

**IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT IN BIRMINGHAM**

Birmingham Civil Justice Centre
Priory Courts, 33 Bull Street
Birmingham

22/07/14

B e f o r e :

MR JUSTICE HICKINBOTTOM

Between:

**DENYS CHRISTOPHER SHORTT
DEBORAH SHORTT**

Claimants

- and -

**(1) THE SECRETARY OF STATE FOR
COMMUNITIES AND LOCAL
GOVERNMENT
(2) TEWKESBURY BOROUGH COUNCIL Defendants**

**Peter Goatley (instructed by Harrison Clark Rickerbys) for the Claimant
Suella Fernandes (instructed by the Treasury Solicitor) for the First Defendant
The Second Defendant was not represented and did not appear
Hearing date: 30 June 2014
Further written submissions 7-14 July 2014**

MR JUSTICE HICKINBOTTOM :

Introduction

1. This claim concerns land owned and occupied by the Claimants ("Mr & Mrs Shortt") at Buckland Manor Farm, Buckland, Broadway, Worcestershire. The Second Defendant ("the Council") is the relevant local planning authority.

2. The history of the land is as follows. In 1974, a Mr Brookes applied to the Council for permission to construct a dwelling at Buckland Manor Farm to serve his 83 hectare agricultural unit based on stock and arable farming. Planning permission was granted, subject to a condition, important to this claim, in the following terms:

“The occupation of the dwelling shall be permitted to persons employed or last employed solely or mainly and locally in agriculture as defined by section 290(1) of the Town and Country Planning Act 1971, or in forestry and the dependants (which shall be taken to include a widow or widower) of such persons.”

I shall refer to this as “the Planning Condition”.

3. The house was duly built, although not in accordance with the plans. In 1975, the Council granted planning permission for the dwelling as built, and subject to the same Planning Condition.
4. In 1976, Mr Brookes sold off 67.4 hectares, retaining the dwelling and the rest of the land which, save for one small level 5-acre grass field, comprised steep-sided permanent pasture. In 1984, that dwelling and land was sold to the parents of the Second Claimant, Mrs Shortt. In 1994, they sold it to the Claimants. Shortly after acquiring it, Mr & Mrs Shortt bought a further 6.27 hectares of steep-sided pasture adjoining the farm, so that they have about 22 hectares of land, with one 5-acre field and the rest steep-sided pasture akin to moorland.
5. Prior to buying Buckland Manor Farm, Mrs Shortt ran a herd of cattle and a small flock of breeding ewes at her husband’s farm in Winderton, Worcestershire. The cattle were sold off, but about 20 sheep were transferred to Buckland Manor Farm. In 2001, she began a pedigree breeding herd of Belted Galloway cattle, and, in 2006, she disposed of the sheep. She currently only keeps the cattle, the herd being made up of eight breeding cows, five heifers and two fattening steers. The only acreage on the site for grazing or hay production is the 5-acre field, with the result that, in winter, Mrs Shortt is obliged to buy in fodder to supplement her stock’s feed ration. She has also turned nearly 12 acres to use in woodland grant schemes.
6. The total labour requirement for the farm is about 35 standard man days, which is less than one-fifth of a full time equivalent. In each of the years 2002 to 2007, the accounts of the farm show that Mrs Shortt made a loss of between £13,000 and £40,000, except in 2003 when she undertook some consultancy work unrelated to the farm and the accounts show a profit for that year of nearly £21,000 because of that additional income. Mr Shortt is a successful businessman, who has not contributed to the farm at all. The only labour contribution to the farm has been that of Mrs Shortt.
7. In 2001 and again in 2011, the Mr & Mrs Shortt sought planning permission to extend the dwelling. In support of the later application and particularly to respond to Paragraph 3(iii) of the Secretary of State’s Guidance PPS7: Sustainable Developments in Rural Areas (which stated that new permanent dwellings should only be allowed to support existing agricultural activities providing that the agricultural activity and the unit concerned have been profitable for at least one out of the last three years, and are financially sound and have a clear prospect of remaining so), the Claimants relied on a report from Rural Consultancy Service Limited (“the RCS Report”). That referred to the “profitable state” of the operations (paragraph 11) and said that the unit was “being run in a traditional and extensive approach which is profitable to the applicants...” (paragraph 10). However, both applications were, in the event, refused.
8. On 11 September 2012, Mr & Mrs Shortt applied to the Council for a certificate of lawfulness of use or development (“a lawful development certificate”) for continued use without compliance with the occupancy condition, on the basis that, for a period of in excess of ten years, even if Mrs Shortt was an agricultural worker, she had made no profits whatsoever; and

so Mr Shortt and their two infant children had not been her dependants during any of that time. In other words, there had been non-compliance with the Planning Condition for the requisite period, and therefore it was immune from enforcement under section 171B(2) of the 1990 Act and thus lawful under section 191(2).

