

Appendix 6 – The Childs High Court judgment

The Queen on the Application of John Childs v The First Secretary of State, Test Valley Borough Council



Positive/Neutral Judicial Consideration

Court

Queen's Bench Division (Administrative Court)

Judgment Date

18 October 2005

CO/2689/2005

High Court of Justice Queen's Bench Division The Administrative Court

[2005] EWHC 2368 (Admin), 2005 WL 2999750

Before: James Goudie QC

Tuesday, 18th October 2005

Representation

Mr R Humphreys (instructed by Messrs Leigh Day & Co , Priory House, 25 St John's Lane, London EC1M 4LB) appeared on behalf of the Claimant.

Mr Mark Beard (instructed by Treasury Solicitor) appeared on behalf of the Defendant.

Judgment

James Goudie QC:

Introduction

1. This is an application under [Section 288](#) , as amended, of the [Town and County Planning Act 1990](#) ("the 1990 Act"). The claimant is aggrieved by the decision of the First Secretary of State's appointed inspector on 24th March 2005 to dismiss four appeals under [Section 195](#) of the 1990 Act against decisions of Test Valley Borough Council ("the council"). The council is the local planning authority for a 2.5 hectare field, adjoining Leckford Hutt Public House, London Road, Chilbolton, Hampshire ("the site").

2. The council had refused to grant a certificate of lawful proposed use pursuant to [Section 192](#) of the 1990 Act. The proposed use for which a certificate of lawful use was sought is respectively for the use of the site as a residential caravan site for 8, 15, 30 and 50 caravans. Any of these would represent an intensification of the existing use. Intensification is, however, an expression not to be found in the comprehensive statutory planning code.

3. A certificate of lawful use can be obtained pursuant to [Section 191](#) or [Section 192](#) of the 1990 Act if what is happening, [Section 191](#) , or is proposed to happen, [Section 192](#) , is something against which enforcement proceedings could not succeed, either because it has planning permission or because planning permission is not required or because the time for enforcement action has expired. In relation to a [Section 192](#) certificate, one has to consider the existing use and the proposed use and determine whether there is a material change of use, having regard to relevant factors. The sole issue before me is whether, as matter of law, a mere increase in the number of caravans on the site can constitute a change of use at all.

4. [Section 191](#) of the 1990 Act, as substituted by the [Planning and Compensation Act 1991](#), following the Report by Robert Carnwath QC, as he then was, “Enforcing Planning Control”, addresses the question of whether any existing use is lawful and provides for an application describing the use. [Section 192](#), as similarly substituted, refers to proposed use of land and again provides for an application and a certificate describing the use.

5. The site had been certified pursuant to [Section 191](#) of the 1990 Act as a residential caravan site for four caravans as defined by [Section 29\(1\) of the Caravan Sites and Control of Development Act 1960](#) (“the 1960 Act”) by a certificate of lawful use, dated 24th April 2003 (“the 2003 certificate”). It was so certified on the basis that that use has been continued without planning permission for a period of at least 10 years. The council accepted that five caravans would not constitute a materially different use. Mr Humphreys for the claimant submits that the reference to four caravans in the 2003 certificate is merely surplusage.

Statutory Framework

6. The most relevant provisions from the 1990 Act are as follows:

“55. Meaning of ‘development’ and ‘new development’

“1. Subject to the following provisions of this section, in this Act, except where the context otherwise requires, ‘development’ means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land ...”

“2. The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land—

(a) the carrying out for the maintenance, improvement or other alteration of any building of works which—

(i) affect only the interior of the building, or

(ii) do not materially affect the external appearance of the building.

