Neutral Citation Number: [2019] EWHC 14 (Admin)

Case No: CO/975/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/01/2019

Before :

MR C. M. G. OCKELTON, VICE PRESIDENT OF THE UPPER TRIBUNAL
(SITTING AS A JUDGE OF THE HIGH COURT)

- -

Between :

Bright Horizons Family Solutions Limited	**Claimant**
and	
Secretary of State for Communities and Local Government	**Defendant**
and	
Watford Borough Council	**Interested Party**

- -
- -

Thea Osmund-Smith (instructed by **Shakespeare Martineau**) for the **Claimant.**
Richard Moules (instructed by **Government Legal Department**) for the **Defendant.**
The Interested Party did not appear and was not represented.

Hearing date: 4 October 2018

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR C M G OCKELTON, VICE PRESIDENT OF THE UPPER TRIBUNAL

Mr C. M. G. Ockelton :

1. Is a nursery, attended by young children, a "school" within the meaning of the General Permitted Development Order ("GPDO")? That is the question of construction posed by these proceedings.

BACKGROUND

2. The claimant, "Bright Horizons", runs nurseries for young children. In particular it runs one at 3 Park Avenue, Watford, where its premises, which have been in use as a nursery since 1997, are a three-storey former dwelling-house in a suburban development of similar houses, mostly Edwardian in date. On 18 January 2017 Bright Horizons sought from the Local Planning Authority, Watford Borough Council ("Watford", the interested party) a Certificate of Lawful Development in respect of a proposed development by the installation of two linked portable cabins in the garden of the premises, to increase the indoor space available for the nursery. Before an answer was given, the cabins were installed.

3. That in itself raised a question, because Watford doubted whether by the time of its decision the application could be valid (a higher fee is payable for confirmation of the lawfulness of an existing development than in relation to a proposed development) but that was resolved in favour of Bright Horizons and is no longer an issue.

4. Watford's decision was dated 9 March 2017. It refused the Certificate. The reason given was as follows:

> "This application seeks confirmation that the proposed modular buildings (which have now been installed) are permitted development under the regulations that are set out in Schedule 2, Part 7, Class M of the General Permitted Development Order; but Class M is not applicable in this case because it applies only to "schools, colleges, universities or hospitals" whereas this site is a children's nursery. A nursery is not a 'school', Class M is not applicable in this case, and therefore the application must be refused."

5. Bright Horizons appealed to an Inspector. The appointed Inspector, Mr Paul Dignan, gave his decision dismissing the appeal on 26 January 2018. His reasons were in essence that Watford's interpretation of the GPDO was correct. Bright Horizons sought statutory review under s 288 of the Town and Country Planning Act 1990 in these proceedings, issued on 8 March 2018. Permission was granted by HHJ David Cooke sitting as a judge of this Court; he also ordered transfer of the proceedings from Birmingham, where they had been issued, to London. The defendant is the Secretary of State; Watford did not file an Acknowledgment of Service and has taken no part in the proceedings.

6. The role of the court in these proceedings is not in principle one of deference to the Inspector's planning judgment. The meaning of the legislation, including the GPDO, is a matter of law, even if, as in this case, the interpretation involves determining the meaning of an ordinary word in the context of the legislation in question. The

Inspector errs in law if he applies the legislation in any sense other than its true construction. My task is therefore to ascertain what that is.

LEGISLATION

7. The current version of the GPDO is the Town and Country Planning (General Permitted Development) (England) Order 2015 (SI 2015/596). The scheme of the Order is that, by article 3, planning permission is granted for any development described within Schedule 2 as permitted development. Schedule 2 is itself divided into 19 Parts, each of which is subdivided into Classes, and in order to see how language is used in relation to schools and nurseries I shall need to refer to a number of them. The provision upon which Bright Horizons principally relies is within Part 7, which is entitled "*Non-domestic extensions, alterations, etc*" and has the following at Class M:

> "Class M – extensions etc for schools, colleges, universities and hospitals
>
> Permitted development
>
> M. The erection, extension or alteration of a school, college, university or hospital building.
>
> Development not permitted
>
> M.1 Development is not permitted by Class M—
>
> (a) if the cumulative gross floor space of any buildings erected, extended or altered would exceed—
>
> (i) 25% of the gross floor space of the original school, college, university or hospital buildings; or
>
> (ii) 100 square metres,
>
> whichever is the lesser;
>
> (b) if any part of the development would be within 5 metres of a boundary of the curtilage of the premises;
>
> (c) if, as a result of the development, any land used as a playing field at any time in the 5 years before the development commenced and remaining in this use could no longer be so used;
>
> (d) if the height of any new building erected would exceed 5 metres;
>
> (e) if the height of the building as extended or altered would exceed—

(i) if within 10 metres of a boundary of the curtilage of the premises, 5 metres; or

(ii) in all other cases, the height of the building being extended or altered;

(f) if the development would be within the curtilage of a listed building; or

(g) unless—

(i) in the case of school, college or university buildings, the predominant use of the existing buildings on the premises is for the provision of education;

(ii) in the case of hospital buildings, the predominant use of the existing buildings on the premises is for the provision of any medical or health services.

Conditions

M.2 Development is permitted by Class M subject to the following conditions—

(a) the development is within the curtilage of an existing school, college, university or hospital;

(b) the development is only used as part of, or for a purpose incidental to, the use of that school, college, university or hospital;

(c) any new building erected is, in the case of article 2(3) land, constructed using materials which have a similar external appearance to those used for the original school, college, university or hospital buildings; and

(d) any extension or alteration is, in the case of article 2(3) land, constructed using materials which have a similar external appearance to those used for the building being extended or altered.

Interpretation of Class M

M.3 For the purposes of Class M—

"original school, college, university or hospital building" means any original building which is a school, college, university or hospital building, as the case may be, other than any building erected at any time under Class M; and

"school" does not include a building which changed use by virtue of Class S of Part 3 of this Schedule (changes of use),

> where 2 or more original buildings are within the same curtilage and are used for the same institution, they are to be treated as a single original building in making any measurement."

8. In the present case there is no doubt that the neither the size nor the position of the development would infringe the provisions there set out. The question is, as indicated, whether Class M could permit development on this site at all. It is convenient to refer at this point to the other provisions of the present GPDO that were canvassed by the parties at the hearing. I refer below to some of the legislative history.

9. Change of use by virtue of Classes S and T of Part 3 is of some importance. Part 3 of Schedule 2 permits certain changes of use; and Class S is "Development consisting of a change of use of a building and any land within its curtilage from a use as an agricultural building to use as a state-funded school or a registered nursery". I do not need to set out the details, but only to note that these provisions enable a registered nursery or state-funded school to come into existence after March 2013 without any specific planning permission for the change of use. The next Class, Class T, makes provision for change of use from business, hotel, institutional or leisure use to use as a state-funded school or registered nursery. It is to be noted, however, that the exclusion from the definition in class M.3 of Part 7 applies only to a site that has changed use under Class S of Part 3, not Class T. The following relevant definitions for the purposes of Part 3 are in paragraph X of that Part:

> ""registered nursery" means non-domestic premises in respect of which a person is registered under Part 3 of the Childcare Act 2006 to provide early years provision;
>
> "state-funded school" means a school funded wholly or mainly from public funds, including—
>
> an Academy school, an alternative provision Academy or a 16 to 19 Academy established under the Academies Act 2010;
>
> a school maintained by a local authority, as defined in section 142(1) of the School Standards and Framework Act 1998."

