LANDOWNERS' RESPONSE TO RVR NOTE ON

IMPLEMENTATION OF PLANNING PERMISSION RR/2014/1608/P

Background

1. As INQ52 para 1 records, the planning permission was subject to a number of pre-commencement conditions. In addition to those listed in INQ52, Condition 12 required approval of a Prior Risk Assessment prior to the commencement of development, "or such other date or stage in the development as may be agreed in writing with the Local Planning Authority)".

2. INQ52 para 2 records that Rother District Council gave written approval for the partial discharge of conditions 3, 5 and 6 (relating to ecology). However:

    a. It appears to be common ground that none of these has been discharged in full.

    b. It is apparent that the conditions relating to bridge design, flood risk, flood defence integrity, flood plain storage compensation, construction site access and traffic conditions, level crossing design and maintenance and archaeology have not been discharged at all.

    c. There is no indication or suggestion that RDC agreed to any other date or stage for compliance with Condition 12.

    d. Although RDC agreed to the partial discharge of the ecology conditions, there is no suggestion that they agreed to the commencement of development as a consequence of those limited approvals.

3. INQ52 para 53 states RVR's view that, notwithstanding the failure to discharge a number of pre-commencement conditions, the permission has now been lawfully implemented, but notes that Rother District Council disagrees with this assertion.

Legal Framework

4. The starting point is the well-known "***Whitley*** principle", which is that development which is carried out in breach of a condition attached to a planning permission cannot properly be characterised as having been carried out "in accordance" with permission, and so cannot normally be said to implement that permission.

5. As INQ52 para 5 notes, there are a number of recognised exceptions to the ***Whitley*** principle. The first, and most clearly understood of these (which was established in ***Whitley*** itself) is where the breach of condition relates to a failure to obtain a particular approval before work commences, but where an application has been, or is subsequently made within the time limits set by the permission (including the overall time limit for commencement of development), and approval is subsequently granted. In those circumstances, the subsequent approval effectively provides retrospective validation of the works which have been carried out, and can be regarded as commencing development.

6. INQ52 para 3 contends that one of the other recognised exceptions to the ***Whitley*** principle is "where the local planning authority agrees that works can commence without the discharge of all precommencement conditions". INQ52 para 6 cites the decisions of Widgery CJ in ***R. v Secretary of State ex p Percy Bilton*** **(1976) 31 P. & C.R. 154**, and Collins J in ***Agecrest*** as authority for that proposition**.**

7. The existence of this particular exception is not accepted by the Landowners. It is now well-established that ***Percy Bilton*** and ***Agecrests*** are decisions based on the legislative regime which predates the 1990 Town and Country Planning Act 1990, and in particular s. 73; that ***Agecrest*** is no longer good authority; that ***Percy Bilton*** provides no authority for the non-statutory variation of a condition; and that a local planning authority has no power to sidestep the procedural protections which would accompany a s. 73 application by informally agreeing to a departure from a pre-commencement condition.

8. In particular, in ***R v. Leicester City Council ex p. Powergen United*** **[1994] PLR 91 (HC) and [2000] JPL 1037 (CA)** the Court was concerned with a situation in which Powergen had been granted an outline planning permission subject to conditions inter alia requiring an application for approval of reserved matters within three years (condition 1) and requiring submission and approval of reserved matters before the development was begun (condition 2). Powergen applied for approval of reserved matters in respect of part of the proposed development, a food store, and approval was given. In subsequent proceedings relating to the LPA's decision to refuse a s. 73 application so as to restrict the operation of condition 2 to the parts of the development for which approval of the reserved matters had not been obtained, one of the issues was whether Powergen was entitled to implement that part of the outline permission which related to the food store without further permission. Powergen's case was that the council's planning officers had represented that permission for that part of the site in respect of which an application for approval of reserved matters had been made would not lapse and could be implemented notwithstanding the lack of submission or approval of reserved matters in respect of the remainder of the site.