“and are not works for making good war damage or works begun after 5th December 1968 for the alteration of a building by providing additional space in it underground;

(b) the carrying out on land within the boundaries of a road by a local highway authority of any works required for the maintenance or improvement of the road (but, in the case of any such works which are not exclusively for the maintenance of the road, not including any works which may have significant adverse effects on the environment);

(c) the carrying out by a local authority or statutory undertakers of any works for the purpose of inspecting, repairing or renewing any sewers, mains pipes cables or other apparatus, including the breaking open of any street or other land for that purpose;

(d) the use of any buildings or other land within the curtilage of a dwellinghouse for any purpose incidental to the enjoyment of the dwellinghouse as such;

(e) the use of any land for the purposes of agriculture or forestry (including afforestation) and the use for any of those purposes of any building occupied together with land so used;

(f) in the case of buildings or other land which are used for a purpose of any class specified in an order made by the Secretary of State under this section, the use of the buildings or other land or, subject to the provisions of the order, of any part of the buildings or the other land, for any other purpose of the same class;

((g) the demolition of any description of building specified in a direction given by the Secretary of State to local planning authorities generally or to a particular local planning authority.)

“3. For the avoidance of doubt it is hereby declared that for the purposes of this section—

(a) the use as two or more separate dwellinghouses of any building previously used as a single dwellinghouse involves a material change in the use of the building and of each part of it which is so used;

(b) the deposit of refuse or waste materials on land involves a material change in its use, notwithstanding that the land is comprised in a site already used for that purpose, if—

(i) the superficial area of the deposit is extended or

(ii) the height of the deposit is extended and exceeds the level of the land adjoining the site.”

“191. Certificate of lawfulness of existing use or development

“1. If any person wishes to ascertain whether—

(a) any existing use of buildings or other land is lawful;

(b) any operations which have been carried out in, on, over or under land are lawful; or

(c) any other matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful,

He may make an application for the purpose to the local planning authority specifying the land and describing the use, operations or other matter.

“2. for the purposes of this Act uses and operations are lawful at any time if—

(a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and

(b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force ...”

“4. If, on an application under this section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, operations or other matter described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case they shall refuse the application.

“5. A certificate under this section shall—

- (a) specify the land to which it relates;
- (b) describe the use, operations or other matter in question (in the case of any use falling within one of the classes specified in an order under [section 55\(2\)\(f\)](#), identifying it by reference to that class);
- (c) give the reasons for determining the use operations or other matter to be lawful; and
- (d) specify the date of the application for the certificate ...”

“7. A certificate under this section in respect of any use shall also have effect, for the purposes of the following enactments, as if it were a grant of planning permission—

- (a) [section 3\(3\) of the Caravan Sites and Control of Development Act 1960](#) ;
- (b) [section 5\(2\) of the Control of Pollution Act 1974](#) ; and
- (c) [section 36\(2\)\(a\) of the Environment Protection Act 1990](#) .”

“192. Certificate of lawfulness of proposed use or development

“1. If any person wishes to ascertain whether—

- (a) any proposed use of buildings or other land; or
- (b) any operations proposed to be carried out in, on, over or under land,

“would be lawful, he may make an application for the purpose to the local planning authority specifying the land and describing the use or operations in question.

“2. If, on an application under this section, the local planning authority are provided with information satisfying them that the use or operations described in the application would be lawful if instituted or begun at the time of the application, they shall issue a certificate to that effect; and in any other case they shall refuse the application.

“3. A certificate under this section shall—

- (a) specify the land to which it relates;
- (b) describe the use or operations in question (in the case of any use falling within one of the classes specified in an order under [section 55\(2\)\(f\)](#) identifying it by reference to that class);
- (c) give the reasons for determining the use or operations to be lawful; and
- (d) specify the date of the application for the certificate.

“4. The lawfulness of any use or operations for which a certificate is in force under this section shall be conclusively presumed unless there is a material change, before the use is instituted or the operations are begun, in any of the matters relevant to determining such lawfulness.”

“336(1) (Interpretation)

“‘caravan site’ has the meaning given in section 1(4) of the Caravan Sites and Control of Development Act 1960 ...”

“‘use’, in relation to land, does not include the use of land for the carrying out of any building or other operations on it;”

7. The most relevant provisions from the 1960 Act are as follows:

“1

(4). In this Part of the Act the expression ‘caravan site’ means land on which a caravan is stationed for the purposes of human habitation and land which is used in conjunction with land on which a caravan is so stationed.”

