Case No. CO/3197/1998

IN THE HIGH COURT OF JUSTICE

IN THE QUEEN'S BENCH DIVISION

CROWN OFFICE

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: Monday 26th June, 2000

B e f o r e:

THE HON. MR JUSTICE COLLINS

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|  | - v – |  |
|  | BOLSOVER DISTRICT COUNCIL EX PARTE PATERSON |  |

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 (Transcript of the Handed Down Judgment of

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MR MICHAEL DRUCE FOR THE APPLICANT

MS MARY COOK FOR THE RESPONDENT

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J U D G M E N T As Approved by the Court

**Mr Justice COLLINS**:

1. Brookhill Hall at Pinxton in Derbyshire is a small country house dating from the 17th century with later additions. It had the usual outbuildings including a stable block which has been converted into two separate houses. One is called the Coach House and is owned and occupied by the applicant, Mr. Somerville Paterson. The other, known as the Groom’s Cottage, is occupied by a Ms Bikow. Both the stable block and the hall are Grade II listed buildings, each having been given a separate listing on 8 July 1966. Brookhill Hall is set in an area of considerable natural beauty consisting of woodland and scattered groups of trees typical of an English country estate. Any development and in particular any new building required, as the Council’s Conservation officer has accepted, careful consideration because of what she describes as the ‘sensitive historic landscape which provided the backdrop to the listed hall and coach house’. She continues in paragraph 3 of the affidavit served on behalf of the Council:-

“From the outset the setting of both listed buildings was a major consideration in all discussions with the owner and his agent”.

1. There was and had since the grant of a planning permission a number of years ago been a garage situated some 50 yards or so from the Coach house and between it and the hall to serve the hall. This was a wooden building capable, it would seem, of housing two cars. The original garage for which permission had been granted had been demolished and replaced. No planning permission had been granted to permit this, but it seems to have been accepted that the replacement did not differ substantially from the building for which permission had been granted. Mr. Chadwick, the owner of the hall, needed more garage space for the hall. In August 1998 he and his agent met Miss Kim Carlen, the Conservation Officer, to discuss whether a new larger garage could be erected and, if so, where. Mr. Chadwick wanted it to be the other side of the hall from the Coach house (a position also favoured by the applicant since it would not then affect him or the setting of the Coach House) but Miss Carlen found that unacceptable. In the end, it was decided that, if in principle a garage was accepted, the best location would be where the existing garage then was. Miss Carlen reached this conclusion for three main reasons. First, it was the traditional service entrance to the hall. Secondly, the hall was an eclectic mix of architectural styles which had evolved in that direction so that it was logical to concentrate a new service building in that location. Thirdly, the approach to the hall by means of the existing drive was well screened and a real appreciation of the scale of the hall was reached on entering the main drive past the site of the garage. The Coach House, historically a subsidiary building to the main hall, was itself set back and at an angle to the main drive and was surrounded by mature vegetation. Therefore, she concluded:-

“a single storey service building in this location would not significantly affect the setting of the hall or the coach house”.

She accepted that the hall should be able to have a garage and so was able to recommend that a replacement garage would be acceptable in principle.

