AC-2022-CDF-000158

Neutral Citation Number: [2023] EWHC 2503 (Admin)

Case No: CO/4473/2022

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

Cardiff Civil and Family Justice Centre
2 Park Street, Cardiff CF10 1ET

Date: 13/10/2023

Before :

HIS HONOUR JUDGE JARMAN KC
Sitting as a judge of the High Court
Between :

MALCOM JEFFREY BARRETT	**Claimant**
- and -	
THE WELSH MINISTERS	**Defendant**
-and-	
POWYS COUNTY COUNCIL	**Interested Party**

- -
- -

Mr Jonathan Clay (instructed by **Fladgate LLP**) for the **claimant**
Mr Owain Rhys James (instructed by **Government Legal Department**) for the **defendant**
The interested party did not appear and was not represented.

Hearing dates:
- -

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.

.....

HIS HONOUR JUDGE JARMAN KC

HHJ Jarman KC:

Introduction

1. The claimant seeks a review pursuant to section 288 of the Town and Country Planning Act 1990 (the 1990 Act) of a decision by an inspector appointed by the Welsh Ministers. For reasons set out in a letter dated 19 October 2022 the inspector dismissed the appeal of the claimant under section 195 of the 1990 Act against the refusal of the local planning authority, Powys County Council, to grant him a certificate of lawful development under section 192(1)(b) of the 1990. The certificate sought is in respect of the development of four dwellings pursuant to outline planning permission granted on 4 July 1988 and a reserved matters decision on 21 September 1990. The appeal was dealt with on the written representation procedure in the course of which the inspector carried out a site visit.

2. There are two closely related grounds of appeal, each of which is contested by the Welsh Ministers, namely:

   i) the inspector was wrong in law to find that condition 2 attached to the outline planning permission was prohibitive in substance.

   ii) the inspector was wrong in law to find that as a matter of fact and degree condition 2 goes to the heart of the permission, without carrying out any fact-sensitive enquiry or assessment into the terms of the condition in the context of the permission and the permission in its planning context.

The planning background

3. Two outline planning permissions were granted on 4 July 1988 for the development of a total of 20 dwellings respectively in the grounds of Llanerchydol Hall, Welshpool, Powys, subject to conditions that the development took place in phases. 16 dwellings have already been constructed pursuant to those permissions. Four dwellings referred to in the permissions as "Site A" remain to be constructed. The developer, after carrying out material operations in respect of that development, put the remainder of the construction on hold for many years. It is now desired to build the four dwellings.

4. It is common ground that the material operations in respect of Site A, within the meaning of section 56(2) of the 1990 Act, consist of the construction of passing bays on the access road, the construction of a sewer spur and the provision of telecommunication cabling. It is also common ground that these mean that the planning permission in respect of Site A has been lawfully commenced and can now lawfully be implemented, unless those operations have been rendered unlawful by a failure to comply with condition 2 and that in turn means that the development has not been lawfully commenced within the conditioned timescale and is now incapable of lawful implementation.

5. Condition 2 refers to the approval of dwellings of which the four on Site A form part and reads as follows:

> "2). The sixteen new dwelling houses are hereby approved under the provisions of Article 5(2) of the Town and Country Planning General Development Order 1977, on an outline application and the further approval of the District Planning Authority shall be required with respect to the following matters hereby reserved before any development is commenced:
>
> a) The siting, design and external appearance of the proposed buildings or other structures to be erected on the site's, including fences, walls and other means of enclosure;
>
> b) details of the access arrangements including car parking and vehicle turning areas;
>
> c) details of the landscaping of the site, including the size and species of all proposed planting and any existing species to be retained. The scheme shall include tree and hedge planting along the South and east boundaries of Site A and the North and South boundaries of Site C referred to on plan 14760/A attached to this consent, as well as the new site entrance off the A490 road.
>
> In the case of the reserved matters specified above, application for approval, accompanied by all detailed drawings and particulars, must be made to the district planning authority not later than the expiration of three years beginning with the date of this permission.
>
> The development to which this condition relates must be begun not later than the expiration of five years from the date of this permission or within the expiration of two years from the final approval of all reserved matters whichever is later."

6. The reason given for imposing condition 2 as stated in the outline permission was "Conditions imposed in compliance with section 42 of the 1971 Act." That provision allowed the grant of outline planning permission with matters not specified in the grant for subsequent approval by the local planning authority, referred to as "reserved matters."

