

CO/10562/2006

Neutral Citation Number: [2008] EWHC 2122 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 31 July 2008

B e f o r e:

MR JUSTICE SULLIVAN

Between:

THE QUEEN ON THE APPLICATION OF TENDRING DISTRICT COUNCIL
Claimant

v

SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
Defendant

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Mr Simon Bird appeared on behalf of the Claimant
Mr Paul Brown appeared on behalf of the Defendant

J U D G M E N T

1. MR JUSTICE SULLIVAN:

Introduction

2. In this appeal under Section 289 of the Town & Country Planning Act 1990 ("the Act") the appellant challenges the decision of an inspector appointed by the first respondent allowing the second, third and fourth respondents' appeals against enforcement notices issued by the appellant in respect of a property known as Yew Trees, 12 The Street, Kirby le Soken, Frinton on Sea, Essex.
3. The inspector's decision is contained in a decision letter dated 20 November 2006. He allowed the appeals under ground (b) in Section 174 (2) of the Act and quashed the enforcement notices. He also allowed other appeals in respect of a property known as Ducks Halt Cottage, Kirby le Soken. The appellant does not challenge the inspector's decisions in respect of Ducks Halt Cottage.
4. Yew Trees is a detached property which was originally constructed as a dwelling house. However on 27 April 1988 planning permission was granted for "change of use to nursing home together with rear extension of the property". The planning permission was subject to a number of conditions, of which condition 6 was of particular relevance for the purposes of the appeal against the enforcement notice:

"The premises shall be used only for a nursing home and for no other purpose, including any other purpose in Class C2 of the Schedule of the Town & Country Planning Use Classes Order 1987."

5. After 1988 Yew Trees was used as a nursing home for the elderly. In December 2002 Yew Trees was purchased by the St Luke's Hospital Group which is a provider of specialist mental health services offering -

"treatment services within a community setting, both medium and long-term rehabilitation care and various therapeutic treatment options for our patient group."

6. Patients were first admitted in July 2003. The undisputed evidence before the inquiry, given by the second respondent, was that the use made of Yew Trees by the St Luke's Hospital Group involved the following:

"(i) Maintenance of secure access and egress arrangements with all external doors locked and access and egress controlled by staff. It is not possible for a patient to leave the property except by prior arrangement and then under supervision.

(ii) Patient treatment delivered by a multi-disciplinary team involving a consultant psychiatrist, nursing team, activity co-ordinators, social workers, clinical psychologists, physiotherapists, speech and language therapists, massage therapists and play therapists.

(iii) Clinical services provided for each patient, including CBT based

therapy for anger and anxiety management, art therapy, cookery classes, massage therapy, relaxation training, language and comprehensive assessment, social skills training, domestic skills training, physical exercise, physiotherapies, psychotropic medication, group educational sessions.

(iv) The provision of facilities involving indoor and outdoor pursuits, including trampolining, rambling, cycling, ball games, including five-a-side football and basketball, and community-based recreational programmes.

(v) The erection of a two-metre high security palisade fence around the rear garden area, CCTV cameras and use of mirrored glass preventing views into the property."

7. The appellant considered that this use of Yew Trees was in breach of condition 6 in the 1988 planning permission. So on 9 December 2005 it issued an enforcement notice alleging a failure to comply with condition 6 -

"because the land is not being used as a nursing home but as an institution for the provision of residential accommodation and care to persons who are generally physically active, not confined to bed, require outdoor exercise and excursions outside the land and who are in need of continuous supervision and for the provision of medical and/or psychiatric treatment of behavioural and learning difficulties."

8. The inspector held an inquiry over four days from 10-13 October 2006 and visited the site on 11 October. He dealt with the Yew Trees appeals on grounds (b) and (c) in paragraphs 5 to 16 of the decision letter:

"Yew Trees' Appeals on Grounds (b) and (c)

5 The 1988 planning permission at 'Yew Trees' is simple and straightforward. The only aspect of the development permitted at that time, which is of concern for the purposes of these appeals, is the change of use to a nursing home. The effect of condition number 6 of that permission is to confine the use of those premises to a nursing home and to no other purpose. Consequently, if I find that the premises at 'Yew Trees' are no longer operating as a nursing home, then condition number 6 is automatically contravened, a breach of planning control has taken place and any appeal for consideration under ground (c) is bound to fail. However before arriving at that position, the question arises whether any change from a nursing home has, as a matter of fact, taken place. If it has not then the appeals made on ground (b) will succeed.