1. An application for planning permission to demolish the existing garage and construct a new one was lodged by Mr. Chadwick on 7 April 1999. This was to be in brick and considerably larger than the existing structure. The council decided that the application should be decided by the Planning Services Manager, Mr. Clarke, as a delegated application. Mr. Clarke could at any stage have decided to pass the application back to the Planning Committee if for any reason he believed it desirable to do so. As things turned out, he exercised his delegated powers and on 10 June 1999 permission was granted subject to conditions. It is this permission which the applicant seeks to quash.
2. A case officer was in accordance with normal practice appointed to make the necessary enquiries, to ensure that the proper procedures were carried out and to report back consultation responses to Mr. Clarke. The case officer chosen was a Miss Empsall who is described as a year-out planning student (and so relatively inexperienced). She did not appreciate that the coach house as part of the old stable block had a separate listing to the hall nor that it was separately owned and occupied. Application for planning permission must be advertised in accordance with Article 8 of the Town and Country Planning (General Development Procedure) Order 1995. Article 8(5) provides that either a notice containing the requisite details must be displayed on or near the land for not less than 21 days or that any adjoining owner or occupier must be served. There must also be a notice in a local newspaper by virtue of s.67(2) of the Planning (Listed Buildings and Conservation Areas) Act 1990. The council also operates a very sensible policy that any neighbour who might be affected must be sent a standard letter notifying him or her of the proposed development. Unfortunately, due to Miss Empsall’s error in not appreciating that Mr. Paterson or Ms Bikow were occupying what had been the old stable block, this notification did not take place. The council has accepted that this was an error amounting to maladministration. What the council did was to affix a laminated site notice to a telegraph pole positioned, it seems, some 15 metres along the road from the entrance to the driveway to the hall and coach house.
3. Although both Mr. Paterson and Ms Bikow were, it seems, aware at least for a day or two that some notice was attached to the pole, neither went to look at it. It was, they claimed, in a dangerous position close to a blind bend in the road and there was no footway. In any event, it was certainly not there for the requisite 21 days. Much time and effort has been spent on the question whether the notice was in a reasonable place and was there for the necessary 21 days but in the end Miss Cook has accepted that the council is unable to establish that the notice had been posted for sufficient time and so I should decide that there was a breach of Article 8(5). This means that the council has been guilty of a breach of the law in connection with its determination of the planning application. Nonetheless, submits Miss Cook, I should not in the exercise of my discretion quash the grant of permission since the applicant has suffered no prejudice since there was no prospect that a different decision would be or would have been reached if he had been able to make objections.
4. Neither Mr. Paterson nor Ms Bikow, who is supporting him, were aware that the application had been made. It was not until work began to demolish the existing garage on 26 June 1999 that Mr. Paterson made enquiries and discovered what had happened. He wrote a letter to the council stating that he objected most strongly to the proposed garage which was ‘totally inappropriate to a complex built in 1745 with the last modification being in the 1860s’. He also asked why he had not been notified. He received an apology for the failure to notify him from Mr. Clarke, who said that this was because:-

“[it] did not appear that the Coach House was a separate dwelling unrelated to the main hall”.

Mr. Clarke has deposed that he himself was aware of the separate listing and that the stable block had been divided into two residential properties because he had paid visits in connection with grants for repairs in 1987 and 1998. He was referring in his letter to Miss Empsall’s error.

1. Before going further into the correspondence and material events after the grant of permission, I should deal with the second ground upon which the applicant relies to establish an error of law. Section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 provides:-

“In considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority ... shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses”.

There has been some argument whether the council should have had regard to any or which Development Plan policy in considering the application. But this was a barren argument since it is common ground that no policy, whether or not it should have been considered, adds anything of substance to the requirements of s.66(1). Putting it very shortly, Mr. Druce contends that Mr. Clarke failed to consider the impact of the proposed garage on the coach house as a separate listed building to the hall. Miss Empsall’s error led her to focus on how the hall and the setting would be affected and to fail to carry out a similar exercise in relation to the setting of the coach house. Mr. Clarke’s own knowledge of the true position did not lead him to correct this error: certainly, there is nothing in writing to suggest he did.

1. Miss Empsall’s report to Mr. Clarke refers to the impact on the setting of the hall, but concludes that the revision to the proposed construction (which was amended to revise somewhat its extent by removing the car port which had originally been part of the application) would ‘lessen the impact on the surrounding trees and the effect on the listed building’. Mr. Druce draws attention to the reference to ‘building’ in the singular. The relevant government guidance in PPG15 at paragraph 2.17 draws attention to the need to give careful appraisal of the effect of a development on the grouping of a number of listed buildings, but this, submits Mr. Druce, does not detract from the obligation under s.66(1) of the 1990 Act to consider the effect on the setting of any individual listed building within the group. It is possible to envisage a development which might well not adversely affect the setting of the group but which might be damaging to the setting of an individual building within the group.
2. Mr Clarke has deposed that the setting of the listed buildings, that is to say, the hall and the old stable block, had to be considered as a whole. This was done. Furthermore, he says that he considered the impact of the development on the amenity of the adjoining dwelling and decided that ‘in view of the distance, the design of the new structure and the existing landscaping concluded that the impact was not significant’. Impact on amenity is not the same as impact on the setting of a listed building and is something to be considered whether or not a dwelling is listed. There may however be an overlap, particularly if, when considering its setting, it is proper to have regard to the view from a listed building towards a proposed development: see *Revival Properties Ltd v Secretary of State for the Environment [1996] JPL B86* per Malcolm Spence Q.C. Mr. Clarke continues:-

“Taking into account the development plan, and all other material considerations identified, I could see no justifiable reason to refuse planning permission. I disregarded the case officer’s references to only one listed building as I was well aware that the Coach House was a listed building and separately occupied from my own personal knowledge of this site”.

