Case No. CO/859/83

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(CROWN OFFICE LIST)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 December 1983

Before:

D WIDDICOMBE QC
(SITTING AS A DEPUTY JUDGE OF THE QUEEN'S BENCH DIVISION)

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Fayrewood Fish Farms Ltd **Appellant**

v

The Secretary of State for the Environment and Another **Respondents**

- -

(Computer aided transcript of the Stenograph Notes of
Marten Walsh Cherer Ltd.,
Midway House, 27-29 Cursitor Street, London EC4A 1LT.
Telephone Number: 071-405 5010
Shorthand Writers to the court.)

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J Fulthorpe (instructed by **J M B Turner & Co, Broadstone, Dorset**) for the **Appellant**
S Brown (instructed by the **Treasury Solicitor**) for the first **Respondent**
The **Second Respondent** did not appear and was not represented

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Judgment

D Widdicombe QC:

This is an appeal under section 246 of the Town and Country Planning Act, 1971 by Fayrewood Fish Farms Limited against a decision of the Secretary of State for the Environment, upholding an enforcement notice made by Hampshire County Council in respect of a development of the appellant's at Butlocks Heath, Netley, Hampshire. An appeal lies to this court on a point of law.

The enforcement notice, which is dated 13th July, 1982, alleges a breach of planning control by the carrying out of a mining operation, comprising the excavation and removal of topsoil and other materials for the purpose of the extraction of underlying gravel. The notice called on the appellant to cease the excavation and restore the land.

The appellant appealed against the enforcement notice and a local inquiry was held by an inspector appointed by the Secretary of State. He reported to the Secretary of State that, subject to the consideration of the legal issues, the enforcement notice should be upheld. The Secretary of State, in his decision letter, dated 11th July, 1983, upheld the notice, though on reasoning that differed on some points from that of the inspector.

The appellant's case against the enforcement notice was that its operation upon the land had deemed planning permission pursuant to Class VI (1) of Schedule 1 to the Town and Country Planning General Development Order, 1977 - "Agricultural buildings, works and uses". It was said that the excavations were for the purpose of making a fish farm, which was an engineering operation within Class VI. The gravel extraction was merely a necessary incident to the making the fish ponds and production of fish for food was an agricultural use of land. This last point was not in dispute in the case, the issue being whether Class VI conferred planning permission for the operations.

Article 3(1) of the Order provides:

> "(1) Subject to the subsequent provisions of this order, development of any class specified in Schedule 1 to this order is permitted by this order and may be undertaken upon land to which this order applies, without the permission of the local planning authority or of the Secretary of State: Provided that the permission granted by this order in respect of any such class of development shall be defined by any limitation and be subject to any condition imposed in the said Schedule 1 in relation to that class."

Class VI (1), so far as is material, provides:

> "1. The carrying out on agricultural land having an area of more than one acre and comprised in an agricultural unit of building or engineering operations requisite for the use of that land for the purposes of agriculture (other than the placing on land of structures not designed for those purposes or the provision and alteration of dwellings), so long as: ... (c) no part of any buildings (other than moveable structures) or works is within 25 metres of the metalled portion of a trunk or classified road."

The relevant parts of the Secretary of State's decision letter are as follows:

> "6. On ground (b) of appeal against the enforcement notice, although fish-farming could well be an agricultural use covered by Section 22(2)(e) of the 1971 Act, and therefore not amounting to development, the Secretary of State would agree with the

Inspector that, on the facts of the present case, works necessary to construct the fish farm would involve operational development requiring planning permission.

"7. The gist of your client's arguments was that the works being carried out were designed to produce a fish farm and although amounting to development requiring planning permission, they were permitted development under Class VI of the Town and Country Planning General Development Order 1977. As a corollary it was submitted that the notice was wrong to describe the works as a mining operation.

"8. Looking at the arguments involved on ground (b) (and also ground (c)) in Section 88(2), the Inspector concluded: 'What has to be determined next is whether those operations can be considered as permitted development within the terms of Class VI of the General Development Order 1977, and I note that the operations to be considered must be 'building or engineering operations' ie mining operations are excluded. It would seem that what is proposed does not involve building operations in the way that term is normally understood with the exception of the 3 small buildings required as a food store, a staff room and an office.