“3

(3). A local authority may on an application under this section issue a site licence in respect of the land if, and only if, the applicant is, at the time when the site licence is issued, entitled to the benefit of a permission for the use of the land as a caravan site granted under Part III of the Act of 1947 otherwise than by a development order.”

“29

(1). In this part of the Act, unless the context otherwise requires—

“‘caravan’ means any structure designed or adapted for human habitation which is capable of being moved from one place to another (whether by being towed, or by being transported on a motor vehicle or trailer) and any motor vehicle so designed or adapted, but does not include—

(a) any railway rolling stock which is for the time being on rails forming part of a railway system, or

(b) any tent;

“‘caravan site’ has the meaning assigned to it by subsection (4) of section one of this Act;”

The Decision

8. The Inspector's decision letter (“the DL”) identifies the only issue between the parties in each appeal as being whether a material change of use would be involved in increasing the number of residential caravans on the site from four to a higher number of eight or more. The DL identified the claimant's case as being that an intensification in use cannot amount to a material change of use. The DL identified the council's case as being that there would be a change in the fundamental nature of the use.

9. The Inspector stated at DL paragraphs 5 and 6:

“As the appellant argues, mere intensification of use does not in itself constitute a material change of use and the courts have decided this on a number of occasions as set out in the notes in the Encyclopedia (of Planning Law) at volume 2 P55.53 and in the appellant's representations. Any change, in order to constitute a material change of use by intensification, must be to a degree that

amounts to a change in the character of a use. In looking at the character of this use, however, it is legitimate to take into account the impact, in planning consequences, of the change on the immediate surroundings outside the planning unit. I consider that that would include examining such matters as the appearance of the site in the landscape and its impact on the visual amenity of the area; the activity taking place on the land; the traffic generated by the use both in terms of numbers of vehicles and patterns of movement and also the effect on the immediately surrounding roads.

“I do not agree with the appellant that a material change in the appearance of the land is irrelevant to deciding if there has been a change in the character of the use. That is to take too narrow a view and it must be relevant to take that into account as the change in character needs to be looked at in planning terms at its widest; in doing that the appearance is one element of the character of the use in land use terms.”

10. The Inspector then applied that approach. At DL paragraph 7 he described the site as being basically an open field in an undulating landscape, characterised by open agricultural land. At paragraph 8 he described the view into the site. At paragraph 9 he stated that the view of four caravans would basically be of a generally little-used open field and that both the impact on the landscape and the associated amount of activity and traffic would be minimal.

11. At paragraph 10 of the DL, the Inspector expressed his opinion that, even with eight residential caravans, the impact on the landscape would be significantly greater than the impact from the lawful use by four residential caravans. The Inspector elaborated on this at paragraphs 11 and 12 of the DL and concluded, at paragraph 13:

“Visually I consider that four caravans and their other incidental paraphernalia and vehicles would appear discreet in the landscape but I do not consider as a matter of fact that that would be the case with eight. Viewed in the landscape the land would, in my opinion, take on a materially different character; it would clearly appear as a developed site which I do not consider would be the case if there were only four caravans.”

12. The Inspector then went on, at paragraph 14 of the DL, to state that in addition to how the site would appear in the landscape, he considered that there would, for the reasons he proceeded to give, be “a significant change in the activity on site”. At paragraphs 15 and 16 he stated:

“I am of the opinion that, as a matter of fact and degree, there would be a material change in the character of what was happening on the site if the number of caravans stationed there and occupied residentially increased from four to eight. In my view it is not just a case in general terms of double the numbers and double all the consequences. That doubling of consequences results in the site being perceived in a materially different way and all that takes place on it and immediately around it being materially different in its character.”

“I acknowledge that it is difficult to define exactly how it is different and at what number of caravans the change becomes material but I take the view that the lawful use for four caravans is such a low level of use in an area virtually devoid of any development at all (at least when looking in all directions from the appeal site itself), that any increase appears significant. To double the number

of caravans and thereby, in all probability, the activity on the site itself and vehicular movements to and from the site, in my opinion would change the site from what appears generally as an open minimally used field into a field quite clearly used for the siting of residential caravans.”

