Case No. QBCOF 1999/0690/C

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
(MR MALCOLM SPENCE)
(sitting as a Deputy High Court Judge))

Royal Courts of Justice
Strand
London WC2

Date: Wednesday, 22nd March 2000

B e f o r e :

LORD JUSTICE MORRITT

LORD JUSTICE PILL

-and-

LORD JUSTICE SCHIEMANN

- - - - - - - -

SKERRITS OF NOTTINGHAM LIMITED
Appellant

- v -

THE SECRETARY OF STATE FOR THE ENVIRONMENT,
TRANSPORT AND THE REGIONS
First Respondent
- and-

HARROW LONDON BOROUGH COUNCIL
Second Respondent

- - - - - - - -

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MR J HOBSON (instructed by the Treasury Solicitor, London, SW1H 9JS) appeared on behalf of the Appellant
MR C KATKOWSKI QC (instructed by Actons, Nottingham NG1 SDB) appeared on behalf of the Respondent

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J U D G M E N T

Wednesday, 22nd March 2000

1. MR JUSTICE MORRITT: My Lord, Schiemann LJ will give the first judgment.

2. LORD JUSTICE SCHIEMANN: The dispute with which this appeal is concerned is about the erection of a marquee in the grounds of a hotel, which is a listed building, without planning permission. The landowner claimed that planning permission was not needed. The local planning authority thought otherwise, and issued an Enforcement Notice alleging the carrying out of development without planning permission. The issue between them was whether or not the erection of the marquee amounted to development.

3. The landowner appealed to the Secretary of State. The inspector found that what had been done did amount to development. The landowner appealed to the High Court. Mr Malcolm Spence, QC, sitting as a Deputy High Court Judge, allowed the appeal. The Secretary of State appeals to this Court.

4. Development is a term of art which is defined in the Town and Country Planning Act 1990. Section 55(1) reads:

> "... except when the context otherwise requires, 'development' means the carrying out of building, engineering, mining or other operations in, on, over or under land or the making of any material change in the use of any buildings or other land. [(1A) For the purposes of this Act 'building operations' includes -
>
> (a) demolition of buildings;
>
> (b) rebuilding;
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> (c) structural alterations of or additions to buildings; and
>
> (d) other operations normally undertaken by a person carrying on business as a builder."]

5. That is an enormously wide definition on its face, and would require the grant of planning permission for a whole variety of activities. In part to cope with that problem, Parliament has enacted sections 55(2) and 59(1) of the Act. Section 55(2) sets out a number of operations and uses which are not to be taken to involve development. It provides, inter alia for the specifying by the Secretary of State in a Use Classes Order of varying classes of use within which one may move from one class to another without carrying out development. Section 59(1) provides for the making of a General Development Order which itself grants permission for varying classes of development.

6. The Town and Country Planning (General Permitted Development) Order 1995 provides in paragraph 3 that permission is granted for the classes of development in Schedule 2. That Schedule is divided into several parts of which one may perhaps mention Part 4, which is headed Temporary buildings and uses. One sees in Class A that one of the matters for which planning permission is granted is the provision on land of buildings, movable structures, works, plants or machinery required temporarily in

connection with and for the duration of operations being or to be carried out on, in, under or over that land or on land adjoining it. Class B provides for the use of any land for any purpose for not more than 28 days in total in any calendar year.

7. So there is machinery for dealing with temporary uses and temporary buildings. It certainly seems to be postulated on the basis that such things do need planning permission and that is why it is granted. So that is the legal background against which one needs to measure whether or not an operation falls within Section 55(1).

8. Apart from authority, my instinct would be that the erection of, say, the Dome at Greenwich, would be an activity which would require planning permission, but that putting out a tent in one's garden would not, and that there would be a continuum between these two extremes. So it would be a matter of judgment, initially, for the planning authority, and, on appeal, the Secretary of State, as to where a particular operation falls on that continuum. Clearly, it is important to establish precisely of what the operation consists. To that I now turn.

