R. v. LEICESTER CITY COUNCIL, EX PARTE POWERGEN U.K. LTD

QUEEN'S BENCH DIVISION (Dyson J.): October 29, 1999

Town and country planning—Planning permission subject to conditions—Time limit for approval of reserved matters—Detailed plans to be submitted for approval—Application for approval of reserved matters in relation to part of site only—Application approved by council—Applications under section 73 of the Town and Country Planning Act 1990 to extend time limit and to restrict requirement for detailed plans to those parts of the development for which approval of reserved matters had not been obtained—Applications refused—Construction of condition—Legitimate expectation—Whether refusal unlawful

On January 25, 1995 Leicester City Council granted outline planning permission to Powergen for the redevelopment of a site for retail, business use, petrol filling station, public house/restaurant and open space. The permission was subject to conditions, *inter alia* that (1) application for approval of reserved matters should be made within three years from the date of the permission and (2) detailed plans and particulars of the siting, design, external appearance and means of access to the development should be submitted and approved before the development was begun. On December 22, 1997 Powergen submitted an application for approval of reserved matters only for part of the site which was to be developed as a supermarket. On January 12, 1998 Powergen made an application to the council under section 73 of the Town and Country Planning Act 1990 to extend the time limit for the submission of the reserved matters under condition 1 to four years. On January 14 and 16 the council wrote to Powergen stating that "unless a reserved matters application for the rest of the site is received by January 25 the outline permission for the remainder of the site will lapse". Powergen did not submit an application for approval of reserved matters in relation to the remainder of the site by January 25, 1998. The council approved the application for approval of reserved matters in relation to the superstore on May 20, 1998. On August 3, 1998 Powergen applied under section 73 for a variation of condition 2 so as to restrict the operation of that condition to those parts of the development for which approval of reserved matters had not been obtained. The council refused both the section 73 applications. The reason for the refusal in relation to condition 2 was that policies now favoured sustaining city centres and regeneration of the site by development of retail uses in preference to other more central sites could have an adverse effect on continued investment in the city. Powergen applied for judicial review of the council's refusal to vary condition 2, as to which the following issues arose: (a) whether, upon the true construction of condition 2, it was a requirement of the planning permission that all reserved matters be approved before any part of the development could begin; (b) if yes, whether Powergen had a legitimate expectation that condition 2 would be interpreted by the council so as to permit development to begin on a part of the site for which approval of reserved matters had been obtained even if approval had not been granted in respect of the remainder of the site; and (c) if the answer to (a) was yes, and to (b) was no, whether the refusal to vary condition 2 was unlawful.

Held, refusing the application, that (i) the literal and natural interpretation of condition 2 was that it required all details to be submitted before development could begin. The natural meaning of "the development" and "the site" was all the development and the entire site which was the subject of the application. Such an interpretation did not produce an unreasonable and commercially unacceptable result. Indeed, section 73 was designed precisely to give the kind of flexibility required in the real world of commercial development. (ii) The letters of January 14

and 16, 1998 did not give rise to a legitimate expectation that condition 2 would be so interpreted as to permit Powergen to start part of the development (namely the foodstore) without having submitted and obtained approval of reserved matters in respect of the remainder of the site. A planning condition could only be modified by way of the statutory procedures set out in sections 73 and 73A of the 1990 Act. The legitimate expectation argument failed for the fundamental reason that the planning officers had no delegated power to vary or waive the conditions to which the planning permission was subject, and any undertaking purportedly given by them was not binding on the council. (iii) Following the decisions of Keene J. in *R. v. London Docklands Development Corporation, ex parte Frost* and Sullivan J. in *Pye v. Secretary of State for the Environment* it was permissible for the council to revisit the question of the acceptability of the development when considering the application to vary condition 2.

Cases referred to:

(1) *Allied London Property Investment Ltd v. Secretary of State for the Environment* (1996) 72 P. & C.R. 327.

(2) *Lever (Finance) Ltd v. Westminster Corporation* [1971] Q.B. 222; [1970] 3 W.L.R. 732; [1970] 3 All E.R. 496; 21 P. & C.R. 778; 68 L.G.R. 757; 134 J.P. 692; 216 E.G. 721; [1970] E.G.D. 828, CA.

(3) *Maritime Electric Co. Ltd v. General Dairies Ltd* [1937] A.C. 610; [1937] 1 All E.R. 748, PC.

(4) *Pioneer Aggregates (U.K.) Ltd v. Secretary of State for the Environment and the Peak Park Joint Planning Board* [1985] A.C. 132; [1984] 3 W.L.R. 32; [1984] 2 All E.R. 358; (1984) 48 P. & C.R. 95; (1984) 128 S.J. 416; (1984) J.P.L. 651; (1984) 82 L.G.R. 488; (1984) 272 E.G. 425; (1984) L.S.Gaz. 2148, HL.

(5) *Pye v. Secretary of State for the Environment* [1998] 3 P.L.R. 72.

(6) *R. v. IRC, ex parte MFK Underwriting Agencies* [1990] 1 W.L.R. 1545; [1990] 1 All E.R. 91; [1990] S.T.C. 873; 62 T.C. 607; [1990] C.O.D. 143; (1989) 139 New L.J. 1343.

(7) *R. v. IRC, ex parte Preston* [1985] A.C. 835; [1985] 2 W.L.R. 836; [1985] 2 All E.R. 327; (1985) 129 S.J. 317; [1985] S.T.C. 282; (1985) 135 New L.J. 463; (1985) 82 L.S.Gaz. 1944, HL.

(8) *R. v. London Docklands Development Corporation, ex parte Frost* (1996) 73 P. & C.R. 199.

(9) *R. v. Secretary of State for the Environment, ex parte Bilton (Percy) Industrial Properties Ltd* (1975) 31 P. & C.R. 154; (1975) 119 S.J. 794; 74 L.G.R. 244; *sub nom. Bilton (Percy) Industrial Properties v. Secretary of State for the Environment* (1975) 237 E.G. 491.

(10) *Western Fish Products Ltd v. Penwith District Council* [1981] 2 All E.R. 204; (1978) 38 P. & C.R. 7; (1978) 122 S.J. 471; (1978) 77 L.G.R. 185; [1978] J.P.L. 623, CA.

Legislation referred to:

Town and Country Planning Act 1990, sections 65, 70, 71(2)(a), 73, 73A, 93(4) and 172; Town and Country Planning General Development Procedure Order 1995, Articles 6, 8, 10 and 19.

Application by Powergen U.K. Ltd for judicial review of a decision of Leicester City Council given on March 9, 1999 refusing applications under section 73 of the Town and Country Planning Act 1990 to vary conditions attached to planning permission granted on January 25, 1995 so as to extend the time for submission of reserved matters for approval and to allow work to start on the development of a supermarket without obtaining approval of the reserved matters in respect of the rest of the site. The facts are stated in the judgment of Dyson J.

John Taylor, Q.C. and *Vincent Fraser* for the applicant.
Tobias Davey for the respondent.

Michael Redman for the Interested Party, Safeway Stores Plc.

DYSON J.: Powergen owns a large site at Raw Dykes Road immediately south of the centre of Leicester on which there was formerly a power station. On January 25, 1995, Leicester City Council ("LCC") granted planning permission for "Redevelopment of site for Retail Use (Class A1), Business Use (Class B1), Petrol Filling Station (Sui Generis), Public House/ Restaurant (Class A3) and Open Space." The interest of Safety Stores PLC derives from the fact that it operates a foodstore whose turnover would be adversely affected by the development of a foodstore as proposed by Powergen.

The planning permission was subject to 25 conditions, the first two of which lie at the heart of this case. Part I describes the details of the proposal in the way I have just summarised. Part II states:

> "In pursuance of its powers under the Town and Country Planning Act 1990, the Leicester City Council grants outline planning permission for the carrying out of the development referred to in Part I hereof in accordance with the application and plans submitted subject to the following conditions:
>
> 1. Application for approval of reserved matters shall be made within three years from the date of this permission and the development shall be begun not later than:
>
> (a) Five years from the date of this permission; or
>
> (b) if later, two years from the date of the final approval of all the reserved matters.
>
> (To comply with section 92 of the Town and Country Planning Act 1990.)
>
> 2. Detailed plans and particulars of the siting, design, external appearance and means of access to the development, and the landscaping of the site (referred to in Condition 1 as reserved matters) shall be submitted to and approved by the City Council as local planning authority before the development is begun and shall have regard to:
>
> (a) ...
>
> (b) ...
>
> (c) ..."

In his third affidavit, Mr Cardwell of Messrs W. S. Atkins Consultants Limited, who has been advising Powergen, explains why there was a delay in submitting application for approval of the reserved matters. The demolition of the power station was not completed until October 1996. Site surveys had to be carried out to check for contamination and diesel contamination was discovered. The necessary remediation work was not completed until December 1997.

On November 17, 1997, Powergen let a contract for the construction of the link road that was to be built across the site as part of the development. Work on this was completed on May 1, 1998. Furthermore, Powergen agreed to pay LCC £1 million as a road licence fee. Payments were made by monthly instalments in November 1997. A formal road contract was made between Powergen and LCC on February 13, 1998. By March 1999, the total sum that had been expended by Powergen in respect of the development was approximately £5.7 million.

Towards the end of November 1997, Powergen was preparing to make an

application for the approval of the reserved matters. It will be recalled that condition 1 of the planning permission required the application to be made before January 25, 1998. There was discussion with LCC's officers as to whether it was necessary to submit an application for approval of all the reserved matters by January 25, 1998. By this time, Powergen had decided only to submit reserved matters for that part of the site that was to be developed by William Morrisons Supermarkets PLC as a superstore of some 83,000 square feet. I shall refer to this part of the site as "the foodstore".

Mr Busby of the LCC Development Control Group wrote Powergen a letter, dated November 26, 1997, which included the following:

> "The Council is concerned about what will happen to the rest of the site and whether the remainder will make sense in terms of the overall planning of the site. This is likely to affect the Council's consideration of the application unless other reserved matters, *e.g.* public open space, nature area, footpath and cycle path networks, are submitted at the same time and it can be demonstrated how the proposed supermarket will relate to the remainder of the site. The deadline for all reserved matters is 24th January 1998 barring some details that could be the subject of planning conditions should permission be granted."

Mr Busby wrote again on December 19 saying:

> "Reserved matters for the other aspects of the outline scheme should be submitted to agree with the description. If they are not submitted before 25th January 1998 the outline permission may lapse."

At a meeting between representatives of LCC and Powergen on December 3, 1997, it was agreed that full details of the site could not yet be determined "owing to the commercial nature of the development". An application for approval of reserved matters in respect of the foodstore was made on December 22. On January 8, 1998, Powergen submitted a number of amendments to the application. As it stated in its letter of that date, only the foodstore was the subject of the application, but it had supplied "an indicative layout of the remainder of the site". The application was duly registered.

Powergen decided to seek an amendment to condition 1 of the planning permission, to enable it to submit proposals for the reserved matters in respect of the rest of the site. Accordingly, on January 12, 1998, it made an application to the LCC under section 73 of the Town and Country Planning Act 1990 ("the Act") to extend the time limit for the submission of the reserved matters to four years.

On January 4, 1998, Mr Evans, Assistant Director of Urban Management of LCC, wrote a letter to Powergen on which Mr Taylor, Q.C. relies heavily for one of his submissions. Having referred to the fact that the officers had advised that an indicative layout showing the feasibility of satisfactorily developing the remainder of the site in accordance with the outline planning permission was necessary, Mr Evans continued:

> "With regard to the 'registering' of the application, it is in all the parties' interests that the Council is absolutely sure that the application is a valid one (for example, should there be a legal challenge to a subsequent planning decision). The application for reserved matters approval was in fact only finally confirmed last week. The application has only been submitted for part of the site. The deadline for submitting reserved

> matters for the whole site is 25th January. The advice of the Council's Head of Legal Services has been sought to ensure the application is a valid one. I am advised it is but also that unless a reserved matters application for the rest of the site is received by 25th January the outline permission for the remainder of the site will lapse. You are no doubt aware of this too."

Mr Busby wrote a letter to similar effect on January 16.

Powergen did not submit an application for approval of reserved matters in respect of the remainder of the site before January 25, 1998, or at all. The application for approval of the reserved matters, in relation to the foodstore site, was approved by LCC on May 20, 1998.

By letter to Mr Cardwell, dated June 22, 1998, Mr Busby noted that Powergen did not intend to make an application to vary condition 2 to allow for development on part of the site to proceed before approval of reserved matters on the rest of the site, and continued:

> "Development can proceed only if the Section 73 application (98/0044) for the variation of condition 1 of the outline permission to allow for an extension of the time limit for the submission of reserved matters is approved and subsequent applications for approval of all outstanding reserved matters are also approved."

On August 3, 1998, Powergen applied under section 73 for a variation of condition 2 so as to restrict the operation of that condition to those parts of the development for which approval of the reserved matters had not been obtained. It also made a fully detailed application for planning permission for office, restaurant and public house development on part of the site for which approval of reserved matters under the 1995 permission could have been sought. This application did not cover the entirety of the balance of the site, and it excluded the foodstore. LCC granted permission on January 4, 1999.

On March 9, 1999, LCC refused both of the section 73 applications. It refused to vary condition 1 so as to extend the time for submission of reserved matters for approval, and it also refused to vary condition 2 to allow work to start on the foodstore without obtaining approval of the reserved matters in respect of the rest of the site. The reasons given for the refusal to vary condition 2 were:

> "1. The effect of varying condition 2 would be to allow work to begin on a food superstore having reserved matters approval. That development would be contrary to Policy S6 of the Leicester Local Plan which states that planning permission will not normally be granted for superstores in the city.
> 2. There is no quantitative need for additional large food stores in the Central Leicestershire area.
> 3. The regeneration of the site by development of retail uses in preference to other more central sites identified for regeneration and which have been identified as being available, suitable and viable, could have an adverse effect on the continued investment in the City and other centres by competing for investment."

In the proceedings before me, Powergen does not seek to challenge the refusal to vary condition 1. The relief it claims, however, includes an application for judicial review of the refusal to vary condition 2.

The issues

The following issues arise:
(a) whether, upon the true construction of condition 2, it was a requirement of the planning permission that all reserved matters be approved before any part of the development could begin;
(b) if yes, whether Powergen had a legitimate expectation that condition 2 would be interpreted by LCC so as to permit development to begin on a part of the site for which approval of reserved matters had been obtained even if approval had not been granted in respect of the remainder of the site;
(c) if the answer to (a) is yes, and (b) is no, whether the refusal to vary condition 2 was unlawful.

The first issue: the true construction of condition 2

Mr Taylor submits as follows. It was not a requirement of the planning permission that the whole site had to be developed in one stage, or even that the whole site had to be developed. The development comprised discrete elements, namely the foodstore, various office buildings, a public house, etc. Moreover, condition 8 expressly contemplated the possibility of the development being undertaken in phases, *viz.* "If the development is carried out in phases ...". It is commercially unrealistic to require all the details of this large site to be finalised before permitting any part of the development to begin. On the literal interpretation for which the respondents contend, the planning permission was unworkable. It is absurd to demand of Powergen that it finalise the details of the office buildings as a condition of being permitted to start work on the foodstore, when it has not yet found tenants for those buildings. To require Powergen to incur the expense of preparing a detailed design of the offices on a speculative basis makes no commercial sense.

As for the language of condition 2 itself, the word "development" can mean either the whole or a part of the development, and the court should give a purposive and sensible commercial meaning to the word, and construe it as if it refers to the parts and not the whole of the development.

Mr Taylor also relies on *R. v. Secretary of State for the Environment, ex parte Percy Bilton Industrial Properties Ltd* (1975) 31 P. & C.R. 154, in support of his argument. Since this authority is relevant to the first two issues that I have to decide, I need to consider it in a little detail.

The facts were as follows. In 1952, outline planning permission was granted to develop 22 acres of land for industrial purposes. The permission contained the condition:

> "The approval of the local planning authority is required before any development is commenced, to its (a) siting ..."

From time to time thereafter, details were put forward and approved in respect of parts of the site. In 1973, the applicants made applications for approval of details in respect of areas which had not yet been built on. The local planning authority made no decision with regard to these applications. The Secretary of State held that (a) he had no jurisdiction to deal with the appeals since they were out of time, and (b) that the applicants were in breach of the condition requiring approval of details as to siting, in that, since no development of any kind could lawfully have taken place until agreement

had been reached with regard to the siting of the buildings, the entire development had been unlawful.

It is important to note that the statutory three year time limit for the approval of reserved matters did not apply to cases where outline planning permission had been granted before April 1, 1969. Accordingly, if the permission granted in 1952 was a single permission, the time limit did not apply. The main judgment was given by Lord Widgery C.J. At 158–159, he rejected the argument that there was a collection of separate permissions, rather than a single and indissoluble permission. He then went on to consider whether the single permission had been varied, and decided that on the facts of that case, it had not. It seems to me, therefore, that the Bilton case clearly does not assist Mr Taylor on the first issue. I shall return to it when considering the second issue.

I cannot accept Mr Taylor's submissions, and largely for the reasons advanced by Mr Ouseley, Q.C. and Mr Davey. At one state of his argument, Mr Taylor appeared to pray in aid the understanding of the officers in support of his interpretation of condition 2. Later, however, I believe that he accepted that the question of interpretation was one for the court, and that it had to be determined solely on the basis of the meaning of the permission itself, and any documents incorporated by reference into it. As Mr Ouseley points out, the planning permission is a public document, not a private document between Powergen and LCC.

In my view, the literal and natural interpretation of condition 2 is that it requires all details to be submitted, etc., before development can begin. This interpretation does not require the addition of any words. The natural meaning of "the development" is all the development which is the subject of the application, and the natural meaning of "the site" is all the site which is the subject of the application.

Part II of the planning permission states that permission is granted for the "development referred to in Part I hereof". Part I lists all the elements of the development and not merely some parts of it. Moreover, Mr Taylor accepts that the word "development" where it appears in condition 1, means the whole or entire development. Condition 2 refers to:

> "Detailed plans ... to the development, and the landscaping of the site (referred to in condition 1 as reserved matters) shall be submitted ... before the development is begun ..."

It would be strange if the word "development" were to bear a different meaning in the two conditions, but that is the effect of Mr Taylor's submission.

Mr Ouseley examined a number of the other conditions where the words "development" and "site" appear, and submitted that in those conditions the words refer to the whole development or site. It could not be intended that these words bear different meanings in the different conditions. It is sufficient to mention condition 8, which provides:

> "If the development is carried out in phases, then the approved landscaping scheme shall also be carried out in phases, each phase of the landscaping scheme to be carried out within one year of completions of the phase of development to which it relates."

It is clear that the word "development" in condition 8 must be a reference

to the whole development. The other conditions relied on by Mr Ouseley were conditions 4, 9, 17, 18, and 23.