6 To reach a reasoned conclusion on this matter, I consider it appropriate to set out the provisions of the Town & Country Planning (Use Classes) Order 1987 as amended (UCO) in full, insofar as they affect these

premises and the consideration of these appeals. Class C2 of the Schedule is headed 'Residential Institutions' and reads as follows:

'Use for the provision of residential accommodation and care to people in need of care [other than a use within class C3 (dwelling houses)]. Use as a hospital or nursing home. Use as a residential school, college or training centre.'

A definition of 'care' is set out in Article 2 of the Order. This says:

"care" means personal care for people in need of such care by reason of old age, disablement, past or present dependence on alcohol or drugs or past or present mental disorder, and in class C2 also includes the personal care of children and medical care and treatment.'

7 Looking at this wording in the round, it seems to me that the phrase 'nursing home' can encompass a wide range of activities involving personal care. It is by no means synonymous with a home for the elderly, which is what a nursing home is commonly thought as and which was its primary use prior to the purchase of the premises by the appellants. Given the wide definition of 'care' set out in Article 2 of the UCO, which is applied across the board to class C2, I find it difficult to distinguish a 'nursing home' from 'use for the provision of residential accommodation and care to people in need of care'. To my mind they are one and the same thing. Therefore I am firmly of the opinion that the only appreciable effect of condition 6 is to prevent the use of 'Yew Trees' as a hospital, residential school, college or training centre, out of the other activities set out in class C2, without the need for planning permission.

8 I am reinforced in adopting this interpretation of the legislation by looking at the date of the planning permission, 27 April 1988, i.e. less than 12 months beforehand. In these circumstances, I consider that it is instructive to see how the provisions of its predecessor, the Town & Country Planning (Use Classes) Order 1972, defined residential institutions. Class C2 combined Class XII and Class XIV, set out in the Schedule of the previous UCO. Class XII was concerned with residential educational establishments and does not need any further explanation. However Class XIV is worth recording in full. It said:

'Use as a home or institution providing for the boarding, care and maintenance of children, old people, or persons under disability, a convalescent home, a nursing home, a sanatorium or a hospital.'

9 Taking that recently revoked legislation into account, the local planning authority could have specified that the use of 'Yew Trees' be confined to a home for the care of old people, the approach it subsequently adopted at 'Ducks Halt Cottage', but it did not. From what I could see of the present operations at 'Yew Trees', its primary purpose is the personal care for

people in need of such care by reason of past or present mental disorder. The previous primary use of 'Yew Trees' was personal care for people in need of such care by reason of old age (and/or possibly disablement). I am satisfied that both categories fall within the broad category of 'nursing home' for the purposes of class C2 and that the breach of planning control as alleged in the notice has not taken place.

10 These arguments are not accepted by the planning authority. It asserts that 'Yew Trees' is in use as a hospital, owing to the high levels of security required to keep the patients confined to the premises and to prevent them from getting out without proper supervision and control. The council accepts that there is no definition to be found for a hospital or nursing home in the UCO, other planning legislation or reported case law. However it claims that the common understanding of these words, the use of the word 'hospital' under mental health legislation for any premises where any of the patients are detained against their will and recent amendments to the UCO indicate that the premises are a hospital and a secure one, taking it not only out of the category of nursing home for the purposes of class C2, but out of class C2 altogether. The council distinguishes between a nursing home and a hospital in that the former provides care, which may include some treatment, whereas the latter is said to be providing treatment primarily and not care. I find that this distinction does not sit comfortably with the definition of care in Article 2. Care is the all-embracing concept across class C2 and treatment is listed as one aspect of it (the final word of the definition).

11 The Health Care Commission, in its report on the premises, refers to 'Yew Trees' as a hospital, on the basis that it meets that definition in the mental health legislation, and that is a place with low level secure standards designed to confine patients who are 'prevented from leaving'. In my opinion, the security aspects of the operation at 'Yew Trees' are very much subsidiary to what is the major component of activities there, the care of persons with a past or present mental disorder. I am firmly of the opinion that this is the primary activity for determining the use under planning legislation, use as a nursing home in its broadest sense, and the use for which the council specifically granted planning permission in 1988. Nursing homes for the elderly also need to be capable of restraining residents suffering from dementia and they may similarly fall within the concept of hospitals for mental health legislation purposes. Their levels of security may be less sophisticated than the system at 'Yew Trees', because the mentally impaired elderly are much less capable of leaving premises unattended by a carer, given their normally impaired physical state compared with younger people with learning difficulties. I am satisfied that homes for the elderly, which are subject to such restrictions remain nursing homes under planning legislation, even if they are considered hospitals under other administrative regimes.

