Sosmo Trust Ltd v The Secretary of State for the Environment & The London Borough of Camden [1983] Lexis Citation 545

[1983] JPL 806

QUEEN'S BENCH DIVISION, CROWN OFFICE LIST

WOOLF J

21 FEBRUARY 1983

21 February 1983

M Barnes QC & E Caws for the Applicants; S. Brown for the First Respondent; The Second Respondent did not appear and was not represented.

Nicholson Graham & Jones; The Treasury Solicitor.

WOOLF J

This is an application in respect of a decision by an Inspector as to whether or not planning permission should be granted on an appeal to the Secretary of State from a decision of the planning authority to refuse planning permission, the Secretary of State having authorised the Inspector to make the decision on his behalf.

The decision was contained in a letter dated 27th September, 1982. The Inspector refused to allow the appeal and grant outline planning permission for the erection of a six-storey block of offices over a semi-basement car park at 37-41 Pratt Street, London, W.1.

The local authority had refused planning permission on a number of grounds and they are conveniently set out at page 28 of the bundle before me. I do not propose to lengthen this judgment by setting them out. It suffices for me to indicate that apart from the matter which has been the subject of challenge before me, there were substantive grounds upon which the planning authority were entitled to refuse planning permission, and it has not been argued before me that the Inspector did not perfectly properly resolve all the other matters (apart from the one to which I am going to refer) properly in favour of the planning authority and therefore adversely to the present applicants.

However, the way the decision is worded in the decision letter is such that whereas it would have been possible for the Inspector to regard those other grounds as being such that in any event they would override the matter which is the subject of complaint, in fact he did not do so and therefore, if there is substance in the matter of complaint, the case will have to go back to the Secretary of State for reconsideration because it cannot be said in this case that the decision would inevitably have been the same irrespective of the matters of complaint.

The complaint arises out of these facts. The properties now standing at the address in question are unoccupied and to some extent derelict. It was the applicants' case that special considerations arose with regard to their application for planning permission because of the state of the buildings present in the locality.

The decision letter satisfactorily sets out the state of the premises and the use which has been made of the premises in the past. It records the fact - and this was part of the argument of the applicants - that the building was built about 1900 and was first occupied as a furniture factory. From 1950 onwards it was used for the manufacture and storage of clothing but for a few years prior to 1978 was used solely for the storage of cloth. The building was acquired by the present applicants in 1954, and following the expiration of a lease in 1978 it had remained unoccupied despite their efforts to re-let it for industrial purposes.

The building started to show signs of structural defects and those had been confirmed by a distinguished firm of consulting engineers. There had been discussions, because of the lack of success in re-letting the premises for industrial purposes, between the planning authority and the present applicants, during which different schemes were considered. First of all to change the use of the second and third floor of the premises to offices. Alternatively to change the second and third floor to offices and add a further floor of offices and, finally, to change the first, second and third floors to offices. All these discussions were, however, fruitless because, according to the applicants, it was not possible to successfully carry out the necessary structural work in a manner which would restore the building to a usable condition, and therefore a decision had been reached that it would be necessary to demolish the building and to re-develop the site.

The way the matter was put by the applicants before the Inspector appears quite clearly from paragraph 12 of the decision letter, which is in these terms: "Unless approved development was economically viable, development would not take place and the appeal site would continue to lie idle. The submitted financial appraisals of possible re-development schemes... indicated that a 4-storey development of ground floor industrial use and three upper floors of office use would show a financial loss; that a 4-storey development of office use would break even and that a 6-storey development of office use with basement car parking would produce a surplus of some £305,000, equivalent to a return of about 12.5%."

The appraisals which are referred to in that paragraph are included in the papers that are before me, and they show three alternative schemes, the first two being ones which produce an uneconomic return and the third being one which produced an economic return. The first included light industrial use of the ground floor of the premises coupled with office use above. The second scheme was confined to offices but was limited to three upper floors. The third contained the larger area of office space which would be the result of using the whole building for offices, if it had additional floors.

The planning authority, before the Inspector, did not oppose in principle a scheme on which the first and second appraisal were founded but opposed the third appraisal because the result of the additional office space, in the planning authority's judgment, made the scheme unacceptable.