The principal constructional element of the scheme is the large lake, followed by the small lake and then the holding/rearing ponds which are to be constructed above ground level with earth banks. In the absence of a full definition of 'engineering works' in the 1971 Act it is necessary to find some brief encompassing form of words which may perhaps suffer the defects of such brevity. Nevertheless my conclusions in this case are based on the philosophy that engineering works are the exercise of civil engineering skills in the construction of a specific project which is of sufficient pre-determined size shape that a conception of the finished project can be illustrated on a plan or drawing with, where necessary, explanatory notes. The plan or drawing need not be a skilled draughtsman's exercise provided the intention is made clear.

Considering now the information available in this case in the context of the above. The plan which was given to the contractor for pricing purposes has been 'thrown away' but it was not explained why a copy has not been retained by that contractor for constructional purposes because the work is barely begun. The only other plan (Document 3 - Appendix 4) was that to the county council which was said by Mr. Threadgold to be 'of much the same type as that sent to the contractor's. At this stage I discount the plan (Plan A) which was produced at the inquiry because it was prepared specifically for illustrative purposes at that inquiry. There would be problems for any contractor to construct the fish farm using only the plan and other necessary constructional details concerning pipework runs. Matters would be made easier if Mr. Threadgold were constantly on-site to give instructions concerning his intentions but this would mean a 'piece meal' type of operation much removed from that which I envisage in my definition. Evidence was given that the work began without setting out pegs or profiles which gives the impression of excavation work more akin to a mining or other operation where, in the initial stages, there would not be the same need for a pre-determined plan or for the work to be set out. The only need would be, and this is what is said to have happened, for a machine operator to commence digging and loading the material into lorries. The intention to provide a weighbridge gives strength of a primary use for mineral extraction with an after use as a fish farm. If this be accepted the proposal is not permitted development within Class VI of the General Development Order and ground of appeal 88(2)b will fail.

If the above be not accepted consideration must be given to the words in Class VI 'requisite for the use of that land for agriculture'. Fish farming experts were present at the inquiry and, although some of the details of the proposal were questioned there was no suggestion that the lakes were being dug deeper than necessary for the particular type of trout farming and therefore, on this particular point, I conclude that the works are requisite for the use of that land for agriculture.

No specific submissions were made on ground of appeal 88(2)c and it is difficult to see what arguments could have been adduced because clearly, the breach of planning control, as alleged in the notice, has taken place. Ground of appeal 88(2)c will therefore fail.

Dealing next with one of the more emotive submissions at the inquiry ie that there is no intention to build a fish farm. Having seen and heard Mr. Threadgold on the subject of this fish farm, his obvious enthusiasm leaves me in no doubt that his intentions are just as he described. Whether or not a fish farm of the type envisaged would actually be constructed on this land in the way described is open to some doubt because the project came over to me as badly under-researched. The first essential is an adequate supply of water and yet no hydrological exploratory work was done except the digging of a few holes. Prudence would dictate consultation with the Southern Water Authority on this matter but this was not done. For my part, and from the evidence, I concur with the view of that Authority that there is doubt that a sufficient and constant quantity of water would be available and further exploratory work is necessary. Other points which throw doubt on the viability of the project is the difference of opinion on the stocking density. Mr. Amos, who is a practising fish farmer, believes that the venture could succeed but his view of the likely stocking rate was less optimistic than that of Mr. Threadgold. The view of the Head of the Fish and Shellfish Cultivation Section of the Directorate of Fisheries Research was, by comparison, pessimistic. Another point which remained obscure was why the appellant firm should be paying £102,000 to a contractor who is reserving unto himself the mineral rights. There is little work in the contract which would not come under the heading of earth-moving.

I have dealt with certain points at some length above because they cover matters which were returned to time and again by those opposing the proposal. My explanation of some of the matters which remained obscure is that Mr. Threadgold's enthusiasm for the project is such that the whole has been taken along at too fast a pace for prudent planning.