9. The inspector in his report said this:

> "4. Grimsdyke is a two and three storey, Grade II listed building which was designed by Norman Shaw in 1872 in a romantic'Old English' picturesque style. It is in use as an hotel. The wooded grounds, which were laid out at the same time, have been included in the Register of Parks and Gardens of Special Historic Interest. The appeal site lies within the Green Belt and the Grimsdyke Estate and Brookshill Drive Conservation Area which was designated in May 1997.
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> 5. The marquee stands on the lawn of a sunken garden to the north-west of the main entrance to the hotel. The sunken garden is rectangular and enclosed by low brick and flint walls with balustraded steps leading to the gravel paths between the central lawn and the perimeter flower beds. The marquee has a tubular aluminium portal frame of seven bays. Five bays are enclosed by white plastic covered canvas and the two eastern bays are roofed only. The five enclosed bays have a timber floor spanning aluminium ground beams resting on the lawn. The entrance to the enclosed area is via aluminium doors leading from the roofed bays. The main enclosure has an electricity supply for lighting and blown warm air heating. Three small aluminium framed structures, clad with canvas, adjoin the marquee and provide storage space and toilet facilities.
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> 8. My conclusions on the appeal under ground (c) follow. If the marquee can be said to be a'building' then the Courts have said that what has taken place is most probably a'building or other operation' (Barvis Ltd v SSE [1971] 22P & CR710). Three factors were identified in Cardiff Rating Authority v Guest Keen Baldwin Iron and Steel Co Ltd [1949] 1 KB 385 in deciding what was a building: Size; permanence and physical attachment.
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> 9. The marquee is a substantial object which is about 40m long, including the additions, and some 17m wide and the ridge height is around 5m. Your letter dated 12th February 1998 mentions that it was scheduled for delivery on 18th February 1998 and would be erected over the following 14 days. There is no direct evidence before me of the assembly method or period, but from my inspection, I consider that it took several days with a number of erectors and amounted to a sizable and protracted event. I imagine that its dismantling follows much the same process. It is assembled on site, not delivered ready

made. I do not regard its considerable bulk to be de minimis in relation to planning controls.

10. Evidently, the marquee stands on the lawn between February and October each year. When in place, I saw that it has a solid and permanent character which derives from its cladding material and the metal framed structure. It is provided with the services and utilities that are normally found in spaces for use by the public. Even though the marquee only remains on site for eight or so months a year, I do not consider that the marquee is so transient or ephemeral that it lacks permanence.

11. The 16 feet of the metal portal frames sit on square metal plates which are spiked to the soil beneath. The structure appears to be held in place by its own considerable weight, the internal bracing and the ground spikes. The timber floor is supported by metal ground beams resting on the land. From this, I consider that the marquee has a significant degree of physical attachment to the land on which it stands. Moreover, the Courts have held that an absence of physical attachment is not in itself decisive.

12. I conclude that, as a matter fact and degree, the marquee, due to its ample dimensions, its permanent rather than fleeting character and the secure nature of its anchorage, is a structure which is to be regarded as a building for planning purposes. Consequently, the erection of the marquee each year amounts to the carrying out of a building or other operation, which constitutes'development' as defined in section 55(1) of the 1990 Act. Planning permission has not been granted for the marquee and so there has been a breach of planning control. Your client's appeal on ground (c) therefore fails."

10. The learned judge held that the inspector had adopted a legal approach which was not open to him. In coming to that conclusion he relied on a number of cases, the first of which was Cardiff Rating Authority and Cardiff Assessment Committee v Guest Keen Baldwin's Iron and Steel Company Limited [1949] 1 KB 385, to which the inspector himself had referred, a decision of this Court on the proper construction of the Plant and Machinery (Valuation for Rating) Order, 1927 which was made under section 24(5) of the Rating Valuation Act. The paragraph in the order which the Court was construing read as follows:

> "The following parts of a plant or a combination of plant and machinery whenever and only to such extent as any such part is, or is in the nature of, a building or structure."

11. It is obvious that that case was concerned, first of all with rating, whereas the present case is concerned with the use which may be made of land and the activities which may be carried on upon it. The Rating Act is concerned with raising money which it does by taxing, essentially land, and then by extension, various things on land. There is no taxation for valuable pictures brought into a house. There is taxation on the house. Then the question is what other things which had been attached to the house or to the land in some form or another count as land for the purpose of rating. For my part, uninstructed by other authority, I would not have regarded that case as a helpful tool for deciding what was permissible under the Planning Act. But it was much relied upon by the learned judge, and, in so doing, he was following a track which judges in a number of cases have also followed.