7. The first sentence of condition 7 reads:

> "The construction of the new dwellings shall be phased in order B, C and A as indicated on plan 14760/A attached. No work, other than the provision of items of common infrastructure, shall be commenced on a new phase until the previous phase has been substantially completed."

8. The reason stated for condition 7 is "To safeguard the visual character of the parkland and to ensure the orderly development of the locality in the interests of amenity."

9. The first sentence of condition 10, which is stated to be in the interests of visual amenity and highway safety, reads:

> "Excluding conversion works to the Hall itself, before any of the remainder of the development hereby approved is commenced the existing access off Raven square shall be permanently closed to vehicular traffic with a scheme which has received the prior approval of the local planning authority."

10. Condition 11 begins with similar wording but goes on to set out a number of detailed requirements in respect of the new access off the A490 to be implemented before any of the remainder of the development is commenced, the stated reason being in the interest of highway safety.

11. A reserved matters application dated 14 August 1990 was then made in respect of Site A. It was accompanied by drawing number L25 on a scale 1:500 dated 30 July 1990 showing that site outlined in red including the access road to it. The plan showed the layout of the proposed four dwellings and the new foul sewer connection to the mains. The legend describes the materials as natural Welsh slate, red brick walls and render, and painted softwood windows. Pavings were shown variously as bitumen, brick or gravel. A post and wire fence was shown separating the plots and at various points along the site boundary.

12. The plan further shows the northern boundary as adjoining the walled garden of the hall with existing trees to be retained at either end. Those to the west were annotated as either ash or larch and those to the east as ash, although the copy supplied to me is not entirely clear The western and south western boundaries are shown with further significant existing trees to be retained which seem to be annotated as pine. The eastern boundary is shown with an existing hedge and existing trees to be retained, including trees in the south east corner, which seem to be annotated as apple and ash. The remainder of the southern boundary shows two existing trees to be retained. There are then two proposed new trees to be planted to the west of these to fill the gap with the existing trees in the south western corner, and four more to fill the gap with the existing trees at the south eastern corner. The proposed trees are shown simply as circles with no discernible annotations as to species. To the south of this boundary are shown two existing bungalows.

13. The decision notice on that application is dated 21 September 1990. It includes the following:

> "…RESERVED MATTERS ARE APPROVED for the following development,
>
> namely:
>
> Erection of four dwellings Llanerchydol Hall Park, Welshpool
>
> In accordance with the application and plans submitted to the Council on 14 August 1990 in compliance with conditions 2a, 2b, 5 and 6 of the Notice of Decision dated the 4th day of July

> 1988 Ref: M14760 subject to the outstanding conditions of the above mentioned decision and to the following conditions…"

14. The notice then goes on to include the following note:

> "There are still outstanding matters to be agreed before this permission can be implemented –
>
> A. Landscaping scheme for this area;
>
> B. Access onto A490 in accordance with Condition No.10."

The inspector's decision letter

15. As the inspector noted in [8] of his decision letter, the notice expressly states that the application and plans comply with certain conditions, including 2a and 2b, but does not say the same for 2c. In paragraph [9], whilst recognising that the note is "not enforceable in its own right," the inspector concluded that the note suggested that that omission was intentional. At [10] he noted the conflict between the reference in the notice to the application and plans being in compliance with condition 2(b), relating to access, and the second part of the following note which suggested that access was still to be agreed. He also noted that there were a number of other conditions not referred to in the notice which needed to be agreed before the permission could be implemented, but observed that nothing had been submitted to lead him to conclude with any confidence that the landscaping matters were discharged by the notice or other written correspondence.

16. In [11], he referred to the fact that the other three Sites, B, C and D were subject to similar pre-commencement conditions to those for Site A and yet were developed without any evidence of landscaping matters being formally agreed. He continued:

> "However, I am not persuaded that such factors assist the appellant in respect of 'Site A', not least because those sites were subject to separate reserved matters permissions. Indeed, any irregularities in respect of those permissions/ developments are stand-alone matters for the LPA. Similarly, whilst I acknowledge the appellant's frustration regarding the ability for the developer to fully discharge the landscaping details for 'Site A' under Ref: M20115, as Condition 2(c) also related to the wider development of 'Site B' and 'Site C', this falls well short of rendering the permission in respect of 'Site A' extant."