12 Indeed, the council goes further and states that the level of security at

'Yew Trees' is such that the premises now falls within new Use Class C2A as a secure hospital. This amendment to the UCO was inserted into its Schedule by Article 5 of SI 1282 of 2006, the Town & country Planning (Application of Sub-ordinate Legislation to the Crown) Order 2006, which came into force on 7 June 2006. Class C2A reads as follows:

'Secure residential institutions

C2A Use for the provision of secure residential accommodation, including use as a prison, young offenders institution, detention centre, secure training centre, custody centre, short-term holding centre, secure hospital, secure local authority accommodation or use as military barracks.'

13 The council argues that the emphasis, in paragraph 83 of the memorandum of DCLG Circular 02/2006 on 'institutions where security is concerned with preventing the residents from leaving', brings the operations at 'Yew Trees' within the category of secure hospital for the purpose of the new Use Class. I do not accept these arguments. Secure hospitals are specifically mentioned within the use class but alongside prisons, young offenders institutions, detention centres, secure training centres, custody centres, short-term holding centres and secure local authority accommodation. Rehabilitation, care and training are certainly key features of prisons, training centres, young offenders establishments, secure local authority facilities and high security mental hospitals, which I consider that this use class refers to. However it seems to me that the main purpose of these categories is to keep persons under control, who are a potential danger to society at large. Moreover as far as I can see, the concept of 'care', imported into Class C2 by Article 2 of the UCO, has not been applied to Class C2A. At 'Yew Trees', I gained the strong impression that 'care' is the unit's primary function and that security, although strict, is in place more for the safety of the residents, to prevent them from harming themselves, rather than their being a danger to society beyond the boundaries of the site.

14 Instead, as I indicate above, I consider the principal activities at 'Yew Trees' to be the care of persons with past or present mental disorders in premises, which, in the absence of any alternative available term in either Use Class C2, or planning permission TEN/374/88 granted on 27 April 1988, was a nursing home and remains such, even if the security arrangements are rather more elaborate than those normally found in a home for the elderly.

15 I am reinforced in taking this line by what is said in paragraph 84 of the memorandum to the recent DCLG circular. It states that the secure hospitals envisaged in that paragraph require large areas of ground and for these reasons may not be easily accommodated within existing

allocations. In contrast, paragraph 5.17 of the council's draft replacement Local Plan (see paragraph 29 below) says that a site unacceptable for housing development will generally be regarded as unacceptable for residential homes, including (from paragraph 5.14 - see paragraph 27) nursing homes and establishments catering for people with disabilities.

16 Overall, I conclude that, on the construction of Article 2 and Class C2 of the Schedule to the Town & Country Planning (Use Classes) Order 1987 as amended, and of planning permission TEN/374/88 granted by Tendring District Council on 27 April 1988, 'Yew Trees' was granted planning permission as a nursing home on that date, the planning permission was implemented, and despite the change of occupancy and ownership, remains a nursing home, for the purposes of current planning legislation, up to the present day. Therefore as a matter of fact, the matters alleged in the notice have not taken place and the appeals on ground (b) succeed. I should make clear to the numerous objectors to the present operations at 'Yew Trees' that my conclusions on these appeals are made without any reference to the planning merits or demerits of the current activities at these premises. They are based solely on my construction of a past planning permission granted for this site, and up-to-date planning legislation, as I interpret them."

The Appellant's Challenge

9. The appellant contends that in reaching the conclusion that the existing use of Yew Trees was as a nursing home within the scope of the 1988 permission the inspector misdirected himself in law and reached a conclusion that was not reasonably open to him on the facts.
10. Before considering Mr Bird's submissions on behalf of the appellant, it is helpful to set out the relevant parts of Section 55 of the Act and the Town & Country Planning (Use Classes) Order 1987 (as amended) ("the order"). Section 55 (2) of the Act provides:

"The following operations or uses of land shall not be taken for the purposes of the Act to involve the development of land:

.....

(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."

11. Article 3 (1) of the order provides:

"Subject to the provisions of the order, where a building or other land is used for a purpose of any class specified in the Schedule, the use of that building or that other land for any other purpose of the same class shall

not be taken to involve development of land."

12. The relevant extracts from Part C of the Schedule to the order are set out in paragraph 6 of the inspector's report. For convenience, I repeat them. Under the heading "Residential Institutions", class C2 identifies the following purposes:

"Use for the provision of residential accommodation and care to people in need of care (other than a use within class C3 (dwelling houses)). Use as a hospital or nursing home. Use as a residential school, college or training centre."

13. Article 2 contains a definition of care. Unless the context otherwise requires, 'care' means -

"Personal care for people in need of such care by reason of old age, disablement, past or present dependence on alcohol or drugs or past or present mental disorder, and, in class C2, also includes the personal care of children and medical care and treatment."

14. It is common ground between the parties that the order is concerned with the primary use of land rather than with uses which are ancillary or incidental to that primary use (see Brazil (Concrete) Ltd v Amersham Rural District Council (1967) 18 P&CR 396, per Lord Denning 399).