9. In dealing with that issue, Dyson J first made a number of general observations about the arguments on legitimate expectation and estoppel (pp.100B–101C):

> "… the effect of the legitimate expectation argument, if accepted, is that Powergen will have achieved a variation of condition 2 without going through the relevant statutory procedures. The starting point is that the law of town and country planning is public law. It is an imposition in the public interest of restrictions on private rights of ownership of land. The courts should not introduce principles or rules derived from private law unless expressly authorised by Parliament to do so, or it is necessary to give effect to the purposes of the legislation ….
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> A planning condition can only be modified by the statutory procedures to which I have referred [i.e. s.73 of the 1990 Act]. It can only be modified by an application for planning permission. An application for planning permission is a public act and there are relevant statutory provisions for publicity, consultation and representations: see sections 65 and 71(2)(a) of the Act, and Articles 6, 8, 10 and 19 of the Town and Country Planning General development procedure Order 1995. If such procedures were not followed, interested third parties would be unable to make

representations against the grant of planning permission and have those representations taken into account.

There have been a number of cases in which the court has had to consider whether a public body can be estopped from performing its statutory duties. It has been held that a public body with limited powers cannot bind itself to act beyond its authority, and if it purports to do so, it will not be held to any undertaking that it has given outside its powers, since it cannot extend its powers by creating an estoppel ….

10. Significantly, Dyson J went on to state that Powergen's argument faced the insurmountable obstacle that in the particular case the planning officers had no actual or ostensible authority to vary or waive the conditions to which the planning permission was subject. In that context he held (at p.101G–H) that:

> "… section 73 is the provision that parliament has enacted to deal with situations where a developer wishes to develop land without compliance with conditions previously attached to a planning permission. What is required in such circumstances is that the developer apply for planning permission. I do not accept that the provisions of section 73 can be sidestepped by persuading a local planning authority, still let an unauthorised officer, to vary or waive a condition under the guise of the exercise of a general management discretion in the implementation of planning permissions."

11. These conclusions were upheld by the Court of Appeal , where (at para 23) Schiemann LJ said:

> "The judge held that the officers, whose words were relied upon as preventing the authority from now taking any point in relation to time, had neither actual or ostensible authority to make representations to that effect and rejected an argument to the effect that the doctrine of legitimate expectation entitled Powergen to such rights. He went on to hold that the words relied on could not give rise to the expectation asserted and that in any event they had not been relied on. I agree with the reasoning and conclusion of Dyson J that on the facts of this case it is not possible to show that the doctrine of legitimate expectation operates so as to entitle Powergen to proceed to build the Food Store."

12. ***Agecrest*** was not cited in ***Powergen***. However, the implications of ***Powergen*** for the continuing validity of the reasoning in ***Agecrest*** were considered in

Coghurst Wood Leisure Park Limited v. Secretary of State for Transport, Local Government and the Regions **[2003] JPL 206.** In that case:

a. Planning permission had been granted by the local planning authority (coincidentally Rother District Council) for a tourist park of 250 tourist chalets, subject to a pre-commencement condition requiring prior approval of the siting of the buildings.

b. The permission was subject to the standard condition requiring the application for approval of reserved matters to be made within 3 years.

c. The site owner applied for and obtained approval for the siting of 18 of the 250 cabins, but no application was made for approval relating to the remainder within the three year time limit.

d. The site owner then wrote to the Council advising that work on the construction of the access already commenced. The letter suggested that compliance with the pre-commencement conditions was "somewhat premature at this stage" and sought the Council's approval for the excavation and base course of the roadway to be undertaken.

e. A planning officer of the Council wrote, confirming that he had no objection to this.

f. However, when the site owner subsequently sought a certificate of lawfulness for the construction of 250 chalets, this was refused.

g. That decision was upheld by the Inspector on appeal, and by the High Court in the landowner's subsequent challenge to that decision.

13. As can be seen from para 42 of the judgment, in the High Court the site owner relied upon the decision in ***Agecrest*** in much the same way as RVR does in these proceedings. Para 45 records the Secretary of State's argument in response, namely that:

> " the earlier cases must all now be read in the light of ***Powergen*** and ***Reprotech*** and that the inspector's reasoning is in line

with those decisions. Moreover ***Agecrest*** was narrow in scope and is distinguishable. It concerned a pre-1968 permission which was not subject to the statutory conditions as to time-limits now contained, as regards outline planning permissions, in s. 92 of the 1990 Act. When the statutory conditions were introduced, there were transitional provisions under which the time limits would not apply if the development had been begun before the beginning of 1968. That was the context within which the case was decided. The present context is materially different, in that there is now a clear legislative intention that a planning permission expires unless the time limits laid down by the s. 92 conditions are met, subject to the possibility of an application under s. 73 for permission to carry out a development without full compliance with conditions. Such an application, as an application for planning permission, carries with it requirements of publicity, consultation and so forth in order to protect all relevant interests; and in considering the application the local planning authority is entitled to look at the wider planning issues. All this would be sidestepped if it were possible for a developer to rely on a planning officer's statement that development could be commenced without compliance with conditions. This is part of the reasoning in ***Powergen*** . Although ***Agrecrest*** was not cited in ***Powergen*** , the reasoning in ***Powergen*** applies to it as much as to the argument on legitimate expectation. The inspector was right to conclude in the light of ***Powergen*** that works carried out in breach of condition were unlawful notwithstanding the planning officer's letter."

14. That argument was accepted. In particular, Sedley J concluded that (emphasis added):

"56. It is obvious that the judgments in ***Powergen*** and ***Reprotech*** mark an important change in direction in this area of planning law. Looked at together, they emphasise not just the need to apply public law *concepts* rather than private law *concepts* but also the importance attached in public law to a statutory body's powers and duties and to the wider public interest. <u>It cannot be assumed that exceptions previously found to exist will still apply</u>. Substantial reappraisal is required.

57. I accept that in ***Powergen*** Dyson J's rejection of legitimate expectation was based on the particular facts, though even within that context his

reasoning included the observation that section 73 should not be 'sidestepped by persuading a local planning authority … to vary or waive a condition under the guise of a general management discretion'; and the Court of Appeal expressed agreement with his reasoning as well as his conclusion. But his wider concerns about the authorities on estoppel and how they fit with an authority's powers and duties within the context of the statutory procedures were plainly viewed with approval in ***Reprotech*** , as evidenced by the repeated references to his judgment in the passage that I have quoted from the speech of Lord Hoffmann.

58. It is of course possible that situations will arise in this field where it would be a breach of legitimate expectation and therefore an abuse of power for an authority to act in a particular way. I suspect that such cases will be very rare. The present case is not one of them.

59. I say that for two reasons. …

60. Secondly, and more importantly, I share the concern expressed by Dyson J in ***Powergen*** about the sidestepping of the statutory provisions of section 73 , with their attendant procedures to protect the interests of third parties and the general public interest. The court should in my view be very slow to find that the principle of legitimate expectation operates so as to keep alive a planning permission that has on the face of it expired because there was no lawful commencement of the development within the time laid down; or, to pursue the matter to the conclusion sought by the claimant in this case, to find that it operates so as to require the grant of a certificate of lawful development in circumstances where on a proper analysis the development would be unlawful. There is nothing in the circumstances of the present case capable of achieving that result. It cannot possibly be said to have been an abuse of power to hold that the planning permission was not lawfully implemented.

61. In my judgment, therefore, the inspector rightly concentrated in his reasoning on the effect of ***Powergen*** and rightly concluded that no legitimate expectation (or estoppel) could arise in this case. It was a conclusion that took proper account of the facts of the case.

62. As to the criticism that the inspector did not consider the ***Agecrest*** line of reasoning, I do not think that ***Agecrest*** should now be regarded as a discrete exception to the general principle that operations carried out in breach of a condition cannot be relied on as material operations capable of commencing a development. Any exceptions to that principle need to be established in accordance with the principles discussed

in ***Powergen*** and ***Reprotech*** . I do not know whether ***Agecrest*** was cited to the court in ***Powergen*** , but there is an implied reference to it, or to its reasoning, in the passage of Dyson J's judgment where he states that section 73 cannot be sidestepped by persuading an authority to vary or waive a condition 'under the guise of the exercise of a general management discretion'; and, as I have already said, that passage fell within the scope of the Court of Appeal's approval of Dyson J's judgment. In any event I have difficulty in seeing how the decision in ***Agecrest*** fits into the present statutory framework and I would accept Mr Brown's submission that it was narrow in scope and is distinguishable. I do not place any great weight on the reference to it in ***Leisure Great Britain***, where the point does not appear to have been the subject of substantial argument. Accordingly the inspector did not fall into error by failing to deal in terms with ***Agecrest*** and the decision in that case does not undermine his reasoning or conclusion."

