Hampshire CC v Secretary of State for the Environment, Food and Rural Affairs

Also known as: R. (on the application of Hampshire CC) v Secretary of State for the Environment, Food and Rural Affairs

Significant

Positive/Neutral Judicial Consideration

Court
Queen's Bench Division (Administrative Court)

Judgment Date
23 April 2020

Where Reported
[2020] EWHC 959 (Admin)
[2021] Q.B. 89
[2020] 3 W.L.R. 597
[2020] 4 WLUK 229
[2020] 2 P. & C.R. 16
[2020] J.P.L. 1359
[2020] A.C.D. 76
[2020] C.L.Y. 1542
Judgment

Subject
Real property

Other related subjects
Planning

Keywords
Airports; Ancillary use; Commons; Commons registers; Curtilage; Deregistration; Statutory interpretation

Judge
Holgate J

Counsel
For the claimant: George Laurence QC, Simon Adamyk.
For the defendant: Ned Westaway.
For the first interested party: Douglas Edwards QC, George Mackenzie.
For the second and third interested party: Philip Petchey, Ashley Bowes.
For the fourth and fifth interested party: No appearance or representation.

Solicitor
For the claimant: In-house solicitor.
For the defendant: Government Legal Department.
For the first interested party: Burges Salmon LLP.
For the second and third interested party: Richard Buxton Solicitors (Cambridge).

Case Digest

Summary
In an application to de-register land under the Commons Act 2006 Sch.2 para.6 on the basis that it fell within "the curtilage of a building", it was wrong to ask whether the land and building together comprised a unit. The

correct test was whether the land was so intimately associated with a building that the land formed part and parcel of the building.

Abstract
A local authority applied for judicial review of an inspector's decision to allow part of Yateley Common in Hampshire to be removed from the commons register.

The application to de-register part of the common had been made by the first interested party, which operated an airport from the site. Approximately 115 acres of the common had been incorporated into the airport, including the runway, taxiways, terminal building and café. The terminal building and café were present on the site when Yateley Common was provisionally registered under the Commons Registration Act 1965. After a public enquiry, the inspector concluded that the requirements were satisfied for the removal of the land from the register under the Commons Act 2006 Sch.2 para.6. The relevant part of the test in dispute was (a) whether on the date of the provisional registration of the common under the 1965 Act, the land was covered by a building or within the curtilage of a building and (b) whether, since that date, the land had at all times been, and still was, covered by a building or within the curtilage of a building. There was no statutory definition of "curtilage".

The secretary of state and the interested party argued that land lay within the curtilage of a building where the land and the building were part and parcel of the same entity and formed a single unit. The local authority maintained that test was wrong, and also submitted that the inspector had erred by finding that the land was ancillary to the terminal building.

Held
Application granted.

Statutory framework - The Common Land (Rectification of Registers) Act 1989 and the 2006 Act had been enacted to correct errors made in the registration of common land. Parliament had carefully balanced the interests of the users of commons and landowners. There was no justification for taking a wider or narrower approach to "curtilage" as that term was used in the 2006 Act (see paras 28-30, 39, 44 of judgment).

Curtilage - As a starting point it was helpful to have in mind Parliament's decision to take a different approach in the 2006 Act from the temporary provisions of the 1989 Act. First, it made de-registration available not only for dwelling-houses but also buildings generally. Second, de-registration was available for land within the curtilage of a building. Parliament chose not to repeat the approach in the 1989 Act which had referred to land "ancillary to" a dwelling-house. Case law had established that the curtilage of a building was not confined to a small area of land; it was land which was attached to, and formed one enclosure with, the building. The interested party and the inspector had relied on the judgment of Buckley LJ in *Methuen-Campbell v Walters [1979] Q.B. 525, [1978] 6 WLUK 124*. However, Buckley LJ had not decided that an area of land was within the curtilage of a building if it was associated with a building in such a way that the land and building comprised part and parcel of the same entity. Nor had he suggested that "part and parcel", "single unit" and "integral whole" were synonymous terms to be used in that manner, *Methuen-Campbell* explained. Rather, the issue was whether an area of land was so intimately associated with a building that that land formed part and parcel of the building. That was consistent with the ordinary English meaning of "curtilage" and "appurtenance" in the dictionaries. Accordingly, the relevant question was whether the application land was so intimately associated with the terminal building as to form part and parcel of that building, *Methuen-Campbell*, *Dyer v Dorset CC [1989] Q.B. 346, [1988] 5 WLUK 33*, *Barwick v Kent CC (1992) 24 H.L.R. 341, [1992] 1 WLUK 787* and *Challenge Fencing Ltd v Secretary of State for Housing, Communities and Local Government [2019] EWHC 553 (Admin), [2019] 3 WLUK 259* applied (paras 71, 74, 86-89).

The only authority which might support the approach put forward by the secretary of state and the interested party was *Attorney General ex rel Sutcliffe v Calderdale MBC (1983) 46 P. & C.R. 399, [1982] 7 WLUK 340*, a case concerning listed buildings. However, care had to be taken when considering whether any principle laid down on "curtilage" in the context of listed building control could be read across to the 2006 Act, given the differences in language, context and statutory purpose. On the authorities as they stood, the broad approach to "curtilage"

identified in *Calderdale* (as modified by *Debenhams Plc v Westminster City Council [1987] A.C. 396, [1986] 12 WLUK 44*) should only be applied to listed building control, but not development control, *Calderdale* and *Debenhams* considered. In general planning cases, it would be necessary in future for practitioners to read the judgment in *Challenge Fencing* as a whole, and to have also in mind those other authorities which laid down key principles (paras 108, 114, 123-127).

Ancillary - There was no legal requirement for land to be ancillary to a building in order to fall within the curtilage of that building, but it could be a material consideration to be taken into account. The inspector had misunderstood what was meant by "ancillary" when he came to apply it. It could not rationally be said that the use of land for aircraft movement was ancillary to the function of the terminal building, as the purpose of the building was to facilitate those movements. In addition, the inspector had adopted the wrong test for curtilage. Those legal errors were fundamental, and his decision had to be quashed (paras 132-140).

Size - The inspector had applied the "relative size" criterion by considering the purpose to which the land and the building were both put. The true question was whether the land qualified as the curtilage of the building, and thus the focus should have been on the size of the land relative to that of the building. Where land formed part and parcel of a building, it made sense to speak of the combination of that building and its curtilage as a messuage, an integral whole or a unit; but those phrases merely described the consequence of having applied the correct legal approach for identifying the curtilage of the building (paras 145-146).