15. The first and fundamental difference between the parties arises from Mr Bird's submission that the purpose of Section 55 (2) (f) and of Article 3 of the order is to allow changes from one purpose to any other purpose within the same use class which would otherwise require planning permission. He submitted that it was necessary to distinguish between the different purposes within the classes. Thus a nursing home could not be a hospital or a use for the provision of residential accommodation and care to people in need of care ("a residential care home") for the purposes of C2. The use had to be one or other of the purposes in C2 and it could be only one of those purposes. It was therefore necessary to give "nursing home" a meaning different from that which was ascribed to "hospital" or "residential care home".

16. I do not agree with that submission. The purpose of the order is not to distinguish between different purposes within the classes in the schedule to the order but is, as Mr Brown submitted on behalf of the first respondent, to group together uses for various purposes which have similar characteristics for planning purposes so that changing from one to the other within the classes is deemed not to be development by way of a material change of use. While in the absence of the provisions of Section 55 (2) (f) and the order some of those changes from a use for one purpose within a class to another purpose within the same class might amount to a material change of use, equally there will be some cases where the change might not be a material one. There would be many other cases where there would be considerable doubt as to whether the change from one purpose to another purpose within the same class would or would not amount to a material change of use.

17. In the absence of the order such questions would have to be resolved by a detailed examination of the evidence in each and every case. The order avoids that need and puts the matter beyond any doubt whether or not - if one looked at the detail - one would have concluded that there had been a material change of use, absent the order. A change from one purpose to any other purpose within the same class in the order is deemed not to be development for the purposes of the Act.
18. In these circumstances it is unnecessary, for the purposes of the Act and the order, to decide whether a particular use where people are cared for is a use for the purposes of, for example, a hospital or a nursing home or a residential care home provided it can fairly be described as a use for one or perhaps a combination of two or three of those purposes. Since the purposes are regarded as sufficiently similar for planning purposes that a change between them is deemed not to amount to development, there will inevitably be the possibility of overlap between such similar activities. To take "a use for the purpose of a nursing home" as one example, the Shorter Oxford English Dictionary defines "nursing home" as "a small private hospital"; Chambers Dictionary defines it simply as "a private hospital". Thus it may well be reasonable to describe precisely the same activity as either a nursing home or as a hospital.
19. The provision of personal care, including treatment, clearly occurs across a wide spectrum of institutions, including hospitals, nursing homes and residential care homes. At extreme ends of the spectrum it may well be easy to describe the purpose as that of a hospital. For example, few people would describe any of the major teaching hospitals as nursing homes. At the other end of the spectrum, a small residential care home providing very little in the way of care might not be described as a nursing home. In the middle of the spectrum, an institution might equally well be described as a hospital, or as a nursing home, or a residential care home.
20. I can see no reason why it is necessary for the purposes of the statutory scheme to pigeon-hole any particular purpose into only one of the categories in class C2 as a nursing home or as a hospital or as residential care home. Just as some establishments may, in ordinary language, be described either as nursing homes or as hospitals, so some establishments may be described either as residential care homes or as nursing homes. The fact that the three purposes identified at the start of class C2 - ie, excluding residential schools, colleges and training centres - would often overlap was recognised, at least to an extent, by the way in which the appellant put its own case at the inquiry. As the inspector noted in paragraph 7 of the decision letter, use as a home for the elderly was the previous use of Yew Trees. That use was acceptable to the appellant because the appellant regarded that use as a nursing home use within condition 6.
21. Thus, in its closing submissions to the inspector, the appellant said:

"They [Yew Trees and Ducks Halt] are not simply caring for their patients in the way a nursing home characteristically does. People do not enter a nursing home in the expectation of having a condition treated. They move there on a permanent basis because they can no longer care for themselves. They need not be ill. And if suffering from dementia, the condition may not be treatable. This is the conventional position with

regard to a nursing home/old people's home."