I would accept that it is not impossible for the same words to bear different meanings in the same document. But in my view it is reasonable to suppose that it was intended that words should bear the same meaning in different parts of the document unless the context clearly showed otherwise. I find nothing in the planning permission to indicate that where they appear in condition 2, the words "development" and "site" mean anything other than the whole development or site. The express reference to condition 1 in condition 2 powerfully suggests that Mr Taylor's interpretation is wrong. It seems to me that Mr Taylor's interpretation is not the natural meaning of the words used in condition 2. As was implicitly acknowledged by Powergen in its application to vary the condition on August 3, 1998, that interpretation requires the insertion of the words "or phase of the development" after "before the development" and before "is begun".

The question remains whether what I consider to be the natural meaning of the words cannot have been intended because, as Mr Taylor submits, it produces an unreasonable and commercially unacceptable result. I do not think that it does. Viewing the situation as at the date of the grant of planning permission, it was possible to contemplate that Powergen would be able, and wish, to submit details of the reserved matters of the whole of the site within the three year period. But if it became clear that Powergen were unwilling or unable to submit details of all the reserved matters before January 25, 1998, it could make an application under section 73 of the Act to vary condition 1, or conditions 1 and 2 together. So far as material, section 73 provides:

> "(1) This section applies, subject to subsection (4), to applications for planning permission for the development of land without complying with the conditions subject to which a previous planning permission was granted.
> (2) On such an application the local planning authority shall consider only the question of the conditions subject to which planning permission should be granted, and—
> (a) if they decide that planning permission should be granted subject to conditions differing from those subjects to which the previous permission was granted, or that it should be granted unconditionally, they shall grant planning permission accordingly; and
> (b) if they decide that planning permission should be granted subject to the same conditions as those subject to which the previous permission was granted, they shall refuse the application.
> (4) This section does not apply if the previous planning permission was granted subject to a condition as to the time within which the development was to begin and that time has expired without the development having been begun."

It seems to me that section 73 is designed precisely to give the kind of flexibility that is required in the real world of commercial development. Indeed, the facts of this case show how that section was intended to be invoked in order to relax the requirements of the conditions of a planning permission in appropriate cases. Powergen applied for a relaxation of both condition 1 and 2. This was because unless condition 1 was varied so as to allow further time for application for approval of reserved matters, or condition 2 was varied so as to allow development to be begun in respect of

any phase which had received detailed approval, the outline planning permission could not be implemented after January 24, 1998. If Powergen had made those applications at a time when the planning permission was still capable of implementation, there is no reason to suppose that they would not have succeeded. Suffice it to say that section 73 provides a complete answer to Mr Taylor's appeal to the commercial absurdity of the natural interpretation of condition 2. I am wholly unpersuaded that the natural interpretation is commercially unrealistic or absurd. Accordingly, I decide the first issue in favour of the respondents.

The second issue: legitimate expectation

The argument advanced on behalf of Powergen is as follows. The LCC letters of January 14 and 16, 1998, and the course of dealing thereafter (until LCC's letter of June 22) amounted to a clear and unequivocal representation that LCC interpreted condition 2 as permitting Powergen to start part of the development (namely the foodstore) without having submitted and obtained approval of reserved matters on the remainder of the site. Particular reliance is placed on the statement that:

> "Unless a reserved matters application for the rest of the site is received by January 25, the outline permission for the remainder of the site will lapse."

It is said that these words amounted to an implied representation that the permission for that part of the site in respect of which an application for approval of reserved matters *had* been made by January 25 would not lapse, and could be implemented.

In answer, Mr Ouseley and Mr Davey deploy a number of arguments. Their fundamental point is that, even if the officers did purport to make a representation on behalf of LCC that part of the development which had been the subject of reserved matters submissions could be constructed in the absence of submission of the remaining details required, the council could not be bound by a wrong interpretation of condition 2. That is because a planning condition can only be modified by way of the statutory procedures set out in section 73 and 73A of the Act, and in any event, the officers in this case did not have delegated authority from LCC to vary or waive strict compliance with conditions to which planning permissions were subject.

As Mr Ouseley points out, since the hypothesis on which the second issue is to be considered is that (as I have held) condition 2 does not bear the meaning for which Mr Taylor contends, 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 purpose of the legislation: see *per* Lord Scarman in *Pioneer Aggregates (U.K.) Ltd v. Secretary of State for the Environment* [1985] A.C. 132, 140H–141C.

A planning condition can only be modified by the statutory procedures to which I have referred. 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 represen-

tations: 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: see De Smith, Woolf and Jowell on *Judicial Review of Administrative Action (Fifth Edition)*, para. 13–028. Estoppel in public law will not lie so that a public body is bound by its own mistake: see *Maritime Electric Co. Ltd v. General Dairies Ltd* [1937] A.C. 610, 620.

The application of these principles, specifically in the planning field, finds very clear expression in *Western Fish Products Ltd v. Penwith District Council* [1981] 2 All E.R. 204. In that case, the plaintiffs proceeded to carry out development on a site without obtaining planning permission in reliance on assurance from the planning officer that there was an established use so that an application for planning permission was not necessary. The planning authority eventually served enforcements notices. The plaintiffs sought a declaration that they were entitled to be treated as having planning permission. Their action failed. In dismissing the appeal, the Court of Appeal rejected an estoppel argument. At 219, Megaw L.J. (giving the judgment of the court) applied the principle that an estoppel could not be raised to prevent the council from discharging its statutory duty of determining planning applications.

He recognised, however, that there were two kinds of exceptions to the general principle. The first is that where a planning authority, acting as such, delegates to its officers powers to determine specific questions, any decisions they make cannot be revoked. An example of the application of this exception is *Lever (Finance) Ltd v. Westminster Corporation* [1971] Q.B. 222. The second is that if a planning authority waives a procedural requirement relating to any application made to it for the exercise of its statutory powers, it may be estopped from relying on lack of procedural formality.

Leaving on one side trivial matters, I find it difficult to discern the true scope of these exceptions. For example, the first exception seems to recognise that an authority may be estopped from performing its statutory duty if, under delegated powers, its officers have made decisions which are outside the powers of the authority itself, but it is not clear to me how far this goes. It seems that the court in *Western Fish* was anxious to limit the scope of the exceptions to the general principle.

However, I do not have to decide this question, since the court also made clear that there must be some evidence to justify the person dealing with the planning officer thinking that what the officer said would bind the authority. Holding an office, however, senior, cannot be enough by itself (220g–h).

Mr Taylor's argument faces the insurmountable obstacle that, in this case, the planning officers had no actual authority to vary or waive the conditions to which the planning permission was subject. Mr Taylor submits that they had ostensible authority, but he has been unable to point to any holding out by LCC.

Mr Taylor seeks to overcome this problem by submitting that, in agreeing to waive the strict requirement of condition 2, the planning officers were acting within the "managerial discretion" vested in planning officers to administer planning control. He referred me to section 172 of the Act, which gives a local planning authority a discretion to issue an enforcement notice where it appears to it that there has been a breach of planning control and it is expedient to issue the notice. But, in my view, section 172 is irrelevant.

First, it has no application to anticipatory breaches of planning control. Secondly, section 73 is the provision which 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 side-stepped by persuading a local planning authority, still less 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.

There will, of course, be areas which can properly be described as falling within the planning authority's discretion, and which one would expect to fall within the officers' delegated powers. For example, where the question is whether the details shown in the reserved matters submission are acceptable. Matters of that kind are not the subject of a statutory procedure, and it is to be assumed that Parliament was content for them to be dealt with by the planning officers to whom one would normally expect the relevant powers to be delegated. But that cannot avail Powergen in this case.

It is true that Mr Taylor does not expressly raise an estoppel in this case. He relies on a legitimate expectation. But although the principle of legitimate expectation is a public law doctrine, and estoppel belongs to the realms of private law, the principles are very closely analogous. This was emphasised by Lord Templeman in *Preston v. IRC* [1985] A.C. 835, 866F–867G. Unfairness amounting to an abuse of power will justify judicial review where there has been conduct by a public body (in that case the Inland Revenue), "equivalent to a breach of contract or breach of representations". For observations to similar effect, see *per* Bingham L.J. in *R. v. Board of Inland Revenue, ex parte MFK Underwriting Agencies* [1990] 1 All E.R. 91, 109d–111b. I am in no doubt that if the arguments in the *Western Fish* case had been expressed in terms of legitimate expectation, rather than estoppel, the outcome would have been the same. The contrary has not been suggested by Mr Taylor.

Finally on this aspect of the argument, I need to return briefly to the *Bilton* case. At 159, Lord Widgery said that planning permissions may be varied in a number of ways, including "by the course of dealing between the parties and lots of things like that". It is unclear to me what Lord Widgery had in mind. It seems to me that I ought to regard the later and detailed discussion in *Western Fish* as the authoritative statement of the approach that I should follow.

I would hold, therefore, that the legitimate expectation argument fails for the fundamental reason that the officers had no delegated power to vary or waive the conditions to which the planning permission was subject, and any undertaking purportedly given by them is not binding on LCC.

Even if all that I have said so far on this issue is wrong, I would still reject the legitimate expectation argument for other reasons. First, in my

judgment, the representations relied on were not sufficient to found a legitimate expectation. Secondly, in this type of case I consider that it is a requirement of establishing unfairness that the aggrieved party is able to show that he relied on the representation to his detriment. Powergen is unable to show reliance.

As regards the alleged representations, the critical documents are the letters of January 14 and 16. The context is important. Powergen had already submitted its application for reserved matters approval for the foodstore site and it had also made an application to vary condition 1 by extending the time for submission of the remaining reserved matters to January 25, 1999, although it seems that Mr Evans was not aware of this.

As the letter of January 14 makes clear, there had been discussion about the need for Powergen to produce an indicative layout of the rest of the site, but the letter also made it clear that the deadline for submitting reserved matters for the whole site was January 25, 1998. In so far as the letter was referring to the conditions of the planning permission, it was referring to condition 1. The letter confirmed that the application that had been submitted in relation to the foodstore was valid, but it was not addressing condition 2 at all. The officers had not been asked for their interpretation of condition 2, or for an assurance that the strict requirements of that condition would be waived.

Turning to the words relied on by Mr Taylor, I accept that it is a reasonable inference that the writer was implying that, unless a reserved matters application was received by January 25, 1998, the permission for the foodstore would *not* lapse, and would be capable of being implemented. But it is only an inference, and the comment relied on was gratuitous. It was not a response to a request for advice on the meaning of condition 2, still less did Powergen indicate that it intended to rely on any such advice. These are relevant considerations to be taken into account when deciding whether it is unfair for LCC now to rely on the true meaning of condition 2.

I am in no doubt that it is not unfair to permit LCC to rely on the true meaning of condition 2. The implied representation is not especially clear. It does not jump out of the letter. More importantly, the context of the letter and the circumstances in which the implied representation came to be made would, in my judgment, make it unfair to LCC to hold it to it.

Finally, I turn to reliance. There is no clear evidence that Powergen did rely on any representation by LCC (i) as to the meaning of condition 2, or (ii) to the effect that compliance with it would be waived. Mr Cardwell's evidence merely recites the various steps that were taken by Powergen, which I summarised earlier in this judgment. It is true that Powergen did not commit itself to various items of expenditure, but there is no evidence that it would not have done so if the alleged representations has not been made. The expenditure is consistent with Powergen having believed that its application to vary condition 1 would succeed.

In any event, the evidence suggests that Powergen was already committed to much, if not all, of the expenditure before January 1998. It is significant that in its letter dated July 31, 1998, written in support of the application to vary condition 2, Powergen said:

> "It is recognised that condition 2 seems to prevent the implementation of Morrisons' reserved matters approval ... in advance of the approval of detailed plans and particulars for the rest of the site."

This statement is wholly inconsistent with the assertion that Powergen relied on the interpretation now placed on the January letters for its understanding of the meaning of condition 2. I find Powergen's evidence less than satisfactory on this part of the case. I am not satisfied that it has discharged the burden of proving reliance.

For all these reasons, I decide the second issue in favour of the respondents.

The third issue: was the refusal to vary condition 2 unlawful?

The officer's report that was before the council made it clear that there was no objection to the proposed variation of condition 2 in the sense that phased development was a realistic proposition which would not prejudice the satisfactory development of the whole site. The report recommended refusal on the sole ground that changed policies favoured sustaining city centres, and that, applying those policies, a foodstore was not acceptable on the site. It has already been seen that LCC accepted that recommendation.

Mr Taylor submits that it was not open to LCC to do this. He contends that it was impermissible for the council to revisit the question of the acceptability of the development when considering the application to vary condition 2. That issue had been determined when the original application was granted.

The question in what circumstances a planning authority may revisit the principle of a development when entertaining an application under section 73 of the Act has been considered in three first instance decisions. Put shortly, in *Allied London Property Investment Ltd v. Secretary of State for the Environment* (1996) 72 P. & C.R. 327, Mr Lockhart-Mummery, Q.C. held that it is not open to a planning authority to reconsider the principle of the development. In *R. v. London Docklands Development Corporation, ex parte Frost* (1996) 73 P. & C.R. 199, Keene J. took a different view. In *Pye v. Secretary of State for the Environment* [1998] 3 P.L.R. 72, Sullivan J. agreed with Keene J.

The most comprehensive treatment of the issue is to be found in the judgment of Sullivan J. Mr Taylor does not seek to persuade me that the reasoning of Sullivan J. and Keene J. is wrong, although he may wish to do so in the event of an appeal. He submits, however, that the present case is distinguishable from those cases. It is necessary, therefore, to consider what the ratio of those cases is.

I shall concentrate on *Pye*, simply because it is the more recent, and gives the fullest consideration to the point. In that case, the owner was granted permission to erect a dwelling. One condition required details of reserved matters to be submitted within three years. Another required the development to be begun within five years of the date of the permission, or two years from the final approval of reserved matters.

An application was made for an extension of the three year period after it had expired. That application was refused on the grounds, *inter alia*, that the effect of granting permission would be to extend the duration of the planning permission for at least another two years, and would be contrary to current policies. The Inspector dismissed the appeal against that refusal, and the owner challenged the Inspector's decision. The application was refused.

The key passage in the judgment of Sullivan J. appears at 86B–87E:

"Considering only the conditions subject to which planning permission

should be granted will be a more limited exercise than the consideration of a 'normal' application for planning permission under section 70, but as Keene J. pointed out, at 207 of the *Frost* case, how much more limited will depend on the nature of the condition itself. If the condition relates to a narrow issue, such as hours of operation or the particular materials to be employed in the construction of the building, the local planning authority's consideration will be confined within a very narrow compass.

Since the original planning permission will still be capable of implementation, the local planning authority, looking at the practical consequences of imposing a different condition as to hours or materials, will be considering the relative merit or harm of allowing the premises to remain open until, say, 10 o'clock rather than 8 o'clock in the evening, or to be tiled rather than slated.

Equally, if an application is made under section 73 within the original time limit for the submission of reserved matters, while implementation of the planning permission is still possible and is not precluded by the provisions of section 93(4), for a modest extension of time for the submission of reserved matters, the local planning authority's role in considering only the question of conditions subject to which planning permission should be granted will be more confined than in a normal section 70 case. The practical effect of submitting details one year later than would otherwise be allowed may be very limited.

In my view, however, the position is different where, as in the present case, an application is made under section 73 to alter a condition, so as to extend the period for submission of reserved matters at a time when the original planning permission is no longer capable of implementation by reason of the effect of section 93(4), because time for submission of reserved matters has expired.

While the council are constrained to consider only the question of the conditions subject to which planning permission should be granted, in deciding whether to grant a planning permission subject to different conditions under para. (a), or to refuse the application under para. (b), are they required to ignore the fact that the original planning permission is no longer capable of implementation, so that if they adopt a latter course it will not be possible for the development to take place, whereas if they adopt the former course, it will be possible for the development to take place?

In my view, there is nothing in section 73 that requires the local planning authority to ignore the practical consequences generally of imposing a different condition, and this is surely a most important practical consequence of granting an application for planning permission under para. (a) or refusing the application under para. (b).

It may well be the case that since the original grant of planning permission, the arguments for carrying out the development have strengthened. Thus, in the present case, where planning permission is for the erection of a dwelling, the shortage of housing locally might have increased since 1992 and Badgall might have been identified in the emerging local plan as a settlement suitable for some additional residential development.

Granting a planning permission subject to a condition providing for an extended period for submission of details would enable the

development to be carried out, whereas refusing the application would mean that a permission for a much needed dwelling could not be implemented.

I do not see why, in such circumstances, the council, in considering an application under section 73, should be required to shut their eyes to those practical consequences. If that is correct, I do not see why the position should be any different if the planning policies have changed since the grant of the original planning permission so that its implementation has become less desirable in planning terms.

The local planning authority have to have regard to the factual circumstances as they exist at the time and to have regard to the facts that exist at the time of their decision. If at that time the original planning permission is incapable of implementation by reason of section 93(4), I can see no basis in the statutory code for requiring the local planning authority to ignore that important fact."

Mr Taylor submits that this passage is of no application in the present case, because Powergen is not challenging a time condition. Unlike the applicant in the *Pye* case, it is not challenging the refusal to vary condition 1. He submits that the ratio of Sullivan J.'s decision is that it was open to a planning authority to reconsider the principle of the development where the development was no longer capable of being implemented *because the relevant time limit had expired.* In the present case, he submits, the effect of the planning permission sought under section 73 was not to extend the duration of the original planning permission.

I cannot accept Mr Taylor's analysis of the ratio of *Pye*. The distinction that Sullivan J. was drawing was between applications under section 73 where implementation of the original permission was still possible, and those where it was not. On the facts of that case, the effect of section 93(4) of the Act was that the original planning permission was no longer capable of implementation because the time limit for the submission of reserved matters had expired. But the reasoning of the judge did not depend on the precise reason why the original permission was no longer capable of being implemented. The fact that in the case of an application for a time extension, the original permission can no longer be implemented due to the operation of section 93(4) of the Act, whereas in the present case it is the operation of the conditions themselves which prevents implementation, makes no difference of principle.

In both the present case, and the case of an application for a time extension, the original permission is not capable of implementation unless the planning authority grant the variation sought under section 73. It would be strange if LCC were able to consider the principle of the development when deciding the application to vary condition 1, but not when dealing with the application to vary condition 2. The applications to vary the two conditions were different routes to the same goal, namely preserving the ability to implement the original planning permission beyond the date provided by the original permission. There has been no challenge to the refusal to vary condition 1, although it was founded on substantially the same reasons as those which underpinned the decision to refuse to vary condition 2.

It is accepted on behalf of Powergen that, if it was open to LCC to reconsider the principle of the development, there can be no challenge to the decision reached.

I conclude, therefore, that on the basis that the decisions of Sullivan J. and Keene J. are correct, this challenge fails.

Application dismissed. Applicant to pay costs of Leicester City Council. Leave to appeal granted.