13. The Inspector referred to other matters in paragraphs 17 and 18 of the DL and concluded that the intensification of use would, as a matter of fact and degree, result in a fundamentally different character of use that one would see when looking at the site. He concluded that the council's refusal to grant a certificate of lawful use in respect of any of the higher numbers was well-founded and that the appeal should fail.

The Claimant's Case

14. The claimant's case is that the Inspector erred in law in proceeding upon the basis that an increase in the number of caravans on land, certified as to its entire extent for lawful use as a residential caravan site, could amount to a material change in the use of the land. This is on the basis that there is no change in use. The claimant does not appeal the Inspector's decision that any change in use, if there was one at all, was material. It is accepted that “material” means material for planning purposes and that materiality is a question of fact and degree for the Local Planning Authority or the Inspector.

15. Mr Humphreys for the claimant submits that the whole of the site comprises a caravan site irrespective of the number of caravans: that a certificate of lawful use requires no more than reference to a particular kind of use; and that there is no warrant for certifying intensity of use. Mr Humphreys submits that the issue, as to whether mere intensification, ie mere increase in number, whether generally or in relation to caravan sites, is capable of amounting to a material change in the use of land, has never been definitively determined as part of the ratio of any decision.

16. Mr Humphreys referred me to *Minister of Housing and Local Government v Hartnell* [1965] AC 1134 (“Hartnell”) per Lord Reid at pages 1154 and 1155 and 1157, on the general approach to statutory construction in this area, on the purposes of the 1960 Act and on the strength of existing use rights and the importance of not cutting them down; and to *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment* [1985] AC 132 per Lord Scarman, at pages 140 and 141, on the general approach to statutory construction in this area.

17. Mr Humphreys referred me on intensification to *Washington UDC v Grey* [1958] 10 P&CR 264 (“Grey”); *Guildford RDC v Fortescue and Penny* [1959] 2 QB 112 ; *East Barnet UDC v British Transport Commission* [1962] 2 QB 484 ; *Glamorgan County Council v Carter* 1 WLR 1 (“Carter”); *James v Secretary of State for Wales, in the Divisional Court* [1965] 63 LGR 269, in the *Court of Appeal* [1966] 1 WLR 135, and in the *House of Lords* [1968] AC 409 (“James”); *Esdell Caravan Parks Limited v Hemel Hempstead RDC* [1966] 1 QB 895 (“Esdell”); *Brooks and Burton Ltd v Secretary of State for the Environment* [1977] 1 WLR 1294 (“Brooks and Burton”); *Kensington and Chelsea RBC v Secretary of State for the Environment* [1981] JPL 50 (“Kensington and Chelsea”); and *Lilo Blum v Secretary of State for the Environment* [1987] JPL 278 ; placing special reliance on *Washington* , *Carter* and *Kensington and Chelsea* . Also on intensification, Mr Humphreys referred me to an article by Mr Philip Petchey of Counsel, “Intensification of a use of land viewed as a material change of use” [2000] JPL 678 , and Professor Malcolm Grant's “Urban Planning Law” at pages 159 to 171.

18. Mr Humphreys referred me on particularity of description in lawful use certificates to *Broxbourne BC v Secretary of State for the Environment* [1980] QB 1 (“Broxbourne”); *Main v Secretary of State for the Environment* [1998] 77 P&CR 300 ;

and *R v Thanet DC ex p. Tapp* [2001] EWCA Civ 559, (“the Manston Airport case”), which also relates to intensification. Mr Humphreys also on particularity, referred to Annex A of Circular 10/97, and it was critical of paragraphs 8.11, 8.16 and 8.17.

19. Mr Humphreys submits that the position as to the law is uncertain but the more recent cases suggest that, if the decision-maker is not able to formulate a different use before and after the intensification, no change in the character of the use can be held to have occurred. He submits that this is the correct approach and that, whilst the courts on occasion refer to the need for there to be a change in the character of use, some of the cases can be reconciled on the basis that by “character” is meant “kind” or “type” of use.