12. The words which were used in the context of rating in that case upon which the judge and Mr Katkowski, who appears for the respondent, rely, are to be found in the judgments of Denning LJ and

Jenkins J. Denning LJ said this:

> "A structure is something of substantial size which is built up from component parts and intended to remain permanently on a permanent foundation; but it is still a structure even though some of its parts may be movable, as, for instance, about a pivot. Thus, a windmill or a turntable is a structure. A thing which is not permanently in one place is not a structure but it may be, 'in the nature of a structure' if it has a permanent site and has all the qualities of a structure, save that it is on occasion moved on or from its site. Thus a floating pontoon, which is permanently in position as a landing stage beside a pier is 'in the nature of a structure', even though it moves up and down with the tide and is occasionally removed for repairs or cleaning."

13. Jenkins J said this:

> "It would be undesirable to attempt, and, indeed, I think impossible to achieve, any exhaustive definition of what is meant by the words, 'is or is in the nature of a building or structure'. They do, however, indicate certain main characteristics. The general range of things in view consists of things built or constructed. I think, in addition to coming within this general range, the things in question must, in relation to the hereditament, answer the description of buildings or structures, or, at all events, be in the nature of buildings or structures. That suggests built or constructed things of substantial size: I think of such size that they either have been in fact, or would normally be, built or constructed on the hereditament as opposed to being brought on to the hereditament ready made. It further suggests some degree of permanence in relation to the hereditament, ie, things which once installed on the hereditament would normally remain in situ and only be removed by a process amounting to pulling down or taking to pieces."

14. The learned judge then referred to Cheshire County Council v Woodward [1962] 2 QB 126, a decision of the Divisional Court. That was a decision in relation to planning legislation. It concerned a hopper on wheels which rested on concrete blocks, and a mobile conveyor which was also on wheels. The machinery was some 16 to 20 feet in height and was driven by an electric motor. No planning permission had been granted for it. An Enforcement Notice was served, requiring the removal of the coal hopper and conveyor from off the land. There was an appeal to the Minister.

15. The inspector held an inquiry and reported to the Minister as follows:

> "As regards the notice which alleges development by the 'erection of a coal hopper and conveyor equipment', both items are on wheels and movable, although having regard to the nature of the site, it would be difficult to move them and their movement is unlikely whilst employed as at present. Neither item is attached to the land.' I am advised that in the circumstances of the case, the installation of the hopper and conveyor did not involve development within the meaning of section 12 of the Act of 1947."

16. The Court, in argument, was referred to Cardiff Rating Authority by both sides, and, in due course, Lord Parker, delivering an unreserved judgment, said this:

> "The sections in question are not altogether easy to construe. Section 12(2), which defines 'development' does so by reference to two matters, first, a change in use of the land, and secondly, quite regardless of the change of use, whether there has been a 'carrying out of building, engineering, mining or other operations in, on, over or under land.' I feel that the concept behind that definition is two-fold, first, in regard to the change of use, one takes

> the lands as it is and ascertains if it has been put to a different use, and secondly, and this is quite regardless of use, one has to ascertain whether the land itself has been changed by certain operations. I go further and say that, having regard to the prepositions describing the operations as 'in, on, over or under land', the concept must in regard to that limb be whether the physical character of the land has been changed by operations in or on it.
>
> ... having got that far, the next question is: what sort of operations, in the case of an operation in or on the land, can be said to change the physical characteristics of the land. I do not think that there is any one test. The mere fact that something is erected in the course of a building operation which is affixed to the land does not determine the matter. Equally, as it seems to me, the mere fact that it can be moved and is not affixed does not determine the matter. It seems to me that the position is really rather analogous to the problems with which one is faced in dealing with fixtures when deciding what fixtures pass with the freehold. There is no one test; you look at the erection, equipment, plant, whatever it is, and ask: in all the circumstances is it to be treated as part of the realty? So here, as it seems to me, under this Act one must look at the whole circumstances including what is undoubtedly extremely relevant, the degree of permanency with which it is affected, in order to see whether the operation has been such as to constitute development."