22. It was inherent in Mr Bird's submissions, which he fairly acknowledged, that a conventional "old people's home" was not a nursing home. It was instead a residential care home for the purposes of class C2. Mr Bird submitted that the difference between a residential care home for elderly people and a nursing home, which provided care for elderly people, was the nature and extent of the care provided. If the primary purpose was the provision of nursing care then the establishment was a nursing home. Otherwise the establishment would be a residential care home. That was not a distinction which was drawn by the appellant at the inquiry. There was no evidence as to the extent of the nursing care that had been provided at what the appellant was content to call a "nursing home" at Yew Trees. Indeed the impression one is left with is that it was very much a conventional old people's home, ie, a home which would, according to Mr Bird's submissions, fall within the definition not of a nursing home but a residential care home. Nevertheless the appellant at the inquiry was entirely content to equate an old people's home with a nursing home.
23. It is common ground between the parties that "nursing home" in condition 6 must have the same meaning as "nursing home" in the order, whatever that meaning might be. However "nursing home" is not defined in either the Act or the order. Mr Bird submitted that "nursing home" should not be given its ordinary and natural meaning and instead should be given the meaning that is ascribed to "nursing home" in the Registered Homes Act 1984.
24. I do not accept that submission for the following reasons. First, "nursing homes" have featured in Use Classes Orders since the advent of planning control. A class making provision for, inter alia, nursing homes is to be found in the Town & Country Planning (Use Classes) Orders 1950. It is unnecessary to trace the evolution of various classes in subsequent use class orders. It suffices to say that until 1972 hospitals and homes or institutions which cared for the mentally ill were placed in a separate use class from those homes, institutions, hospitals and nursing homes which cared for those who were physically ill or in need of care for some reason. That distinction was removed in 1972.
25. Class XIV in the 1963 Use Classes Order had referred to -

"Use as a home or institution providing for the boarding, care and maintenance of children, old people or persons under disability, a convalescent home, a nursing home, a sanatorium or a hospital (other than a hospital, home, hostel or institution included in class XVI)."

Class XVI was in these terms:

"Use as a hospital, home or institution for persons suffering from mental disorder, or epileptic persons, or a home, hostel or institution in which persons may be detained by order of a court or which is approved by one of her Her Majesty's Principal Secretaries of State for persons residing there under a requirement of a probation or supervision order."

26. The 1972 order effectively removed the separate class XVI of the 1963 order. Thus class XIV in the 1972 order is as follows:

"Use as a home or institution provided for the boarding, care and maintenance of children, old people or persons under disability, a convalescent home, a nursing home, a sanatorium or a hospital

27. I do not accept Mr Bird's submission that that change left "mental nursing homes" as some form of sui generis use. Rather in my judgment all institutions providing varying degrees of care to those who needed it because of their physical or mental condition were brought together in one use class.
28. The Registered Homes Act 1984 ("the 1984 Act") distinguishes between nursing homes and mental nursing homes (see Section 21 (3) (b) and Section 22 (1)). While that is understandable in the context of the regulatory regime under the 1984 Act, it is not consistent with either class XIV of the 1972 order or with class C2 in the present order. It does however demonstrate that an establishment which cares for those whose disability is caused by their mental rather than their physical state can properly be described as a nursing home. The 1984 Act chooses to define it as a mental nursing home and gives that term an extended meaning.
29. Secondly, while the 1984 Act deals with the registration of residential care homes in Part I and with the registration of nursing homes and mental nursing homes in Part II - and the definition of "residential care home" is similar to that in the order - unlike the order, the 1984 Act does not contain an extended definition of "care" as is included in Article 2 of the order. Thus a residential care home within class C2 of the order which provided medical care and treatment would not be a residential care home for the purposes of the 1984 Act. It would instead be a nursing home. The definition of "nursing home" in the 1984 Act is contained in Section 21 (1) (a):

"(a) any premises used, or intended to be used, for the reception of, or the provision of nursing for, persons suffering from any sickness, injury or infirmity;

(b) any premises used, or intended to be used, for the reception of pregnant women, or of women immediately after childbirth (in this Act referred to as a 'maternity home'); and

(c) any premises not falling within either of the preceding paragraphs which are used, or intended to be used, for the provision of all or any of the following services, namely -

[various relatively minor surgical procedures are set out]."

30. The definition of "nursing home" in the 1984 Act specifically excludes public hospitals (see sub-section (3) (a)), that is to say -

"(a) hospital[s] maintained or controlled by a government department or local authority or any other authority or body instituted by

special Act of Parliament or incorporated by Royal Charter."

Thus private hospitals are not excluded from the definition of "nursing homes" for the purpose of the 1984 Act. It follows that some private hospitals would be nursing homes for the purposes of the 1984 Act. But, if Mr Bird is right in his submissions, for planning purposes they would have to be classified as hospitals because they could not be classified as nursing homes for the purposes of the Use Classes Order since one would have to choose which purpose they fell under: nursing home or hospital.