One of the matters which the Inspector decided in favour of the planning authority and against the present applicants was that the subject matter of the third appraisal which was the scheme which was the subject matter of the application for planning permission, contravened the planning policy for the area. In particular, as the Inspector found, the site lay outside the preferred office location of the Camden Town Action Area. However, it was fundamental to the case that was being put forward by the applicants that even though that should be the conclusion, the decision of the Secretary of State by his Inspector should be in their favour because if permission was not granted the result would be that the site would be left with a building which could not be used, redevelopment would not take place and that would lead to planning consequences which were more undesirable than the consequences which flowed from the departure of the planning policy to which I have made reference.

The way the matter was dealt with by the Inspector is set out in paragraph 29 in these terms. "You submitted that neither a mixed use development nor an office development of less than 6-storey design would prove to be an economically viable proposition and that if the appeal was rejected, the existing building would remain unoccupied and derelict. However as a generality, the financial aspects of a development are not a relevant planning

consideration. A planning permission runs with the land and in my opinion it would not be appropriate for the grant of permission to be dependent on the resources or intentions of a particular developer to carry out a development. The authority questioned the rental assumptions adopted in the financial appraisal submitted to justify the appeal scheme and it appears to me that any possibility of a downward movement in those assumptions could undermine the validity of that appraisal. Having regard to these various considerations, I am of the opinion that there are no compelling reasons in favour of allowing the appeal proposal contrary to the office policy of the district plan."

It will be appreciated that the argument of the applicants had two related strands. First of all there was the argument that a lesser development, that is a development which did not have the amount of office content for which they were contending, would be economically non-viable and therefore would not be carried out and, secondly, that their proposal was economically viable.

In relation to the second strand of that argument, the paragraph to which I have justreferred must be understood having regard to the fact that before the Inspector the authority had suggested that the figures contained in the appraisal, in respect of the proposal for which planning permission was sought, were unduly favourable, in so far as they were assuming that a rent of £10 per square foot for offices was likely to be obtained, whereas the planning authority were of the view that a lesser figure might only be capable of being obtained. This would, of course, have the consequence of making the third scheme at least less profitable than the applicants thought, if not one, which like the earlier two schemes, could not economically be carried out.

There have been a number of authorities on the question as to whether or not, on an appeal of this sort, it is proper to take into account the economic viability of a development which is proposed or the economic consequences of not carrying out a development which is proposed.

Although the various authorities are, at first sight, in conflict, in my view it is possible to reconcile satisfactorily the various statements which are made once it is appreciated that the same approach is not necessarily appropriate in all inquiries which are conducted into planning matters, and that what can be significant is not the financial or lack of financial viability of a particular project but the consequences of that financial viability or lack of financial viability.

Applying that approach to this particular case, it seems to me that it could not possibly be contended that in a case where the issues were such as I have indicated already, the question of economic viability can be put to one side. Indeed, no such argument was advanced by Mr. Brown on behalf of the Secretary of State in this case.

It must be a planning consideration that a consequence of not granting planning permission is that an existing building is going to be left unoccupied and derelict. That is a matter which would inevitably have to be taken into account in deciding whether or not a change should be allowed as to the use of a site or as to what is to be allowed to be built on a site.

The weight which it has is, of course, a matter for the determining authority, in this case the Secretary of State. In relation to any particular proposal he is entitled to come to the conclusion (as long as it is one to which he could reasonably come) that the other planning considerations which also were relevant to his consideration of a particular application were so much more important that little, if no weight, was to be given to the consequences of refusing planning permission which would result in the existing state of affairs continuing. He would, however, not be entitled to shut from his mind the fact that unless an economically viable proposition was given planning permission, it would be unlikely that a change of circumstances would ever occur.

The greatest assistance on this problem is to be obtained from the decision at first instance of Mr. Justice Forbes in Sovmots Investments Limited v Secretary of State for the Environment and Others [1977] 1 QB 411. That was a case which subsequently proceeded to the House of Lords, but the matter which is relevant to this case which was dealt with by Mr. Justice Forbes, was not dealt with in the Court of Appeal or the House of Lords and Mr. Justice Forbes' views were therefore left undisturbed. It was also, it is to be emphasised, a case involving compulsory

purchase, and in a compulsory purchase case the importance of economic considerations may frequently be greater than they are in planning cases.