Secretary of State's Case

20. Mr Beard for the First Secretary of State accepts that [Section 191](#) of the 1990 Act merely requires that the use shall be described and does not require that there be a particular level of specificity. He submits, however, that the language of the section does not preclude specific descriptions, including reference to the level of intensity of use.

21. Mr Beard submits that the fact that [Section 191](#) does not require more than a reference to the relevant use class, where the use is within a use class, does not assist the court in determining the issue in this challenge. He submits that it is clear that Parliament intended that the scheme of control of development should not apply to changes of use within the broad use classes specified in the use classes order, but that by excluding certain uses from the use classes order it is clear that Parliament intended that changes of use in such instances should fall within the ordinary scheme of development control. Mr Beard refers to the recognised need for precision in drafting certificates of lawful development in relation to uses that do not fall within any use classes order.

22. Mr Beard accepts that the relevant authorities demonstrate that the issue of whether mere increase in number is capable of amounting to a material change in the use of land has never been definitively determined as part of the ratio of a decision. He submits, however, that, whilst the issue may not have been definitively determined, there is, save for some judicial expressions of doubt on the application of the doctrine in a particular context, a clear line of judicial opinion recognising the possibility that an increase in the intensity of use of land may constitute a material change in the use of the land.

23. Mr Beard submits that it is clear, as recognised by the *Court of Appeal in Brooks and Burton*, that the issue of whether a change in the use of the land is “material” is a question of fact and degree to be determined in each case and is not a matter with which the court will interfere; that in determining whether a change in the use of land is “material”, it is proper to assess materiality as in this context, meaning materiality for planning purposes; and that, when considering the matter by reference to the character of the use of the land, this must include factors such as the planning consequences and environmental impact of any particular use, which in borderline cases may include having regard to the possible effect of the change on local amenity. Mr Beard relies upon the purpose of the regulatory scheme of planning control under the 1990 Act as being to retain effective control over development, as defined in [Section 55](#) of the 1990 Act, including changes in the use of land that would have a material impact, in land-use planning terms on local amenity or the environment. He submits that the fact that a caravan site is a concept known to the law does not necessarily preclude the possibility that an increase in the number of caravans on any particular site may result in a material change in the character of the use when the use of the land as a caravan site is considered in its proper planning context.

Discussion

24. The starting point is [Section 191](#) of the 1990 Act, relating to certificates of lawfulness of, inter alia, “any existing use” of land. If a certificate is issued under [Section 191](#), it must, inter alia, describe the use in question and give the reason for

determining the use to be lawful. As regards the description of the use, it provides that, in the case of any use falling within one of the use classes, identification should be by reference to that class.

25. In a case such as the present, not falling within any use class but being a recognised use, namely a residential caravan site, in my judgment the planning authority is entitled, albeit not bound, to include in the description of the use the intensity of the use. I regard the 2003 certificate, the lawfulness of which was not challenged at the time, as having been lawful in certifying the site for four caravans. In considering whether there was a material change in that use, I do not consider that it can be said that a change in the number, however great, is incapable of amounting to a material change of use, whatever the position might have been if the 2003 certificate had been silent as to number.

26. Turning to [Section 192](#) of the 1990 Act, with which the present case is directly concerned, relating to certificates of the lawfulness of, inter alia, “any proposed use”, lawfulness must involve whether the proposed use would be a material change of use from the existing use. This, in my judgment, is capable of being the case when the existing use has been expressed by reference to intensity of the use and the proposed use is materially more intensive.

27. There is no doubt what the lawful use before is: a residential caravan site for four caravans. There is no doubt what it is proposed the use after should be: a residential caravan site for eight or more caravans. A change in use can be clearly identified, albeit by reference to scale. The question then is whether it is a material change of use. From four to five has, as a matter of fact and degree, been found not to be material. From four to eight has, as a matter of fact and degree, been found to be material, given the change in the character of the use that the difference in scale would produce.