10. There is also a paragraph of definitions in Part 7, paragraph O. It does not provide a comprehensive definition of "school", but does have the following provisions:

> "'registered nursery" and "state-funded school" have the meanings given in paragraph X of Part 3 of this Schedule (changes of use);"
>
> "school"—
>
> includes a building permitted by Class C of Part 4 (temporary buildings and uses) to be used temporarily as a school, from the date the local planning authority is notified as provided in paragraph C.2(b) of Part 4;

> except in Class M (extensions etc for schools), includes premises which have changed use under Class S of Part 3 of this Schedule (changes of use) to become a state-funded school or registered nursery; and
>
> includes premises which have changed use under Class T of Part 3 of this Schedule (changes of use) to become a state-funded school or registered nursery."

11. The primary effect of these provisions, ignoring for the moment the requirements relating to size or position of the development, is as follows. If the extension is to a school, it is within Class M. If the extension is to premises which have changed use to a nursery under Class T, it is within Class M, because of the definition of "school". If the extension is to premises which have changed use to a nursery under Class S, it is not within Class M, because of the specific exclusion in Class M itself and in the definition of "school". If the extension is to premises in use as a nursery, but not as a result of a change of use under either Class S or Class T, it can be within Class M only if the word 'schools' in Class M is to be read as incorporating nurseries.

12. There are formidable difficulties in an argument to the latter effect. They centre around the ordinary meaning of the words "school" and "nursery", and the particular context that those words have in the GPDO provisions that I have set out.

WHAT IS A SCHOOL? WHAT IS A NURSERY?

13. There cannot, I think, be any doubt that "school" in the sense with which I am concerned is an institution for the provision of education. If used without any qualification (compare "adult school", "ballet school", "dog training school") the word means an institution where a general education is provided for young human beings, typically on the basis of attendance at a specified place for a number of hours on a considerable number of days per year. Amongst the other activities taking place in such an institution there will be some that are either not specifically attributable to education (for example the provision of refreshments) or which may be regarded as having a quality that is not solely educational (for example the organisation of games). But the principal purpose needs to be that set out above. A canteen is not a school, even though a school may have a canteen; a chess club is not a school, even though a school may have a chess club.

14. It is also clear that the provision of education does not make an institution a school. "A ride on an elephant may be educational" (Re Lopes [1931 2 Ch 130 at 136-7, per Farwell J), but that does not mean that a zoo is a school. Similarly, museums and concert-halls are not schools; and they do not become schools within the ordinary unqualified meaning of that word by having substantial outreach or educational activities. Further, only limited assistance can be gained from the institution's name. The Vale of York Academy is a School, but the London Hairdressing Apprenticeship Academy is not. Winchester College is a school, but Oriel College is not.

15. As the word is used in the United Kingdom (there is a distinction here from other English-speaking countries, particularly in North America) a university or other institution of tertiary education is not a "school". Such institutions may have parts that carry a name using that word with some qualification ("law school", "school of

cosmetology") but the ordinary use of the word "school" does not comprise institutions whose object is the education or training of people above the age of about 18. One may use phrases such as "schools and colleges" or "schools and universities" without being suspected of tautology.

16. That proposition, which in my judgment is also beyond doubt, raises the question of the meaning of the commonly-used phrase "school-age". As it is generally understood, that phrase encompasses the period in a young person's life beginning with the requirement to go to school and ending with the age at which the person is too old to have education in a school. The period before school age, and institutions which may cater for children of such an age, are often called, without any apparent ambiguity or difficulty, "pre-school".

17. It appears from the above that an institution concerned with children below school age is unlikely to be regarded as properly called, without qualification, a "school". It may be called a "nursery school", but that does not entitle it to be called simply a 'school' any more than being called a "law school" does. And the provision of some education to its denizens will not make the institution a "school" (compare zoos, above); even having education as its main purpose will not make the institution a "school" (compare universities, above). If an estate agent said that at the end of the road there was a good school, one would not expect to find only a nursery, however good. The services provided in such an institution are "pre-school".

18. For these reasons, in my judgment, the unqualified use of the word "school" does not in its ordinary meaning include a nursery.