At page 424, Mr. Justice Forbes having referred to the judgment of Mr. Justice Ackner in the case of J Murphy & Sons Limited v Secretary of State for the Environment [1973] 2 All ER 26, [1973] 1 WLR 560, went on to say this: "Ackner J took the view that cost was an irrelevant consideration in determining whether planning permission should be granted under section 29 of the Town and Country Planning Act 1971. He also appears to have said that it was similarly irrelevant when considering a compulsory purchase order. If Ackner J was intending to say that cost can never be a relevant consideration either in a planning appeal or on a compulsory purchase order (and that I am told is how this decision is interpreted in Whitehall) then I find myself unable to agree with him. Of course planning is concerned with land use, but the Minister charged with the overall duty of considering applications for planning permission and the confirmation of planning proposals for particular areas must it seems to me be entitled to bear in mind the likelihood of the proposed development being carried into effect. If the Minister is faced with rival proposals for the development of a particular piece of land, and on land use grounds either rival solutions is equally attractive but one of them could only be carried out by an eccentric millionaire while the other would be regarded as a wise commercial venture by any sensible commercial undertaking, it seems to me that the Minister would be perfectly entitled to take this matter into account when deciding on the planning use of that particular piece of ground. One cannot shut one's eyes to the fact that at any rate a few years ago the practice of what was known as cost-benefit analysis was regarded as a useful tool in arriving at a proper decision on land use problems. Before the Minister's interpretation of the decision of Ackner J. became current, the economic viability of a projected scheme was frequently the subject of attack or justification at planning inquiries. Perhaps the longest inquiry ever held in the planning field was the special inquiry into proposals for the Third London Airport by the Commission presided over by Sir Eustace Roskill. The economic factors were not only there canvassed at great length; they were regarded by the commission as of such importance as to override the environmental objections and to determine the commission's recommendations.

"I think the position is a fortiori with compulsory purchase orders made by local authorities under Part V of the Housing Act 1957. It seems to me that the Secretary of State has a duty to consider cost in these cases, or at any rate in suitable cases may well have such a duty. The provision of housing accommodation after all involves the proper deployment not only of the ratepayers' but also the taxpayers' money and it seems to me that the Secretary of State is entitled to take these matters into account in suitable cases and that therefore cost can be relevant. That I think is the extent to which the court can give a ruling: cost may or may not be a relevant consideration depending on the circumstances of the case; all the court can do is to say that cost can be a relevant consideration and leave it to the Minister to decide whether in any circumstances it is or is not. Of course it follows that the weight to be given to cost, if it is a relevant factor, is also a matter for the Minister and not one in respect of which any court is entitled to substitute its opinion. Questions therefore whether in any particular case cost is relevant, as a primary, or only a secondary consideration are not for the courts but entirely for the Minister. I would conclude that it is impossible to say that cost can never be a relevant consideration either in a planning matter or in a compulsory purchase matter. It can be in both or either and it will depend in every case on the circumstances of the case. It is then a matter for the Minister to decide whether or not in any particular instance cost is in fact a relevant consideration. In the instant case I think the Inspector was put in some difficulty because no attempt was made to differentiate between relevance and weight, and the Inspector was to some extent left with the submission that whether cost was a relevant consideration or a primary consideration was one and the same argument".

That passage was approved by Mr. Justice Gibson in the case of Calflane Limited v Secretary of State for the Environment and Westminster City Council [1981] JPL 879. I would respectfully agree with what Mr. Justice Forbes there said. I would, however, add that while it is for the Secretary of State to decide whether in any particular case the question of cost is relevant, and in any particular case, assuming it is relevant, the weight that is to be attached to the question of cost, this particular case which I am considering is one where no Secretary of State could reasonably come to the conclusion that the economic factor was not relevant. He could not come reasonably to that conclusion: he could, however, subject to that, have decided what weight was to be attached to it.

