degree of harm thus caused by the proposed development with the harm which would result from a cemetery use, had that been the proposal; but he was not required to. No-one was proposing a "pure" cemetery use of this land. Nor, on the evidence, would such use be viable (see paragraph 12 of the decision letter).

37. I therefore would reject the criticism of the way the inspector dealt with whether the development was appropriate or inappropriate in the green belt. In my judgment, the degree of reasoning which he provided was entirely adequate, given the context in which this issue had been presented between the parties.

38. A further point, described by Mr Clay as a subsidiary one, is raised about the green belt issue, namely as to the adequacy of the inspector's consideration of "very special circumstances" which might justify planning permission being granted. Here, it is contended that the inspector only dealt with the circumstances of the need for the proposed facilities and of the landscaping gain and that he failed to take into account other circumstances raised under this topic.

39. In particular, it is said that the inspector failed to deal with the benefit resulting from the proposed demolition of the existing 4-storey pavilion. That demolition is not mentioned where the inspector dealt in his decision with the very special circumstances. Even if the inspector took it into account, Mr Clay argues that one has no idea how much weight the inspector attached to this factor and the appellant is prejudiced thereby.

40. It is quite right that there is no express mention of the pavilion demolition in that paragraph of the decision which deals with very special circumstances. That, of course, does not mean that the inspector left it out of account. He was clearly very well aware of this aspect of the proposals because he refers to it repeatedly in the decision letter at paragraphs 7, 9 and 11. Such letters by planning inspectors have, according to a long list of authority in this Court and elsewhere, to be read as a whole. An inspector is not required to spell out every matter expressly which he has taken into account. Here the appellant had put at the forefront of its case on very special circumstances the need for the proposed facility, and understandably the inspector gave that the pride of place in his analysis of very special circumstances. That does not mean that he ignored the other matters which had been raised. I cannot, for my part, accept that the inspector overlooked the proposal to demolish the existing pavilion.

41. In any event, in my judgment the matter goes somewhat further than that. "Very special circumstances" come into play in such cases as part of the balancing exercise. On the other side of the scales is the presumption against inappropriate development in the green belt and the harm to green belt objectives that the particular proposal would do.

42. Here the inspector, in assessing the harm which the proposal would do to green belt objectives, had concluded that the proposed development would "cause a reduction in the openness of the site". That comes from paragraph 13 of the decision letter. The use of the word "reduction" there indicates that he was carrying out a comparative exercise between the present state of affairs, with the pavilion standing, and the proposed future state of affairs, where the pavilion would have been demolished, but with all the impacts referred to in paragraph 13.

43. In other words, it seems to me that the inspector had already taken account of the proposed demolition of the pavilion when he was assessing the harm to the green belt which would result from these proposals. To bring it in again as very special circumstances, or part of the very special circumstances, would have amounted to a form of double-counting.

44. Looked at overall, therefore, I can see no basis for regarding the inspector's treatment of "very special circumstances" as being flawed.

45. It follows that I would reject the challenge to the inspector's conclusion that there was a valid green belt objection to this proposal. As I have already indicated, that, in my judgment, is sufficient to dispose of this appeal. Even if the decision letter were flawed in respect of the open space and playing fields objection, and I do not seek to say that it was, there would be no realistic prospect of planning permission being granted here, given the importance attached in planning terms to the green belt. As a matter of discretion, I would not be prepared to quash the decision and send it back to be remade because no useful purpose would be served by such a course, given the conclusion to which I have come on the green belt issue.

46. It follows that, for the reasons I have indicated, I, for my part, would dismiss this appeal.

47. LADY JUSTICE ARDEN: I agree.

48. THE VICE-CHANCELLOR: I also agree.

Order: Appeal dismissed. Defendant's costs order granted.