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Condition that all reserved matters be submitted and approved before any development could be begun - interpretation - legitimate expectation - condition imposing time limit for approval of reserved matters

Case Comment

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Cases cited
Powergen UK Plc v Leicester City Council (2001) 81 P. & C.R. 5; [2000] 5 WLUK 531 (CA)

J.P.L. 1037 On January 25, 1995 outline planning permission was granted by Leicester City Council (LCC) for the development of the site (owned by Powergen) for retail, business, petrol filling station and public house/restaurant uses and for open space (the Total Site). The Total Site was the site of a former power station. In reliance upon the grant of planning permission, Powergen had undertaken the demolition of the power station, remediated the whole site, decontaminated the site, constructed a road-link and paid LCC a licence fee at a total cost of £5.7 million. The preparation of the site for development involved a time consuming process longer than was anticipated at the time planning permission was applied for. The planning permission was subject to a number of conditions. Condition 1 provided that application for approval of reserved matters shall be made within three years from the date of this permission and the development shall be begun not later than (a) five years from the date of this permission; or (b) if later, two years from the final approval of all the reserved matters. Condition 2 provided that detailed plans and particulars of siting, design, external appearance and means of access to the development, and the landscaping of the site (referred to in Condition 1 of the reserved matters) shall be submitted to and approved by the City Council as local planning authority before the development is begun. Condition 8 provided that, "if the development is carried out in phases, then the approved landscaping scheme shall also be carried out in phases, each phase of the landscaping scheme to be carried out within one year of completion of the phase of development to which it relates". Although condition 8 envisaged the possibility of development being carried out in stages, it was clear that the outline permission imposed the conditions envisaged in section 92(2) of the Town and Country Planning Act 1990 (the 1990 Act) and did not follow the course indicated in section 92(5), that is, the development being carried out in stages. Matters proceeded slowly and it became apparent to Powergen that unless it secured a relaxation of conditions it might be unable to develop. On November 26, 1997 LCC wrote to Powergen expressing its concern regarding the remainder of the Total Site if only part of it was to be developed. The letter reminded Powergen that the deadline for all reserved matters was January 24, 1998. LCC wrote again on December 19, 1997 stating that if reserved matters were not submitted before January 25, 1998 the outline permission may lapse. On January 8, 1998 Powergen submitted an application for the approval of reserved matters pursuant to the planning permission for a food superstore, petrol filling station with carwash, 585 car parking spaces together with landscaping and public open space. The land occupied by the development the subject of the reserved matters application comprised a substantial part of the Total Site (the Food Store Segment). An indicative layout in respect of the rest of the site (the Remaining Segment) was also submitted. On January 12, 1998 Powergen made an application under section 73 of the Act to amend Condition 1 so as to extend the time limit for the submission of reserved matters. This application was refused by LCC on March 15, 1999 and no challenge was made as to the legal correctness of that decision. The application for approval of the reserved matters in relation to the Food Store Segment was approved in May 1998. On August 3, 1998 the applicant applied under section 73 of the Act for a variation of condition 2, the effect of which (if granted) would have been to enable the reserved matters referred to in condition 1 to comprise, not all the matters relating to every part of the site, but only those relating to that part of the site with which the applicants were at any particular time anxious to proceed. It was submitted to be a consequence of this that the application made on January 8, 1998 would have

been made within the time limits specified in condition 1. On January 4, 1999 LCC resolved to grant planning permission for some, but not all, of the Remaining Segment to be developed as offices, restaurant and public house. On March 15, 1999 LCC refused the application under section 73 of the Act in **J.P.L. 1038* respect of condition 2. The reasons given for refusing to vary condition 2 were as follows. The effect of varying condition 2 would be to allow work to begin on the food superstore. This development would be contrary to Policy S6 of the Leicester Local Plan. There was no quantitative need for additional large food stores in the Central Leicestershire area. The regeneration of the site by development of retail uses in preference to other more central sites identified for regeneration could have an adverse effect on the continued investment in the City and other centres by competing for investment. Powergen sought judicial review of the decision to refuse to vary condition 2 and made the following submissions before Dyson J. First, that it had complied with condition 1 in that the reference in condition 2 to "the development" was a reference to "such part of the development as the developer chooses to proceed with". Secondly, that by reason of the dealings between the parties it was entitled to implement that part of the development which related to the retail development. Thirdly, that the decision in relation to condition 2 was legally flawed because LCC were not permitted to refuse the application for the reasons which it gave. The application was refused. Powergen appealed to the Court of Appeal.

Held,

1. It was plain from an examination of section 92 of the Act that, absent any specification of separate periods under subsection (5), in that section "reserved matters" referred to every matter reserved by the outline planning permission for the subsequent approval of the authority and "development" referred to the development as a whole. Either the permission granted by LCC echoed the section faithfully or conditions having that effect were to be implied. In any event construing this permission in its context, it was clear that throughout the document development referred to the development of the whole.

2. That the reasoning and conclusions of Dyson J., that the officers, whose words were relied upon as preventing LCC from now taking any point in relation to time, had neither actual nor ostensible authority to make representations to that effect, were accepted. The argument that the doctrine of legitimate expectation entitled Powergen to such rights was rejected. The words relied on could not give rise to the expectation asserted and in any event, they had not been relied on.

3. Section 73(4) of the Act indicated that section 73 did not apply where the application purportedly made pursuant to it was made at a time when development had not been begun within the time specified by a condition. The question was however, what was the position where the application was made in time but the consideration of it by the authority was after the expiry of time. Based in part on the use of the verb "apply" in both subsections (1) and (4) of section 73 of the Act, the crucial time was the time of the application and there was no subsequent loss of jurisdiction to hear the matter.

4. The purpose behind the time limits in sections 91 and 92 of the Act was to enable the Planning Authority and others to know what outstanding permissions were capable of implementation and which had reached their expiry date. That expiry date could be reached in one of two ways--the expiration of the time within which application for details must be made or the expiration of the time within which the development must be begun. There was no doubt that the effect of granting a new planning permission in the terms sought by Powergen would be to enable a development to proceed after the expiry date of the permission. Powergen accepted the legal correctness of LCC's refusal to extend the time period specified in condition 1. To allow it to achieve substantially the same end by altering the terms of condition 2 would fly in the face of the policy behind sections 91 and 92 of the Act. However that would not dispose of the point if the words in section 73(2) "shall consider only the question of the conditions subject to which a previous planning permission was granted", clearly prevented LCC from taking into account the fact that the earlier permission had reached its expiry date. Those words did not do so. The reasoning for this conclusion was essentially the same as Sullivan J.'s in *Pye v. Secretary of State for the Environment* [1998] 3 P.L.R. 72. Although the court in that case was concerned with an application in terms to extend the time for submission of details whereas the present case was only concerned with an application which had that effect, that was a difference of no significance.

**J.P.L. 1039* 5. The present effect of condition 2 imposed years ago was to prevent the food store development going ahead whereas the present effect of a permission containing the proposed condition 2 was to permit the food store development. It was beyond argument that current planning policy and facts had to be taken into consideration when deciding whether or not to permit that new effect.

6. One of the purposes of the imposition of conditions 1 and 2 on the 1995 permission, required as it was by section 92, was to secure a situation in which no development should proceed under that permission unless, *inter alia,* application pursuant to the 1995 permission for approval of all the reserved matters in relation to the Total Site was made before January 25, 1998. That purpose was not achieved by March 15, 1999 for three reasons. First, the application for planning permission which produced

the resolution of January 4, 1999, did not as a matter of fact cover the Total Site. Secondly, this application was not made before January 25, 1998 and thirdly, it was not an application for approval of details under the 1995 permission. LCC on January 4, 1999 was dealing with an application to grant a new full planning permission. In considering that application it was bound to look primarily at the Remaining Segment which was the subject of this new application and also to bear in mind that the outline permission which had been granted in 1995 for the Total Site was no longer capable of implementation. The conclusion reached by LCC on the application which resulted in the resolution of January 4,1999 was not necessarily the same as the one it would have reached on an application for approval of details under the 1995 outline permission of the Total Site.

7. There was nothing irrational in LCC refusing, after the expiration of the three years referred to in section 92(1)(a) of the Act, to grant such an application as in the present case, in circumstances where relevant policies had altered. Indeed, in present circumstances to have granted a permission pursuant to an application under section 73 without considering that a food store development was now governed by different policies to those which appertained in 1995 would have been just as unlawful as granting such a permission following a normal application for full planning permission without such a consideration of current policies. When considering whether or not to grant planning permission for the development of land without complying with conditions subject to which a previous planning permission had been granted, the authority had to take into account the provisions of the development plan and any other material considerations. The answer to the question "material to what" was material to the application under section 73.

8. Appeal dismissed.

The following judgment was given.

Schiemann L.J.:

Introduction
1. This appeal by developers raises two points specific to its facts and one point of some general importance in relation to the scope of the powers given to a local planning authority on an application made under section 73 of the Town and Country Planning Act 1990 for a planning permission subject to conditions different from those which were applied to an earlier planning permission in respect of the same land. Such an application is commonly referred to as an application to modify conditions imposed on a planning permission.

2. The background to the present dispute lies in section 92 of the Town and Country Planning Act 1990. That section was enacted to prevent the accumulation of unimplemented permissions. That is undesirable because, when further planning decisions have to be made in relation to an area, it is a help to good planning not to be inhibited by past grants of permission. On the other hand, landowners ***J.P.L. 1040*** clearly must have some time in which to implement grants of permission. The section is a compromise between these two desiderata. It is convenient to set out parts of the section because it forms the background to much of the argument.

(1) … "outline planning permission" means planning permission granted … with the reservation for subsequent approval … of matters not particularised in the application ("reserved matters").

(2) … where outline planning permission is granted … it shall be granted subject to conditions to the effect:

(a) that, in the case of any reserved matter, application for approval must be made not later than the expiration of three years beginning with the date of the grant of outline planning permission: and

(b) that the development to which the permission relates must be begun not later than--
<DPA5>(i) the expiration of five years from the date of the grant of outline planning permission; or</DPA5> <DPA5>(ii) if later, the expiration of two years from the final approval of the reserved matters or, in the case of approval on different dates, the final approval of the last such matter to be approved.</DPA5>
(3) If outline planning permission is granted without the conditions required by subsection (2), it shall be deemed to have been granted subject to those conditions.

(5) [the authority concerned with the terms of an outline planning permission] may also specify … separate periods under paragraph (a) of subsection (2) in relation to separate parts of the development to which the planning permission relates; and, if they do so, the condition required by paragraph (b) of that subsection shall then be framed correspondingly by reference to those parts, instead of by reference to the development as a whole.

3. On January 25, 1995 Leicester City Council ("LCC") granted outline planning permission for "Redevelopment of site for retail use (Class A1), Business use (Class B1), Petrol Filling Station (*sui generis*), Public House/Restaurant (Class A3) and Public open space" on a site of approximately 15 hectares. I shall refer to this as the Total Site.

4. The Total Site is the site of a former power station. In reliance upon the grant of planning permission Powergen have undertaken the demolition of the power station, remediated the whole site, decontaminated the site, constructed a road-link and paid LCC a licence fee at a total cost of £5.7 million. The preparation of the site for development involved a time consuming process longer than was anticipated at the time planning permission was applied for.

5. The planning permission was subject to 25 conditions which, however, did not include a condition on the lines suggested by section 92(5). Condition 1 provided that:

Application for approval of reserved matters shall be made within three years from the date of this permission and the development shall be begun not later than:

(a) five years from the date of this permission; or

(b) if later, two years from the date of the final approval of all the reserved matters.

6. The reason given for this condition was "to comply with section 92 of the Town and Country Planning Act 1990".

7. Condition 2 provided that:

J.P.L. 1041 Detailed plans and particulars of the siting, design, external appearance and a means of access to the development, and the landscaping of the site (referred to in condition 1 as reserved matters) shall be submitted to and approved by the City Council as Local Planning Authority before the development is begun and shall have regard to:

(a) the size and height of the development including details of the materials to be used on all external elevations and roofs;

(b) the provision of necessary footway crossings;

(c) a landscaping scheme showing the treatment of all parts of the site to remain unbuilt upon, and including:

(a) details of the position and spread of all existing trees, shrubs and hedges to be retained or removed;

(b) new tree and shrub planting, including plant type, size, quantities and locations;

(c) means of planting, staking and tying of trees, including tree-guards;

(d) other surface treatments;

(e) fencing and boundary treatments;

(f) any changes on levels;

(g) the position and depth of surface and/or drainage runs.

8. The reason given for the condition was "to secure the satisfactory development of the site".

9. Condition 8 provided:

"If the development is carried out in phases, then the approved landscaping scheme shall also be carried out in phases, each phase of the landscaping scheme to be carried out within one year of completion of the phase of development to which it relates."

10. The reason given for the imposition of this condition was "in the interests of amenity".

11. As I have pointed out, although condition 8 envisages development possibly being carried out in phases, it is clear that the outline permission imposed the conditions envisaged in section 92(2) and it did not follow the course indicated in section 92(5) as a possibility.

12. It will be seen that the effect of these conditions was that:

(1) No development could be begun until detailed plans of the reserved matters had been approved by the Authority.

(2) Application for approval of the reserved matters had to be made before January 25, 1998.

(3) The development could only proceed if it was begun within the later of the two time periods set out in condition 1.

13. Matters proceeded slowly and it became apparent to Powergen that unless they secured a relaxation of conditions they might be unable to develop. Mr Busby of the Authority's Development Control Group on November 26, 1997 wrote a letter to Powergen which included the following:

"The Council is concerned about what will happen to the rest of the site and whether the remainder will make sense in terms of the overall planning of the site. This is likely to affect the Council's consideration of the application unless other reserved matters, *e.g.* public open space, nature area, footpath and cycle path networks, are submitted at the same time and it can be demonstrated how the proposed supermarket will relate to the remainder of the site. The deadline for all reserved matters is 24th January 1998 barring some details that could be the subject of planning conditions should permission be granted."

J.P.L. 1042 14. Mr Busby wrote again on December 19 saying:

"Reserved matters for the other aspects of the outline scheme should be submitted to agree with the description. If they are not submitted before January 25, 1998 the outline permission may lapse."

15. On January 8, 1998 Powergen submitted an application for the approval of reserved matters pursuant to the planning permission for "83,000 sq. foot food superstore and petrol filling station with carwash and 585 car parking spaces together with landscaping and public open space". The land occupied by the development the subject of the reserved matters application occupied a substantial part of the Total Site. I shall refer to it as the "Food Store Segment".

16. On January 12, 1998 Powergen made an application to extend the time period specified in condition 1. That application was refused by the Authority on March 15, 1999 and no challenge has been raised to the legal correctness of that refusal or as to the length of time taken to arrive at the decision. The policy background justifying the refusal of what had previously been permitted in principle was that central and local government policies had changed since 1995 and therefore the Authority were anxious not to do anything which would permit the outline permission to be implemented.

17. On August 3, 1998 an application was made which purported to be for a variation of condition 2 and for consequential variations of various other conditions. The nature of the variation asked for appears from the suggested wording of a new condition 2, namely, "Before the development *or phase of the development* is begun detailed plans and particulars of … the development *or phase of the development* … shall be submitted to and approved by …". The effect of granting that application would have been to enable the "reserved matters" referred to in condition 1 to comprise, not all the matters relating to every part of the site, but only those relating to that part of the site with which the applicants were at any particular time anxious to proceed. It is submitted to be a consequence of this that the application made on January 8, 1998 would have been made within the time limit specified in condition 1.

18. That would have had a number of advantages from the applicants' point of view. Legally they would be able to assert that condition 1 had been fulfilled by the making of the application for the Food Store Segment. Commercially they would be relieved of the pressure to produce plans for and/or to carry out various landscaping measures, parking provisions, investigations for archaeological remains or for the protection and enhancement of sites of wildlife or other ecological significance.

19. On the other hand the granting of that application had various disadvantages from the point of view of the Authority. In particular it would have enabled the Food store development to go ahead although this was by now against the Authority's policy. It would have prevented the Authority from having an overall scheme for the site before them before any part of the

development took place--something which they obviously thought desirable. It would also remove the cut off date by which the authority would know that the permission could no longer be implemented.

20. On March 15, 1999 LCC refused planning permission for the section 73 applications. As I have already said, no complaint is made in relation to the refusal of the application relating to condition 1. In relation to the application relating to condition 2 the refusal was for the following reasons:

1. The effect of varying condition 2 would be to allow work to begin on a food superstore having reserved matters approval. That development would be contrary to Policy S6 of the City of Leicester Local Plan which states that planning permission will not normally be granted for additional super-stores in the City.

J.P.L. 1043 2. There is no quantitative need for additional large food stores in the Central Leicestershire area.

3. The regeneration of the site by development of retail use is in preference to other more central sites also identified for regeneration and which have been identified as being available, suitable and viable, could have an adverse effect on the continuing investment in the City and other centres by competing for investment.

The Construction of Condition 2

21. Powergen's primary submission before Dyson J. and before us was that they have complied with condition 1. They submit that the reference in condition 2 to "the development" is a reference to "such part of the development as the developer chooses to proceed with". The judge rejected this construction of the permission for reasons which he set out in full. He rejected Powergen's submission that such a construction of the permission produced a result which was commercially absurd because, there being no obligation to carry out all of the development, it was pointless for the company to produce, and for the Council and its officers to consider, plans for development which there was no present intention to carry out.

22. It is plain from an examination of section 92 that, absent any specification of separate periods under subsection (5), in that section "reserved matters" refers to every matter reserved by the outline planning permission for subsequent approval of the authority and "development" refers to the development as a whole. Either the permission granted by LCC echoes the section faithfully or conditions having that effect are to be implied--see section 92(3). In those circumstances the resolution of the construction point may not matter. However, I agree with Dyson J. for the reasons which he set out in full, that construing this permission in its context it is clear that throughout the document development refers to the development of the whole.

The effect of dealings between the parties

23. Powergen's secondary submission was to the effect that by reason of the dealings between the parties they are entitled to implement that part of the outline permission which relates to the retail development. This submission turns on the details of the dealings between the parties and whether these gave to Powergen any legal rights to proceed with the building of the Food Store without further permissions. 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.

Introduction

24. Powergen submit that the decision in relation to condition 2 is legally flawed because the Authority were not permitted to refuse that application for the reason which they gave. Before turning to the law, I should note the following additional matters of fact.

J.P.L. 1044 25. In May 1998 LCC resolved to approve the reserved matters which had been submitted on January 8, 1998 in relation to the Food Store Segment. In recommending approval of the reserved matters application LCC's Director of Environment and Development advised that an indicative lay-out had been submitted by the applicants in relation to what I shall call the Remaining Segment. He stated that whilst this particular block layout would probably not be acceptable in that form, the final form of development (which would be the subject of a separate planning application) was in his view capable of meeting the general requirements of the planning brief and that the design of the super-store and the general lay-out were satisfactory.

26. On January 4, 1999 LCC resolved to grant planning permission for some, but not all, of the Remaining Segment to be developed as Offices, Restaurant and Public House. I assume that at some time a full planning permission in respect of this part of the Remaining Segment was issued.

The Legal Background
27. Section 73 of the 1990 Act provides:

1. This section applies, subject to sub-section (4), to applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted.

2. On such an application the Local Planning Authority shall consider only the question of the conditions subject to which planning permission should be granted, and

(a) if they decide that planning permission should be granted subject to conditions differing from those subject to which the previous permission was granted, or that it should be granted unconditionally, they shall grant planning permission accordingly; and

(b) if they decide that planning permission should be granted subject to the same conditions as those subject to which the previous permission was granted, they shall refuse the application.