9. In support of their application, Mr & Mrs Shortt relied upon *Fawcett Properties Limited v Buckingham County Council* [1961] AC 636, in which the House of Lords was called upon to consider a planning permission condition in (it was contended) similar terms to that in this case. Lord Keith of Avonholm said, at page 671:

“Nor can I see any difficulty in construing “dependants”, when brought within the confines of a house, as meaning persons living in family with the person defined and dependent on him in whole or part for their subsistence and support”.

That definition was effectively adopted in the Secretary of State’s Guidance in place at the relevant time in this case, Circular 11/95: Use of Conditions in Planning Permission, at paragraph 104 and endnote 5, the endnote saying simply:

““Dependants’ means persons living in family with the person defined and dependant on him (or her) in whole or part for their subsistence and support” (*Fawcett Properties v Buckingham County Council* [1961] AC 636 at page 671)”.

10. On the basis of this authority and guidance, it was submitted by Mr & Mrs Shortt that, as she did not financially contribute to her husband or children, they were not her “dependants”; and thus the planning condition that only an agricultural worker and dependants can occupy the dwelling has been breached for over ten years, and the Claimants were entitled to the certificate they sought.
11. The Council did not give notice of its decision on the Claimants’ application within the appropriate period, and Mr & Mrs Shortt therefore appealed to the First Defendant (“the Secretary of State”) under section 195(1) of the 1990 Act. The Secretary of State appointed an Inspector to consider and determine the appeal, namely Dr Paul Dignan (“the Inspector”).
12. Before the Inspector, the Council said that, although it had not determined the application, it would have refused to issue a lawful development certificate, because the RCS Report lodged on the earlier planning application stated that the farming enterprise was being run in a manner “profitable to the applicants”. On that basis, Mrs Shortt had made a financial contribution to the family, and her husband and children (who had benefited from that contribution) were therefore her dependants within the meaning of the condition.
13. The Inspector considered that, although the evidence was difficult to reconcile, “profitable to the applicants” in that report could be construed in terms of non-monetary benefits (paragraph 8). However, he refused the appeal on different grounds. He dealt with the *Fawcett Properties* point thus:
 - “4. It was held in *Fawcett Properties Ltd v. Buckingham County Council* [1961] AC 636 (page 671) that the term ‘dependants’ means persons living in a family with the person defined (the agricultural occupant), and dependent on him (or her) in whole or in part of their subsistence and support, and this definition is used in Circular 11/95: Use of Conditions in Planning Permission. In this case the sole aspect of ‘subsistence and support’ that is said to be absent is financial, so in effect it is being argued that the condition is in breach if any of the occupiers of the dwelling do not depend, in part at least, on income generated by Mrs Shortt’s agricultural work.

5. In my view this is an unnecessarily restrictive interpretation of the wording of the condition. In the context of people living in a family, the words subsistence and support are capable of having a non-monetary construction. Further, were the meaning of 'dependent' in the condition to be invariably interpreted as financial dependent, it would leave members of a family who lived in a dwelling whose occupation was the subject of such a condition, but who were not themselves working in agriculture, at risk of enforcement action whenever the agricultural worker's income fell below a level deemed to establish dependency, which would be a nonsense. I consider that the wording of the condition should be interpreted so as to avoid such a possibility, having regard to the potential impact on, or interference with, ordinary family life.
6. In this context it is also worth considering what Keene LJ, in [*Swale Borough Council v First Secretary of State and Lee* [2005] EWCA Civ 1568], set out as the ultimate test in determining whether or not lawfulness might have been achieved through immunity from enforcement by the passage of time. That is whether the Council could, at any time during the whole of the relevant period, have taken enforcement action. I consider the answer to that question, since it is common ground that Mrs Shortt was at all times a person employed or last employed solely or mainly and locally in agriculture, and the other occupants were her husband and two children, is that the Council could not have taken enforcement action."
14. In this application under section 288 of the 1990 Act, Mr & Mrs Shortt seek to quash that decision. At the hearing, Peter Goatley appeared for the Claimant, and Miss Suella Fernandes for the Secretary of State; and I am grateful to them both for their diligent researches and otherwise helpful contribution.

