 APPENDIX HG25

Pages from the Encyclopedia
(Plng law and Practice)

6. *Operational development*

(1) *Building operations*

(a) *definition of "building"*

P55.14

A "building" is defined by s.336(1) as including "any structure or erection, and any part of a building, as so defined, but does not include plant or machinery comprised in a building." "Building operations" also receives an extended definition, now in subs.(1A) as including demolition (though see further below), rebuilding, structural alterations of or addition to buildings, and "other operations normally undertaken by a person carrying on business as a builder."

The approach of the courts in construing the definitions has been to ask first whether what has been done has resulted in the erection of a "building": if so, the court "should want a great deal of persuading that the erection of it had not amounted to a building or other operation" (*Barvis Ltd v Secretary of State for the Environment* (1971) 22 P. & C.R. 710 at 715, per Bridge J.). Following that approach, in *R. (on the application of Westminster City Council) v Secretary of State for the Environment, Transport and the Regions* [2002] J.P.L. 58; Jackson J. set aside the Secretary of State's decision that the stationing of a wooden kiosk (2.14m square, and 2.7m high) at Covent Garden did not require planning permission. He held that the Secretary of State had erred in focusing on the question whether the placing of the kiosk was a building operation, instead of the question whether the kiosk in its final form was a building.

In the *Barvis* case, the Divisional Court placed reliance upon a passage in the judgment of Jenkins J. in *Cardiff Rating Authority v Guest Keen Baldwin's Iron and Steel Co Ltd* [1949] 1 K.B. 385 (subsequently endorsed by the Court of Appeal in *Skerritts of Nottingham Ltd v Secretary of State for the Environment, Transport and the Regions (No.2)* [2000] 2 P.L.R. 102) which identified three primary factors as being relevant to the question of what was a "building."

1. size: a building would normally be something which was constructed on site as opposed to being brought already made to the site. But it may nonetheless be on a small scale, such as a model village (*Buckinghamshire County Council v Callingham* [1952] 1 All E.R. 1166). Nonetheless, where the operations are quite insignificant, they may be regarded as de minimis, and outside control: see, e.g. the planning appeal decision at [1977] J.P.L. 122 (boundaries of "leisure plots" marked out by about a dozen metal pegs interlaced with two strands of nylon rope).
2. permanence: a building, structure or erection normally denotes the making of a physical change of some permanence. In *Skerritts of Nottingham Ltd v Secretary of State for the Environment, Transport and the Regions (No.2)* [2000] 2 P.L.R. 102 the Court of Appeal upheld an inspector's decision that a marquee that was erected on a hotel lawn every year for a period of eight months was, due to its ample dimensions, its permanent rather than fleeting character and the secure nature of its anchorage, to be regarded as a building for planning purposes. The annual removal of the marquee did not deprive it of the quality of permanence. Permanence did not necessarily connote that the state of affairs was to continue forever or indefinitely. The importance of permanence is illustrated by the following decisions: in *James v Brecon County Council* (1963) 15 P. & C.R. 20 the Divisional Court declined to find any error in a ministerial decision that the erection of a battery of fairground swing boats, capable of being lifted and taken away complete by six men or

dismantled in about one hour, did not constitute development. Similarly, the mere stationing of mobile caravans and touring caravans on land would not be taken to involve any building operation, having regard to the factors of permanence and attachment: *Measor v Secretary of State for the Environment, Transport and the Regions* [1998] 4 P.L.R. 93. On the other hand, where a number of self-build chalets and sheds had been erected and suspended on pillars on land, it could be assumed that they were all erected with a prospect of permanence, and as a matter of objective judgment they would have to be regarded as "structure or erections" for the purposes of the Act: *R. v Swansea City Council Ex p. Elitestone Ltd* (1993) 66 P. & C.R. 422.

3. physical attachment: this is in itself inconclusive, but weighed against the other factors may tilt the balance. Thus, in *Cheshire County Council v Woodward* [1962] 2 Q.B. 126 the Divisional Court declined to disturb a ministerial finding that no development had occurred when a wheeled coal hopper and conveyor between 16 and 20 feet high had been brought on to the appeal site; but in *Barvis Ltd v Secretary of State for the Environment* (1971) 22 P. & C.R. 710 the erection of a large scale tower crane running along rails was held to constitute development notwithstanding that it was capable of being dismantled and being erected elsewhere. In *Tewkesbury Borough Council v Keeley* [2004] EWHC 2594 (Q.B.) Jack J. held that certain sheds that were mobile, to the extent of having wheels so they could be moved about a site, did not constitute buildings, and that planning permission had not been required for their stationing on agricultural land. Nor did this constitute an "other operation" under s.55(1): if there was no building operation because the shed was not a building, then it fell outside the potentially apposite category and should be treated as outside the section.