4. This section does not apply if the previous planning permission was granted subject to a condition as to the time within which the development to which it related was to be begun and that time has expired without the development having been begun.

Some preliminary points
28. The background to this section was considered by Sullivan J. in his judgment in *Pye v. Secretary of State for the Environment* [1998] 3 P.L.R. 72. Sullivan J. said the following:

"An application made under section 73 is an application for planning permission: see section 73(1). The Local Planning Authority's duty in deciding planning applications is to have regard to both the development plan, which brings into place section 54A, and to any other material considerations: section 70(2).

In general terms, the practical consequences of imposing a condition on a grant of planning permission must be a material consideration that a Local Planning Authority should consider, unless prevented from so doing by some other express provision in the statutory code.

… Prior to the enactment of (what is now) section 73, an applicant aggrieved by the imposition of the conditions had the right to appeal against the original planning permission, but such a course enabled the Local Planning Authority in making representations to the Secretary of State, and the Secretary of State when determining the appeal as though the application had been made to him in ****J.P.L. 1045*** the first instance, to "go back on the original decision" to grant planning permission. So the applicant might find that he had lost his planning permission altogether, even though his appeal had been confined to a complaint about a condition or conditions.

It was this problem which section 31A, now section 73, was intended to address …

While section 73 applications are commonly referred to as applications to "amend' the conditions attached to a planning permission, a decision under section 73(2) leaves the original planning permission intact and un-amended. That is so whether the decision is to grant planning permission unconditionally or subject to different conditions under paragraph (a), or to refuse the application under paragraph (b), because planning permission should be granted subject to the same conditions.

In the former case, the applicant may choose whether to implement the original planning permission or the new planning permission; in the latter case, he is still free to implement the original planning permission. Thus, it is not possible to "go back on the original planning permission' under section 73. It remains as a base line, whether the application under section 73 is approved or refused, in contrast to the position that previously obtained.

The original planning permission comprises not merely the description of the development in the operative part of the planning permission … but also the conditions subject to which the development was permitted to be carried out …

Considering only the conditions subject to which planning permission should be granted will be a more limited exercise than the consideration of a "normal' application for planning permission under section 70, but as Keene J. pointed out, at page 207 of the *Frost* [1] case, how much more limited will depend on the nature of the condition itself. If the condition relates to a narrow issue, such as hours of operation or the particular materials to be employed in the construction of the building, the Local Planning Authority's consideration will be confined within a very narrow compass.

Since the original planning permission will still be capable of implementation, the Local Planning Authority, looking at the practical consequences of imposing a different condition as to hours or materials, will be considering the relative merit or harm of allowing the premises to remain open until, say, 10 o'clock rather than 8 o'clock in the evening, or to be tiled rather than slated.

Equally, if an application is made under section 73 within the original time limited for the submission of reserved matters, while implementation of the planning permission is still possible and is not precluded by the provisions of section 93(4), for a modest extension of time for the submission of reserved matters, the Local Planning Authority's role in considering only the question of conditions subject to which planning permission should be granted will be more confined than in a normal section 70 case. The practical effect of submitting details one year later than would otherwise be allowed may be very limited.

In my view, however, the position is different where … an application is made under section 73 to alter a condition, so as to extend the period for submission for reserved matters at a time when the original planning permission is no longer capable of implementation by reason of the effect of section 93(4), because time for submission for reserved matters has expired.

While the Council are constrained to consider only the question of the conditions subject to ***J.P.L. 1046*** which planning permission should be granted, in deciding whether to grant a planning permission subject to different conditions under paragraph (a), or to refuse the application under paragraph (b), are they required to ignore the fact that the original planning permission is no longer capable of implementation, so that if they adopt the latter course it will not be possible for the development to take place, whereas if they adopt the former course, it will be possible for the development to take place?

In my view, there is nothing in section 73 that requires the Local Planning Authority to ignore the practical consequences generally of imposing a different condition, and this is surely a most important practical consequence of granting an application for planning permission under paragraph (a) or refusing the application under paragraph (b).

It may well be that the case since the original grant of planning permission, the arguments for carrying out development have strengthened …

[sc. in such circumstances] Granting a planning permission subject to a condition providing for an extended period for submission of details would enable the development to be carried out, whereas as refusing the application would mean that a permission for a much needed building could not be implemented.

I do not see why, in such circumstances, the Council, in considering the application under section 73, should be required to shut their eyes to those practical consequences. If that is correct, I do not see why the position should be any different if the planning policies have changed since the grant of the original planning permission so that its implementation has become less desirable in planning terms.

The Local Planning Authority have to have regard to the factual circumstances as they exist at the time and to have regard to the facts that exist at the time of their decisions. If at that time the original planning permission is incapable of implementation by reason of section 93(4), I can see no basis in the statutory code for requiring the Local Planning Authority to ignore that important fact.

Much less do I see any justification for requiring the Local Planning Authority to base their decision upon a hypothesis: comparing the merits of development proceeding now with the merits of its having proceeded at some time in the past when it is known that the hypothesis does not accord with reality.

29. I express my concurrence with what is there said.

30. Subsection (4) indicates that the section clearly does not apply where the application purportedly made pursuant to it is made at a time when development had not been begun within the time specified by a condition. However, what is the position

where the application is made in time but the consideration by the authority of that application is after the expiry of time? Does the Authority lose jurisdiction by reason of the expiry of time? In my judgment, based in part on the use of the verb "apply" in both subsections (1) and (4), the crucial time is the time of the application and there is no subsequent loss of jurisdiction to consider the matter. We have heard no submissions to the contrary.

31. The question can arise whether, on an application which asks for a variation of one particular condition, the authority can grant a new permission subject to a number of conditions which were not the subject of the application to vary. Mr Taylor submitted that a proper reading of subsections (1) and (2) of section 73 led to the conclusion that only the condition the subject of the application was to be the subject of consideration by the authority. I disagree. Just as on an application for permission to carry out ***J.P.L. 1047*** a development the authority can impose conditions on a permission for development which they would find objectionable unless such conditions were imposed, so on an application to carry out development without complying with one condition the authority can impose a different new condition or a number of new conditions and/or remove another condition subject to which the earlier permission was granted. An example given by Mr Ouseley Q.C., who appeared for the second respondent, was a situation where a retail operator wished to have deliveries for longer hours than was permitted under the original permission. In such circumstances the Authority might be content to grant this but only on condition that the warehouse was sited further away from nearby dwellings than had been regarded as acceptable at the time of the grant of the original permission.

Submissions and Conclusions

32. Mr John Taylor Q.C., who appeared for Powergen, drew attention to the opening words of section 73(2): … the Local Planning Authority shall consider only the question of the conditions subject to which a previous planning permission was granted.

33. He submitted that these words had the result that an authority faced with a section 73 application was not allowed to refuse it just because it now disapproved of a permission which it or the Secretary of State had granted in respect of the land on an earlier occasion. To refuse for such a reason would be to exercise the power of refusal for an impermissible purpose, namely, to prevent, without paying compensation, the implementation of a permission which had been lawfully granted.

34. He pointed out that section 73(2)(a) contemplated the grant of unconditional planning permission, submitted that this would conflict with the requirements of sections 91 and 92 of the Act as to time limits and submitted that therefore the permission granted pursuant to section 73 must in some way relate to the earlier permission.

35. He submitted that to construe section 73 as envisaging the grant of an independently viable permission would produce absurd results in situations where details had already been approved under the earlier outline permission. They would need to be submitted and approved afresh under the later permission. In such circumstances there would be no advantage in making a section 73 application rather than starting afresh.

36. He argued that if each permission pursuant to a section 73 application were to be regarded as an independently viable permission then the time limits for submission of reserved matters and commencement of development would start afresh.

37. He submitted that the *Frost* and *Pye* cases to which I have already adverted were cases where what was sought was an extension of the period within which something had to be done whereas the present, in form at any rate, was not.

38. These are powerful arguments and they were skilfully put. Nonetheless, I am not persuaded by them. The purpose behind the imposition of time limits in sections 91 and 92 is to enable the Planning Authority and others to know what outstanding permissions are capable of implementation and which, if I may borrow a term from food retailing, have reached their expiry date. That expiry date can be reached in one of two ways--the expiration of the time within which application for details must be made or the expiration of the time within which the development must be begun. In the uncertain world of planning that at least limits the amount of uncertainty and provides a basis on which decisions have to be reached as to what is to happen to that land and land nearby in the future. There is no doubt that the effect of granting a new planning permission in the terms sought by the appellants would be to enable a development to proceed after the expiry date of the permission. The appellants accept the legal ***J.P.L. 1048*** correctness of the Authority's refusal to extend the time period specified in condition 1 of the earlier permission. They argue that they should be allowed to achieve substantially the same end by altering the terms of condition 2. In my judgment that would clearly fly in the face of the policy behind sections 91 and 92.

39. That would not dispose of the point if the words in section 73(2) "shall consider only the question of the conditions subject to which a previous planning permission was granted" clearly prevented the Authority from taking into account the fact that the earlier permission had reached its expiry date. I do not consider that they do. My reasoning is essentially the same as that of Sullivan J. in the *Pye* case set out above. I accept that there the court was concerned with an application in terms to extend the time for submission of details whereas in the present case the court is only concerned with an application which has that effect. This however seems to me to be a distinction of no significance. If Sullivan J.'s reasoning is correct, as I think it is, then it must apply to both situations.

40. I accept that section 73(2)(a) contemplates the grant of an unconditional planning permission but I do not accept Mr Taylor's submissions to the effect that therefore it is wrong to regard a permission granted pursuant to a section 73 application as not being an independently viable permission because of any application of sections 91 and 92. Those sections also contemplate the grant of unconditional permissions and provide that if permission is granted unconditionally then it shall be deemed to have been granted subject to time conditions.

41. Nor do I accept his argument in relation to having to resubmit details which had already been approved. Sometimes the alteration of a condition which is asked for will involve alterations as to previously approved details, sometimes it will not. In those cases where it does not there is no difficulty in referring to the old plans and it may well be that the Authority will be inhibited by the opening words of section 73(2) from considering their merits.

42. The most seductive way in which Mr Taylor put his submissions was to my mind as follows. He submitted that the Authority must focus on the condition mentioned in the application ("condition x"--in the present case condition 2) and ask themselves "were we to substitute condition y for condition x what harm would result which does not result from the grant of permission with condition x?". I agree that, if it does not now matter from a planning point of view whether the future development of the site is governed by condition x as imposed on the old permission or condition y as suggested by an applicant, then the authority would be wrong to refuse permission just because they objected to the development in principle. An example might be a proposed change in the fenestration in a building.

43. But Mr Taylor's formulation of the question subtly conceals that in the present case it does matter. The comparison is not between the present effects of condition x imposed now and the present effects of condition y imposed now but rather between the present effects of condition x imposed years ago and the present effect of condition y imposed now. Once it is clear that this is the right comparison, then it is obvious that in a case such as the present the difference is enormous. The present effect of condition 2 imposed years ago is to prevent the Food Store Development going ahead whereas the present effect of a permission containing the proposed condition 2 is to permit the Food Store development. It is in my judgment beyond argument that current planning policy and facts must be taken into consideration when deciding whether or not to permit that new effect.

44. Mr Taylor had a further argument based on events after the expiry date in January 1995. He submitted

J.P.L. 1049 (a) that no condition should be imposed unless its imposition serves some planning purpose;

(b) that the purpose of imposing condition 2 on the 1995 Permission was to secure the approval of the Authority for the details of the development of the Total Site;

(c) that this purpose had been achieved by March 15, 1999, albeit in two bites, namely, (1) the approval of the details for the Food Store Segment in May 1998 pursuant to the application made on January 8, 1998 and (2) the resolution of January 4, 1999; and

(d) that in those circumstances it was irrational on March 15, 1999 to refuse to vary the old condition 2.

45. I accept of course that conditions should not be imposed unless their imposition serves some planning purpose. However, as it seems to me one of the purposes of the imposition of conditions 1 and 2 on the 1995 permission, required as it was by section 92, was to secure a situation in which no development should proceed under that permission unless, amongst other things, application pursuant to the 1995 Permission for approval of all of the reserved matters in relation to the Total Site was made before January 25, 1998. That purpose had not been achieved by March 15, 1999 for three separate reasons. One is that the application for planning permission which produced the resolution of January 4, 1999 did not as a matter of fact cover the Total Site. The second is that this application was, I believe, not made before January 25, 1998. The third is that it was not an application for approval of details under the 1995 permission. The Authority on January 4, 1999 was dealing with an application to grant a new full planning permission. In considering that application it was bound to look primarily at the Remaining Segment

which was the subject of this new application and also to bear in mind that the outline permission which had been granted in 1995 for the Total Site was no longer capable of implementation. The conclusion reached by the Authority on the application which resulted in the resolution of January 4, 1999 is not necessarily the same as the one it would have reached on an application for approval of details under the 1995 outline permission for the Total Site.

46. At times Mr Taylor I think came close to submitting that it was irrational of the Authority to refuse the section 73 application in respect of condition 2. If that was his submission I would reject it. When the authority came to consider the application under section 73 to grant a new permission in respect of the Total Site subject to a different condition 2 it was perfectly rational to refuse to do so. It might well have been rational to refuse to do so in 1995 but it was certainly rational to refuse to do so in 1999 when planning policies had changed. The original conditions were imposed in pursuance of the policy set out in section 92 of the Act which is to prevent the accumulation of unimplemented permissions. The application under section 73 was clearly designed to achieve a result which would be at variance with that policy. There is nothing irrational in an authority refusing, after the expiration of the three years referred to in section 92(2)(a), to grant such an application in circumstances where the relevant policies have altered. Indeed, in my view, in present circumstances to have granted a permission pursuant to an application under section 73 without considering that a Food Store Development was now governed by different policies from those which appertained in 1995 would have been just as unlawful as granting such a permission following a normal application for full planning permission without such a consideration of current policies.

47. I agree with Sullivan J. that when considering whether or not to grant planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted the authority must take into account the provisions of the development plan and any other material considerations. If one asks "material to what?" the answer is material to the application under section 73. Thus, for instance, if the application is to retain a use of land without complying with a condition imposed on a previous permission that the use should cease after five years ***J.P.L. 1050*** it must be right to examine that application in the light of facts and policies as they are at the time of the decision on the new application.

48. In the result, for reasons which are substantially those well set out by Dyson J. in his judgment, I would dismiss this appeal.

Comment. The decision of Dyson J. (reported at [2000] J.P.L. 629) caused consternation with its insistence that the literal words of a planning condition be followed and so all reserved matters should be approved before the commencement of development. The Court of Appeal decision was eagerly awaited and it deals with a battery of points relevant to major projects.

The Court of Appeal agreed with the High Court on the construction of the permission on an additional ground. Schiemann L.J. concluded that section 92 of the Town and Country Planning Act 1990 required that approval of all reserved matters be sought within three years (subsection (2)) unless separate periods are specified under subsection (5). If the attached conditions did not require this, subsection (3) would imply it. However the statute does not require all reserved matters to be submitted or approved before development commences. On section 92 alone, Powergen could have submitted reserved matters approval for the retail development alone, expected it to be dealt with on its merits and commenced development with approval. It was the *Grampian* phrasing of condition 2 that required all details to be submitted.

The issue as to reconsideration of the principle of a planning permission on a section 73 application was covered by the Court's endorsement of Sullivan J.'s judgment in *Pye v. Secretary of State for the Environment* [1998] 3 P.L.R. 72. Some implications of *Pye* were then examined. The Court recognised that a section 73 application could be considered by the local planning authority or the Secretary of State after the permission has expired provided the application was submitted in time. That approval of a section 73 application creates a fresh planning permission rather than varies the existing consent not only follows the words of the statute but recognises the real, as opposed to personal, nature of planning permission. Suppose planning permission is granted on appeal for retail development. If a commercial rival then made a section 73 application to restrict the opening hours this could be approved by the local planning authority and would hinder the operation of the store unless the application created a new permission, distinct from that granted on appeal. The Court considered that reserved matters and details approved under conditions on the original permission could be applied to a section 73 permission provided the changed conditions did not bear on that approval. It is a common sense result but its legal basis was not fully explained. Mr Taylor said that if the permissions were separate then the time limits for submission of reserved matters and commencement of development would start afresh. Their Lordships did not address the point, which is correct. Local planning authorities should be alert when granting section 73 applications and adjust the time periods to match the original consent unless the intention is to extent the life of the first permission. Conditions unaltered from the original consent should be included in the section 73 decision notice.

Case comment by Richard Harwood.

Footnotes

1 *R. v. London Docklands Development Corporation, ex p. Frost* (1996) 73 P. & C.R. 199.

Outline planning permission - whether application for approval of reserved matters made within prescribed time period

Richards J.:

Case Comment

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Planning

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Cases cited
Coghurst Wood Leisure Park Ltd v Secretary of State for Transport, Local Government and the Regions [2002] EWHC 1091 (Admin); [2003] J.P.L. 206; [2002] 5 WLUK 817 (QBD (Admin))

Legislation cited
Town and Country Planning Act 1990 (c.8) s.73

J.P.L. 206 On June 26, 1990 Rother District Council ("the Council") granted outline planning permission for a development described as "tourist park including access road from lvyhouse Lane, 250 self-catering tourist chalets in the form of log cabins". All matters of detail were reserved for subsequent approval by the Council. The outline planning permission included the usual time limiting conditions such that application for approval of reserved matters had to be made by June 26, 1993. An application for approval of reserved matters was submitted in April 1993 which described the proposed development as "erection of 250 log cabins, layout road, access and sewage treatment plant and associated car-parking". Accompanying the application, although not referred to in the form, were plans showing 18 log cabins clustered in three small groups. On March 30, 1994 the Council issued a formal approval of reserved matters. The heading included the description "erection of 250 log cabins" and gave the site address. The Claimant carried out initial works for the construction of an access on or before March 13, 1996. A witness statement filed on behalf of the Claimant states that the Claimant acted throughout in good faith and had taken the outline planning permission and subsequent approval of reserved matters together with a letter of waiver from the Council at face value and had expended substantial amounts of money in acquiring land and carrying out works.

J.P.L. 207 On April 11, 1997 the Claimant applied to the Council under s.192 of the 1990 Act for a certificate of lawful development in respect of the carrying out of further works pursuant to the outline planning permission and approval of reserved matters. On June 19, 1997 the Council refused the application on the basis that the outline permission had lapsed. A further application for a certificate of lawful development in respect of the completion of the engineering works commenced in 1996 was made on July 2, 1997, but was refused on February 17, 2000, on the basis that it had not been satisfactorily demonstrated that the relevant planning permission had been implemented. The Claimant appealed to the Secretary of State against those refusals. The Inspector appointed by the Secretary of State held a public inquiry and recommended that the appeals be dismissed and that certificates under s.192 be not granted. In his decision letter dated November 21, 2001 the Secretary of State accepted the Inspector's recommendation. The Claimant appealed.