The Claimants' Case

15. Mr Goatley relies upon two grounds. I can deal with one shortly. The Inspector relied on *Swale* in support of the proposition that "the ultimate test in determining whether or not lawfulness might have been achieved" is whether there was immunity from enforcement during the relevant period. Mr Goatley submitted that the Inspector erred in relying upon *Swale*, as the case had never been considered at the inquiry and the parties had therefore not had an opportunity to make representations as to its effect. In fact, Mr Goatley says, that failure resulted in the Inspector misunderstanding *Swale*.
16. I accept that *Swale* does not have the force the Inspector thought: the test is whether the land has been used in a manner contrary to its lawful use, during the requisite period, such that the unlawful use has in effect become lawful because enforcement has become impossible. The fact that, during the requisite period, the lawful use could have been enforced is true: but enforcement during that period is a consequence of other findings, not some sort of ultimate test. To regard it as such is circular.
17. However, that point was clearly not determinative of the appeal before the Inspector; and it is not determinative of this application, which turns on Mr Goatley's second ground, namely that the Inspector erred in adopting the definition of "dependants" that he did, dependency in this context (Mr Goatley submitted) requiring subsistence and support in money or money's worth. The meaning adopted by the Inspector was at variance with the clear meaning of the words used in the condition, a meaning confirmed in *Fawcett Properties* and used in the Secretary of State's Circular.
18. Miss Fernandes submitted the Inspector was right: for one person to be a dependant of another, in the context of the condition, did not require that other to contribute in money or money's worth.

Discussion

19. For the purposes of this application, I shall assume that Mrs Shortt was an agricultural worker, but made no profit from the farm in any year, and therefore made no financial contribution to the family. That appears to be the clear evidence of her accounts.
20. The focus of the debate before me was on the definition of “dependant”. The diligent researches of Counsel, to which I have referred, demonstrate that there is no single definition of “dependant” applicable in all circumstances: the definition of the term is largely context-specific. Mr Goatley rightly emphasised the difficulties and dangers of resorting to common sense usage or dictionaries when defining terms in a statutory context (see *Customs and Excise Commissioners v Top Ten Promotions Limited* [1969] 1 WLR 1163 at 1171 per Lord Upjohn); and, although a financial element is a common theme in such definitions, it is by no means the case that being dependant necessarily requires the presence of such an element in all usages of the word. Furthermore, where it is not specifically defined, “dependant” in a statutory or other legal context displays the same ambivalence. For example, “wholly or mainly dependant” generally in an immigration context has been held to mean primarily financial dependence, but where there is doubt as to that, other forms of dependency, such as emotional, may be taken into account and may tip the balance (*R v Immigration Appeal Tribunal ex parte Bastiampillai* [1983] 2 All ER 844). In a family law context, perhaps as to be expected, dependency has sometimes been given a wider scope: and so, in Australia, it has been held that provision from the estate of a deceased person to someone who is wholly or partly dependent on the deceased under section 6(1) of the Family Provisions Act 1982 (NSW) covers the situation where a deceased mother had provided typical maternal services to a child essential for their well-being, but not in money or money’s worth (*Petrohilos v Hunter* (1991) 25 NSWLR 343). That is no doubt why, when the term is used in a statutory context, it is often expressly defined. For example, section 186 of the Housing Act 1996 defines “dependant” in the context of an asylum-seeker as a person who is a spouse or child under the age of 18 years, and who does not have the right of abode or indefinite leave to remain in the United Kingdom. Section 1 of the Fatal Accidents Act 1976 has a wider and very specific definition, but to include a spouse or child.
21. Therefore, as with so much else, so far as the definition of “dependant” is concerned, context is everything.
22. The wording used in the Planning Condition in this case clearly originally derives from various statutory provisions. “Agricultural population” was defined in section 34(2) of the Housing Act 1930, as

“... persons whose employment or latest employment is or was in agriculture... or in an industry mainly dependent upon agriculture and **including also the dependants of such persons** as aforesaid” (emphasis added).