15. The ***Coghurst*** analysis of ***Agecrest*** was subsequently expressly approved by the Court of Appeal in ***Henry Boot Homes Ltd v. Bassetlaw DistrictCouncil*** **[2002] EWCA Civ 983**, where Keene LJ (who had delivered the judgment in ***Leisure Great Britain*** on which RVR relies) said this:

> "53. The decision in ***Agecrest*** relied on by the appellant needs to be seen in its context. The case was dealing with events which had taken place in 1967, before what is now section 73 of the 1990 Act had been enacted. At that time no statutory procedure existed for discharging or varying a condition on a planning permission. The decision can have little relevance to cases concerned with events since section 49 of the Housing and Planning Act 1986 came into force. As Richards J said in ***Coghurst Wood Leisure Park Ltd v Secretary of State for Transport, Local Government and the Regions [2002] EWHC Admin 1091*** , at para. 62:
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> > "I have difficulty in seeing how the decision in ***Agecrest*** fits into the present statutory framework."
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> I agree. I would emphasise that, when I referred to ***Agecrest*** in the ***Leisure Great Britain*** case, as an exception to the ***Whitley*** principle, I was not seeking to endorse it beyond recognising that the decision was there as an authority. For the reasons already indicated, it has no bearing on the recent appeal.

> 54. The scope, therefore, for waiver by non-statutory means of the need to comply with a condition must be extremely limited. That is so, whether one is concerned with an alleged waiver of a condition in total or with an allegation that the local planning authority has allowed development to take place in a phased manner, contrary to a condition. The latter still involves an informal variation of the condition and gives rise to the same problems as any other kind of non-statutory variation. The decision in ***Percy Bilton*** was, like the ***Agecrest*** case, concerned with events before the section 73 mechanism had been introduced by Parliament. Moreover, the wording of the condition in ***Percy Bilton*** was such that it could be construed as meaning that no particular item of development within the permission could be begun until the siting, design, external appearance and means of access of *that* item of development had been approved, rather than that all the details of the whole development had to be approved before any development could begin. On that basis it is an understandable decision. But, however one interprets it, in my judgment it provides no authority today for the non-statutory variation of a condition. The statutory planning system has moved on."

16. INQ52 para 5 cites paras 7-9 of the more recent decision of the Court of Appeal in ***Greyfort v Secretary of State for Communities and Local Government*** **[2011] EWCA Civ 908**, but those paragraphs simply summarise Keene J's judgment in ***Leisure Great Britain***. Unlike the situation in ***Coghurst*** and ***Henry Boot***, the status of ***Agecrest*** was not in issue in ***Greyfort***, and the judgment says nothing about whether ***Agecrest*** <u>remains</u> a recognised exception to the ***Whitley*** principle, nor does it comment on or overrule Keene LJ's observations in ***Henry Boot***.

17. In the light of the above, the Landowners submit that ***Agecrest*** is no longer good authority, and that the proper approach is that local planning authorities have no power to waive the requirements imposed by conditions attached to a planning permission. A developer seeking authority to avoid the full implications of a pre-commencement condition by partial compliance is required to do so through the prescribed statutory process, i.e. a s. 73 application.

Application

18. Applying the above principles, the Landowners note the following:

a. Such works as have been carried to date are in breach of the pre-commencement conditions attached to the permission. Note that this is true even of the ecology conditions, since those conditions envisage the submission and approval of assessments which cover the whole of the scheme which is the subject of the permission, and make no provision for a phased or partial discharge. This must be the case, because there would otherwise be no means of now requiring RVR to submit the details which are still required for the unconstructed part of the scheme.

b. It cannot be said (nor does RVR sensibly seek to argue) that none of these conditions "goes to the heart of the permission". They all clearly relate either to matters (such as the acceptability of the level crossings over the A21 and Junction Road) which are central to the deliverability of the scheme as a whole (and without which there would be no justification for allowing only part of the scheme to be constructed), or to matters which it is essential to resolve before development commences, in order to minimise the risk of harm.