Held, dismissing the appeal:

1. The true meaning of an approval of reserved matters is a matter for the court and in construing the approval it is permissible to look at extrinsic material in order to resolve an ambiguity. The true focus of attention, must be the application for approval rather than the approval itself, since under condition 1 it was the application that had to be made within the three year period and the Secretary of State, in accepting the Inspector's reasoning, based his dismissal of the appeals on a finding that details of

the siting of 232 of the 250 cabins were not submitted within that period. The court must adopt the same general approach in relation to an application as in relation to an actual approval. Thus the scope of the application is to be determined objectively by reference to the terms of the application itself, though it is permissible to look at extrinic evidence to resolve an ambiguity. The scope of the application does not depend on the subjective intention of the person submitting the application.

2. In order to make any sense of the application for approval in this case, it is necessary to look not only at the application form but also at the accompanying plans, despite the fact that the plans are not referred to in the form. It is impossible to conclude from those documents that the Claimant was applying for approval of details of the siting of all 250 cabins. It is true that the application form refers to the "erection of 250 log cabins" as part of the description of the proposed development but that was no more than a general description of what was embraced within the outline planning permission. When it comes to the details of siting, there is nothing to indicate that approval is sought in respect of the siting of all 250 cabins. The plans depict only 18 cabins. There is nothing on them or in the application form to suggest that the plans are intended to show the principle of the groupings of the cabins and that the principle is to be applied to all 250 cabins, or indeed that the plans are intended to show anything at all about any cabins other than the 18 depicted on them.

3. Even if one takes into account the letter of April 20, 1993 which accompanied the application for approval of reserved matters (and it is probably permissible to do so since it is only via the letter that reference is made to the plans), it does not give the Claimant the support claimed for the principle of the groupings of the cabins and that the principle is to be applied to all 250 cabins. Even if, contrary to my view, the application could be construed as an application for approval of the principle of the groupings, with detailed locations to be agreed on site, this was not capable of amounting in itself to an application for approval of the details of the siting of all the cabins. It was at most an application requesting the adoption of a particular procedure by which the precise details would be approved.

4. 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. It cannot be assumed that exceptions previously found to exist will still apply. Substantial reappraisal is required.

***J.P.L. 208** 5. 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.

6. 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. Such cases will be very rare. The present case is not one of them for two reasons. First, the facts do not support it. All that happened in this case was that the planning officer stated that he would have "no objection" to access works being carried out without prior submission and approval of details required by the conditions of the reserved matters approval. Secondly, and more importantly, (sharing the concern experessed 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 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. 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.

7. As to the criticism that the Inspector did not consider the Agecrest line of reasoning, Agecrest should not 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.

Appeal dismissed.

1. This is an application under s.288 of the Town and Country Planning Act 1990 challenging a decision by the Secretary of State dated November 21, 2001 by which he dismissed appeals against refusals by Rother District Council to grant lawful development certificates in relation to the proposed construction of 250 chalets on land at Coghurst Wood, Ivyhouse Lane, Guesting, East Sussex.

2. The relevant history starts with the Council's grant of outline planning permission (RR/86/2504) on June 26, 1990 for a development described as "tourist park including access road from Ivyhouse Lane, internal circulation roads, 250 self-catering tourist chalets in the form of log cabins, open-air swimming pool, children's pool; control and administration building comprising reception office, shop, laundry, toilets and 2-bedroom staff flat; and further building incorporating family room, games room, licensed bar, toilets and changing rooms". All matters of detail were reserved for subsequent approval by the Council. Reference was made to illustrative layout plans and details of the chalets, but it was stated expressly that they were not approved.

3. The outline planning permission included the following conditions:

"(1) Application for approval of reserved matters must be made not later than the expiration of ***J.P.L. 209*** three years beginning with the date of this permission. The development must begin not later than whichever is the later of the following dates: the expiration of five years from the date of this permission or the expiration of two years from the final approval of the reserved matters.

(2) Before the development permitted hereby is commenced, details of the siting, design and external appearance of the building(s), the means of access to and the landscaping of the site, which matters are herein referred to as "reserved matters', shall be submitted to and be subject to the approval of the District Planning Authority."

4. It followed that application for approval of reserved matters had to be made by June 26, 1993.

5. An application for approval of reserved matters was submitted on the claimant's behalf in April 1993. The application form, dated April 23, 1993, described the proposed development as "erection of 250 log cabins, layout road, access and sewage treatment plant and associated car-parking". Accompanying the application, although not referred to in the form, were plans showing 18 log cabins clustered in three small groups, one of four cabins and two of seven cabins, each group having its own cul-de-sac access from the main service roads. There was a separate full planning application for the administration and communal buildings.

6. A covering letter dated April 20, 1993 from the claimant's chartered surveyor stated:

"You will observe that the first application is for the details in pursuance of the Outline Planning Consent showing the log cabins and in diagrammatic form their locations and sitings in small groups. As agreed the exact position and location of each and every unit will be determined on site in order to minimise the effect on existing trees and undergrowth. The application also shows the layout of the service roads and access ways and the nature of finish and construction of them, together with the sewage treatment plant located on the north east corner of the site …".

7. The Council acknowledged receipt of the application. In August 1993 a decision on the application was deferred to allow further discussions and negotiations concerning a management plan for the woodland, which is not material. On March 30, 1994 the Council issued a formal approval of reserved matters (RR/93/0758). The heading included the description "erection of 250 log cabins, layout road, access, parking and treatment plant pursuant to outline permission RR/86/2504" and gave the site address. The text provided:

"the Rother District Council hereby approve the following details required by planning permission RR/86/2504

Siting, Design, External Appearance, Means of Access and Landscaping subject to the following conditions …".

8. There followed nine conditions dealing with matters such as details of foul and surface water drainage, surface treatment of hard surfaced areas and car parking, and detailed plans for boundary walls and fences. None of the conditions related to the siting of the cabins.

9. A note at the end of the approval stated that the decision notice related to "the proposals as shown on the originally submitted plans and subsequently amended plan(s)", namely the plans submitted with the application for approval of reserved matters dated April 23, 1993 and subsequent amendments to those plans.

10. On September 30, 1994 the claimant's surveyor wrote to the Council as follows:

***J.P.L. 210** "Erection of 250 Log Cabins, Coghurst Wood, Guestling*

Following the issue of the planning approval for reserved matters Ref No RR/93/0758/P we have also now received planning permission from Hastings Borough Council for the alterations to Ivyhouse Lane and the access road into the site. This work in fact has commenced as our clients were anxious to undertake that part of the work before the winter.

As it is proceeding satisfactorily it has also been decided to continue the access road around the edge of the fields belonging to the Pern family and into the woodland, terminating at this stage in and around the point crossing the stream, i.e. in line with the footbridge to the railway line. Again the work will only be at a base course level without kerbs etc but it will enable vehicular access to the woodland, albeit by forward drive vehicles, and will also enable the legal agreement with the Pern family to be properly implemented and their land can then be restored in and around the line of the roadway. Our clients do not have any proposal to extend the roadway into the main body of the site, nor at this stage to undertake the commencement of the construction and erection of the log cabins or communal buildings etc.

However, we are aware that Condition Nos. 2, 3, 4, 5 and 6 of the planning approval RR/93/0745 seek details of various matters to be submitted and agreed with you prior to commencement. It is considered that the submission of those details are somewhat premature at this stage and we are writing to inquire if you would allow the excavation and base course of the roadway to be undertaken as outlined above in accordance with the planning approval but waiving the necessity to submit details of the other matters at this stage. It would assist our client if the line of the road can be established and formed prior to the winter and we would be pleased for your assistance in this matter."

11. A reply dated November 9, 1994 by a Mr Scott on behalf of the District Planning Officer stated:

"I refer to your letter of 30 September 1994 regarding the new access road to Coghurst Wood. The works to Ivyhouse Lane and the access junction are I note substantially complete.

Provided the access construction is confined to the fields and is to base course only I confirm that I would have no objection subject to submission of all outstanding matters prior to commencement of development within the woodland area. This would allow construction to base course at the access road from cross-section point 1 on drawing no. 93-006-0 to cross-section point 7, (where the access road enters the strip of woodland). Fencing and landscaping details will be required in due course for this section of the access road."

12. On November 22 the claimant's surveyor wrote to the claimant stating:

"I enclose herewith a copy letter I have received from R other District Council giving approval to the construction of the access road up to base course level across the field to the woodland. This is the confirmation of the telephone approval I received earlier and as soon as that work is started the detailed planning approval that I recently obtained on your behalf will also have been commenced and cannot then be affected by the lapse of time.

I look forward to hearing from you therefore if you wish this work to proceed, but obviously it is in your best interests to protect the value of the land."

13. It is common ground that the claimant carried out initial works for the construction of an access on or before March 13, 1996. A witness statement on behalf of the claimant states that the claimant has acted throughout in good faith and has taken the outline planning permission and the subsequent ***J.P.L. 211*** approval of reserved matters together with the letter of waiver from the Council at face value and has expended substantial amounts of money running into several hundred thousand pounds in acquiring land and carrying out works.

14. On April 11, 1997 the claimant applied to the Council under s.192 of the 1990 Act for a certificate of lawful development (referred to in the documents as a "LDC") in respect of the carrying out of further works pursuant to the outline planning permission and approval of reserved matters. On June 19, 1997 the Council refused the application on the basis that the outline permission had lapsed. A further application for a certificate of lawful development in respect of the completion of the engineering works commenced in 1996 was made on July 2, 1997 but was refused on February 17, 2000 on the basis that it

had not been satisfactorily demonstrated that the relevant planning permission had been implemented. The claimant appealed to the Secretary of State against those refusals.

The Inspector's report

15. The Inspector appointed by the Secretary of State held a public inquiry and submitted his report to the Secretary of State on May 16, 2001. He recommended that the appeals be dismissed and that certificates under s.192 be not granted.

16. In the material part of his conclusions the Inspector dealt first with the question whether the outline planning permission had lapsed (to which I shall refer as "question 1"). He stated:

"14.2 … It is common ground that the outline permission reserved siting for subsequent approval as a reserved matter. Because details of the siting of 232 of the 250 chalets were not submitted within the 3 year period specified it is my view that the outline permission has lapsed. The appellant has not applied for a variation of condition 1 pursuant to s.73.

14.3 In reaching this view I recognise that "siting' was expressly included in the formal notice of approval of the reserved matters RR/93/0758P dated 30 March 1994 and appreciate that the description of this development refers to the erection of 250 log cabins. I agree there is some ambiguity. Nevertheless, notwithstanding that this was a matter that was overlooked by Rother until raised at the inquiry, the details of the siting of 232 chalets were plainly not submitted within the 3 year period specified in condition 1 of the outline permission.

14.4 The appellant places reliance on the letter accompanying the reserved matters application which refers to the agreement with the Council's Officers that in order to minimise tree loss the siting of each chalet would need to be determined on site. The three year period still applied, however, and it remains the case that no chalet siting details other than those of the 18 units were submitted for approval. It must follow that after 26 June 1993 no development could lawfully be carried out under the outline permission. It is my view, when bearing in mind also the Powergen judgment, that this outline permission has lapsed in its entirety. In the circumstances the operations the subject of the LDC appeals would not be lawful for planning purposes. The LDC appeals ought fail on this account."

17. In case his conclusion on question 1 was not accepted, the Inspector went on to consider the implications of the Council's letter of November 19, 1994 as to works proceeding in the absence of certain details being submitted and agreed prior to commencement ("question 2"). After referring to the letter of September 30, 1994 from the claimant's surveyor and to the terms of the Council's response, he continued:

"14.7 The Council's response here is unambiguous and given the terms of the reply the developer ***J.P.L. 212*** could reasonably expect that it incorporated the drainage details required under the reserved matters condition No. 1. That said, it would seem that both the appellant and Rother had overlooked the fact that there was an express condition (No. 2) attached to the outline planning permission which required the submission and approval of the reserved matters before the commencement of the development.

14.8 As the County Council comment in relation to the status of the "renewal' applications, the case of *R v Leicester CC Ex p. Powergen UK Ltd* is relevant in this regard. It was held in that case that what was required in such circumstances was that the developer should apply under s.73 for permission to develop land without compliance with conditions previously attached to a planning permission. It was not accepted that s.73 could be side-stepped by persuading a local planning authority to vary or waive a condition under the guise of the exercise of a general management discretion in the implementation of planning permission. With this and the *Tesco Stores v N Norfolk DC*, 1999 judgment in mind I share the view that no legitimate expectation or estoppel can arise. It follows that such works as the developer may have carried out in purported implementation of the outline permission are unlawful."

18. The Inspector went on to consider whether, if his conclusions on question 1 and/or question 2 were not accepted, the works which had been carried out for the construction of an access amounted to implementation of the permission ("question 3"). He held that the works comprised a material operation such as to amount to implementation.

19. The Inspector's report also dealt with called-in applications for planning permission in respect of the development. He recommended that planning permission be refused. It is unnecessary to consider the details of his reasoning in respect of those applications.

The Secretary of State's decision
20. In his decision letter dated November 21, 2001 the Secretary of State stated, so far as material:

"9. The Secretary of State accepts the Inspector's conclusions on both the called-in applications and the LDC appeals, except where indicated below.

…

14. The Secretary of State accepts the Inspector's analysis and reasoning in paragraphs 14.2-14.4 of his report. He therefore agrees, for the reasons given by the inspector, that the LDC appeals should be dismissed.

…

18. Having regard to all the matters raised, the Secretary of State is satisfied, on the evidence now available, that the details of the siting of 232 of the 250 chalets were not submitted within the specified three year period given in the outline permission RR/86/2504. He therefore agrees with the Inspector that the outline permission RR/86/2504 lapsed on 26 June 1993 before the access works were carried out. Accordingly, Rother District Council's decision to refuse to grant LDCs was well founded and the appeal fails."

21. Mr Jones for the claimant submits that the Secretary of State, whilst agreeing with the Inspector on ***J.P.L. 213** question 1, reached no conclusion on question 2 or question 3. The catch-all statement in paragraph 9 of the decision letter that the Secretary of State "accepts the Inspector's conclusions … except where indicated below" should be given no weight in circumstances where in paragraph 14 the Secretary of State has adopted only a specific part of the reasoning in support of the conclusion on the LDC appeals. I do not accept that submission. The passage of the Inspector's reasoning referred to at paragraph 14 (and reflected also in paragraph 18) was sufficient to dispose of the claimant's case on the LDC appeals and was therefore all that the Secretary of State needed to refer to in order to justify the dismissal of those appeals. There is, however, no reason to cut down the generality of the Secretary of State's statement in paragraph 9 that he accepted the Inspector's "conclusions" on all the appeals; and it is clear from the structure of the Inspector's report that his "conclusions" included his conclusions on questions 2 and 3 as well as his conclusions on question 1. The relevance of this is the claimant cannot succeed in the present challenge unless it establishes that the Inspector and therefore the Secretary of State erred in law in relation both to question 1 and to question 2.

Legislative framework
22. It is unnecessary to set out the terms of s.192 of the 1990 Act, under which the applications for a certificate of lawful development were made. The relevant question for the local planning authority, and for the Secretary of State on appeal, was whether the construction of chalets and related works in accordance with the outline planning permission would be lawful.

23. Of relevance to question 1 are the statutory provisions concerning outline planning permission and applications for approval of reserved matters. As to the former, s.92 of the 1990 Act provides *inter alia*:

"(2) Subject to the following provisions of this section, where outline planning permission is granted for development consisting in or including the carrying out of building or other operations, it shall be granted subject to conditions to the effect--

(a) that, in the case of any reserved matter, application for approval must be made not later than the expiration of three years beginning with the date of the grant of outline planning permission; and

(b) that the development to which the permission relates must be begun not later than--
<DPA5>(i) the expiration of five years from the date of the grant of outline planning permission …</DPA5>
(3) If outline planning permission is granted without the conditions required by subsection (2), it shall be deemed to have been granted subject to those conditions."

24. By s.93(4)(b), in the case of a planning permission which has conditions attached to it under s.92, an application for approval of a reserved matter, if it is made after the date by which the conditions require it to be made, shall be treated as not made in accordance with the terms of the permission.

25. It is not necessary for approval in respect of all reserved matters to be sought in a single application. Applications for approval of reserved matters can be made in stages, provided that all the applications are made within the period specified.

26. Applications for approval of reserved matters were governed at the material time by the Town and Country Planning (General Development Procedure) Order 1988 ("the 1988 Order"). Article 8 of the 1988 Order provided:

"An application for approval of reserved matters--

J.P.L. 214 (a) shall be made in writing to the local planning authority and shall give sufficient information to enable the authority to identify the outline planning permission in respect of which it is made;

(b) shall include such particulars and be accompanied by such plans and drawings as are necessary to deal with the matters reserved in the outline planning permission; and

(c) except where the authority indicate that a lesser number is required, shall be accompanied by three copies of the application and the plans and drawings submitted with it."

27. Article 10 of the 1988 Order provided:

"(2) When the local planning authority with whom an application has to be lodged receive …

(c) in the case of an application made under article 8 … above, the documents and information required by that article <DPAC2>and the fee (if any) required to be paid in respect of the application, the authority shall as soon as is reasonably practicable send to the applicant an acknowledgement of the application in the terms (or substantially in the terms) set out in Part 1 of Schedule 3 hereto.</DPAC2>

…

(4) Where, after sending an acknowledgement as required by paragraph (2) of this article, the local planning authority consider that the application is invalid by reason of a failure to comply with the requirements of … article 8 … above or any other statutory requirement, they shall as soon as reasonably practicable notify the applicant that his application is invalid."

28. Of relevance to question 2 is s.73 of the 1990 Act, which enables applications to be made for permission for development without complying with conditions attached to a previous permission:

"(1) This section applies, subject to subsection (4), to applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted.

(2) On such an application the local planning authority shall consider only the question of the conditions subject to which planning permission should be granted, and--

(a) if they decide that planning permission should be granted subject to conditions differing from those subject to which the previous permission was granted, or that it should be granted unconditionally, they shall grant planning permission accordingly, and

(b) if they decide that planning permission should be granted subject to the same conditions as those subject to which the previous permission was granted, they shall refuse the application.

…

(4) This section does not apply if the previous planning permission was granted subject to a condition as to the time within which the development to which it related was to be begun and that time has expired without the development having been begun."

29. Of relevance to question 3 is s.86 of the 1990 Act, which provides in subsection (1), so far as material, that development shall be taken to be begun "on the earliest date on which any material operation comprised in the development begins to be carried out". Subsection (2) defines "material operation" as including "any operation in the course of laying out or constructing a road or part of a road".

***J.P.L. 215** **Question 1**

30. The first main submission by Mr Jones on behalf of the claimant is that it was wrong in law to conclude that no application for approval of reserved matters in respect of the siting of 232 out of the 250 cabins had been made within the three year period specified in condition 1 of the outline planning permission. The application for approval dated April 23, 1993, which was made within the three year period, was an application for approval of the siting of all 250 cabins. The accompanying plans, although showing only 18 cabins, showed the principle of how the cabins were to be grouped around cul-de-sacs from the main service roads. It had been agreed between the claimant and the planning officer that this was the most suitable way of dealing with the matter, covering the principle in the written application and leaving detailed siting of all the cabins to be agreed on site. There was no suggestion by the Council that the application was deficient, albeit that the Council had a duty under Article 10 of the 1988 Order to notify the claimant if it considered that the application was invalid by reason of a failure to comply with the requirements of Article 8. The approval issued by the Council on March 30, 1994 was on its face and in context a general approval. Its effect was to approve the reserved matter of siting on the basis that the principle of the grouping of cabins would be as shown on the plan and the exact location of each cabin would be determined on site, no time limit being imposed on that requirement. It may or may not have been prudent for the Council to proceed in that way, but that is how it decided to deal with the matter and its decision has not been subject to challenge. Thus the Secretary of State has misconstrued the true meaning of the approval and has misdirected himself in law. He ought to have held that approval of all reserved matters had been properly given and that the outline planning permission was capable of implementation (pursuant to the last part of condition 1) for a further two years from the date of that approval.