Similarly, section 114(5) of the Housing Act 1957 provided that, for the purposes of that Act:

“... the expression “agricultural population” means persons whose employment or latest employment is or was employment in agriculture or in an industry mainly dependent upon agriculture, and **includes also the dependents of such persons as aforesaid**” (emphasis again added).
23. Counsel have been unable to identify any authorities on the meaning of “dependants” in these particular statutory contexts. However, in *Fawcett*, the House of Lords were called upon to construe a planning condition which simply adopted this statutory wording. Planning permission had been granted in respect of a pair of semi-detached houses, subject to the following condition:

“The occupation of the houses shall be limited to persons whose employment or latest employment is or was in agriculture as defined by section 119(1) of the Town and Country Planning Act 1947, or in forestry, or in an industry mainly dependent upon agriculture and including also the dependants of such persons as aforesaid.”

24. Each of their Lordships gave a separate judgement, but none of their Lordships appears to have demurred from Lord Keith in this point, which I have quoted above (paragraph 9). He defined “dependants” in terms of persons living in family with the person defined and dependant on him in whole or part “for their subsistence and support”.
25. Mr Goatley submitted that “subsistence” means food and other physical things necessary to exist; and it does not include, as Miss Fernandes suggested, non-physical items such as time. “Subsistence” can only therefore be provided, one person to another, in money or money’s worth. He accepted that non-financial contribution can be included in the concept of “support”; but the “and” in the phrase “subsistence *and* support” is used conjunctively, the phrase means “*both* subsistence and support”. He therefore submitted that it is implicit in the definition used by Lord Keith that the person upon whom the dependant depends must provide for that person in money or money’s worth.
26. Mr Goatley submitted that that is how the condition has been generally understood in the planning field following *Fawcett Properties*. He referred me to a number of planning decisions on the point, in which the definition of “dependant” has been defined in terms of financial dependency. These are of course not binding or even persuasive in this court; but they do indicate, says Mr Goatley, how decision-makers have interpreted the term since *Fawcett Properties*, and are therefore of some use. One (Tafarn Bach Farm, Trerhingyll, Cowbridge, Vale of Glamorgan Inspectorate Appeal No App/Z6950/X/09/2109455) was an inspector’s decision. Two (Land at Sevenoaks, Hall Road, Martham, Norfolk Appeal Ref App/C/U2615/624549-50, and Land at Beenham Stocks Vineyard, Beenham Hill, Reading App Ref App/X/95/G0310/002333) were decisions by the Secretary of State himself, although of course following an inspector’s report. In each of these cases, *Fawcett Properties* has apparently been construed as requiring some contribution to the overall income of the household; although it was said that, where the agricultural worker has financially contributed something to the family, then the family are treated as the dependants of that worker, even if the contribution is less than that of another member of the family. However, in this case, Mrs Shortt has not financially contributed at all.
27. Those submissions have very considerable force; and, initially, I was inclined to accept them. But, for the following reasons, I am unable to do so.
28. In my view, *Fawcett Properties* is itself equivocal as to whether “dependant” in the statutory context from which the Planning Condition derives necessarily requires an element of financial dependency. In that case, the relevant planning condition was materially in the same terms as section 34 of the Housing Act 1930, the words being taken *ipsissimis verbis* from that definition, which appears to have borne heavily in some of their Lordships as they sought to construe it (see, e.g., page 528D-E per Lord Jenkins). It appears to have been the view of Counsel for the plaintiffs (Robert Megarry QC) that, in the statutory context of the Housing Acts, “‘dependants’ would probably refer to financial dependence” (see argument before the Court of Appeal, at [1959] Ch D 543 at page 552). Certainly, there appears to have been discussion as to whether financial dependence was a requirement in the terms of the condition, and none of the Court of Appeal judges (see, e.g., at page 565 per Lord Evershed MR) or their Lordships in the House of Lords stated categorically that it did. Lord Keith, in my view, was less than categorical on the point. Indeed, it seems that some considered a wife and children might be covered (see, e.g., Lord Denning at page 519C: although I accept that that comment may have been made on the late-1950s assumption that they would be financially dependent).