31. In my judgment, the two statutory regimes have very different functions to play. There is no reason whatsoever to import a statutory definition from one very different regime into the other. If Parliament had wished to define "nursing homes" in the order by reference to the 1984 Act, or indeed by reference to any other enactment it could and would have done so expressly. It follows that "nursing home" should be given its ordinary and natural meaning.
32. I have already indicated that the ordinary and natural meaning of a "nursing home" may include an establishment that others would describe as a private hospital. It may also be equally apt to describe some nursing homes as residential care homes. While little nursing care might be provided in some conventional elderly persons' homes, there can be no doubt that the ordinary meaning of a "nursing home" includes an establishment where "nursing care" is provided.
33. If one then looks that the extended definition of "care" in Article 2 to the order - so that it includes medical care and treatment in class C2 - it is plain that residential care homes which provide medical care and treatment might equally well be described as nursing homes and vice versa. Somewhere that provides residential accommodation and care to people who are in need of care because of their old age is fairly described as "old people's home". And an "old people's home" is, as the inspector noted in paragraph 7, what is commonly thought of as a nursing home. Certainly the appellant at the inquiry equated the two purposes (see above).
34. One of the problems with this case is that Mr Bird was not at the inquiry, and he fairly acknowledges that the case he now presents differs from the case as it was presented by the appellant to the inspector at the inquiry. At the inquiry the appellant did not argue that "nursing home" should be given anything other than its natural meaning, and certainly did not argue that it should be defined by reference to the definition of "nursing home" in the 1984 Act. It argued that the former use - which appears to have been a conventional old persons' home which, on Mr Bird's analysis, would be a residential care home, not a nursing home - was a nursing home (and was therefore in accordance with condition 6) whereas the new use was that of a secure hospital within class C2A of the order (see paragraph 10 of the inspector's decision letter and the definition of class C2A uses set out in paragraph 12 of the decision letter).
35. Before me, Mr Bird did not submit that the present use fell within class C2A; rather he submitted that the use was a sui generis one as a residential rehabilitation centre. If I did not accept that submission, then he submitted that the use was as a residential care home, ie, for the first of the purposes in class C2. However he accepted that the use

had some of the features of a hospital. Indeed one of his submissions was that if one looked at the activities taking place in Yew Trees, far more was being done than merely the provision of nursing care. Therefore, he submitted, use as a hospital was "an option".

36. The only matter that appeared to be crystal clear was that he submitted that - whatever it was - the use was not that of a nursing home. He submitted that the inspector had not adequately considered whether the use was more properly described as that of a hospital rather than a nursing home.
37. I accept Mr Brown's submission that the appellant's own difficulties in classifying the use demonstrate only too clearly that there are no bright lines to be drawn between hospitals, nursing homes and residential care homes within class C2. Such establishments provide a spectrum of care, and the question is not could the present use of Yew Trees be described as a hospital or could the present use of Yew Trees be described as a residential care home? Rather it is, could it reasonably be described in ordinary language as a nursing home even though it might equally well be described as a hospital and/or as a residential care home? As I have indicated, there is no necessary contradiction between the three concepts. It is perfectly possible for the same use to be described either as a hospital or as a care home or as a nursing home or as a nursing home or a residential care home.
38. The question which the inspector posed for himself was in paragraph 5:

" the question arises whether any change from a nursing home has, as a matter of fact, taken place."
39. Mr Bird submitted that the inspector had wrongly applied the wide definition of "care" across the board when the wide definition of "care" is not relevant for the purposes of considering what is a nursing home and applies only where the word "care" is to be found in class C2. Thus it applies when one is considering a residential care home, ie, a use for the provision of residential accommodation and care to people in need of care. But it does not apply when one is considering the other purposes within class C2, including use as a hospital or nursing home.
40. I do not accept that the inspector erred in that way. At the outset of paragraph 7 the inspector considered what was the meaning of the phrase "nursing home". He rightly concluded that a nursing home can encompass a wide range of activities involving personal care. He specifically responded to what appeared to be the appellant's case at the inquiry, that rather than a place which might encompass a wide range of activities involving personal care, the words "nursing home" were effectively synonymous with a home for the elderly. The inspector, while acknowledging that that is what is commonly thought of as a nursing home, rejected that very limited definition of "nursing home" which had been advanced by the appellant at the inquiry, ie, one which equated it simply with a home for the elderly.
41. Having considered the breadth of the meaning of the phrase "nursing home", the inspector then went on to consider whether there was any practical difference for the

purposes of the appeal between a nursing home and a residential care home, bearing in mind the wide definition of "care" set out in Article 2 of the order. Bearing that wide definition in mind, he found it difficult to distinguish between a nursing home and an institution where there was "a use for the provision of residential accommodation and care to people in need of care by reason of, inter alia, old age".