17. The Court then held that it was impossible to say that the Minister had erred in law.

18. The judge then referred to Barvis Limited v Secretary of State for the Environment and another [1971] 22 P & CR 710, another planning case in the Divisional Court, consisting of Lord Parker CJ, Widgery LJ, and Bridge J. That was a case again where an Enforcement Notice had been served on appellants requiring the removal of a track and crane which had been erected at the appellant's depot in 1969. Before the end of the year the planning authority served an Enforcement Notice complaining of development comprising the laying of a length of steel track and the mounting, thereon, of a tower crane some 80 feet in height.

19. The inspector in that case held that, in his view, no development was involved in the erection and use of the crane. However, the Secretary of State, whilst accepting the inspector's findings of primary fact reached a different conclusion which he expressed thus:

> "It is noted that although the crane is available for use elsewhere as and when required, it has been in its present position since May or June 1969 and your clients could give no indication as to when it was likely to be moved except that it would probably be within the next twelve months. It is clear that it is intended that it should be returned to the site when its period of use elsewhere is ended. ... in these circumstances it has been concluded that the erection of the crane with all that it entailed did alter the physical characteristics of the land as a matter of fact and degree and amounted to building, engineering and other operations in, on or over land comprising development."

20. The judgment was given by Bridge J who said at page 715 of Woodward's case:

> "I think it is important to bear in mind that the words of the judgment have not the force of statute and also to bear in mind the circumstances in which the appeal came before the court. The planning authority's complaint, as appears from the reported argument of counsel, was that the inspector and in due course the Minister, had misdirected themselves in founding their conclusion that the conveyor and hopper had not involved

> development of the land solely on the consideration that they were mobile, and it was submitted, that that was the wrong test. The judgment of my Lord, Lord Parker CJ, as I understand it, accepted that, if that was indeed what the inspector and Minister had done, that would have been wrong; that the right approach was to look at all the circumstances of the particular case, and the court concluded, indeed, that that was precisely what the Minister had done.
>
> The tests of the kind there suggested may be tests which it is necessary to apply to a borderline case. There again, for my part, I think that one should avoid the danger of finding oneself, in trying to solve one problem, involved in the solution of another different problem which is really more difficult. We have been referred in the course of argument in this case to some of the decided cases in the field of real property law deciding what do and what do not amount to fixtures. It would be quite wrong, in my judgment, to substitute that question for the statutory question which is asked under the Town and Country Planning Act 1962."

21. The learned judge then went back to the definition in the Act and asked himself: was the crane, when erected, a 'building' within the definition in section 221. He stated that if it was, then:

> "I should want a great deal of persuading that the erection of it had not amounted to a building or other operation. 'Building' includes any structure or erection. If, as a matter of impression, one looks objectively at this enormous crane, it seems to me impossible to say that it did not amount to a structure or erection."

22. I interpose to say that, as it seems to me, the inspector, who specifically referred to this case, was clearly carrying out the exercise which this case sanctioned. But it is right to say that Bridge J stated at page 716:

> "I would only add that we have been referred, in addition, to certain cases from the rating field, and, whilst conscious of the danger in the field of statutory construction of applying considerations derived from the decisions in one body of legislation to the consideration of another body of legislation, I do find assistance in this case from a passage in the judgment of Jenkins J in Cardiff Rating Authority v Guest Keen Baldwin's Iron & Steel Co Ltd."

23. Then he sets out the passage to which I have already adverted, and says:

> "If one substitutes throughout that passage the phrase 'structure or erection' for the phrase 'structure or in the nature of a structure,' in my judgment it is fully applicable to the considerations which govern the application of the definition in the Town and Country Planning Act 1962, and I think that one only has to read it to see how apt it is in the circumstances of this case."