"9. These conclusions have been considered. However before proceeding to a view on the basis of these conclusions, it is considered that there is one other issue that must also be examined. If advantage is to be taken of a permission that is granted by virtue of Article 3(1) of the Town and Country Planning General Development Order 1977, regard must be had to the limitations imposed in Schedule 1 to that Order in relation to the particular class of development in question. Your client sought to rely upon Class VI but it was admitted on his behalf that the limitation specified in paragraph 1(c) of that Class had not been adhered to. In these circumstances it is considered that, even if the works undertaken by your client could reasonably have been regarded as engineering operations, his claim that these operations were permitted by virtue of

that order would have failed. Nonetheless since particular attention was paid at the inquiry to other arguments on Class VI, it is considered reasonable that they should be considered by the Secretary of State.

"10. For any works to be permitted under Class VI they must be building or engineering operations and not mining or other operations. In practice, your client only sought to argue that engineering operations were involved. The Secretary of State would not entirely accept the conclusions of the Inspector on this issue. In the first place since it is the application of the General Development Order that is under consideration, it is in that Order rather than in the 1971 Act that a definition must be sought. Secondly the Secretary of State does not accept that any evidence of your client's intentions as illustrated by the intended provision of a weighbridge would be relevant to deciding whether engineering operations were involved. In the event the term 'engineering operations' is not defined in the General Development Order, but the Secretary of State would agree with the Inspector, for the other reasons the latter gives, that the operations concerned cannot reasonably be described as 'engineering operations'. The works cannot therefore be permitted under Class VI and since this was the basis of the appeal on ground (b), the appeal must fail on ground (b). If it were necessary to determine the matter, the Secretary of State would take the view that since the works are not associated with any current active use of the land for the purposes of agriculture but relate to a future agricultural use, they cannot be said to be 'requisite for the use of that land for the purposes of agriculture'.

"11. On ground (c) in Section 88(2), the Secretary of State must consider the Council were correct to allege a mining operation. There is no definition of 'mining operations' in the 1971 Act, but the Secretary of State would take the view that the work that has actually been carried out, namely the removal of top soil and other materials, which has included some gravel, could reasonably be so described. The appeal must therefore fail on ground (c) also."

Mr. Fulthorpe, for the appellant, contended that Class VI of the General Development Order applied. He said that the land was in agricultural use for grazing and that there was an engineering operation, namely, the making of the fish ponds. Alternatively, he claimed the works were a building operation. There being no definition of an engineering operation in the Act or Order, he referred to the definition of engineering in the Concise Oxford Dictionary, namely "the application of science for the control and use of power, especially by the use of mechanics." He said that the inspector and the Secretary of State went too far in the requirement of engineering and planning skills. On the facts as found, there was a sufficient engineering or scientific element to satisfy Class VI.

Mr. Simon Brown said that there were three reasons why the works were not permitted development within Class VI(1). First, because part of the works were within 25 metres of the metalled portion of a classified road. The works as a whole were therefore caught by proviso (c) to Class VI(1), as the Secretary of State held in paragraph 9 of the decisions letter. Second, the works were not engineering operations. He said that the Secretary of State had applied the right test to the facts. Third, the land was not in agricultural use when the work began.

On this last point, Mr. Brown informed me that the Court of Appeal had just given judgment on an appeal from a decision of the Lands Tribunal in Jones v Metropolitan Borough of

Stockport 45 P&CR 419 It was held that (1) for the purposes of Class VI(1) there must be a pre-existing agricultural use of the land, but that (2) to be requisite for the use of that land for the purpose of agriculture, the building or engineering operations referred to in Class VI(1) did not have to relate to that pre-existing use. It was sufficient if they related to a proposed or prospective agricultural use. No transcript of the judgment of the Court of Appeal in that case is yet available, but both parties were content that I should proceed to judgment on this appeal on the basis that the Court of Appeal had made the above two rulings. On this basis, Mr. Fulthorpe abandoned ground (e) of the notice of motion.

In reply to Mr. Brown's first point about proviso (c) to Class VI(1), Mr. Fulthorpe said that only ten per cent. Of the works were within 25 metres of the road and that the proviso should be held to apply to only to that part of them, not the whole of them. In reply to Mr. Brown's third point, Mr. Fulthorpe said that it was clear from the inspector's report that the land was in agricultural use before the operation began.