42. I confess that I share the inspector's difficulty. It will very often be extremely difficult to distinguish between a nursing home and a place where residential accommodation and care to people in need of care by reason of their old age is provided, particularly when one bears in mind that since that care may include medical care and treatment, it may therefore include nursing care.
43. Although Mr Bird took exception to the inspector's statement that "to my mind they are one and the same thing", the decision letter has to be read in a common sense way. The inspector was not writing a treatise on the Use Classes Order. The question was whether they were one and the same thing for the purpose of the appeal which he was required to determine.
44. For the reasons that I have given, his conclusion that it was difficult to distinguish between the two concepts for the purposes of the appeal was one which was eminently reasonable and was certainly one that was open to him. Thus, he said, the only appreciable effect of condition 6 was to prevent the use of Yew Trees as a hospital, residential school, college or training centre. In short, it was his view that because of the difficulties of distinguishing between a nursing home and a residential home, in practical terms, it would not be possible under condition 6 to prevent the use of Yew Trees for a purpose that could be described as either a nursing home or a residential care home.
45. For my part, I would have gone further than the inspector, and I am not persuaded that condition 6 would have prevented the use of Yew Trees for some forms of hospital use. Not use as a hospital in the sense of a London teaching hospital, but use as a hospital in the sense of the kind of private hospital which can also be described as a nursing home, as demonstrated by the dictionary definitions (see above).
46. Mr Bird criticised the inspector's reference to the 1972 Use Classes Order. But in my judgment the order was relevant in that it had combined all of the institutions providing care and, for the first time, included those providing care to people because of their mental disabilities as well as those which provided care to people because of their physical disabilities.
47. Bearing in mind the way the council was putting its case, effectively equating a nursing home with a home for the elderly, the inspector was doing no more than pointing out that if that is what the council had wanted to do - to limit Yew Trees to a home for the elderly - it could have done so given the fact that class XIV in the earlier order had specifically referred to homes or institutions providing for the board and care and maintenance of children, old people or persons under a disability. Thus the appellant could have plucked out a home for old people and excluded a nursing home which might care for persons under a disability, for example.

48. The inspector then in paragraph 9 of the decision letter dealt with the primary purpose, as he saw it, of the operations at Yew Trees. He concluded that that primary purpose was the personal care for people in need of such care by reason of past or present mental disorder. He then contrasted that with the previous primary use which the appellant was contending was within the definition of "nursing home", and concluded that the only difference was that there was personal care for those who needed care by reason of their past or present mental disorder on the one hand, and on the other there had been personal care for people who needed that care by reason of old age and/or possibly disability. Thus he was satisfied that both categories fell within the broad category of "nursing home" for the purposes of class C2.
49. In my judgment, that was a conclusion which was reasonably open to him. In effect, the conclusion was that the fact that the personal care was being provided for people who needed that care by reason of their mental disorder did not take the use out of the description of "nursing home".
50. The inspector then dealt, in paragraph 10 of the decision letter, with the argument that was being advanced to him by the appellant at the inquiry, that is to say, that the present use was as a secure hospital. That submission was not advanced by Mr Bird. Moreover the distinction drawn by the council "between a nursing home and a hospital in that the former provides care, which may include some treatment, whereas the latter is said to be providing treatment primarily and not care" was not adopted by Mr Bird. He acknowledged that given the broad definition of "care" in Article 2, a residential care home might provide a considerable amount of medical treatment and still remain a residential care home.
51. Thus, in effect, Mr Bird's concession echoes the inspector's conclusion that the distinction that had been drawn by the appellant at the inquiry did not sit comfortably with the definition of "care" in Article 2. Although Mr Bird criticised the inspector for saying care is the all-embracing concept across class C2 because care is clearly not involved - or may well not be involved - in use as a residential school, college or training centre, again it is necessary to bear in mind that the inspector was responding to the appeal before him. He was not writing a thesis on the whole of class C2 in the Use Classes Order. The only relevant parts of class C2 which he was considering were those which were concerned with institutions which provided care.
52. That this is the common thread running through those institutions is confirmed by Circular 13/87 which explained the significant changes that had been brought about by the order. Paragraph 25 of that circular states:

"The residential institutions class combines classes XII and XIV of the 1972 order. Apart from educational establishments, the characteristics of the uses contained in this class that sets them apart from those in the hotels and offices and dwelling houses classes is - in the case of the former - the provision of personal care and treatment."

Thus the inspector's approach, when read reasonably, was wholly in accord with the guidance in Circular 13/87.

53. Unsurprisingly, given the way in which the appellant's case had been advanced at the inquiry, much of paragraphs 11 to 14 of the decision letter deal with whether or not the present use could reasonably be described as a secure hospital use within use class C2A. As I have indicated, that was not a submission that Mr Bird pursued. He acknowledged that that particular use class was not in existence when the planning permission had been granted. It was subsequently added in 2006.
54. Circular 02/06 from the Department of Communities and Local Government explained in paragraph 83:

"The list of institutions falling within the C2A class is not exhaustive. However, the class should include all the various categories of secure facilities in the criminal justice and immigration states. Two non-Crown uses have been included (secure local authority accommodation and secure hospitals) because they share the land use characteristics and impacts of some of the Crown uses. The list contains two types of institution: the first type is those uses already described, where security is concerned with preventing the residents from leaving. The second type is military barracks, where security is concerned with preventing unauthorised entry

Plainly the inquiry was not concerned with the military barracks type of use. The question for the inspector was whether the present use of Yew Trees was to be equated with those institutions where security was concerned with preventing the residents from leaving. Thus he was perfectly entitled to say in paragraph 13:

"However it seems to me that the main purpose of these categories is to keep persons under control who are a potential danger to society at large."