SCHOOLS AND NURSERIES IN THE GDPO

19. It must be uncontroversial that to a certain extent the use of the language in the GDPO is in accord with that set out above. The phrase "a school, college, university or hospital building" shows that the Order does not see colleges or universities as schools. What about the other end of the age range?

20. Here there is less help. There is no provision that "school" includes nursery, nor a less-encompassing provision that "school" includes registered nursery. There are only provisions that treat certain nurseries in the same way as certain schools sharing a similar planning history. If there has been a change of use under Class S or Class T, there are GPDO benefits (save in Class M for sites with a Class S change of use) for state funded schools and registered nurseries.

21. It is helpful to look at the legislative history. Before 2013 the GPDO (then in the form of the Town and Country Planning (General Permitted Development) Order 1995 (as amended)) contained no reference to these particular permitted changes of use, and so also did not contain the provisions defining the applicability of the Order to such changes of use. The Order, then as now, permitted the erection of buildings on the site of any school, college, university or hospital for the purposes of the institution (continued now in Class M of Part 7). From 2010 there was a permitted development right to provide a hard surface within the curtilage of any school. This right is continued in Class N of Part 7 of the GPDO. In 2013 the Town and Country Planning (General Permitted Development) (Amendment) (England) Order introduced permitted changes of use from classes B1, C1, C2, C2A and D2 (in

summary, business, hotel, leisure and residential institutions) to a "state-funded school". The same Order introduced a permitted development right for change of use of any building as a school for a single academic year, to which right the partial definition of "school", set out above, refers at (a).

22. In 2014 came the first reference to nurseries. The Order was the Town and Country Planning (General Permitted Development) (Amendment and Consequential Provisions) (England) Order 2014. The change of use right was extended so as to permit a change to "a state-funded school or registered nursery". This is the present Class T (above). A new change of use right was added, from use as an agricultural building to use as "a state-funded school or registered nursery". This is the present Class S (above). The Order also extended the right to provide a hard surface by providing that in relation to that right "school" included premises that had changed use in one of these ways.

23. The result following consolidation in the GPDO is, as has been seen, that both "state-funded schools" and "registered nurseries" that have come into existence as a result of a Class S or T change of use obtain some of the permitted development benefits granted by the GPDO to schools, save that in relation to new buildings, the Class M development right is not extended to sites that have changed use under Class S.

THE PARTIES' POSITIONS

24. Ms Osmund-Smith's argument, as presented in her grounds and in her written skeleton argument, is that the legislative structure demonstrates that, in general, "school" includes nursery. If it were not so, she asks, why would it be necessary to exclude nurseries (as well as schools) in the definition at paragraph O of Part 7? A reference to schools alone would surely suffice. Further, the definitions, and the extension of the consequences of change of use under Class S and Class T appear to treat state-funded schools in precisely the same way as registered nurseries, which, she submits, serves to show that schools and nurseries are to be treated as equivalent throughout the GPDO. She also points out that the Inspector would, as he said, have been prepared to find that "early years provision" would enable a building to be regarded as "predominantly used for education" and argues that that conclusion assists in showing why nurseries should be regarded as schools.

25. In response to a passage in the Defendant's Summary Grounds of Defence saying that the definition at Part 7 was the entire definition, she pointed out that the definition is either comprehensive or merely inclusionary. If it is inclusionary, it does not rule out the interpretation she seeks, which is supported or mandated by the treatment of state-funded schools and registered nurseries together. If it is comprehensive, then it seems to exclude buildings that have been designed as schools (that is, have not changed use to a school) – which is absurd. Although Ms Osmund-Smith's written skeleton argument was focussed on the GPDO in its current emanation, including the amendment provisions to which I have referred, she made it clear in the course of her oral submissions that the Claimant's position is that the word "school" in the GPDO and its predecessor had always encompassed a nursery.

26. Mr Moules' position on behalf of the defendant is that the Inspector was right to consider that nurseries are not schools in the GPDO, save where specific nurseries are

included in the definition of "school" in specific places in it. The inclusion of registered nurseries at certain points is simply part of the policy of relaxing some of the restrictions on change of use, demonstrated by the history of the relevant provisions. The definition in Part 7 is non-exhaustive, simply adding certain premises to those having permitted development rights as schools.

