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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

No. CO/2950/21

Royal Courts of Justice

Thursday, 18 August 2022

[2022] EWHC 2661 (Admin)

Before:

MR JUSTICE DOVE

B E T W E E N :

THE QUEEN
on the Application of HAYES — Claimant

- and -

STROUD DISTRICT COUNCIL — Defendant

J U D G M E N T

MR JUSTICE DOVE:

Introduction.

1 The claimant challenges the grant of retrospective planning permission at Lower Kilcott Farm, Hillesley, Wotton-Under-Edge, Gloucestershire, made by the defendant to the interested party on 12 July 2021. The nature of that planning permission is set out below. The site in question lies within the Area of Outstanding Natural Beauty ("the AONB") and the farmhouse it contains is a grade II listed building. The application site also included three barn buildings that were, for those purposes, labelled "A", "B" and "C".

Background to the Claim.

2 Of these three barns, barn B is the largest and is the subject of the controversy in this case. It was constructed using agricultural permitted development rights following a determination by the defendant that prior approval was not required, made on 30 June 2014.

3 On 3 August 2017, the defendant granted planning permission for an extension to barn B enabling the addition of two further bays to the existing five bays of the building constructed using permitted development rights. Originally, barn B, following its erection, was used for the storage of agricultural machinery. When the approval was granted, the permitted development rights for construction of agricultural buildings were contained in the Town and Country Planning (General Permitted Development) Order 1995 ("The GPDO"), in particular within Schedule 2, Part 6 Class A of that instrument. Any permission which was granted using Part 6 Class A, like that which was used to construct barn B, was granted subject to conditions which were mandatory and automatically imposed. Of particular

relevance to this case is condition 8.2(5) within Part 6 Class A. That condition reads as follows:

> "Where development consists of works for the erection, significant extension or significant alteration of a building and –
>
> (a) the use of the building or extension for the purposes of agriculture within the unit permanently ceases within ten years from the date on which the development was substantially completed: and
>
> (b) planning permission has not been granted on an application, or has not been deemed to be granted under Part III of the Act, for development for purposes other than agriculture within three years from the date on which the use of the building or extension for the purposes of agriculture within the unit permanently ceased.
>
> Then, unless the local planning authority have otherwise agreed in writing, the building or, in the case of development consisting of an extension, the extension, shall be removed from the land and the land shall, so far as is practicable, be restored to its condition before the development took place, or to such condition as may have been agreed in writing between the local planning authority and the developer."

4 On 1 October 2019, the interested party's agent made the application for retrospective planning permission which is the subject of this case. The development described in the application for retrospective planning permission was as follows:

> "Material change of use of land from agriculture to the processing, seasoning, drying, storage, sale and supply of firewood."

The form stated that the use had commenced on 1 February 2015 and was completed on 1 March 2015. The form also stated that the existing use of the barn, namely barn B, was the one for which retrospective planning permission was being sought. The claimant objected to the application on a variety of grounds, and other individuals and organisations also objected. The Cotswolds Conservation Board, The Ramblers Association and the Campaign for the Preservation of Rural England expressed their own objections to the application.

Amongst the grounds of opposition which were raised to the development were the location of the site in the AONB, and its impact on the interests of that nationally important designation.

5 The case officer's review of the application concluded that the proposal was farm diversification, which was supported by adopted Local Plan policy. There were no material environmental harms identified in the officer's review. In relation to the principle of development, the officer set out the factual position and the relevant policies as follows:

> "National policy promotes the development and diversification of agricultural and other land based rural businesses.
>
> Local Plan Policy CP15 supports development outside defined settlement limits where it is essential to the maintenance or enhancement of a sustainable farming enterprise.
>
> Policy EI5 supports farm enterprises and diversification where a proposal can demonstrate the viability of farming through helping to support, rather than replace or prejudice, farming activities on the rest of the farm.
>
> The farm owns 21 hectares and also rents 21 hectares and continues to farm the land. There are 60 cattle and intermittently sheep grazing on the land. 20 hectares of the land is cut for haylage twice yearly. In addition, the applicant also owns just over 7 hectares of woodland.
>
> The farm has diversified to the processing, seasoning, drying, storage, sale and supply of firewood. The drying process is carried out within existing barns that are no longer in full use as part of the farm. The barns were formerly used to house 700 pigs. Wood now sold for domestic use across all of England, must meet new requirements. In order to supply or sell wood fuel there is a requirement for the wood to be certified as 'Ready to Burn'. This confirms it has a moisture content of 20% or less. This requirement has influenced the applicant's decision to diversify.
>
> Given the above, it is considered that the proposed change of use would accord with policy EI5."

6 The report also noted:

> "This proposal is for the use of existing agricultural buildings to be used for the processing, seasoning, drying, storage, sale and supply of

> firewood. The proposal is a 'one-man' operation that utilises existing agricultural buildings on a working farm as part of farm diversification. The proposal does not require the construction of additional buildings."