c. Accordingly, applying the ***Whitley*** principle, the starting point is that the works to date have been carried out in breach of condition, and therefore cannot have lawfully implemented the permission. The only way in which RVR can avoid this conclusion is if it can bring itself within one of the exceptions to the ***Whitley*** principle.

d. In terms of Rother District Council's agreement to allow partial discharge of the ecology conditions, the Landowners note that this is as far as RDC has gone. Agreeing to partial discharge of one particular condition is not the same as agreeing that the development can commence before other conditions are discharged. Consequently, even if ***Agecrest*** were good authority, this is not a case where RVR would be able to rely on it, because RDC has never given approval to the commencement of development.

e. In any event, even if RDC had gone that far, this case is on all fours with ***Powergen*** and ***Coghurst Park***. Rother District Council had no power to waive compliance with the pre-commencement conditions, and its acceptance of an application for partial discharge cannot and does not operate as approval for the commencement of work in breach of them.

19. In the circumstances, the Landowners consider that RDC is entirely right in its conclusion that the permission has not been lawfully implemented.

20. The Landowners note RVR's assertion (INQ11) that it is "expected that further conditions will be discharged, in any event, before March 2022". If (but only if) all pre-commencement conditions are discharged by that date, the Landowner's recognise that the first exception to the ***Whitley*** principle would be engaged, and in those circumstances that the effect would be to retrospectively validate the works which have been carried out to date. However, any reliance on this would require clear evidence that RVR was likely to meet this timetable, in circumstances where (on RVR's own case) the reason why it has not yet made an application to discharge some of the conditions is that it has not been possible to gain access to the land, and will not be able to do so unless and until the TWAO is made. If any of the applications required by the pre-commencement conditions remains outstanding, the permission will lapse and RVR will need a new planning permission.

21. The Landowners also note RVR's stated intention to make a s. 73 application to allow for phasing of its implementation. If and when any such application is made, it will be for RDC to determine that application, and the Landowners reserve the right to comment upon it at that time. At this stage, however, they note that:

a. The s. 73 application will have to be made before the expiry of the permission;

b. The s. 73 application will need to be accompanied by an updated environmental statement;

c. A s. 73 application which seeks to allow construction of only the first part of the railway at a time when it is still not known whether the entirety of the line can be constructed (for example, because RVR has not yet obtained compulsory purchase powers) would be open to objection on the grounds that, unless it has been demonstrated that the connection to Robertsbridge is deliverable, there is no justification for allowing any other part of the development to proceed. It cannot, therefore, be assumed that RDC will consider the application acceptable or approve it;

d. If it is allowed, the s. 73 application would result in a freestanding new permission which will exist alongside the 2017 permission. However:

    i. The s. 73 application would not be an application for retrospective permission;

    ii. Any permission granted cannot extend time for the commencement of development.

It would therefore be necessary for RVR to obtain the s.73 permission in time to discharge any pre-commencement conditions and implement the permission before 22 March 2022.

22. The Landowners strongly disagree with RVR's contention (INQ52 para 10) that the conditions could be amended by a non-material amendment:

a. Under section 96A(7), a person with an interest in some, but not all of the land to which the permission relates can only make an application under s. 96A "in respect of so much of the planning permission as affects the land in which the person has an interest". RVR does not have any interest in either Moat Farm or Parsonage Farm. An amendment which introduced a phasing condition which allowed details to be submitted in respect of different parts of the scheme at different times would affect both Moat Farm and Parsonage Farm and is therefore outwith the scope of s. 96A.

b. In any event, this is not like a housing development where the individual dwellings are capable of standing in isolation from one another, and where there is consequently some advantage to be gained through the delivery of every individual house. The scheme has been "sold" to RDC and the public as a package which will deliver benefits which are wholly dependent upon the connection to the mainline station at Robertsbridge. A permission which allowed RVR to construct only part of the line without that connection (and, therefore, without those benefits) would be materially different to the current permission.

23. The Landowners note the assertion at INQ12 that RDC "must have been satisfied that the relevant conditions were capable of being discharged when it granted conditional planning permission." For the reasons which have been canvassed in cross-examination of RVR's witnesses, and which will be expanded upon in closing, the Landowners do not accept this. Having regard to the information which was available to them at the time, it is difficult to see how either Highways England or the Environment Agency could have had any confidence that the conditions they requested could be satisfied.