28. The description in the 2003 certificate was not confined to a part of the field that it was lawful to use as a residential caravan site. Therefore the lawful use as described applied to the whole of the field. There was no description by reference to space within the field. If the description had been silent as to numbers, then no doubt the lawful use would have applied without reference to numbers. In that case, a change, however considerable in numbers, might well not involve a change in use, still less a material change. Here, however, the 2003 certificate did have a description expressed in terms of numbers.

29. I derive assistance from *Broxbourne*, a decision of course on earlier legislation and not concerned with caravans or numbers. In *Broxbourne*, Robert Goff J, as he then was, said, at pages 10 and 11:

“Nor, in my judgment, does it assist Mr Fay to argue that the certificate specifies no particular level or intensity of activity, and, therefore, to submit that the level or intensity of activity was not a matter stated in the certificate and so was a matter on which the certificate was not conclusive. The short answer on this point is that the use was a matter stated in the certificate. Since no limit was placed upon either part of the site to be so used or the intensity of the use, the use so specified was without limit as to space within the site or intensity. Mr Fay cannot, therefore, now complain that the Secretary of State has erred in law in holding that there has been no material change of use by reason of the area of the site now employed or the present intensity of the use ...”

“But the case has a moral. It demonstrates that planning authorities should exercise great care concerning the terms of established use certificates which they issue. If a certificate is not drawn with care and expressly limited to the precise use in question, then its issue can lead to the consequence that the authority may, through its own act, find itself thereafter precluded from preventing a use for which planning permission would not have been granted simply because the certificate had been issued in terms wider than were necessary”.

30. I also derive assistance, as to the desirability of precision in describing an existing use so that it can be used thereafter as a point of reference and as to numbers of caravans being a relatively simple indicator in the case of caravan sites, from the judgment of Sullivan J in the *Manston Airport case*, *unreported*, 6th July 2000 at paragraphs 51 to 55 inclusive, and the same case in the Court of Appeal, per Buxton LJ at paragraph 18 and per Pill LJ at paragraphs 42 to 44 inclusive.

31. I do not consider that collateral challenge can be mounted upon the 2003 certificate in the proceedings before me, having regard to [Section 284\(1\(f\) and 284\(3\)\(g\)](#) of the 1990 Act. This is not like the case of the enforcement notice considered by the *House of Lords in R v Wicks [1998] AC 92*.

32. However, even if it were possible to mount a collateral challenge in the proceedings before me upon the 2003 certificate, in my judgment such a challenge would fail. It was not inappropriate to define the existing use in the way that was done.

33. Once one has a definition of the existing use, and that definition validly contains a reference to intensity of use, then an intensification of that use does not necessarily amount to a material change of use but a change of use is not excluded and the change may be material. I do not regard the position as being comparable to a situation where a use falls within a class in a use classes order. Then there may be no change of use in a relevant sense if the use remain within the same class. This seems to me to be the effect of the *Brooks and Burton* case.

34. Of the other cases, I need to make particular reference to two decisions of the Court of Appeal, in both of which Lord Denning MR presided. One is *James*. The question arises whether it is amongst the holdings of at least a majority of the court, Lord Denning and Davies LJ, not in this respect reversed by the majority in the House of Lords, that intensification can constitute a material change of use and therefore a change of use. Lord Denning said at 143, in relation to the validity of the enforcement notice, the terms of which are set out at page 141:

“It was said on behalf of the appellant that the change of use alleged in the enforcement notice (from one to four caravans) was not a material change of use. Intensification of an existing use, it was said, is not a material change of use. I do not agree. I think that a considerable increase in the number of caravans would be a material change of use. In any case it must be remembered that this whole site was used as a pleasure ground with a café and one caravan. If the site is used as well for several caravans, that would be a material change of use. It would be a change from a pleasure ground to a caravan site, at least in part. This question — of a material change of use — has been repeatedly held to be a question of fact and degree. The Divisional Court was quite right to refer it to the Minister for decision.”

35. I conclude that it is not of the ratio of *James* that mere intensification can constitute a material change of use. The change there was in the number of caravans, but in the context of the use or uses of the site as a whole, including use as a pleasure ground with a café. The site was not a site in single use as a caravan site.