29. Nor are the planning decisions to which Mr Goatley referred entirely in his favour. In each of the three cases to which I have referred, the agricultural worker had, in fact, made some financial contribution, the issue being whether that contribution was sufficient. In a fourth case (Land at Meadows, Colwell Road, Freshwater, Isle of Wight: Planning Inspectorate Appeal No App/C/96/P2114/643380), the Inspector did not consider that “the condition could be construed as excluding a married couple, one of whom works outside agriculture”, where the agricultural worker appears to have earned nothing from that enterprise (paragraph 9).
30. Therefore, even in the statutory context (or a context in which the precise statutory wording had been adopted), there is no clear authority to the effect that “dependant” necessarily implies financial dependency.
31. However, in any event, although no doubt the wording of the Planning Condition derived from the statutory wording in the Housing Acts, I am not here construing a statutory provision, nor (as in *Fawcett Properties*) a condition taken *ipsissimi verbis* from a statutory provision. The Planning Condition does not simply refer to agricultural workers and their dependants, but agricultural workers and “the dependants (**which shall be taken to include a widow or widower**) of such persons” (emphasis added). I accept that the italicised words are a deeming provision – but “dependants” here appears to be deemed to include a widow or widower of an agricultural worker, whether or not, before that worker’s death, the spouse was financially dependent upon him or her: it would strain the construction of the condition too far for it to mean “the dependants (which shall be taken to include a widow or widower **who was, prior to the agricultural worker’s death, a financial dependant of that worker**”. Given that “dependants” may or may not include dependency other than financial dependency depending upon the context of the word, it seems to me that, if the term is to include a widow or widower irrespective of earlier financial dependency, looked at objectively, it must have been intended to have included a husband or wife without financial dependency. In my view it cannot have been the intention of the condition to prohibit spouses who are not financially dependent upon an agricultural worker from occupying the dwelling during the worker’s life, but allow such spouses to occupy it after the worker’s death.
32. Therefore, whilst I do not find the question easy – and accept that this analysis is not without its difficulties (for example, because it does not answer the question of the degree of dependency, if any, of a spouse prior to an agricultural worker’s death that would enable him or her to fall within the deeming provision) – the words as used in the Planning Condition, looked at as a whole, appear to me to envisage “dependency” in a wider and more open-textured way than one requiring an element of financial dependency, certainly to include a spouse and minor children of the worker who is their wife and mother and who provides them with usual family services and care.
33. Whilst (unlike the judges who heard *Fawcett Properties*: see Lord Evershed MR at page 566 (who confirms that Roxburgh J at first instance was not troubled by the point either), and Lord Keith in the short passage I have quoted above (paragraph 9)), I would have found the term “dependants” in its statutory context somewhat more difficult, I am in any event satisfied that, on the facts of this case and in the context of the Planning Condition, Mr Shortt and the two children were each “dependants” of Mrs Shortt.
34. Whilst I have come to that conclusion looking at the terms of the Planning Condition in context, on an objective basis, it comes as some comfort that the construction which I favour prevents some of the unfortunate consequences to which Ms Fernandes referred in terms of family cohesion and stability. It is not necessary for me to set out the precise parameters of who would and who would not fall within the condition on a hypothetical basis. Each case will depend upon its facts, subject to the point of law I have determined, i.e. that the definition of “dependant” in the context of this particular Planning Condition does not require financial dependency. I am simply satisfied that the term includes Mr Shortt and the children in this case.

Consequently, as the Inspector indicated, enforcement action cannot and could not have been taken against them.

35. Furthermore, as will be very apparent, in this judgement I restrict myself to construing the particular Planning Condition in this case. It is unnecessary for me to seek to construe “dependants” in the statutory context to which I have referred, and I decline to do so. The facts of this case are unusual – a persistent loss-making agricultural enterprise – and whether others fall within or outside the statutory definition will be best determined on the basis of real facts in another case, if and when those facts arise in practice.

Conclusion

36. For those reasons I consider the Inspector was right in his determination that there was no breach of the relevant planning condition for the requisite ten year period, and he was right to dismiss Mr & Mrs Shortt’s appeal to him which was premised on the contrary view. I consequently dismiss this application