24. Then the judge referred to R v Swansea County Council ex parte Elitestone Limited [1993] 2 PLR 65 (CA). There, the issue was whether the appellants were allowed to demolish some chalets or chalet type dwellings which were on their land. They argued that designating the area as a conservation area was irrational because the authority had failed to consider whether or not chalets were buildings. Mann LJ, with whom the other members of the Court agreed said at page 71:

> "The significance of the point which lies behind this ground is this: in a conservation area buildings cannot be demolished without consent... One of the objects of achieving conservation area status in this case, as advanced before the subcommittee, was that it

would prevent demolition of the chalets without consent. If the chalets were not buildings then the object is not achievable. Mr Thom submitted that the subcommittee and the committee failed specifically to address themselves as to whether the chalets were buildings. They have, of course, no need so to do if it was obvious that they were."

25. Then His Lordship referred to the definition of "building". He went on to say at page 73 after quoting from Barvis:

"In the light of those observations Mr Thom accepts that incorporation in the realty is but one factor and is not determinant either way. I think that he is right in so accepting. I also think that he is right in accepting that the degree of permanence is a highly material factor. Other significant factors are, size and composition by components: see by way of analogy the discussion in Cardiff Rating Authority v Guest Keen Baldwin's Iron and Steel Co Ltd.

Reference is there made to the passage from Jenkins J which I have already read. His Lordship continued:

"In those circumstances I cannot, for my part, see any conclusion as a matter of objective judgment other than that these chalets were and are structures or erections. Such a conclusion seems to me to respond to common sense and means that these chalets are buildings for the purposes of this planning legislation."

26. Those are the cases to which the Deputy High Court Judge referred. He said this:

"There are three factors to be taken into account, one of which is permanence. I consider that the chain of cases cited reveals that the question of whether the object under discussion forms part of the realty is now largely subsumed in the question of its permanence. But Lord Parker's judgment has never been overruled or doubted, and I consider that the question as to whether it forms part of the realty remains a relevant consideration. I fully accept Mr Katkowski's submission that 'permanent' means, as Denning LJ put it, 'intended to remain permanently on a permanent foundation', and, as Jenkins J put it, 'normally remain in situ'. That authority has, since Bridge J's words at the end of his judgment in Barvis, been good law for planning purposes."

27. Then the judge (at page 16) comes to the heart of his criticism of the inspector:

"The approach of the inspector has been to go straight into the consideration of whether or not the marquee is a building. And in my judgment he has fallen into error in that part of his analysis which relates to permanence. I regard myself as bound by the judgments in Barvis in the light Bridge J's words at the end of his judgment. As I have said, that case is good law in planning as well as in rating. I am bound, particularly by Denning LJ's words'intended to remain permanently on a permanent foundation.'"

28. And a little later on he says:

"My view is that the inspector has approached the question of permanence incorrectly in paragraph 10. I agree with Mr Katkowski's emphasis upon the words "when in place". What the inspector has done is to consider its character rather than its permanence. When it is not in place from November to February it has no character at all. So this approach does not go to the question of permanence at all. And the last sentence of the paragraph, in my view, is tantologous. If it is there for eight months only, it is, as a matter of ordinary English, not permanent. Maybe the best

indication that he has not applied the Cardiff meaning of 'permanent' is that he contrasts the word with transient or ephemeral. That is definitely wrong because there are many degrees of 'stability', for want of a better word, between transient or ephemeral and permanent. In particular, it is obvious from the judgment of Cardiff that Denning LJ and Jenkins J were not envisaging that the converse of what they laid down as permanent was transient or ephemeral. I consider that the if the inspector had approached the question whether the marquee was a building on the basis of Denning LJ's and Jenkins J's judgments, he might well have reached the opposite conclusion."

29. Mr Hobson, who appears for the Secretary of State, submits that, firstly, the judge was in error in holding that he was bound by the judgments in Barvis in the way that he indicated, and, in particular, bound by the words by Denning LJ, "intended to remain permanently on a permanent foundation."For my part, I regard that criticism of the judge as well founded. He clearly was not bound in relation to remarks made by Denning LJ in a rating case when construing a provision of a statutory instrument. By no conceivable process of legal reasoning can that be regarded as binding in a planning context designed to achieve different aims.