I will deal with the appeal against the Secretary of State's decision as to the meaning of "engineering operations" first. The only definition of "engineering operations" in the Act merely provides that it includes the formation or laying out of means of access to highways. There is no definition in the Order and, as far as I am aware, there is no decision of the courts on the meaning of the phrase. In paragraph 8 of the decision letter, the inspector is quoted as saying that "engineering works are the exercise of civil engineering skills in the construction of a specific project which is of sufficient pre-determined size and shape that a conception of the finished project can be illustrated on a plan or drawing with, where necessary, explanatory notes. The plan or drawing need not be a skilled draughtsman's exercise provided the intention is made clear".

The Secretary of State appears to have approved this test, although he differed somewhat from the inspector on its application to the facts. I do not think the Secretary of State is correct in paragraph 10 of his letter, when he says that it is in the Order rather than the Act that a definition must be sought. The definitions in the Act apply to the Order unless the Order itself makes other provision or the context otherwise requests. As neither the Act nor the Order defines the term, I need say no more on that.

In the absence of a definition, the term "engineering operations", in my judgment, should be given its ordinary meaning in the English language. It must mean operations of the kind usually undertaken by engineers, i.e., operations calling for the skills of an engineer. In relation to land, the engineering skills are likely to be those of a civil engineer, but I do not think that the phrase is limited to that branch of the profession. The definition in the Act shows that the operations of traffic engineers may come within the phrase, and there may be other specialist engineers who apply their skills to land. This does not mean than an engineer must actually be engaged on the project, simply that it is the kind of operation on which an engineer could be employed, or which would be within his purview.

Both counsel accepted that there could be an overlap between building, engineering and indeed mining operations within section 22(1) of the Act. I think that that must be so.

Although I think that the inspector and the Secretary of State are basically right in that they define engineering operations by reference to works calling for engineering skills, I think they go too far in requiring that there be a "specific project which is of sufficient pre-determined size and shape that a conception of the finished project can be illustrated on a

plan or drawing with, where necessary, explanatory notes". No doubt the existence or otherwise of a plan in detail can constitute important evidence as to whether particular operations are the kind of works an engineer undertakes, but they are not essential. I think, therefore, that the Secretary of State has applied too exacting a test, so that on this point, if the matter stood alone, it would have to be remitted to the Secretary of State.

I do not propose to dwell on "building operations". Mr. Fulthorpe said that he did not concede at the inquiry that the works were not building operations, but he has not included that point in the notice of motion. I think he was right not to do so. In my judgment, these excavations are clearly not building operations.

I turn to Mr. Brown's first point about proviso (c) to Class VI(1). The proviso to article 3(1) of the Order says that permission granted by the Order shall be defined by any limitation imposed in the Schedule. I accept Mr. Brown's submission that proviso (c) applies to exclude from Class VI the whole of any building or engineering operations if any part of them is within 25 metres of a classified road. If does not just apply pro tanto. I think this makes sense because the building or engineering operations can normally be expected to comprise a single whole, not readily capable of severance. I think the Secretary of State was correct in law in paragraph 9 of his decision letter.

With regard to Mr. Brown's third point, I am not prepared to disturb the decision on this ground. It appears that this point was in issue at the inquiry (see the report, paragraphs 44 and 87), but there is no express finding or conclusion recorded upon it. However, I think there is a sufficient inference from the inspector's description of the land as "farm land" (report paragraphs 4 and 103(1)) to constitute a finding that the use before the operation began was an agricultural use as defined by the order. There is evidence of an agricultural use in paragraph 9(ii) of the report.

The result is that the appeal succeeds on the point about the meaning of "engineering operations", but the development does not come within Class VI(1) because part of the works are within 25 metres of a classified road.

Having heard counsel on both sides, I think the proper course in these circumstances is to remit the matter to the Secretary of State, that being the view of both parties. I do this without prejudice to the question of whether the court may, in appropriate circumstances, have a discretion as to whether to remit in a case where the decision has been found faulty in point of law, but for other reasons the decision would still stand. That point does not call for decision today and I therefore remit the case to the Secretary of State with the opinion of the court.

Appeal allowed with costs.