His knowledge of the area and the photographs (which are before me) enabled him without a site visit to decide that the application would be approved.

1. Miss Cook submits that it is wrong to conclude that the impact on the Coach House was not considered. While it would no doubt have been better to have spelt out that it had, the approach of the applicant involved a close inspection of individual words used without proper regard being paid to the overall account. It was impossible to believe that in looking at the grouping of the buildings and the impact of the proposed development on their setting Mr. Clarke would have failed to consider the impact on the Coach house. Miss Carlen did at her preliminary meeting in August 1998 and Mr. Clarke was aware that the Coach house was a separate listed building and of his obligations under s.66(1).
2. Mr. Druce is clearly correct in submitting that the impact on each individual listed building must be taken into account. Equally, consideration of the impact on the setting of the group may in given circumstances inevitably cover the impact on the particular individual member of the group. It is clear to me that the primary consideration was given, certainly by Miss Empsall, to the setting of the hall. Furthermore, the failure to notify either Mr. Paterson or Ms Bikow led to a lack of any objection from either of them which must itself have influenced the decision maker. If someone directly affected had no objection, it was surely less likely that there would in his view be any damaging effect on the building he occupied. It is at least reasonable to suppose that such a belief would be held. It is perhaps a little surprising that Mr. Clarke did not query the absence of objection or at least ascertain that Miss Empsall had ensured that the neighbours had been notified. When he read Miss Empsall’s report, he should have appreciated that there was no indication that she had appreciated there was a listed building other than the hall involved.
3. While undoubtedly the impact on the hall was the main concern, the Coach house was considered as part of the group and I am not prepared to reject Mr. Clarke’s evidence he did have regard to it. But I am sure that he considered it of less importance than the hall and he might well have looked at matters a little differently had he appreciated that there were strong objections to the proposal from Mr. Paterson and Ms Bikow. That is not to say that the result would have been any different: indeed, Mr. Clarke is adamant that it would not. Thus I do not think any error of law is established or that Mr. Clarke failed to have regard to a material consideration and if this ground had stood alone I would not have found any basis to quash the decision. But I have to take all the circumstances into account in deciding whether to exercise my discretion in the light of the admitted failure to notify the applicant not to grant relief and the conclusions I have reached are relevant to that exercise.
4. I return to what happened after 26 June 1999. On 2 July Mr. Paterson asked the council to stop the work immediately before too much was done: he noted that concrete was about to be poured. There is a note on the letter which reads:-

“Spoke to Mr. Oxley (agent) requesting temp. halt as they may face an injunction from a neighbour but that I had no formal powers to act”.

On 5 July there was a site meeting attended by the applicant, “his planning advisor”, Mr. Chadwick, Mr. Clarke and Ms Carlen. The applicant asked if the garage could be resited, but this was said not to be possible since any other site would adversely affect the setting of the hall. He also made clear he intended to take action to try to get the planning permission set aside. Mr. Clarke recalls that he spoke to Mr. Chadwick after the applicant had left and told him that he could see no reason why the building operations should not continue since the planning permission was in place and, if the council were persuaded to revoke it, (itself improbable) compensation would be payable. I appreciate that I may be taking advantage of hindsight, but I think perhaps it might have been better to have advised a short suspension to enable the council to consider what to do. Mr. Chadwick need not have acquiesced, but at least he would have been put on notice and given the opportunity to avoid additional expense.