30. That said, Mr Hobson accepts, for present purposes, the broad approach which was adopted in the three cases cited in each of which there is some reference to permanence. But, he submits, permanence is not a clear concept, it is merely part of a wider approach to the question as to whether or not what has been put up can fairly be described as a structure or an erection or a building, and these are matters of judgment for the inspector, who went on the site, and who took a view. There is no reason to suppose that the inspector did apply a test which was not open to him, but rather, he submits the inspector did apply the test which had been indicated in the cases which I have cited.

31. The dispute between the parties is a very narrow one because Mr Katkowski accepts that one can look at the past history of this site. He says it should have been perfectly obvious to the planning authority that the marquee would remain in situ for eight months and then be taken down during the winter season, and that in those circumstances something which is merely up for eight months does not have the requisite degree of permanence to qualify as a building for the purposes of the present exercise. "Permanence" is not a word that appears in the statute. It is used in the case law. It is not a word which has the same meaning in all contexts. In the present context it must be judged in the context of the desiderata of planning law.

32. It seems to be implicit in Mr Katkowski's submissions to us, that although the inspector held that the presence of this huge marquee for eight months of the year was undesirable from a planning point of view, nonetheless, it was beyond the reach of planning legislation. He submitted, or at least it was implicit in his submission that, if it was clear that the building was going to be pulled down after two years, then equally it could not be regarded as having the requisite degree of permanence demanded by the case law.

33. For my part I would not accept that. I consider that the learned judge paid too much attention to the wording of particular phrases in judgments in different contexts, and that the inspector was entitled to reach the conclusion which he did reach. I am not satisfied that he applied an impermissible test. For my part I am by no means persuaded that the test which he applied is the only test which he could have applied. If anything, the test that he applied was too favourable to the landowner. But this is not something of which the landowner can complain. Mr Katkowski much relies on the words of Jenkins J about the development remaining "in situ". That, as it seems to me, carries the argument no further. It merely causes one to ask: "in situ for how long", to which I would answer: "for a sufficient length of time to be of significance in the planning context." On that basis it seems to me the inspector asked himself the right question and came to a defensible answer. I would allow this appeal.

34. LORD JUSTICE PILL: I agree. The issue is whether the correct test was applied by the inspector in deciding whether there had been a breach of planning control. Whether there has been a building operation involves the application of a legal test. I accept that the appropriate test, having regard to the single point raised in this case, is that stated by Jenkins J in Cardiff Rating Authority and Cardiff Assessment Committee v Guest Keen Baldwin's Iron and Steel Company Limited [1949] 1 KB 385. That was a case involving, not the planning legislation, but rating. However, in Barvis Limited v Secretary of State for the Environment and another [1971] 22 P & CR 710, heard by the Divisional Court, Bridge J set out that part of the judgment of Jenkins J in Cardiff which appears at pages 402 and 403. Having done so, Bridge J stated:

> "If one substitutes throughout that passage the phrase 'structure or erection' for the phrase'structure or in the nature of a structure,' in my judgment it is fully applicable to the considerations which govern the application of the definition in the Town and Country Planning Act 1962, and I think that one only has to read it to see how apt it is in the circumstances of this case."

35. Barvis was an Enforcement Notice case.

36. While referring to Barvis I also note the statement of Bridge J at page 715:

> "I go back to be the definition in the Act itself and ask, first: was the crane, when erected, a 'building' within the definition in section 221, and, if it was, then I should want a great deal of persuading that the erection of it had not amounted to a building or other operation."

37. Bridge J thus approved an approach to the question whether there had been a building operation within the meaning of the statute, by considering, first, whether there was a building; if there was a building, applying the test of Jenkins J, then what had created it was a building operation. That is plainly the approach which the inspector followed. The inspector referred at paragraph 8 to the decision in Barvis.

38. Mr Katkowski, for the respondent, accepts that it is an appropriate way to approach the matter, and further accepts that, in approaching it in that way, it is necessary to have regard to the history of the "item" (to use the neutral word which Mr Katkowski used). Mr Katkowski's submission is that the discontinuance in the presence of the marquee deprives it of the quality of permanence and that the

inspector has not correctly approached the criterion of permanence.