36. The other case to which particular reference should be made is *Esdell*. In that case, Lord Denning again stated, at page 921, that an increase in the number of caravans may well amount to a material change of use. He also, at pages 922 to 925, building on *Hartnell*, addresses the respective roles of the planning authority and the site licensing authority and warns that the planning authority should deal with matters that relate solely to planning and should not go into detail, an instance of which may be the number of caravans, on matters that are within the area of responsibility of the site licensing authority.

37. The position in *Esdell* was that the site was an existing site within the 1960 Act and had the benefit of deemed planning permission. The case was concerned with the grant of the site licence and, in particular, with the imposition of a condition upon the grant of the site licence limiting the number of caravans and what the powers of the site licensing authority were. I do not find *Esdell* of much assistance in relation to the question indirectly before me, namely whether in a [Section 191](#) certificate it is open to a planning authority to describe existing use rights by reference to actual intensity of use.

Conclusion

38. I prefer the submissions of Mr Beard. In my judgment, the site was lawfully certified in 2003 as a residential caravan site by reference to a specified number of caravans and an increase in the number is capable of amounting to a change of use which may be material. I detect no error of law on the part of the Inspector and no diminution of existing use rights. I refuse the application.

39. MR BEARD: My Lord, may I just have a very brief moment to take instructions?

40. JAMES GOUDIE QC: Yes, of course.

41. MR BEARD: My Lord, in the circumstances, this matter has gone beyond one day and I do make an application for costs but, my Lord, there was a summary.

42. JAMES GOUDIE QC: I have not had summary bills from either side.

43. MR BEARD: My Lord, I appreciate that. I think we are agreed—I applied for costs but I think, in the circumstances, costs should be assessed on a detailed assessment, if not agreed, of course, between parties, all the better if there is agreement. At the moment I understand there is some disagreement between us. This case has gone beyond one day. Clearly it is appropriate—

44. JAMES GOUDIE QC: And an estimated day.

45. MR HUMPHREYS: Yes, my Lord, that is right. I do not object to the principle of costs, it is the amounts. We hope it can be agreed before it gets to detailed assessment but I would formally ask that it would go to detailed assessment.

46. Whilst I am on my feet, may I formally—

47. JAMES GOUDIE QC: So on costs, there is no controversy—

48. MR HUMPHREYS: There is no controversy as to the principle.

49. JAMES GOUDIE QC: — that you should pay the Secretary of State's costs. They are not going to be summarily assessed today but, if they cannot be agreed, they will be subject to a detailed assessment.

50. MR HUMPHREYS: I am grateful. Whilst I am on my feet, may I formally seek the permission of the court for permission to appeal. I have in mind obviously Part 52, rule 3(6) in terms—

51. JAMES GOUDIE QC: I do not have a White Book here but it probably will not be necessary.

52. MR HUMPHREYS: “Permission to appeal will only be given where—

“(a) the court considers that the appeal would have a real prospect of success ...”

53. JAMES GOUDIE QC: Judges rarely think they may have got it wrong.

54. MR HUMPHREYS: Or:

“(b) there is some other compelling reason why the appeal should be heard.”

55. On both bases I would, with respect, submit that, clearly, given the issues and the various dicta, which remain dicta, in the Court of Appeal and the Divisional Court — a difference in those dicta, over a long long period and, most recently, the *Court of Appeal in the Thanet* case recognised that those were difficult issues — that permission—

56. JAMES GOUDIE QC: I suspect the Court of Appeal might follow me, at least, to this extent: of determining this case on the basis of a use outwith the use classes order or even a use as a caravan site, rather than addressing the whole concept of intensification—

57. MR HUMPHREYS: Yes and, as I made it clear early on, I was quite content just to restrict what I said to the caravan site in the way I formulated it, the caravan site issue, as I identified in my skeleton argument and, so far as the question of construction in relation to [Section 191](#), how it relates to planning as a case where there are different views expressed. In my respectful submission, in terms of — there are compelling reasons why the appeal should be heard in relation to these issues and, indeed, there is a realistic, I would submit, prospect of success. I do not ask—

58. JAMES GOUDIE QC: You do not have to have both, do you?

59. MR HUMPHREYS: No, it is either/or. So, my Lord, given the nature of the argument — obviously we had the benefit of the argument over a day and a half — it would be my respectful submission that there has been a considerable degree of common ground between Treasury counsel and myself in relation to a number of different cases. The difficulties, the uncertainty and, in my respectful submission, that this is something which the Court of Appeal may very well find compelling in terms of whether they wish the law to advance, as it has not really been addressed formally by the Court of Appeal since 1959 with full argument.