DISCUSSION AND DECISION

27. It seems to me, with respect, that Ms Osmund-Smith's submissions are misplaced. She assumes, without establishing, that in general terms "school" would include a nursery, and then goes on to seek some support (or absence of contradiction) for that position in the detailed provisions relating to the consequences of change of use and in the Inspector's view about predominant use. Even on those terms, however, her argument does not quite work. The centre-piece of her submissions is to ask why it would be necessary to exclude nurseries from some of the permitted development benefits attributable to schools if they would not otherwise have had them, as nurseries falling within the definition of "school". The problem, however, is that the very same provisions appear to go to some pains to add "state-funded schools" to the definition of "school", which (expressed in those terms) is obviously unnecessary. Clearly a state-funded school is a school, and it could not conceivably be necessary to extend the definition of "school" to incorporate state-funded schools, which are in any event the vast majority of the institutions that word encompasses.

28. As it seems to me, however, the starting-point must be the ordinary meaning of the ordinary word "school". For the reasons given above, in my judgment that word, when used without any qualification, does not encompass nurseries. Therefore, the provisions of the GPDO to which I have referred had no application at all to nurseries before the amendments in 2014.

29. Those amendments gave new development rights enabling change of use without permission from certain classes of use to "state-registered school or registered nursery". As part of the advantageous treatment of such change of use, the buildings so affected were given other permitted development rights, and the treatment of them uses the words of the change of use provisions, as well it might. The key to those provisions is not to be found by treating the words "registered nursery" in isolation, but by considering the whole phrase "premises which have changed use under Class S [or Class T] of Part 3 of this Schedule (changes of use) to become a state-funded school or registered nursery" as a unit implementing consequential provisions in relation to such premises. The effect is that some nurseries are to be treated in the same way as some schools for some (but not all) purposes; and the language used demonstrates that that treatment is derived from their use history.

30. Three additional points may be made in this context. First, given what is said in the previous paragraph, it was necessary to mention state-funded schools in this treatment, in particular in the definition now in paragraph O of Part 7, although they are obviously schools, because if they had been omitted it might have been thought that buildings whose use had changed to a state-funded school were not encompassed within "school", although those which had changed to registered nurseries were. Secondly, subject only to the distinction between registered nurseries and other nurseries (which formed no part of any submission by Ms Osmund-Smith), if

"school" in general includes nurseries there would be no purpose in any of the provisions extending the definition of "school" to the beneficiaries of the change of use provisions because all buildings that had changed use under either Class S or Class T would be within the definition of "school" anyway. Thirdly, contrary to what Ms Osmund-Smith implied in her argument, there are in fact no provisions excluding nurseries as such at any point. The definition in Part 7 limits its inclusionary provisions without using any words of exclusion; and in Class M itself the exclusion is of all buildings that have changed use under Class S: it is the origin rather than the destination that defines the exclusion. The mere fact that were it not for the exclusion some nurseries as well as some schools would be included cannot possibly found the proposition that in general the word "school" encompasses all nurseries or even all registered nurseries.

31. It is right to say that there are some oddities in the GPDO provisions about schools, including some perhaps surprising provisions in relation to when a high fence can, and cannot, be erected around a school or a nursery without planning permission. But the only oddity of relevance in the present case is that as a result of the apparent encouragement of change of use to state-funded school or registered nursery in the 2013 and 2014 amendments to the Order, registered nurseries created by such a change of use have some planning advantages that nurseries with a different history do not have. That is neither absurd nor unfair, and it provides no good reason for giving to the word "school" in the GPDO anything other than its ordinary meaning, which does not include a nursery.

32. For the foregoing reasons I conclude that the construction of Class M adopted by the Inspector was correct and gives no ground to quash his decision. I shall therefore dismiss this claim.