39. Jenkins J stated a three-fold test which involved considering size, permanence and degree of physical attachment in considering whether an item was a building or structure. In relation to permanence he said this:

> "It further suggests some degree of permanence in relation to the hereditament, ie, things which once installed on the hereditament would normally remain in situ and only be removed by a process amounting to pulling down or taking to pieces."

40. In my judgment, that test introduces a degree of flexibility into the approach to permanence. It does so, first, by qualifying the word "permanence" by the expression "some degree." Secondly, it does so by using the word, "normally". Thirdly, it does so by introducing the concept of removing the building, "by taking to pieces."

41. Those are all factors which, in my view, bear upon the facts of the present case.

42. I also agree with Mann LJ in R v Swansea City Council ex parte Elitestone [1993] 2 PLR 65 (CA), that in some circumstances the degree of permanence may be a "highly material factor." In considering Jenkins J's three-fold test, no issue is taken by Mr Katkowski upon the inspector's approach to the factors of size or degree of physical attachment. The submission made, based upon the finding of the learned deputy judge, is that the inspector applied the wrong test in relation to permanence. It is submitted, as the judge found, that the inspector considered "character" rather than "permanence". There is no doubt that the inspector was concerned with character, and rightly so, in my judgment. He meant it in a sense which could relate to all three parts of the three-fold test, parts which it is common ground do overlap to some extent.

43. In my judgment, the inspector did apply the correct test when considering the question of permanence. Schiemann LJ has set out the relevant parts of the inspector's report in his judgment.

44. Criticism is made of the use of the words "transient or ephemeral" by contrast with the word, "permanence" in paragraph 10 of the decision, and the word, "fleeting" in contrast to the word "permanent" in paragraph 12. Both "transient" and "ephmeral" mean lasting for a short time. I see no error in using them to approach an item by using them by way of contrast with the word "permanence" in applying the test to a particular item. The same can be said of the use of the word "fleeting". These are appropriate words to use by way of distinction with the word "permanent" on the present facts.

45. The inspector rightly stated that the marquee only remained on site for eight or so months a year. He plainly had in mind the duration of the presence, and that the presence had occurred for that period of a year over many years before the issue came to be decided. As I have said, it is common ground that the history of the item can be taken into consideration in considering whether the "permanence" aspect of the test is satisfied.

46. That duration was, in my judgment, an important factor, one which the inspector rightly had in mind. Permanence does not necessarily mean that the item must be on site for 365 days a year. On a strict application of a contrary principle, an item, however large and well constructed, which is built in such a way that it can be dismantled and is removed annually for a short time would not be subject to planning control - an application of the permanence principle which Mr Katkowski readily conceded could not be right.

47. Not only did the inspector, in my judgment, apply the correct test with respect to permanence, but he reached a conclusion which he was entitled to reach. The annual removal of the marquee did not deprive it of the quality of permanence. The inspector was entitled to reach the conclusion that the item was a building and hence there had been a building operation which was in breach of planning control. I can find no error either in the conclusion of the inspector or the reasoning by which it was reached. I, too, would allow this appeal.

48. LORD JUSTICE MORRITT: I agree that this appeal should be allowed. I think the judge was wrong when he said (at page 16G of the transcript) that he was bound by the dictum of Denning LJ in the Cardiff rating case. It was expressed in relation to different legislation.

49. It is clearly established that permanence has some part to play in the question of whether the operation is a building operation or not, and whether the product of the operation is a building or not. But it seems to me that it does not depend upon the intention of the erector as to whether it is a building operation or a building. Moreover, that permanence does not necessarily connote the state of affairs is to continue for ever or indefinitely. It is a matter of degree between the temporary and the everlasting.

50. In the case of planning control, it is apparent from the (General Permitted Development) Order 1995 Schedule 2 Part 4, that a building may be sufficiently permanent for the purpose of planning control and yet be temporary so as to come within the exemption for which that order provides. In those circumstances, it seems to me that the test by which the inspector directed himself, and applied in paragraph 10 of his decision letter, is the correct test as a matter of law, and it is not for this Court to say whether it was correctly applied as a matter of fact.

51. I agree that this appeal should be allowed.

(Appeal allowed with costs; subject to detailed legal aid assessment).