17. He stated his overall conclusions briefly at [12] as follows:

> "Therefore, on the basis of the foregoing, I concur with the Council's position that the appellant has failed to demonstrate that, on the balance of probability, the requirements of Condition 2(c) of planning permission Ref: M14760 were properly discharged. Much has been made of whether a not Condition No.2 represents a condition precedent. Nevertheless, it is clear that, amongst other things, Condition No.2 required

> details of the landscaping of the site, including the size and species of all proposed planting, to be approved by the LPA before any development commenced. The condition was therefore prohibitive in substance and effect and, as a reserved matter, there is little doubt in my mind that, as a matter of fact and degree, the condition goes to the heart of the permission. In coming to this conclusion, I have been mindful of the wide range of legal authorities in respect of such matters, including those referred within the appellant's evidence, and I am satisfied that my findings are consistent with the principles established therein."

18. It is this brief paragraph to which the two grounds of challenge relate. The inspector did not deal with the authorities to which he had been referred in any greater detail. In the next concluding paragraph, he found therefore that the development of Site A did not lawfully commence within the required timescales and the planning permission relating to it was not extant and could not be lawfully implemented. For that reason, the local planning authority had been right not to issue a certificate of lawful development and the appeal was dismissed.

Legal principles

19. I too was referred by Mr Clay for the claimant and Mr James for the Welsh Ministers to a number of authorities. There was no substantial difference between them as to the principles to be applied, but there was disagreement as to how those principles should be applied to the rather unusual facts of this case. As the grounds of challenge are closely related I shall deal with the authorities together. In my judgment, for present purposes, the relevant principles to be drawn from them may be summarised as follows.

    i) The interpretation of a condition attached to a planning permission is a matter for the courts.

    ii) The starting point is to consider what it meant by the words of the condition.

    iii) If a condition is intended to prohibit something, this should be spelled out in clear terms.

    iv) There is no difference between a condition which provides that no development should commence until a scheme is submitted and approved and one which provides that a scheme should be submitted and approved before development commences.

    v) Whether a breach of such a condition means simply that enforcement action may be taken to remedy the breach or whether it renders any commencement of development unlawful depends on whether the condition goes to the heart of the planning permission.

    vi) Whether a condition goes to the heart of the planning permission can be answered only by a fact-sensitive enquiry into the terms of the condition in the context of the permission, and the permission in its planning context.

vii) Such a question is a matter of planning judgment and is not a matter for the court.

20. To make good the above summary, I need to deal with the authorities in some detail. Some of them refer to "The Whitley principle" which is a principle derived from *Whitley & Sons v Secretary of State for Wales* (1992) 64 P&CR 296. Woolf LJ, as the then was, explained it at page 302 as follows:

> "As I understand the effect of the authorities to which I am about to refer, it is only necessary to ask the single question: are the operations (in other situations the question would refer to the development) permitted by the planning permission read together with its conditions? The permission is controlled by and subject to the conditions. If the operations contravene the conditions they cannot be properly described as commencing the development authorised by the permission. If they do not comply with the permission they constitute a breach of planning control and for planning purposes will be unauthorised and thus unlawful. This is the principle which has now been clearly established by the authorities."

21. In *Fawcett Properties Ltd v Buckingham County Council* [1961] AC 636, at 678, Lord Denning stated:

> "It is the daily task of the courts to resolve ambiguities of language and to choose between them; and to construe words so as to avoid absurdities or to put up with them. And this applies to conditions in planning permissions as well as to other documents."

22. The Supreme Court approved that proposition *in Trump International Golf Club Scotland Limited v The Scottish Ministers* [2015] UKSC 74 at [27]. Construction of conditions is a matter of law for the court: see *Hillside Parks Ltd v Snowdonia National Park Authority* [2022] UKSC 30 at [26] –[27].

23. Ousley J in *R (Hammerton) v London Underground Limited* [2002] EWHC 2307(Admin) summarised the principles at [122]-[133]. The starting point is to consider what is meant by the words of the condition.