31. It is common ground that the true meaning of an approval of reserved matters is a matter for the court and that in construing the approval it is permissible to look at extrinsic material in order to resolve an ambiguity (*cf. Staffordshire Moorlands DC v Cartwright* [1992] J.P.L. 138 at 139). Although Mr Jones submitted that there was no ambiguity in the approval here, it is to be noted that the claimant's case before the Inspector was that the absence of a plan did render the approval ambiguous. In any event Mr Jones submitted that if the approval was ambiguous the court should look at the accompanying letter of April 20, 1993 and that the letter supported the claimant's case on construction.

32. The true focus of my attention, however, must be the *application* for approval rather than the *approval* itself, since under condition 1 it was the application that had to be made within the three year period; and the Secretary of State, in accepting the Inspector's reasoning, based his dismissal of the appeals on a finding that details of the siting of 232 of the 250 cabins were not *submitted* within that period. It seems to me that the court must adopt the same general approach in relation to an application as in relation to an actual approval. Thus the scope of the application is to be determined objectively by reference to the terms of the application itself, though it is permissible to look at extrinsic evidence to resolve an ambiguity. The scope of the application does not depend on the subjective intention of the person submitting the application. I did not understand either counsel to submit otherwise.

33. In order to make any sense of the application for approval in this case, it is necessary to look not only at the application form but also at the accompanying plans, despite the fact that the plans are not referred to in the form. In my judgment it is impossible to conclude from those documents that the claimant was applying for approval of details of the siting of all 250 cabins. It is true that the application form refers to the "erection of 250 log cabins" as part of the description of the proposed development; but that was no more than a general description of what was embraced within the outline planning permission (which, ***J.P.L. 216** it should be noted, had not approved the illustrative plans submitted previously). When it comes to the details of siting, there is nothing to indicate that approval is sought in respect of the siting of all 250 cabins. The plans depict only 18 cabins. There is nothing on them or in the application form to suggest that the plans are intended to show the *principle* of the groupings of the cabins and that the principle is to be applied to all 250 cabins, or indeed that the plans are intended to show anything at all about any cabins other than the 18 depicted on them.

34. Even if one takes into account the letter of April 20, 1993 (and it is probably permissible to do so, since it is only via the letter that reference is made to the plans), it does not give the claimant the support claimed for it. Again, it does not state that approval is sought for the principle of the groupings of the cabins and that the principle is to be applied to all 250 cabins. It does not refer to any specific number of cabins; and in the absence of a clear indication that all 250 cabins are embraced within the application, the reasonable inference is that the cabins covered are the 18 shown on the plans. What is said in the letter about determining on site "the exact position and location of each and every unit" makes perfectly good sense when applied to the 18 cabins shown on the plans, since the plans did not identify the exact position or location of any of those 18 units.

35. Further, even if, contrary to my view, the application could be construed as an application for approval of the principle of the groupings, with detailed locations to be agreed on site, I accept Mr Brown's submission that this was not capable of amounting

in itself to an application for approval of the details of the siting of all the cabins. It was at most an application requesting the adoption of a particular procedure by which the precise details would be approved, *i.e.* by agreement on site. It would still have been necessary for the claimant to apply for actual approval of the details of the siting of the 250 cabins, *e.g.* by agreeing detailed locations with the planning officer on site and then making a further written application seeking the Council's approval of what had been agreed on site.

36. Mr Jones placed weight on what he said was an agreement with the planning officer that the application represented the most suitable way of dealing with the matter, covering the principle in the written application and leaving the detailed siting to be agreed on site. It appeared towards the end of his submissions that he was even contending that the claimant had a legitimate expectation that the application would be treated in this way (though legitimate expectation did not feature in the grounds of appeal or the skeleton argument in relation to this issue, as distinct from question 2). I have indicated why, even if the contention were well founded, it would not get the claimant home since there would still have been no application for approval of the actual details of the siting of the 250 cabins. But in any event I do not consider the contention to be well founded. There is no evidence of an agreement to the effect alleged: I have already pointed out that the statement in the letter of April 20, 1993 that "[a]s agreed the exact position and location of each and every unit will be determined on site" can sensibly be attributed to the detailed siting of the 18 cabins shown on the plans. There is no other relevant evidence. There is certainly insufficient evidence to get an argument as to legitimate expectation off the ground.

37. As to Mr Jones's reliance on the fact that the Council did not notify the claimant under Article 10 of the 1988 Order that the application failed to comply with Article 8, the answer given by Mr Brown, which I accept, is that there was no requirement for the claimant to apply for approval of reserved matters in respect of all 250 cabins at the same time; the Council could reasonably consider that the plans submitted with the application were sufficient to enable it to deal with the application as it related to the 18 cabins shown; there was still time for a further application within the three year period in respect of the remaining cabins; and there was therefore nothing in the circumstances to make it ***J.P.L. 217*** necessary for the Council to give an Article 10 notification. I would add that the Council's perception of the matter cannot be determinative of the true scope of the application for approval and that the absence of a notification under Article 10 cannot therefore be relied upon as establishing the existence of a valid application for approval of reserved matters, still less a valid application in respect of all 250 cabins.

38. Nor do the terms of the actual approval assist the claimant. Again, the fact that the description included reference to "250 log cabins" does not take matters further. The text is entirely general, referring to approval of, *inter alia,* details of "siting". It is the note at the end of the approval which is most important, since that states that the decision relates to the proposals as shown on the plans submitted with the application for approval (and as subsequently amended). That takes one back to the plans showing 18 cabins. There is nothing in the approval to show that it was intended to embrace the detailed siting of all 250 cabins. Furthermore, none of the conditions included in the approval of reserved matters touches upon the siting of the cabins. If it was intended to approve the principle whilst leaving detailed siting to be agreed on site, it is extraordinary that the approval contained no condition to reflect it (*e.g.* to the effect that precise locations were to be agreed on site with the planning officer). If the claimant's case were correct, it would follow that the claimant had planning permission, together with reserved matters approval, for the construction of 250 log cabins without *any* condition as to their detailed siting. Such a result would be very surprising. For all those reasons, if and in so far as the actual approval can be relied on as casting light on the scope of the application for approval, it tells against rather than in favour of the claimant's case.

39. I therefore conclude that the Inspector's reasoning on this issue was correct and that the Secretary of State acted lawfully in accepting it. It follows that there was no approval of all reserved matters within the three year period required by condition 1. The result was that the outline planning permission lapsed or expired at the end of the three year period: see *R v Leicester City Council Ex p. Powergen United Kingdom PLC* [1999] 4 P.L.R. 91 (Dyson J.) and [2000] J.P.L. 1037 (Court of Appeal). Any material operation carried out thereafter was and will be in breach of condition and therefore unlawful. It would have been open to the claimant to apply under s.73 of the 1990 Act for permission to proceed without complying with the condition as to timing of the application for approval of reserved matters, provided that the s.73 application was made before the expiration of five years from the date of the permission (see the combined effect of s.73(4) and the period specified in condition 1 as the period within which the development must begin). No such application was made. Accordingly the development was not the subject of any extant permission and the certificate of lawful development was correctly refused.

40. I should mention finally that in the alternative to his main submission on question 1, Mr Jones submitted that there was an *application* complying with Article 8 of the 1988 Order for approval of the siting of 250 cabins, but that the Council's *approval* was only a partial approval. It was agreed that the exact location of each cabin would have to be determined on site. The approval in respect of the siting of each cabin is yet to be given. There is no requirement in the outline planning permission that approval

must be given within a specified period; and the permission will therefore remain extant (pursuant to condition 1) until such approval is given and for a period of two years thereafter. In my view, however, this alternative submission adds nothing to the main case advanced on question 1. In each case the key point is whether the application for approval of reserved matters was an application for approval of details of siting in respect of all 250 cabins. I have held that it was not: it was an application in respect of the 18 cabins shown on the plans. In those circumstances there cannot be an extant but undetermined application for approval in respect of the balance of the 250 cabins. It is plain in any event that the application and the approval were coextensive.

***J.P.L. 218** **Question 2**

41. The issue here concerns the inspector's alternative finding that the works carried out for the construction of an access were unlawful since they were in breach of condition and the letter of November 1994 from the Council's planning department did not create a legitimate expectation or estoppel upon which the claimant could rely. In the light of my conclusion on question 1, I do not strictly need to deal with this issue, but I propose to do so for the sake of completeness.

42. Mr Jones's submissions have two prongs to them. First, he submits that the proposition that development commenced in breach of condition is unlawful is subject to a recognised exception where the local planning authority has agreed that development could start without full compliance with the conditions. In *Agecrest v Gwynedd County Council* [1998] J.P.L. 325, 334, Collins J. described this as "not a case of waiver but of the Council exercising a proper and sensible discretion in the manner in which it dealt with the conditions". In *Leisure Great Britain v Isle of Wight Council* (2000) 80 P. & C.R. 370, Keene J. stated the general principle of law that operations carried out in breach of a condition cannot be relied on as material operations capable of commencing the development, but referred to Agecrest as one of the "narrow exceptions to the general principle, … arising where the planning authority had agreed to work starting without compliance" (p.375). He also said that the decision accorded with normal legal principles.

43. The other prong to Mr Jones's submissions is that the letter from the planning department created a legitimate expectation that the works for construction of the access would be treated as lawful notwithstanding that they were in breach of condition. There was an unambiguous representation that there would be no objection to the works being carried out without compliance with conditions 2-6 of the reserved matters approval. In reliance on the representation the claimant carried out the works and in so doing incurred substantial expenditure. To go back on the representation would be in breach of legitimate expectation and an abuse of power. The argument was put in that way, rather than in terms of estoppel, because the House of Lords has recently held in *R v East Sussex County Council Ex p. Reprotech (Pebsham) Ltd* [2002] UKHL 8 that the private law concept of estoppel as used in cases such as *Lever Finance Ltd v Westminster (City) London Borough Council* [1971] A.C. 222 and *Western Fish Products Ltd v Penwith District Council* [1981] 2 All E.R. 204 is unhelpful in the field of planning law and that public law concepts such as abuse of power and legitimate expectation should be applied instead.

44. Mr Jones submits that the inspector (whose reasoning, as I have held, was accepted by the Secretary of State) failed to consider the *Agecrest* exception at all and failed to give proper consideration to legitimate expectation. As to the latter, the inspector proceeded on the erroneous basis that as a matter of law, following the decision in *R v Leicester City Council Ex p. Powergen United Kingdom PLC* [1999] 4 P.L.R. 91 (Dyson J.) and [2000] J.P.L. 1037 (Court of Appeal), a legitimate expectation could not arise in this context. The decision in *Powergen* as to the absence of a legitimate expectation depended not on any such legal principle but on the particular facts of the case. If the inspector had considered the particular facts in this case, he ought to have found a legitimate expectation for the reasons already summarised.

45. For the Secretary of State, Mr Brown submits generally 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 ***J.P.L. 219** 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.

46. Mr Brown advanced a number of other arguments on the issue of legitimate expectation, but I think it sufficient to highlight only one of them. He submitted that if the claimant's case on legitimate expectation is right, then it means that the claimant will have gained a right to build 250 chalets for which the planning permission has expired and which the Inspector and the Secretary of State (in accepting the Inspector's conclusions on the planning permission appeal) have found to be contrary to the wider interest.

47. Before setting out my conclusion on those rival submissions, it will be helpful for me to refer more fully to the decisions in *Powergen* and *Reprotech.*

48. The factual circumstances in *Powergen* were that *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. *Powergen* also applied under s.73 of the 1990 Act to extend the time-limit for submission of reserved matters in respect of the rest of the site to four years. It made a separate application under s.73 for a variation of condition 2 so as to restrict the operation of that condition to parts of the development for which approval of the reserved matters had not been obtained. Both applications were refused. *Powergen* applied for judicial review of the refusal to vary condition 2.

49. The first issue was whether upon the true construction of condition 2 it was a requirement of the planning permission that all reserved matters be approved before any part of the development could begin. Dyson J. held that it was. The Court of Appeal agreed, but held that this was in any event the effect of s.92 of the 1990 Act and that a condition having the requisite effect was to be implied if the actual condition did not echo the section faithfully.

50. The second issue was whether, by reason of dealings between the parties, *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. 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 ***J.P.L. 220*** 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 …

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 …

The application of these principles, specifically in the planning field, finds very clear expression in *Western Fish Products Ltd v Penwith District Council* [1981] 2 All E.R. 204 … Megaw L.J. (giving the judgment of the court) applied the principle that an estoppel could not be raised so prevent the council from discharging their statutory duty of determining planning applications.

He recognised, however, that there were two kinds of exception to the general principle. The first is that where a planning authority, acting as such, delegates to its officers powers to determine specific questions, any decisions they make cannot be revoked. An example of the application of this exception is *Lever (Finance) Ltd v Westminster (City) London Borough Council* [1971] Q.B. 222. The second is that if a planning authority waives a procedural requirement relating to any application made to them for the exercise of their statutory powers, they may be estopped from relying on lack of procedural formality.

Leaving on one side trivial matters, I find it difficult to discern the true scope of these exceptions. For example, the first exception seems to recognise that an authority may be estopped from performing their statutory duty if, under delegated powers, its officers have made decisions that are outside the powers of the authority themselves, but it is not clear to me how far this goes. It seems that the court in *Western Fish* was anxious to limit the true scope of the exceptions to the general principle."

51. Dyson J. stated, however, that he did not have to decide that question since *Powergen* 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 ***J.P.L. 221*** under the guise of the exercise of a general management discretion in the implementation of planning permissions."

52. He further stated that if he was wrong in rejecting the argument on legitimate expectation for the fundamental reason that the officers had no delegated power to vary or waive the conditions to which the planning permission was subject, and any undertaking purportedly given by them was not binding on the Council, he would reject the argument on the ground that the representations relied on were not sufficient to found a legitimate expectation and that *Powergen* had failed to show reliance (p.102E-F).

53. The Court of Appeal dealt very shortly with the appeal on the issue of legitimate expectation. Schiemann L.J. stated (at [2000] J.P.L. 1043, para. 23):

"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."

54. In *Reprotech,* solicitors for a potential purchaser of a waste treatment plant had written to the Council with arguments that use of the plant for generation of electricity would not be a material change of use which required planning permission. There was no formal application for a determination pursuant to what was then s.64 of the 1990 Act (now s.192). An application was, however, made under s.73 of the 1990 Act for amendment of one of the conditions of the existing outline planning permission so as to encompass the proposed use. In a report to the Council the county planning officer said that he was satisfied that no material change of use was involved. The Council resolved to substitute a new condition subject to certain arrangements being agreed. But no planning permission was issued pursuant to the resolution and the s.73 application was eventually withdrawn. Some years later an application was made for declarations *inter alia* that the Council's resolution constituted a determination under s.64 that no planning permission was required for the generation of electricity.

55. The House of Lords held that the Council's resolution to grant planning permission could not impliedly constitute a binding determination under s.64. There was also, however, an argument on estoppel, which Lord Hoffmann, giving the leading speech, went on to consider as follows:

"32. Mr Porten Q.C., who appeared for the respondent, submitted that even if the resolution was not a determination under section 64, the County Council are estopped by representation or convention from denying that electricity can be generated on the site without further planning permission. I think that even if the council was a private party, there is no material upon which an estoppel can be founded. The opinion of the County Planning Officer could not reasonably have been taken as a binding representation that no planning permission was required. Planning officers are generally helpful in offering opinions on such

matters but everyone knows that if a binding determination is required, a formal application must be made under what is now section 191 or 192. Nor was the committee resolution such a representation …

33. In any case, I think that it is unhelpful to introduce private law concepts of estoppel into planning law. As Lord Scarman pointed out in *Newbury District Council v Secretary of State for the Environment* [1981] A.C. 578, 616, estoppels bind individuals on the ground that it would be ***J.P.L. 222*** unconscionable for them to deny what they have represented or agreed. But these concepts of private law should not be extended into the "public law of planning control, which binds everyone'. (See also Dyson J. in *R v Leicester City Council Ex p. Powergen UK Ltd* [2000] J.P.L. 629, 637.)

34. There is of course an analogy between a private law estoppel and the public law concept of legitimate expectation created by a public authority, the denial of which may amount to an abuse of power: see *R v. North and East Devon Health Authority Ex p. Coughlan* [2001] Q.B. 213. But it is no more than an analogy because remedies against public authorities also have to take into account the interests of the general public which the authority exists to promote …

35. It is true that in early cases such as the *Wells* case and *Lever Finance Ltd v Westminster (City) London Borough Council* [1971] 1 Q.B. 222, Lord Denning M.R. used the language of estoppel in relation to planning law. At that time the public law concepts of abuse of power and legitimate expectation were very undeveloped and no doubt the analogy of estoppel seemed useful. In the *Western Fish* case the Court of Appeal tried its best to reconcile these invocations of estoppel with the general principle that a public authority cannot be estopped from exercising a statutory discretion or performing a public duty. But the results did not give universal satisfaction: see the comments of Dyson J. in the *Powergen* case [2000] J.P.L. 629, 638. It seems to me that in this area, public law has already absorbed whatever is useful from the moral values which underlie the private law concept of estoppel and the time has come for it to stand on its own two feet."

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. It cannot be assumed that exceptions previously found to exist will still apply. 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 s.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. First, the facts do not support it. All that happened in this case was that the planning officer stated that he would have "no objection" to access works being carried out without prior submission and approval of details required by the conditions of the *reserved matters approval.* As the inspector pointed out in paragraph 14.7 of his report, the parties appear to have overlooked, and in any event it has not been established that they were referring to, condition 2 of the *outline planning permission.* There was no representation that *that* condition would be "waived", let alone that works done without complying it would be treated as "lawful" for the purposes of implementation of the planning permission. Even if there had been such a representation, I do not think that there was ***J.P.L. 223*** sufficient evidence that the officer concerned had the delegated power to make such a representation on behalf of the Council.

60. Secondly, and more importantly, I share the concern expressed by Dyson J. in *Powergen* about the sidestepping of the statutory provisions of s.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 s.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.

63. I should mention that Mr Jones also referred to a recent judgment of my own in *Downderry Construction Ltd v Secretary of State for Transport, Local Government and the Regions* [2002] EWHC 2 (Admin), in which I considered and applied earlier authorities on estoppel. In that case it was common ground that the matter fell to be decided by reference to estoppel. My attention was not drawn to *Powergen* and the judgment predated *Reprotech.* My approach would otherwise have been very different. The contrast between *Downderry* and the views expressed in the present judgment serves to illustrate the extent of the reappraisal now required.