The officer recommended that planning permission should be granted, and planning permission was indeed granted on 12 July 2021.

The Claim.

7 These proceedings were originally started applying for judicial review on a variety of grounds. The first ground was that the original planning permission implemented for building B was unlawful, and that the building had not been lawfully erected in accordance with the permitted development rights which are identified above.

8 The defendant responded to this contention by drawing attention to evidence of a site inspection which had taken place in 2017, which established that at that time the building was being used for agricultural purposes. The interested party, the developer, who had the benefit of the permission under challenge, provided a witness statement in which he observed that in 2017, at the time of that application, barn B was solely used for the storage of agricultural machinery and equipment. He stated it was used as such until the late summer of 2018. Thereafter, it was used for the storage of processed logs as well as the storage of agricultural machinery. At the time of the making of that witness statement in September 2021, the interested party stated that the building was mostly used for the storage of processed firewood.

9 Permission to apply for judicial review was refused by His Honour Judge David Cook, sitting as a Deputy High Court Judge, on 28 October 2021, on the papers. The claimant sought an oral reconsideration of that decision. At the oral reconsideration hearing the

claimant reformulated his case into what was, in effect, a single ground. Permission was, at the oral hearing, granted, and that was recorded in an order dated 15 February 2022. The ground, which was identified and for which permission was granted, was as follows:

> "The Council failed to take into account material considerations, namely that barn B was subject to a condition (A2(5) of the GPDO) which would require its removal if a non-agricultural planning permission was not granted or written agreement made. The approval of the planning application would be such a planning permission, and the consequences of authorising the retention of the building, in particular with respect to the Cotswolds' area of outstanding natural beauty and the setting of a listed building."

10 Following the grant of permission for this ground, the defendant reconsidered its position and, in particular, a planning officer, Ms Brown, undertook a site visit to assess how barn B was being used. In her witness statement she states as follows:

> "In my professional opinion, the use of the barn for the storage of agricultural machinery and equipment, and the maintenance of such items, is ancillary to the primary use of the building in connection with viable business."

Ms Brown exhibits photographs of the barn taken on 11 March 2022, illustrating the storage of items of equipment and machinery. In a further statement, the interested party states that barn B is used to store equipment and machinery which is used for farming, as well as overnight storage of farm tractors, and activities and storage for the purposes of his firewood business.

11 This material is disputed by the claimant, who provides his own evidence, contending that nearly all of the equipment and machinery in Ms Brown's photographs are used in the firewood business also observing that, in truth, there is little agricultural activity taking place on the interested party's land. There is some limited livestock grazing and haylage, but little more. The claimant contends that the agricultural use, such as it is, is *de minimis*.

12 It would be difficult to describe the facts as being agreed in this case, but a number of points fall to be noted. First, the differences between the parties are very narrow. Secondly, the parties' positions at the hearing were that it was not necessary to seek to resolve such differences on the facts as there may be in order to resolve the essential question of the legality of the planning permission.

13 Further key points to note are as follows. The claimant accepts that there is some small element of agricultural use appearing in barn B, but the claimant contends that that could not legally be ancillary to the principal use for processing, seasoning, drying and storage, the sale and supply of firewood. The defendant accepts that if the requirement of the statutory condition imposed under paragraph 8.2(5) was triggered, then the fact that the planning permission, which was granted and subject to challenge, would enable the retention of the barn, would have been a material consideration, and would have been one which was not, in truth, taken into account in the officer's decision. It is the defendant's position, however, that the condition was not triggered and, therefore, that this was not a material consideration which needed to be taken into account in reaching the decision to grant planning permission.

The Issues.

14 There are two principal legal issues raised in the case, although the parties accept that one of them is, in reality, quite peripheral. The peripheral point which was raised at the hearing is the question of whether the modest agricultural use of the building could be ancillary to a principal use of the building comprised in the firewood business use. The far more central point, and the one to which the balance of this judgment is devoted, is the question of whether the condition at paragraph A.2(5) has been triggered, and therefore the defendant

needed to take this into account in determining the planning application, in that granting it would enable the retention of the building as a result of the terms of condition 8.2(5)(b).

15 The determination of this question depends on the proper interpretation or construction of condition A.2(5) and, in particular, A.2(5)(a). The claimant and the defendant agree the question is one of statutory construction, and although the question was raised in the course of argument as to whether the principles of interpreting planning conditions to be derived from the Supreme Court's decisions in *Trump International Golf Club Limited & Anor v The Scottish Ministers* [2015] UKSC 74 [2016] 1WLR 85, and *London Borough of Lambeth v Secretary of State for Housing, Communities and Local Government & Ors.* [2019] UKSC 33 might be more relevant to the exercise, the claimant and the defendant considered that the outcome would, in truth, be the same if those principles were deployed. I agree. The question is to be resolved by examining what is the natural ordinary meaning of the words used in the condition in the light of the purpose of the condition, and the planning permission to which it relates. The context, including any other conditions, will cast light on the purpose of the relevant words, and it is necessary at all times to apply common sense in the interpretation process.