24. Sullivan J, as he then was, in *R (Hart Aggregates) v Hartlepool Borough Council* [2005] EWHC 840 (Admin) dealt with a planning permission for mineral extraction which by condition required the submission and approval of restoration schemes before the commencement of development. Sullivan J at [58-61] said this:

> "58. If a local planning authority wishes to impose any obligation upon an applicant by way of a requirement or prohibition, it should do so in express terms. The need for a local planning authority to spell out any requirement or prohibition in clear terms applies with particular force where the condition is said to prevent not merely some detail of the development, but the commencement of any development

> pursuant to the planning permission…….the principle argued for by the defendant applies only where a condition expressly prohibits any development before a particular requirement, such as the approval of plans, has been met…
>
> 59…If Durham County Council had wished to prohibit any extraction before a restoration scheme for the worked out areas was agreed, it could have said so by imposing a condition expressly to that effect, similar in form to condition 2 in Whitley, "No extraction shall take place except in accordance with a restoration scheme to be agreed ..."; or it could have imposed the standard form of conditions that are imposed on grants of outline planning permission: "details of [a restoration scheme] shall be submitted to and approved by the Local Planning Authority before any development takes place.
>
> …
>
> 61. Condition 10 is a "condition precedent" in the sense that it requires something to be done before extraction is commenced, but it is not a "condition precedent" in the sense that it goes to the heart of the planning permission, so that failure to comply with it will mean that the entire development, even if completed and in existence for many years, or in the case of a minerals extraction having continued for 30 years, must be regarded as unlawful."

25. At [67] Sullivan J distinguished between:

> "….cases where there is only a permission in principle because no details whatsoever have been submitted and those cases where the failure has been limited to a failure to obtain approval for one particular aspect of the development…. In the former case, common sense suggests that the planning permission has not been implemented at all. In the latter case, common sense suggests that the planning permission has been implemented, but there has been a breach of condition which can be enforced against."

26. In *Bedford Borough Council v SSCLG and Murzyn* [2008] EWHC 2304 (Admin) HHJ Waksman QC, as the then was, said at [46-47]:

> "The fact that a condition is not complied with does not necessarily render the entire development unlawful. One has to ascertain first what the nature and extent of the relevant clause is…
>
> The conditions stipulate that the schemes must be applied for and agreed before commencement. If they are not approved

> before commencement there is a breach of the condition, but there is not the further consequence that the building cannot commence."

27. The judgment of Sullivan J in *Hart* was approved by the Court of Appeal in *Greyfort Properties Limited v Secretary of State for Communities and Local Government* [2011] EWCA Civ 908. Richards LJ, giving the lead judgment, referred to *Hart* and said at [31]:

> "The passage in Hart Aggregates to which the judge referred was at [59], quoted above, where Sullivan J gave two examples of express language that could have been used by the local planning authority if it had wished to prohibit extraction before a restoration scheme for the worked out areas was agreed: it could have imposed a condition in the form "No extraction shall take place …"; or it could have imposed the standard form of condition used in the grant of outline planning permission, namely "… before any development takes place". Sullivan J plainly, and in my view rightly, regarded the two forms of words as equivalent."

28. At [32] Richards LJ referred the fact that in *Bedford*, HHJ Waksman QC had observed a degree of tension in *Hart* between, on the one hand, Sullivan J's acceptance of the second form of words as apt to impose an express prohibition and, on the other hand, the rejection of condition 10 as a condition precedent, and said this:

> "It seems to me that any tension is more apparent than real. It is clear that condition 10 was rejected as a condition precedent engaging the Whitley principle not because it used the second form of words rather than the first, but for the deeper reasons explained at length in the judgment. There is nothing in the judgment to detract seriously from the force of the examples given by Sullivan J at [59]"

29. Richards LJ then went on to consider whether a condition in *Greyfort* relating to ground floor levels of a building went to the heart of the planning permission for the building. He gave a number of reasons why he agreed with the judge that it did, including that the building was proposed to be in a sensitive position, on a very steep gradient in a conservation area and adjacent to a grade 2* listed building. His final reason was set out at [44] as follows:

> "Fourthly, the local planning authority was in my view reasonably entitled to treat the ground floor levels of the building as a matter of sufficient importance to justify the inclusion of a condition prohibiting the commencement of any work on the site, including access work, before the levels were agreed. By condition 4 it chose wording plainly intended to achieve that result. I can see no good reason for declining to respect its judgment on the point."