64. I therefore hold that the Secretary of State was right to accept the Inspector's conclusion on question 2 and that that conclusion provided an alternative and independent basis for dismissing the LDC appeals. If the claimant had wanted to safeguard its position in relation to the access works and the commencement of development, it could and should have gone down the s.73 route. Nothing in the Council's stance prevented it from doing so.

Question 3

65. Although Mr Jones identified a further issue, as to whether the works carried out on the access constituted a material operation, I do not need to deal with it. The fact is that the Inspector found in the ***J.P.L. 224*** claimant's favour on question 3 and I have held that the Secretary of State accepted the Inspector's conclusion. That would assist the claimant only if it had succeeded on the previous questions. It cannot assist in circumstances where its case on both previous questions has been rejected.

Conclusion

66. For the reasons given, the challenge to the Secretary of State's decision fails and the claim is dismissed.

Comment. Paragraph 56 of this judgment from Richards J should be displayed in every planning lawyer's office. It simply states:

"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. It cannot be assumed that exceptions previously found to exist will still apply. Substantial reappraisal is required."

This decision, along with others such as *Burkett, Reprotech,* and *Henry Boot* mark out 2002 as one of the most significant years for judicial policy making in the field of planning law. Viewed collectively they signal an end to the attitude prevalent amongst some administrators and policy makers that planning law was somehow detached from mainstream public law and that it was a process that primarily involved the planning authority and the developer and to which the public had no active part to play. Thus planning has now been brought into the public law fold, a measure that is entirely consistent with concepts such as transparency in decision making by public bodies. As Richards J so succinctly put it "Substantial reappraisal is required".

Commentary by Martin Edwards.

Richards J.:

Henry Boot Homes Limited v Bassetlaw District Council

Positive/Neutral Judicial Consideration

Court
Court of Appeal (Civil Division)

Judgment Date
28 November 2002

Case No: C/2002/0820

Court of Appeal (Civil Division)

Neutral Citation Number: [2002] EWCA Civ 983, 2002 WL 31599673

Before: Lord Justice Brooke , Lord Justice Keene and Mr Justice Bodey

Thursday 28th November, 2002

On Appeal from the Queens Bench Division Administrative Court

(Sullivan J.)

Representation

Mr David Holgate Q.C. and Mr Timothy Morshead (instructed by Messrs. Hammonds Suddards Edge , Leeds LS3) for the Appellant.
Mr Mark Lowe Q.C. and Mr Jonathan Clay (instructed by Legal Services Department, Bassetlaw District Council) for the Respondent.

JUDGMENT

Lord Justice Keene:

Introduction

1.. The Town and Country Planning Act 1990 ("the Act") makes provision for the expiry of planning permissions not implemented within a certain time. It does this by requiring any planning permission which is granted to be subject to conditions under which the development to which the permission relates must be begun within a certain period.

2.. If the development has not been begun by the end of that period, then it is no longer authorised by the permission: section 93(4)(a) . The Act also defines when it is that development begins. Section 56(2) provides that:

> "development shall be taken to be begun on the earliest date on which any material operation comprised in the development begins to be carried out."

"Material operation" is then defined so as to include various kinds of works, including any work of construction in the course of the erection of a building:— section 56(4) .

3.. The conditions imposing the time limits are to be found in sections 91 and 92 of the Act, the latter dealing with outline planning permissions as opposed to full planning permissions. The present appeal is concerned with an outline planning permission, but the issues raised affect all planning permissions covered by either of those two sections. It is unnecessary to

set out the terms of those two sections in this judgment because the planning permission involved in the present case contained conditions complying with the Act, conditions to which I shall refer in due course. In addition to those time limit conditions, planning permissions regularly include a number of other conditions relating to the development. This appeal concerns whether and in what circumstances development under a planning permission can be said to have begun as a result of a material operation carried out in breach of a condition on the permission and to what extent there can be a legitimate expectation on the part of a developer that the local planning authority will treat the material operation as authorised by the permission despite the breach of condition.

The facts

4.. The facts of this case were set out in detail by Sullivan J in his judgment in the court below, a judgment reported at *[2002] J.P.E.L. 1224* . However, it is said by the appellant, Henry Boot Homes Limited, that that judgment does not refer to all the material facts, and so it is necessary to cover them afresh in this judgment, particularly because of the emphasis being placed by the appellant on a legitimate expectation resulting from the respondent's conduct.

5.. The case concerns a site of some 13 hectares (32 acres) or thereabouts located in the valley of the River Idle at Retford, Nottinghamshire. The respondent is the local planning authority for the area. The river forms the eastern boundary of the site. To the west lies residential development served by a number of estate roads, such as Heathfield Gardens and Camborne Crescent, leading into Hallcroft Road. To the north there is open land, as there is to the immediate south, with a retail store and a road called Amcott Way beyond it.

6.. The site can be regarded as being divided into two parts by a drainage ditch running roughly north — south. The smaller western part is referred to in the documents as Part A or Site A. On part of this area some 63 houses have now been built, with part of an estate road having been laid out on the remainder. The larger eastern part, B, is undeveloped and some of it is part of the floodplain of the River Idle.

7.. In May 1994, at which time the whole site was undeveloped, outline planning permission for residential development of the whole site was granted, contrary to the recommendation of officers and despite objection from the highway authority, the National Rivers Authority and some local residents. The only vehicular access obtainable as things stood was via the residential estate road, Heathfield Gardens, and onto Hallcroft Road where there were already traffic problems. The permission, which envisaged some 315 dwellings, was subject to a number of conditions, some of which required work to be done or details to be approved before any development began. It is unnecessary to set them out, because they were incorporated into a later permission, of greater significance for this appeal. But one of the conditions, condition 3, required that the road layout on site should include a particular feature and that no dwelling be commenced until that road feature had been provided.

8.. Later that year, the appellant bought the site, though it indicated that it had “serious reservations about the effect of the floodplain of the River Idle on the nett developable area”. It then applied in April 1995 for an amendment to condition number 3 on the 1994 permission so that the road layout could be varied in a particular way. This was an application under section 73 of the Act, which enables an application to be made:

> “for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted.” (section 73(1))

9.. On such an application, the LPA can only consider the question of the conditions to be attached but the end result, if it is decided that permission should be granted subject to different conditions from those in the original permission, is a wholly new planning permission. That is what happened here. On 2 August 1995 the respondent granted a new outline permission similar to the 1994 permission but with a different condition 3. This outline permission (“the outline permission”) is central to this case. It contained first the time limit condition required by section 92(2) of the Act:

> “1. Application for approval of reserved matters must be made not later than the expiration of three years beginning with the date of this permission and the development must be begun not later than whichever is the later of the following dates:
>
> (a) the expiration of five years from the date of this permission; or

(b) the expiration of two years from the final approval of the reserved matters …"

Condition number 2 was the standard reserved matters condition:

"2. The siting, design and external appearance of the building(s), the means of access thereto, and the landscaping of the site shall be only as may be approved in writing by the District Planning Authority before any development commences."

Condition 3 was as follows:

"The details required by condition No 2 above shall provide for an adoptable road layout which shall include an extension of Heathfield Gardens in a easterly direction, making provision for access to adjoining land to the south in the manner indicated in Drawing No BH6616/1F …

No dwelling shall be commenced until the extension to Heathfield Gardens, including the roundabout and the access to the land to the south have been constructed to at least base course level, from the existing end of Heathfield Gardens to the point where it meets the southern boundary site."

One can then go to condition number 8:

"No development of the site shall begin until such time as full details of the manner in which foul sewage and surface water are to be disposed of from the site have been submitted to and agreed in writing by the District Planning Authority."

Condition 10:

"The landscaping scheme required by Condition No 2 shall be submitted to and approved in writing by the District Planning Authority before development commences …"

10.. On 8 September 1995 the appellant applied for approval of the reserved matters under Condition 2. Various discussions and meetings took place, including ones involving the National Rivers Authority, who were concerned about flooding. The appellant stated that it wanted to begin development as soon as possible and, according to the minutes of one meeting "agreed to limit the first phase to land outside the floodplain".

11.. On 17 November 1995, even before the application for reserved matters approval had been determined, the appellant wrote to the respondent to confirm that development would commence in January 1996. An application was then made for a building regulation approval for a number of the proposed dwellings.

12.. On 5 December 1995 the reserved matters application was approved, subject to a number of conditions, including:

"2. No dwelling shall be commenced until the extension of Heathfield Gardens has been constructed, and surfaced to at least base course level, from the existing end of Heathfield Gardens to the point where it meets the southern boundary of the site …

5. Before development commences precise details of the finished floor level of each dwelling, road and footpaths, garden areas and open spaces shall be submitted to and agreed in writing with the District Planning Authority …

6. The facing and roofing materials to be used in the development hereby permitted shall be only as may be agreed in writing by the District Planning Authority before development commences.

7. A scheme for tree planting on and landscaping treatment of the site, including the area indicated as Public Open Space, shall be submitted to and agreed in writing by the District Planning Authority before development commences …

8. The form of surfacing used for all outdoor hard surfaces on the site shall be only as may be agreed in writing by the District Planning Authority before development commences.

9. Precise details of the landscaped strip adjacent to the River Idle shall be submitted to and agreed in writing by the District Planning Authority before development commences …

10. No development of the site shall begin until such time as full details of the manner in which foul sewage and surface water are to be disposed of from the site have been submitted to and agreed in writing by the District Planning Authority.

12. Precise details of the landscaping, surfacing treatment and footpath provision for the strip of land containing the gas main shall be submitted to and agreed in writing with the District Planning Authority before development commences …"

13.. There is no dispute that this approval ("the detailed approval") met condition 2 of the outline permission dealing with those matters referred to as "reserved matters", and consequently the three year time limit for approval of reserved matters, set out in condition 1 of the outline permission, was met. All that remained was to begin the development within 5 years of the date of the outline permission, that is to say by 2 August 2000. Likewise there is no dispute about two further facts: first, works sufficient in physical terms to amount to a "material operation" within the meaning of section 56 of the Act began on 16 January 1996 and continued for a considerable time thereafter, as I shall describe; secondly, as Sullivan J noted, such works began without compliance with condition 8 of the outline permission (covered also by condition 10 of the detailed consent) and without compliance with conditions 5, 6, 7, 8, 9, 10 and 12 of the detailed consent. Each of those conditions stipulated either that something was to be done "before development commences" or that "no development of the site shall begin until" some action had been carried out.

14.. There had been an application on 8 December 1995 by the appellant for approval of an external finishing schedule, in effect under condition 6 of the detailed approval, for what was described as "the first phase" of the development. This was approved by the respondent on 2 February 1996, but the letter of approval went on to say:

"I would also take this opportunity to highlight other conditions of [the] planning application which have yet to be complied with, I trust these matters will be given attention at the earliest opportunity."

There was likewise an approval on 24 April to landscaping proposals for part of the site, described as "phase III", so that there was partial compliance with condition 7 on the detailed approval. Once again the officer writing on behalf of the respondent reminded the appellant of the need for "full compliance" with that condition and of the requirements of the other conditions.

15.. However, in the meantime other more dramatic events had been taking place. During 1995 concern had been growing about the number of planning permissions which had been granted by the respondent authority against professional advice, almost always to the benefit of a particular individual developer. This individual had been the driving force behind the company which had obtained the 1994 outline permission on the site with which we are concerned, and that 1994 permission was one of those causing concern. The result was the appointment by the full Council of the respondent in November 1995 of Mr Richard Phelps CBE to carry out an independent investigation of those concerns. He reported to the respondent in March 1996. His report was highly critical of the respondent's Planning Committee. Para. 2 (xii) stated:

"A reasonable outside observer must conclude that the Committee has been manipulated in some way. Otherwise there is no rational explanation to the way in which the Hallcroft Road decision was reached, or the outline planning permission for site 9 at Ordsall."

The Hallcroft Road decision was the grant in 1994 of permission for the site in this appeal. The outline planning permission for the site at Ordsall was subsequently quashed in judicial review proceedings brought by the leader of the Council, Mr Oxby: see *R -v- Bassetlaw District Council ex parte Oxby [1998] PLCR 283* .

15.. Mr Phelps recommended that "to restore confidence in the planning system in Bassetlaw, the present Planning Committee should resign en bloc as soon as practicable".

15.. His report also stated:

> "The Council should decide within about 6 months whether in relation to the major part of the Henry Boots site in the Idle Valley (i.e. the '212 houses'), they should revoke the planning approval completely or modify it and/or meet the cost of the construction of a connecting road to Amcott Way."

The "major part of the Henry Boots site" there referred to is the area known as part B. It is clear that it was that part which gave rise to the significant planning objections.

16.. I should say at this point that there is no criticism of the appellant company in the Phelps Report and it is accepted by the respondent that the appellant bought the site in good faith. It is, as Sullivan J commented, a reputable house-building company. Nonetheless, on the receipt of the Phelps Report the respondent had to consider what was to be done about this site or at least the major part of it. The Report had emphasised the severity of the damage which would be done to the community, were part B of the site to be developed for housing.

17.. On 2 May 1996, the respondent wrote to the appellant, referring to Mr Phelps' recommendation that the authority should decide "within about 6 months" whether to revoke or modify the permission in respect of part B of the site and/or meet the cost of constructing a road south to Amcott Way. The letter continued:

> "Council officers have begun to consider available options in relation to this matter and will wish to discuss these with you in the near future.
>
> However, in the meantime, I am writing to you specifically in relation to the latest approval granted on 5 th December 1995. There are a number of conditions of the approval which have not been complied with notably 2, 3, 5, 8, 9, 10 and 12. Clearly consideration needs to be given to providing appropriate details to deal with the requirements of these conditions. My purpose in writing is in relation to condition 2.
>
> I believe it is unlikely that the Council will seek to revoke or modify the permission in so far as it relates to that part of the site to the west of the dyke [Site A]. However, one of the options available to the Council is to consider revocation or modification of the permission in relation to the remainder of the land. In these circumstances, I would suggest that full compliance with the requirements of condition 2 would be inadvisable and I can confirm that no action to ensure such compliance will be taken by the Council at this time.
>
> An appraisal of the land in the Idle Valley has been started and other information is being sought from the highways authority and the Environment Agency. The intention is to reach conclusions in this matter as soon as possible. Obviously, your firm will need to be involved in formulating decisions on this."

Condition 2 on the detailed approval was the one which required the construction and surfacing to base course level of a road from Heathfield Gardens to the southern boundary of the site.

18.. There was then a meeting between representatives of both parties to discuss the options, with notes being taken of the discussion. Those reveal that representatives of the appellant expressed concern that the Council was viewing their site in two parts; they had bought it as a whole, designed it as a whole — any phasing was set for the convenience of the developer.

18.. It was also recorded that, as between revocation and modification of the permission, the Council's view was that modification was more likely since Henry Boots had already started to develop part of the site.

18.. This meeting was subsequently referred to in a letter from the appellant to the respondent's Head of Legal Services, dated 4 July 1996, in which it was said:

> "As you acknowledged, the development has commenced and the permission has been implemented. The company is presently investing heavily in the site with infrastructure works, roads and sewers, show homes and production units."

In August a local resident wrote to the Council saying that houses were being constructed and was told that the development was being carried out under the 1995 outline permission.

18.. At a meeting between representatives of both parties in that same month, the Chief Executive of the respondent, Mr Havenhand, referred to the judicial review proceedings being taken in respect of the planning permission granted for the site at Ordsall. The appellant's minute of this meeting records that:

> "Mr Havenhand reiterated that the current objective was to establish that Ordsall was an unlawful decision and the real aim of the judicial review is to provide substantive proof to the police. Mr Havenhand went on to acknowledge our planning permission was valid."

19.. In November 1996 the respondent gave written approval for details of floor levels, roads and footpaths, gardens and open areas for the westernmost part of the site under condition 5 of the detailed approval. The letter noted that the details:

> "… discharge the requirements of Condition No 5 for this part of the site. The condition will only be fully discharged when the necessary levels details for the whole of the site have been agreed in writing."

An internal note by an officer of the respondent, undated but probably in about November 1996, observed that the appellant was in breach of conditions but the writer thought that matters could be resolved simply. The note made reference to "the first phase" of the development. This and other documented material shows that by this time the respondent's officers were aware that the appellant had started work on the site and had done so in breach of condition. For example, in February 1997, a memorandum from the Head of Planning Services of the Council notes that the appellant had failed to comply with the terms of the planning consent in that they had not supplied information on floor levels et cetera required by that consent before building commenced.

20.. There was then a meeting between representatives of the appellant and respondent on 24 February 1997 in an attempt to arrive at a solution of the problems concerning the site in the light of the Phelps Report. The appellant was expressing concern at the delays. The respondent proposed that access to part B of the site should be obtained other than via Heathfield Gardens, which would then only serve what was referred to as the First Phase. The appellant objected that the Council was attempting to phase the development by artificial means.

21.. Nonetheless, discussions about a possible compromise went on, so that by early May 1997 the officers were recommending that the Council should look to find solutions rather than opting for revocation of the 1995 outline permission. Further studies were undertaken and eventually on 22 December 1997 there was a report by officers to a Special Council Meeting. This set out the various options, including revocation of the permission insofar as it related to part B of the site, purchase of that part of the site by the Council, or an alternative form of development on that area. The last of those options would have reduced development in the floodplain and amended the road layout. It required a new planning application and permission. It was this last option which found favour with the Council, and therefore it was contemplated that the appellant would submit a new planning application.

22.. The respondent's officers reminded the appellant again in July 1998 that it had not yet complied with most of the conditions on the existing consent. In that same month the respondent published a number of Topic Papers for the forthcoming Local Plan Inquiry, including one dealing with the Phelps Report. In the course of this paper it was said that a valid planning permission existed on the appellant's site and that implementation of the permission had begun. Some of the houses were occupied. Similar comments were subsequently made in proofs of evidence used by the respondent at the Local Plan inquiry.

23.. On 7 August 1998 and 11 September 1998 the appellant submitted its revised scheme, in the shape of applications for planning permission for housing on the undeveloped parts of the site, namely the balance of Part A and the whole of part B. The Local Plan Inquiry itself began in September 1998, and heard objections from a number of parties to the proposed allocation of this site for housing development. One of those objectors was another house-builder, Aldergate Properties Limited ("Aldergate"). Subsequently, Aldergate wrote to the respondent threatening judicial review if it dealt with the appellant's pending planning applications before the Local Plan inspector had reported. The appellant expressed concern about the delay but the respondent decided that it had to take Counsel's opinion on the matter.

24.. Counsel advised in writing on 12 February 1999. He had been instructed that "Development within Part A has already commenced pursuant to the extant permission and some 40 dwellings have already been constructed". Much of his opinion was devoted to the issue of the alleged prematurity of any decision by the respondent on the appellant's applications, but he also addressed the question of the weight to be given to the existing planning permission. He referred to doubts as to whether that permission would in fact be implemented in full and then stated:

> "… If, as with the access pre-conditions, certain works cannot or will not be implemented, then all development is taking place in breach of planning control. If those works are not practicably capable of being implemented then the very validity of the permission itself may be in question."