16 Schedule 2 Part 6 of the GPDO provides the following in relation to permitted development rights under Class A:

> "A Permitted development.
>
> The carrying out on agricultural land comprised of an agricultural unit of 5 hectares or more in area of:
>
> (a) works for the erection, extension or alteration of a building, or
>
> (b) any excavation or engineering operations
>
> which are reasonably necessary for the purposes of agriculture within that unit."

At A.1 a number of exclusions to the entitlement to this permitted development are set out and which are addressed below. Then at A.2 there are a number of conditions set out which are imposed on the permitted development including the condition at the heart of this case at A.2(5) which is set out in full above.

17 The claimant submitted that the construction of the condition should reflect the context in which it arises, namely in a bespoke process to provide permitted development rights for agricultural uses; not mixed uses, or uses for buildings to which agricultural uses are ancillary. The language of Part 6 Class A of the GPDO is consistent in referring to use for the purpose of agriculture. It would not be permitted under this class of permitted development to erect a building for a mixed use, including agriculture. It follows from this, the claimant contends, that the condition under A.2(5) is triggered once the building being in agricultural use permanently ceases, and an agricultural use ceases when it is replaced by a mixed use or as here, on the defendant's case, the firewood use with an ancillary agricultural use.

18 By contrast, the defendant submits that the condition should be approached as a piece of ordinary language and that Part 6 Class A speaks of operations reasonably necessary for the purposes of agriculture, not specifically about an agricultural, or solely agricultural, use. The common sense meaning of the condition, submits the defendant, and in particular its trigger, is that the meaning of "the use of the building…for the purposes of agriculture within the unit permanently ceased" means that all elements of agricultural use of the building must have permanently ceased, whereas here some elements of agricultural use continue, albeit at a low level. The condition is not triggered and the removal of the building pursuant to the operation of the condition is not required.

19 The defendant submits that the concept of 'change of use' and 'mixed uses' has no part to play in the construction of the condition. From a practical perspective, it is submitted that it has to be recognised that the extent of the use of the building for agriculture may vary over time, and the fact that it diminishes does not lead to the conclusion that the building must be removed. The condition would only bite when the agricultural use stops altogether. To suggest that when another use occupies the building there is a breach of the condition is an unnecessarily draconian approach.

Conclusions.

20 Having reflected on the competing submissions, I am satisfied that the claimant's construction is correct. The approach to the construction requires an ordinary, natural and common sense approach to language, clearly related to the context of the statutory material being interpreted: see *Evans v Secretary of State For Communities and Local Government* [2014] EWHC 4111, a decision of Mr Neil Cameron QC, sitting as a Deputy Judge of the High Court, applying the decision of Goulding J in *English Clays Lovering Pochin & Co. Ltd. v Plymouth Corporation* [1973] 2 All ER 730. In my view, reading the condition along with the whole of Part 6 Class A of the GPDO places it in context and is an aid to understanding.

21 The starting point of the exercise must be the development which, by virtue of Part 6 Class A of the GPDO, the developer can take advantage of, and which is subject to the condition of A.2(5). The entitlement to exercise the permitted development right relates to work for the erection, extension or alteration of a building "reasonably necessary for the purpose of agriculture within that unit." The exemption from normal processes of development control, and the conventional application process comprised within Part 3 of the Town and Country Planning Act 1990, arises solely in respect of a building reasonably necessary for the

purposes of agriculture, not for some other purpose, or for the purpose of a combination of being reasonably necessary for agriculture and some other activity. The phrase in the condition at A.2(5) "…the use of the building…for the purposes of agriculture within the unit permanently ceases…" must be read in a similar way for it to be understood in context. If the use of the building changes from being for agriculture to its being used for another purpose, or for a combination of agricultural use and another activity, then the justification for it being permitted development and an exception to normal development control processes, will no longer exist. The common sense reading of the condition is, therefore, that permanent cessation of agricultural use means permanent cessation of the use which gave rise to the entitlement to take advantage of permitted development rights in the first place, and that use was an agricultural use reasonably necessary for the activities within the unit. That use ceases permanently when replaced by another use, or a combination of uses, even if one of those uses is agricultural and related to the activities of the unit.

22 This analysis is not affected by an understanding of any periodic changes of the intensity of the agricultural use taking place within the building. The intensity of the agricultural use may wax and wane without triggering a requirement of the condition to remove the building. Only permanent cessation of the agricultural use in the sense already described will trigger the condition's requirement.