The above factors were discussed and applied in *R. (on the application of Hall Hunter Partnership) v First Secretary of State* [2006] EWHC 3482 (Admin) (polytunnels for soft fruit production). The High Court upheld the inspector's decision that agricultural polytunnels constructed by machinery on top of legs penetrating 1 metre into the ground constituted operational development due in part to their degree of attachment to the land. At [18] Sullivan J. considered the evidence that "it took teams of 10 men 45 man hours to fully erect 1 acre and 32 man hours to dismantle the same", "machines were used to screw the legs up to 1m deep into the ground and to bend straight lengths of metal into arcs to create the hoops" and "3.9ha (or 9.6 acres) would on that basis have taken over 430 hours (or about a week's work for the 10 man team, assuming no over time) to erect and over 300 hours for them to dismantle" and in such circumstances held at [19] –

> "In view of the fact that machines were used to screw the "vast number of ... legs needed" up to one metre into the ground, it is not surprising that the inspector concluded "the polytunnels have a substantial degree of physical attachment to the ground". "'Permanence' does not in this context necessarily connote a state of affairs which is to continue forever or indefinitely. It is matter of degree between the temporary and the everlasting" (see per Morritt L.J. at 1036 of *Skerrits*). The fact that a large and well constructed structure is capable of being, and is, dismantled and removed annually for a short time is not determinative (see per Pill L.J. at 1035 of *Skerrits*). If one asks how long must a structure or erection remain in situ for there to have been a sufficient degree of permanence, the answer is: "for a sufficient length of time to be of significance in the planning context" (see per Schiemann L.J. at 1034 of *Skerrits*). The inspector's finding that the polytunnels "would remain in one particular location from between three and seven months in any one year" (para.54) is not challenged. His conclusion that "even

the shortest of those periods of time would be a sufficient length of time to be of consequence in the planning context and more so in respect of the longer periods" cannot be said to be unreasonable."

In *R. (on the application of Save Woolley Action Group Ltd) v Bath and East Somerset Council* [2012] EWHC 2161 (Admin); [2013] Env. L.R. 8 Lang J. held that the local planning authority had adopted too narrow an approach to the meaning of development when considering the application of the 1990 Act to certain poultry units. The units in question were described as follows:

(i) the poultry units would house 1,000 laying hens, each weighing 2kg;
(ii) each unit was approximately 20 metres by 6 metres by 3.5 metres high;
(iii) the units were not fixed to the ground, but were on metal skids to allow them to slide along the ground when pulled by a tractor;
(iv) if extreme winds were forecast they could be held down with metal spikes;
(v) each unit would weigh about 2 tonnes (in addition to the 2 tonne flock of hens);
(vi) each unit would be in a fenced paddock of 1-2 acres and would stay in the paddock;
(vii) the units would be moved within their paddock regularly (approximately every 8 weeks) by being dragged by a tractor or 4x4;
(viii) each unit could be assembled by a 'skilled' team from metal hoops, metal skids, uPVC planks, polythene and insulation in 'a couple of days'. If the metal hoops were not taken apart then the shed could be dismantled in 3-4 hours;
(ix) the units had slatted floors, manually operated conveyor belts, drinkers, feeders and integral lighting. They were powered by an onsite generator;
(x) the units were supplied with mains water by means of a hosepipe connection to standpipes located alongside the access track.

Lang J. held that the term 'building' in s.336(1) had a wide definition which included "any structure or erection" and this definition has been interpreted to include structures which would not ordinarily be described as 'buildings' ([69]). Given, in particular, the substantial weight and size of each unit the local planning authority should have considered whether the units fell within s.336(1). In concluding that the units were chattels and not buildings as they could be moved around the site, the authority had erred. Permanence had to be considered in terms of "significance in the planning context" and "the ability to move [the units] around the field did not remove the significance of their presence in planning terms" ([75]). The works carried out to construct the units were capable of falling within s.55(1)(A)(d) "other operations normally undertaken by a person carrying on business as a builder".

Guidance in relation to the meaning of building operations may also be obtained from Ministerial decisions. For example, an inspector held that the erection in a pub garden of three large umbrellas in concrete footings and attached together with canvas side shades amounted to the erection of a building (Ref: APP/H5390/C/1128513); an inspector held that the erection of a large stainless steel sculpture constituted a building operation (Ref: APP/k5600/X/10/2140909 and [2011] J.P.L 822); but an inspector held that the installation of a free-standing cash dispensing machine on a garage forecourt was not a building operation (Ref: APP/22830/C/06/2009917).