Plainly he was not there referring to the military barracks element of class C2A, but rather to institutions such as prisons, young offenders institutions, etc.

55. The inspector considered this matter in considerable detail and concluded that care was the unit's primary function and that security, although strict, was "in place more for the safety of the residents to prevent them from harming themselves rather than there being a danger to society beyond the boundaries of the site".
56. Mr Bird submits that the inspector did not consider whether the present use should be described as a hospital use. The inspector was not asked by the appellant to consider that question. He dealt with the case as it was presented before him. He also specifically dealt with the way in which the appellant had sought at the inquiry to distinguish between a nursing home use and a hospital use (see the end of paragraph 10), that is to say, the distinction that is no longer pursued by Mr Bird. Thus it is readily understandable that the inspector did not devote a great deal of time in the decision letter to that issue.
57. In any event, the question for the inspector was not whether the present use could be described as a hospital use but whether it could fairly be described as a nursing home

use. The inspector concluded that it could be so described (see paragraph 14). In my judgment, he was reasonably entitled to do so. Mr Bird submitted that in paragraph 14 the inspector had fallen into the error described in Tessier v Secretary of State for the Environment and Another 31 P&CR 1975 161, see per Lord Widgery CJ at 166 where he -

"indicated the desirability of not stretching the Use Classes Order to embrace activities which do not clearly fall within it because it is no bad thing that unusual activities should be treated as sui generis for this purpose" -

In my judgment Tessier is of no assistance in the present case. The use of Yew Trees could not sensibly be described as "unusual activities". In Tessier it will be remembered that the unusual use was that of a sculptor's studio. On any basis the present use is acknowledged by the claimant, subject to Mr Bird's sui generis point, to fall within one or other of the purposes within class C2. It cannot sensibly be said that the inspector was stretching the Use Classes Order to accommodate an unusual use.

58. Once it is accepted that hospitals, nursing homes and residential care homes should not be placed, for the purposes of the order, into watertight compartments but rather that they represent a spectrum of care provided to those who need it, whatever their disability, whether that be caused by their physical or mental condition, it is not unnecessarily straining the language of the order, or condition 6 to describe the present use of Yew Trees as a nursing home use.
59. For these reasons I am satisfied that the inspector did not err in law and did not reach a conclusion which was unreasonable. It follows that the appeal must be dismissed.
60. MR BROWN: I am grateful to your Lordship for giving judgment today. In the light of dismissal of the appeal, I would ask for an order that the claimant pay the Secretary of State's costs. Schedules have been exchanged but there has been some discussion about the amounts of the schedules since then. I am going to ask you to assess summarily the Secretary of State's costs at slightly less than is on the schedule in the sum of £8,004 which I understand - and hope I get the nod to my left which is always encouraging - is an agreed figure.
61. MR BIRD: That is agreed. I do have an application for permission to appeal on a number of grounds. First, in relation to the approach to Section 5 (2) (f) and Article 3 (1). In my submission your Lordship has erred in the approach there, and also in respect of the condition itself which says that the use shall be as a nursing home and for no other purpose. In my submission it is irrational to conclude that such a condition would allow purposes other than the defined list - a matter other than nursing home to fall within it.
62. Secondly, in terms of the approach of the inspector and the interpretation of "nursing home", in my submission, the interpretation your Lordship has afforded to the term is not one which accords with the proper meaning of the term, having regard, first, to the statutory context or alternatively the natural ordinary meaning when looked at in

context for the reasons I have set out in argument. In my submission, both those grounds would have a real prospect of success having regard to the relevant test - - - -

63. MR JUSTICE SULLIVAN: Hold on. This is an enforcement case.

64. MR BROWN: It is a second appeal.

65. MR JUSTICE SULLIVAN: It is a second appeal so you have to ask the Court of Appeal.

66. MR BIRD: You are absolutely right. It is my fault.

67. MR JUSTICE SULLIVAN: It not as though I can allow or disallow it?

68. MR BIRD: You are right, that is quite correct. My apologies.

69. MR JUSTICE SULLIVAN: It is silly, is it not, that 288 applications because they are applications are not second appeals. You have to go to the Court of Appeal for that.---