23 There are subsidiary points which support this construction. First, this construction is entirely consonant with an understanding of uses in development control set out in section 55 of the 1990 Act. Change of use from an agricultural use to either another use, or a mixed use, of some other use than agricultural use would be material and would amount to development. It would require approval and not be within the scope of the development permitted under Part 6, Class A. This reinforces the conclusion which I have reached in relation to the construction of the condition. Secondly, in my view, the Parliamentary

intention of Part 6 Class A of the GPDO is clear, and supports the claimant's construction of the condition. The entitlement to permitted development for a building for agricultural uses reasonably necessary for an agricultural unit, as an exception to the normal development control processes set out in the 1990 Act, is in recognition of the particular circumstances and importance of agricultural uses. Those circumstances include that, in the main, agricultural uses will be in a rural countryside setting, and require buildings and storage of equipment, crops and housing of livestock. The countryside has, as a feature of consistent Government policy, broadly speaking been a location to be protected from sporadic building and the subject of stricter development control policies.

24 Part 6 Class A is therefore intended to assist agricultural activities to be provided with necessary buildings outside the controls which would operate in respect of other activities in a rural area. But entitlement to the permitted development is limited to agricultural uses only and this is emphasised by the provisions of Part 6 Class A.1 which defines development not permitted under this class in the following way:

> "A.1 Development not permitted
>
> Development is not permitted by Class A if–
>
> (a) the development would be carried out on a separate parcel of land forming part of the unit which is less than 1 hectare in area:
>
> [(aa) it would consist of the erection or extension of any agricultural building on an established agricultural unit (as defined in paragraph O of Part 3 of this Schedule) where development under Class MA or MB of Part 3 (changes of use) has been carried out within a period of ten years ending with the date on which development under Class A(a) begins;]
>
> (b) it would consist of, or include, the erection, extension or alteration of a dwelling;
>
> (c) it would involve the provision of a building, structure or works not designed for agricultural purposes;

(d) the ground area which would be covered by–

(i) any works or structure (other than a fence) for accommodating livestock or any plant or machinery arising from engineering operations; or

(ii) any building erected or extended or altered by virtue of Class A, would exceed 465 square metres, calculated as described in paragraph D.2 below;

(e) the height of any part of any building, structure or works within 3 kilometres of the perimeter of an aerodrome would exceed 3 metres;

(f) the height of any part of any building, structure or works not within 3 kilometres of the perimeter of an aerodrome would exceed 12 metres;

(g) any part of the development would be within 25 metres of a metalled part of a trunk road or classified road;

(h) it would consist of, or include, the erection or construction of, or the carrying out of any works to, a building, structure or an excavation used or to be used for the accommodation of livestock or for the storage of slurry or sewage sludge where the building, structure or excavation is, or would be, within 400 metres of the curtilage of a protected building;

(i) it would involve excavations or engineering operations on or over article 1(6) land which are connected with fish farming; or

(j) any building for storing fuel for or waste from a biomass boiler or an anaerobic digestion system–

(i) would be used for storing waste not produced by that boiler or system or for storing fuel not produced on land within the unit; or

(ii) is or would be within 400 metres of the curtilage of a protected building."

25 It is entirely consistent with Parliament's intention to make specific provision for an agricultural use, and because of the particular requirements and importance of agricultural uses to conclude that these provisions are made solely for an agricultural use and not any other form of use, or for another use alongside, or mixed with, an agricultural use. It is consistent with this analysis that once the sole use of the building for agriculture has ceased

the building should be removed as the reason for permitting its development under Part 6 Class A would have ceased. This approach is, therefore, consistent with the conclusion that the defendant should have taken account of the fact that the provisions of the condition at A.2(5) had been triggered.

26 On analysis, I am of the view that the requirement of the condition A.2(5) was triggered, and the requirement for the removal of building B was material to the application for the firewood use on the facts as presented in the application. This is so either on the basis of the claimant's view that there remains a *de minimis* agricultural use in the building, or the defendant's view that the use of the building is for the firewood use with an ancillary agricultural use. Indeed, if the building was in a mixed firewood and agricultural use, the position would be the same.

27 The defendant accepts, as set out above, that the triggering of the condition was not taken into account in the decision making process in respect of the planning application, and therefore it follows, in my judgment, that the decision which the defendant reached was legally flawed as a result of the failure to take account of the material consideration and must be quashed.

28 In the light of this conclusion, there is no need for me to consider the submissions made in relation to whether or not there could lawfully be an agricultural use which was ancillary to the firewood use as the point is not determinative of the decision. This was, in any event, a position which was common ground between the parties.

29 It follows, for the reasons which I have given, that the claimant's application for judicial review succeeds on the sole ground upon which permission was granted, and the decision to grant planning permission on 12 July 2021 by the defendant must be quashed.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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