1. It is entirely understandable that Mr. Paterson should have been thoroughly upset at what had happened and what he saw as the failure by the council to take appropriate action, that is, to reverse its decision in order to enable him to make proper objections. He did however allow himself to use somewhat intemperate language and I have no doubt that the tone of his letters did not help his cause with the council. But I am wholly satisfied that Mr. Clarke dealt with what had happened carefully and professionally. Nevertheless, he was bound to be, if not openly, at least subconsciously defensive and he would have been an unusual paragon had he not sought to justify his decision. Mr. Paterson was aware that the matter was to be put to a meeting of the planning committee on 4 August 1999. On 17 July he wrote saying inter alia that he was finding it difficult to put coherent objections after the event and he needed time to commission experts and get his thoughts together. On 23 July he wrote to the chairman of the planning committee setting out his strong objections to the development and saying that it was unreasonable to expect him to get the expertise and documentation together for 4 August. He said this:-

“We have a substantial amount of work to do in a short time frame and we are lay people and have to learn as we go. We were denied a proper time frame in a sense to begin with”.

The chairman replied in a letter of 30 July. He made the point that when considering the possibility of revocation, the council had to take the compensation implications into account. That is wrong: see *R v Secretary of State for the Environment, Transport and the Regions ex parte Alnwick D.C. Richards J (unreported) 4.8.99*. But more importantly he refused to adjourn the matter to the next meeting fixed for 8 September since there was urgency because “revocation cannot be taken against building works which have been completed”. While that may be technically correct, there is always power to require a structure which has been built without permission to be removed. Nevertheless, it is better to move quickly if possible, but Mr. Chadwick had been warned and it was in my judgment unreasonable to expect Mr.

Paterson to put forward a proper objection by 4 August. The adjournment he requested should have been granted.

1. Mr. Clarke made a report to the Committee. In it he said that Mr. Paterson had not put forward any significant or persuasive argument as to why garage accommodation should not be built or why the selected location was not the most appropriate location or why the specific design which had been proposed was not acceptable. He would not have changed his opinion. The most he might have done was to put the application back to the committee for decision but he would have recommended that it should be approved. He saw no defect in the decision made and would not recommend revocation. The committee agreed. Miss Cook has submitted that in the circumstances no prejudice has been suffered by Mr. Paterson since the decision would have been the same even if he had the opportunity to make his objections. In any event, he has still not provided any expert evidence to support his case.
2. I have carefully considered this argument . I am conscious that one of two innocent parties may suffer as a result of the error made by the council. I am not persuaded that Mr. Paterson should have produced his expert evidence. Why should he go to the expense before he knew the outcome of the judicial review? Having seen the photographs, I am satisfied that there are arguments which could be put forward to show that the garage is likely to harm the setting of the Coach house. I bear in mind that the matter will now go to the committee and that, even if Mr. Clarke’s advice is to maintain his decision, the committee may be persuaded by material provided by Mr. Paterson to take a different view. That view may not in the end prevail, but it might and Mr. Paterson is in my view entitled to have a proper opportunity hitherto denied to him to put his case properly.
3. I propose therefore to quash the decision to grant planning permission. Mr. Chadwick may decide to lodge a fresh application to regularise the position in which case the committee will decide it on its merits. Alternatively, the committee will have to decide whether to take enforcement action. Again, it will listen to Mr. Paterson’s arguments and reach a decision accordingly. In either event, Mr. Paterson will be able to make his case. He may feel that he is in a worse position than if he had objected at the outset, but there is now nothing that can be done about that.

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Monday, 26th June 2000

**MR JUSTICE COLLINS**: The parties have had the handed down judgment in advance. Thank you for the various corrections. If there are any others that have been spotted, now is the time to say. Nothing? Then, for the reasons given, the grant of planning permission will be quashed. Any consequential orders?

**MR DRUCE**: My Lord, I seek one: the respondent council to pay the applicant's costs in the sum of £12,582.00, in accordance with the schedule that has been distributed. MISS COOK: I have no objections.

**MR JUSTICE COLLINS**: That is a reasonable sum, is it? **MISS COOK**: Yes.

**MR JUSTICE COLLINS**: Sorry, what was that figure again? **MR DRUCE**: £12,582.00.

**MR JUSTICE COLLINS**: In that case the application will be allowed with £12,582.00 costs.

 **MR DRUCE**: My Lord, I am grateful.