Returning to paragraph 29, on behalf of the applicants Mr. Barnes, in his admirably clear submissions, makes three points. First of all, he says that that paragraph shows that the Inspector, in coming to his conclusion, deliberately excluded from consideration the economic lack of viability of the alternatives recommended by the planning authority as compared with the scheme which was the subject matter of the third appraisal, which was the one which the applicants had adopted.

Secondly, he says that the paragraph shows that the Inspector misunderstood and misrepresented the applicants' unchallenged evidence that the alternative developments to the one which they were proposing would not be carried out by anyone because of their lack of economic viability, and instead treated them as though they were ones which would not be carried out by the applicants because of their particular resources and particular intentions.

Thirdly, he argued that the Inspector had by inference regarded as a ground for refusing the applicants' proposal the fact that he considered it would not be economic for the applicants to carry it out.

I can deal with the first and second grounds of complaint, with regard to paragraph 29, together. I accept, as Mr. Brown argued, that when you cut paragraph 29 into five separate compartments (and it consists of five individual sentences) it is possible to advance an argument which makes each sentence, viewed in isolation, unexceptional. In particular, the opening sentence admirably and accurately reflects the argument which was being put forward by the applicants.However, viewed as a whole, I can only read that paragraph as indicating that the Inspector was treating this as one of the cases where the financial consequences of not granting planning permission could be ignored in his assessment of the pros and cons of granting or refusing planning permission.

Looked at as a whole, it seems to me that he was treating this case as one which fell within what he described as the "generality". It was not such a case, as I have already indicated, and the Secretary of State, by his Inspector, went wrong in so treating it. In consequence he did not have regard to a material consideration and his failure to have regard to that consideration means that the decision has to be quashed and the matter has to go back to the Secretary of State for reconsideration.

So far as the third argument which was advanced is concerned, I find the position more difficult. Mr. Barnes accepted that his third argument, when viewed in the light of his first and second arguments, meant that he was contending in effect that what was sauce for the goose was not sauce for the gander. He was submitting that while the Secretary of State had to have regard to the financial effect of his not granting planning permission, he was not entitled to refuse planning permission merely on the ground that the proposed development may be one which was not attractive from an economic point of view, even though this could result in that planning permission never being implemented.

Certainly there is support to be found for such an argument in the case of Walters v Secretary of State for Wales and the City of Swansea [1979] JPL 171, (1978) 249 Eq 245 .That was a decision of Sir Douglas Frank sitting as a Deputy High Court Judge.

Speaking for myself, I have reservations as to whether what was said by Sir Douglas applies to all cases. I would like to leave open for consideration, in a case where the matter is essential for decision, the question as to whether or not in certain circumstances it would not be proper for the Secretary of State to say "I am not going to grant planning permission because I do not consider that there is any practical possibility of that planning permission being implemented."

It seems to me that the accumulation of planning permissions which are incapable of being implemented from a planning point of view could be undesirable. Furthermore, it seems to me that to some extent what Sir Douglas said, if it is taken to its logical conclusion, is contrary to what was said by Mr. Justice Forbes in Sovmots

Investments Ltd v Secretary of State for the Environment & Others [1977] 1 QB 411, because there it was accepted by the learned judge that it would be right for the Secretary of State to treat more favourably a wise commercial venture than a venture which was only favoured or could only be favoured by an eccentric millionaire.

However, I do not regard it as being essential to this decision to come to a conclusion on the third point raised by Mr. Barnes. First of all, it is not clear to me that the matter complained of in this ground was in fact the basis of the decision. Furthermore and in any event, the fact that I have come to an adverse conclusion on the first and second grounds is sufficient to result in a decision favourable to the applicants, and so I am not required to rule on the third ground.

I should add for the sake of completeness that there was an alternative ground put forward by Mr. Barnes. That was to the effect that if this reading of paragraph 29 was not the correct one, then the reasoning was inadequate in so far as it gave the impression that that was the basis of the decision.

I take the view that Mr. Barnes' interpretation of paragraph 29, at least so far as the arguments which I have dealt with are concerned, is the correct one, so it is not necessary for me to deal with the alternative ground. If, however, it had been necessary for me to do so, it follows from what I have already said that I would have, as an alternative basis of decision, been favourably disposed to that alternative ground. It follows therefore that this application is allowed.

Application allowed with costs.