60. But, my Lord, I appreciate that I am applying to a judge who has very clearly set out his views but, in my respectful submission, there are nevertheless important issues which do have a realistic, as opposed to hypothetical, prospect of success. Indeed, if I may say so, although your Lordship has picked up on the point of the certificate, the 2003 certificate refers to a number — it is that basis that was not challenged — clearly, whilst that might, in the ordinary course of events, say that this is peculiar to this site, really it is a vital issue anyway. In this case—

61. JAMES GOUDIE QC: My judgment would apply to any case in which the certificate did express a number.

62. MR HUMPHREYS: My Lord, yes. In terms of the relevance of the six or the four or the five, clearly that is an important issue. In terms of if it is the surplus, as I submitted, then the question of whether intensification can amount to a material change of use is an important issue to be decided by the Court of Appeal. But, my Lord, I make my submission.

63. JAMES GOUDIE QC: Mr Beard, what do you say about that?

64. MR BEARD: My Lord, for my part I accept that this case is limited to either the facts of this present case or to the type of case where there is a certificate of lawfulness.

65. JAMES GOUDIE QC: Not least given the circular, certificates are likely, are they not, generally to contain a number and, indeed, after this judgment becomes known, if it does, then that may become even more commonly the case. So it is a point that is going to have a fair degree of general application, is it not?

66. MR BEARD: A fair degree — my Lord, I would say, perhaps, a fair degree of application but in the relatively limited circumstances. My Lord, I hesitate only as a matter of practicality as I do not think there are that many parcels of land where caravan sites are left so unregulated. My learned friend has identified that his case is only — in so far as the case could have

a wider application, it is only for residential caravan sites but I certainly take your Lordship's point as to the possibility of it only being fairly relevant in a wider context.

67. JAMES GOUDIE QC: Yes.

68. MR BEARD: My Lord, certainly, in respect of whether or not the matter has been dealt with by the Court of Appeal, it has been dealt with since 1959 by both the Divisional Court and the Court of Appeal.

69. JAMES GOUDIE QC: But never of the ratio and with conflicting dicta.

70. MR BEARD: My Lord, that is exactly what I was going to accept. There is that aspect, of course, but it is a matter for—

71. JAMES GOUDIE QC: No, I will grant permission to appeal. (**pause**)

72. I have simply written, “the point of law is an important one on which there have been conflicting dicta”.

73. MR HUMPHREYS: I am grateful. Under Part 52, Rule 4, if I could just read out the other part:

“The appellant must file the appellant's notice at the appeal court within —

(a) such period as may be directed by the lower court; or

(b) where the court makes no such direction, 14 days after the date of the decision of the lower court that the appellant wishes to appeal.”

74. JAMES GOUDIE QC: Fourteen days is all right, is it not?

75. MR HUMPHREYS: My Lord, I was going to ask in this case — first of all, clearly my client would like to reflect very carefully. He does have the judgment after a day and a half.

76. JAMES GOUDIE QC: He may want to see the transcript and that may take a while.

77. MR HUMPHREYS: Exactly, and, in terms of the cost consequences of appealing, what may turn out to be an unsuccessful challenge, let us put it on that basis—

78. JAMES GOUDIE QC: How long do you want?

79. MR HUMPHREYS: May I have 28 days?

80. JAMES GOUDIE QC: What do you say, Mr Beard.

81. MR BEARD: There is no objection to that.

82. JAMES GOUDIE QC: 28 days. Right, anything else? Thank you both very much for your submissions.

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