30. In *Meisels v SSHCLG and LBHackney* [2019] EWHC 1987 Mr C M G Ockelton, Vice President of the Upper Tribunal, said this at [16-17]:

> "16. The starting-point is that development in breach of conditions is unlawful, and it follows that, if there is a condition that has to be fulfilled before development commences, and development commences without the condition being fulfilled, the development has been commenced unlawfully. This is 'the *Whitley* principle'. In those circumstances, if a question arises about whether the development commenced within the three-year period after the grant of permission, the work done in breach of the condition will not count, and the result may be that the permission expired before the commencement of any work authorised by the permission
>
> 17. But that starting-point has to be applied in the context of the statutory regime as a whole, which draws a clear distinction in s171A(1) of the 1990 Act between (a) carrying out development without planning permission and (b) failing to comply with a condition subject to which planning permission was granted. It follows that not every breach of condition can have the result that the development has been carried out without planning permission.
>
> 18. Nevertheless, when an authority has clearly made a condition requiring some further act before the commencement of work, there must be scope for saying that the intended function of the condition was to prevent the commencement of work (or render it unlawful) before the condition had been fulfilled. That will be the case if the condition 'goes to the heart of the planning permission': if it does, it is a condition going beyond the detail of a matter that is agreed in principle: it is, instead, something without which the authority would not be content to permit the development at all.
>
> 19. The question whether a condition "goes to the heart of the planning permission" is not merely a matter of construing the grant of permission. The grant may give reasons why the condition is imposed; but those reasons cannot resolve the question by themselves. Rather, the question can be answered only by a fact-sensitive enquiry into the terms of the condition in the context of the permission, and the permission in its planning context. In other words, this question is a matter of planning judgment. It is not for the Court; it is for the Inspector; and unless the Inspector's decision on the issue is at fault in a Wednesbury sense, the Court will not intervene "

The principles applied

31. I now turn to apply those principles to the two grounds of challenge in turn. In my judgment, condition 2 clearly includes a prohibition on any development until the local planning authority approves the matters thereafter set out. It may be, as Mr Clay for the claimant submits, that that allows the developer to know when to submit those matters for approval, namely before any development is carried out, but in my judgment the wording is in substance prohibitive in nature.

32. As Mr James, for the Welsh Ministers submits, the wording prohibits *any* development before approval of such matters, which prohibition applies to each of the subparagraphs. Some of those in subparagraph a), for example the siting design and external appearance of the proposed buildings may well be seen as going to the heart of the planning permission for four dwellings. It can readily be seen that a local planning authority may wish to ensure that no development at all is commenced until such important matters are approved. Accordingly ground 1 is not made out.

33. However such matters, as well as those in subparagraph b) namely access, parking and turning areas, were approved in the notice issued in September 1990.

34. The real issue in my judgment is whether what remained of the landscaping matters went to the heart of the planning permission, and that depends on the terms of the condition 2c) in the context of the permission for four dwellings, the siting design and external appearance of which had been approved, and the permission in its planning context. I do not accept Mr James' submission that if ground 1 fails then ground 2 must fail too. Although that was a matter for the inspector, that should be determined after a fact sensitive enquiry into such matters. There is an indication of the sort of fact sensitive enquiry which may inform this decision given in the judgment of Richards LJ on the facts in *Greyfort* as referred in [29] above. The facts there were very different to the present case, which serves to emphasise that the enquiry is fact sensitive.

35. The inspector in the present case carried out a site view in August 2022, but does not record in his decision letter what he saw on site. Although he says at [12] that he had little doubt that as a matter of fact or degree that the condition goes to the heart of the permission, he does not consider this in the context of the remaining landscaping matters and does not give any further indication that the necessary fact sensitive enquiry had been carried out. If, for example, all that remained is for the size and species of the six proposed new trees shown on the reserved matters application plan in 1990 to be specified, that may well inform the conclusion whether or not that went to the heart of the permission and the outcome after such an enquiry may well be different. Whether it does or not is a matter for the decision maker and not for the court.

36. Although such an enquiry was a matter for the inspector, as Mr Clay submits, there can be no confidence in this case that such an enquiry was carried out. In my judgment therefore ground 2 succeeds. Counsel agreed in that event the matter should be remitted before a different inspector for such an enquiry to be carried out.

37. I am grateful to each counsel for their focussed and helpful submissions. They also agreed any consequential matters which cannot be agreed can be determined on the basis of written submissions. A draft order, agreed as far as possible, and any such submissions should be filed within 14 days of hand down of this judgment.