25.. This seems to have been the first time that any question as to the validity of the outline permission had been raised. Counsel advised that an assessment of the viability of implementation of that permission be made, and the respondent's Planning Committee accepted that recommendation on 3 March 1999.

26.. Following reminders to the appellant that it needed to comply with the conditions on the permission, the respondent's Head of Legal and Estate Services, Mrs Brown, wrote on 14 May 1999 as follows:

> "I note from our meeting that your Company probably intended to recommence building in advance of the Council's consideration of the outstanding planning application for the Site.
>
> You will be aware that the permission is subject to a number of conditions that have yet to be complied with. In view of the sensitivity of the Site the Council would expect that you comply with all of these conditions before you commence any further works. In particular further information must be provided on the proposed levels and landscaping for the site as a whole in compliance with Conditions 5, 9 and 12."

On that same day she sought further advice from Counsel, noting that the appellant was in breach of several conditions on the permission and asking for his views on the expediency of issuing an enforcement notice. She also raised the issue of whether the validity of the permission could be challenged because of the breaches of condition, though she expressed the view that the courts would be reluctant to quash the permission,

> "particularly if one takes into account the delay by the authority and our practice with other developers in not requiring compliance before development."

Counsel advised on 17 June 1999 that development commenced in breach of conditions precedent would not have begun pursuant to the outline permission and detailed consent.

27.. That advice was not disclosed to the appellant. Very remarkably it was not set out or even referred to in the officer's report to the Planning Committee at its meeting on 18 August 1999, when the pending applications by the appellant were under consideration. The suggested explanation is that Mrs Brown was away on leave then and the matter was dealt with by a recent recruit to the Legal Services Department. The report to Committee simply referred to the existing permission as valid and went on to note that the development proposed in the outline permission had commenced. The report recommended granting both applications, subject to conditions and a section 106 agreement, and the Committee accepted that recommendation.

28.. All must have seemed to the appellant to be proceeding smoothly, when Aldergate returned to the attack. On 20 October 1999 Aldergate sent a letter before action and on 5 November 1999, before any planning permission had been granted as a result of the 18 August 1999 decisions, Aldergate and Mr Christian, a local resident living in Camborne Crescent close to the site, applied in the High Court for permission to bring judicial review proceedings to quash those decisions. At the forefront of the grounds set out in their Form 86A application was the contention that the respondent had erroneously assumed that there was in existence already an extant and viable permission. At para. 37 it was said:

> "Aldergate has very little information as to when, if at all, the conditions of any of the above planning permissions were fulfilled. It will be seen in due course that an (undated) internal memorandum of Bassetlaw suggest[s] that there may well be conditions which were not fulfilled within the required time period. Aldergate's own investigations suggest that Conditions

2, 3, 5 (in part), 7 (in part), 8, 9, 10 and 12 of planning permission 1/95/73 have not been fulfilled within the required time. At the very least this raises questions as to whether any of the planning permissions were extant in August 1999."

29.. Receipt of this Form 86A was acknowledged by the appellant's solicitor on 9 November 1999. On 23 December 1999, Mrs Brown wrote to those solicitors, advising them that pending certain investigations no planning permission would be issued pursuant to the August 1999 resolution and that the Council could not at this stage commit itself to a position whereby any further works carried out would be assumed to have the benefit of a valid planning permission. "If such works continue it should be clearly understood by your clients that the Council is not at this stage prepared to warrant that those works would be authorised."

29.. The appellant's solicitors demanded to know on what basis it was contended that the works might not be authorised, to which Mrs Brown replied on 14 February 2000, saying that:

"A question has been raised over the 1995 permission because of the failure of your clients to comply with the conditions attached to that permission especially conditions precedent and Counsel's advice is being sought on this issue.

Your client's failure to comply with conditions attached to the permission means any further development of the site is a breach of planning control and should your clients continue with the development you should be aware and be on notice that the Council's intention would be to take enforcement action against your clients, which may include an injunction under Section 187B of the 1990 [Act]. By return please provide an assurance that no further development will proceed until the status of the 1995 planning permission in relation to the site has finally been resolved."

In a letter dated 25 February the appellant's solicitor said:

"We believe that your Council has had all the information required to enable the satisfaction of these conditions. It may be that there was some procedural informality but this reflected the practice of your Council in other matters relating to this development as well as other developments elsewhere. Indeed alterations to the layout have been carried out informally at your Council's request (under condition 2) …

We have now advised our clients to make a new application for approval of all these matters to clear up any future misunderstanding. These applications are made on a without prejudice basis."

30.. A vigorous correspondence followed, but in any event on 10 March 2000 applications were made by the appellant in order to seek to meet the terms of conditions 5, 6, 7, 8, 9, 10 and 12 of the detailed approval of 5 December 1995. These were said to be made on a "without prejudice" basis. Subsequently an application in respect of condition 4 was also made.

31.. Mrs Brown wrote on 15 March 2000 to the appellant's solicitors saying that the Council intended seeking a declaration in the High Court as to the status of the 1995 planning permission, and her letter continued:

"In the meantime and for the avoidance of doubt Counsel has advised that the development which has already occurred on the site as well as that which appears to be taking place at present is in breach of planning control. Accordingly I must insist that your client desists from developing the site further and provides me with a written assurance that building work on the site has stopped and will not begin again until the Court has given its final judgment as to the status of the planning permission …"

32.. The appellant's solicitors responded by pointing out that, as detailed approval of reserved matters had already been granted, their clients could submit applications to meet the outstanding conditions until 1 August 2000. They added that no new development would be undertaken until the recent (10 March) applications were approved.

33.. By now, the respondent had clearly received further advice from Counsel, since Mrs Brown referred in a letter dated 27 March 2000 to a number of decisions in the courts, including *Whitley and Sons -v- Secretary of State for Wales [1992] 64 P & CR 296* , dealing with the effect of a breach of condition on the starting of development. She observed that it did not seem to be in

dispute that development of the site had proceeded in breach of conditions precedent and questioned whether the Council could now properly entertain the recent applications. In reply, the appellant's solicitors pointed out the distinction between approval of reserved matters, which was subject to a three year time limit, and approvals required under other conditions, which was not. Mrs Brown accepted that and agreed that the Council could lawfully deal with recent applications. On the same day, 30 March 2000, the appellant withdrew its 1998 applications for the "compromise" scheme, with the result that Aldergate's application for judicial review was never pursued to a hearing.

34.. There was then further correspondence about the effect of any approval of the March applications and about the need for further information about them, and a meeting took place between officers of the respondents and representatives of the appellant on 7 July 2000. The applications went to the Council's Planning Committee on 19 July 2000, with a recommendation from officers to refuse approval of most of them, because they were unsatisfactory in a number of respects. The Committee approved the applications in respect of conditions 4 and 6, but refused those relating to conditions 5, 7, 8, 9, 10 and 12.

35.. On 31 July 2000, the appellant appealed to the Secretary of State against those refusals. Further details which had been submitted during July in relation to the conditions were considered by the committee on 1st August 2000 but no decision notices were issued by the respondent and no appeals were made by the appellant in respect of these decisions. Also on 31st July 2000 it submitted two applications under section 73 of the Act to vary conditions on the outline permission and the detailed approval. One of these sought to vary condition 1 on the outline permission so as to extend the time for the commencement of development; the other sought to vary the outline permission and detailed approval so that the development of Part A of the site could be completed without complying with conditions 1 to 12. An application was also made under section 73A to obtain retrospective planning permission for the dwellings already built on part of Part A of the site. Those applications were said to be made "without prejudice" to the contention that the outline permission would remain valid after 2nd August 2000. We were told during argument that the first application was in due course refused by the respondent and that there was no appeal by the appellant. The other two applications were not registered by the council because insufficient detail had been submitted to them by the appellant and the appellant took no further action to pursue these applications. It seems that the 63 dwellings which have been built on Part A have since been granted full permissions as a result of a number of applications made by the owners or others.

36.. As for the appeal to the Secretary of State against the refusal of approval under the various conditions, that has a somewhat curious history. The appellant's solicitors were told by the Planning Inspectorate that certain missing documents had to be supplied within six months of the local planning authority's decision. The appellant, however, failed to send the relevant documents by the deadline, and the appeal was as a result deemed invalid. Consequently the conditions in question have never been complied with, save that the details required under conditions 5, 7, and 8 (floor levels, landscaping and hard surfacing) were approved in respect of the developed area within Part A of the site.

The Legal Context

37.. It was accepted by counsel for the appellant in the court below, and not challenged before us, that there is an established principle of law that in order for operations to amount to the commencement of development under a planning permission, those operations must be authorised by the permission in question, read together with its conditions. In general, operations carried out in breach of a condition cannot be relied upon as material operations capable of commencing the development within the meaning of section 56(2) . This principle, sometimes referred to as the *Whitley* principle, goes back at least to the decision in *Etheridge v Secretary of State for the Environment [1984] 48 P&C R 35* , where Woolf J referred to the statutory time limit on starting development then contained in paragraph 20(1) of Schedule 24 to the Town and Country Planning Act 1971 and said:

> "if it were development that was commenced in contravention of conditions of planning permission, it seems to me that it would be development that, from the planning point of view, would be in breach of a planning control. Therefore it would not be a development contemplated by para. 20(1) …"

38.. That proposition was expressly approved in *Oakimber Limited v Elmbridge Borough Council [1991] 62 P&CR 594* , 609, by Purchas L.J., with whom Taylor L.J. agreed. Beldam L.J. was also prepared to endorse it, had it been necessary in his judgment to deal with that issue.

39.. In *Whitley* itself, Woolf L.J., with whom the other two members of the court agreed, reviewed the authorities and formulated the principle at p. 302:

> "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 properly be 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. It is a principle which I would have thought made good sense since I cannot conceive that when section 41(1) of the 1971 Act made the planning permission subject to a condition requiring the development to be begun by a specified date, it could have been referring to development other than that which is authorised by the permission."

Subsequent authorities have applied this principle. It has also been established that it operates even where the necessary detailed approvals for the works actually carried out have been obtained but where another condition on the permission has to be complied with before development began and there has been no compliance with that other condition: *Leisure Great Britain plc v Isle of Wight Council [1999] 80 P&CR 370* , where the authorities to this effect are reviewed at pages 376–377.

40.. The works carried out in the present case by the appellant were in breach of a number of conditions which had to be satisfied "before development commences". That is common ground. It would seem to follow that, on the face of it, those works could not amount to a valid commencement of development under the outline permission. It was indeed the decision of Sullivan J in the court below that the development authorised by that permission was not commenced prior to 2 August 2000 and that the outline permission was no longer extant. He granted declarations to the respondent to that effect and refused to grant declarations to contrary effect to the appellant, as well as refusing it a declaration that it had a legitimate expectation that the respondent would treat the development authorised by the outline permission and detailed approval as having commenced before that date, to which the respondent was bound to give effect and from which it would be unlawful for the respondent to resile.

41.. That brings me conveniently to the grounds on which Sullivan J's decision is now attacked by the appellant.

The Appellant's submissions

42.. It is contended first by the appellant that, as a result of the representations made on behalf of the Council and the conduct generally of the Council, it had a legitimate expectation in the terms which I have just set out. Mr Holgate, Q.C., for the appellant submits that over a period of years from May 1996 the respondent had indicated that the outline permission had been implemented. He points in particular to the meeting during that month as noted in the letter of 4 July 1996, to the Council's Topic Paper for the Local Plan inquiry and to its proof of evidence used at that inquiry in the autumn of 1998. Reliance is also placed on the report to Committee in August 1999 with its references to the development in the outline permission having commenced, as well as on a number of other documents. All this gave rise, it is said, to the expectation on the part of the appellant that the respondent would treat the development as having validly commenced, despite the breach of conditions.

43.. Moreover, the respondent gave piecemeal approval to details in respect of those houses which the appellant in fact built and took no action to prevent them being built. Only, it is submitted, in its letter of 14 February 2000 did the respondent give the appellant reason to believe that it had changed its position on this issue as to the valid commencement of development under the outline permission. By then, it was in reality too late for the appellant to rescue its position by putting together satisfactory applications to meet the outstanding conditions. It would therefore be unfair and an abuse of power to allow the respondent to resile from the position it had adopted for so long a period, especially since the appellant had relied upon the representation and conduct of the respondent.

44.. Mr Holgate cites *R v Inland Revenue Commissioners, ex parte Unilever plc [1996] STC 681* and *R v North and East Devon Health Authority, ex parte Coughlan [2001] Q.B.213* as demonstrating how a legitimate expression can arise in such circumstances. He recognises that legitimate expectation may have a more limited role to play in town and country planning law, because of the extent of public interest in the planning process. But he submits that the public would have had very little involvement in how the appellant met the terms of the conditions in question. As an approval under such a condition is not a "planning permission" under section 57 of the Act, there is no requirement for publicity of or consultation about an application for such an approval: see Town and Country Planning (General Development Procedure) Order 1995, Article 8 and 10 . Such

an application does not have to be included in the register of planning applications (see Art 25 of the 1995 Order), nor can the Secretary of State direct that such applications be referred to him for decision: section 77 of the Act. The only requirement is that such an application should be in writing (*R v Flintshire County Council, ex parte Somerfield Stores Limited [1998] PLCR 336* , 351 and *Tesco Stores v North Norfolk District Council [1999] JPL 920*). Therefore, argues Mr Holgate, there is no expectation on the part of the public that there would be consultation or publicity when an application for approval under a condition is made. In the present case the public might have concerns about the principle of the development of the site but those could not be raised on such an application, because outline permission had already been granted. In any event, the Council is entrusted with the responsibility of representing the public interest.

45.. The other way in which this argument is put is that there is a power in the local planning authority to waive the need for compliance with such conditions, and that in effect is what happened in the present case. A developer does not always have to make a formal application under section 73 of the Act to vary or discharge the conditions. The planning system needs to be practical and flexible, as was recognised by Collins J in *Agecrest v Gwynedd County Council [1998] JPL 32* . That case shows that, where a local planning authority waives the need for such compliance, development can commence for the purpose of sections 56 and 93 of the Act without compliance, thus operating as an exception to the *Whitley* principle. There can be exceptions to that principle, as *Whitley* itself established, and as was recognised in *Leisure Great Britain* and in the *Flintshire* case. Here the respondent chose in essence to deal with the implementation of the permitted development in a phased way, without insisting on strict compliance with the conditions. Mr Holgate relies on the *Divisional Court decision in R v Secretary of State for the Environment, ex parte Percy Bilton Ltd [1975] P&C R 154* as demonstrating that a local planning authority is entitled to adopt such an approach of phased implementation.

Analysis

46.. It seems to me that all these arguments are interrelated, at least to some extent. If, as Mr Lowe, Q.C., submits on behalf of the respondent, we now have a comprehensive code of planning control and the local planning authority does not have the power to waive in an informal way the need for compliance with a condition, the circumstances in which a legitimate expectation of the type suggested here will arise on the part of a developer because of the conduct of the authority will be very exceptional.

47.. It has long been recognised at the highest level that planning law is contained in a comprehensive code. In 1984, in *Pioneer Aggregates Ltd v Secretary of State for the Environment [1985] 1 A.C. 132* , Lord Scarman, with whom the rest of the House of Lords agreed, emphasised that fact and said at page 141 B.C.:

> "… if the statute law covers the situation, it will be an impermissible exercise of the judicial function to go beyond the statutory provision by applying such principles merely because they may appear to achieve a fairer solution to the problem being considered."

48.. The House of Lords was there dealing with the statutory code contained in the Town and Country Planning Act 1971 . Since that time, as Sullivan J noted in the present case (para. 137), the code has become even more comprehensive. Of particular relevance for present purposes is the introduction by section 49 of the Housing and Planning Act 1986 of what is now section 73 of the 1990 Act. That provides a statutory mechanism by which a person can, in effect, seek a variation in a condition on a planning permission or the discharge of such a condition. It does so by providing for an application:

> "for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted" (section 73(1))

49.. Thus it is the case that (to use the language of *Pioneer Aggregates*) "statute law covers the situation" when a developer wishes to vary or discharge one or more conditions on a permission. As Sullivan J commented, this, together with the power to appeal against a condition in the first place or to obtain retrospective permission under section 73A , builds in a considerable degree of flexibility to the statutory code (see paras. 137–140 of his judgment). I would add that the reality is that developers of experience, such as the appellant, also generally seek to negotiate the form of conditions with the local planning authority before any permission is granted.

50.. But the section 73 procedure has an additional importance. Because it operates by means of providing for an application to be made for "planning permission" without certain conditions previously imposed, it imports (as Mr Holgate accepts) the safeguards for third parties and the public generally which apply to applications for planning permission under the Act. Thus, although it is right that an application seeking approval under a condition does not attract the statutory provisions concerning publicity and consultation, an application under section 73 to vary or discharge such an existing condition does. Such an application has to be entered on the planning register, available to the public. Indeed, it can be called in by the Secretary of State for his own determination. The statutory procedure ensures that a condition requiring matters to be dealt with before development begins cannot be varied or discharged without an opportunity for the public to be informed and to object or make other representation. So the public is engaged in that statutory process.

51.. In those circumstances, the scope for such variation or discharge to be achieved by some other non-statutory method, bypassing the statutory safeguards for the public, must be extremely limited. Such a change is not simply a matter for bilateral agreement between the developer and the local planning authority. The public is entitled to be involved. As Dyson J said in the first instance decision in *R v Leicester City Council, ex parte Powergen United Kingdom plc [1999] 4 PLR 91* at 101 G–H:

> "… 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 side-stepped by persuading a local planning authority, still less an authorised officer, to vary or waive a condition under the guise of the exercise of a general management discretion in the implementation of planning permissions."

The reasoning of Dyson J was endorsed when that case went to the *Court of Appeal: see [2001] 81 P& CR 47* , at paras. 21, 47 and 48. Moreover, it is entirely in harmony with the *House of Lords' decision in R v East Sussex County Council, ex parte Reprotech (Pebsham) Limited [2002] UKHL 8, [2002] 4 All ER 58* , where the issue concerned the process of determining whether development requiring planning permission was involved. At para. 29, Lord Hoffmann said:

> "It is, I think, clear from this brief summary that a determination is not simply a matter between the applicant and the planning authority in which they are free to agree on whatever procedure they please. It is also a matter which concerns the general public interest and which requires other planning authorities, the Secretary of State on behalf of the national interest and the public itself to be able to participate."

52.. That is very much the nature of town and country planning law. Even more than many areas of public law which concern an individual and a public body, planning law is likely to have to reflect the fact that third parties and the public generally may have interests in any decision. I agree with what was said by Sullivan J in the present case at para 140:

> "… It is important at all times to remember the public nature of Town and Country Planning. It is not a matter for private agreement between developers and Local Planning Authorities."

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:

> "I have difficulty in seeing how the decision in *Agecrest* fits into the present statutory framework."

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.

55.. The interests of third parties and the public in such matters also greatly reduce the potential for a legitimate expectation, such as is contended for in the present appeal, to arise. One of the reasons is that it is difficult to see how a legitimate expectation, said to derive from the conduct of the local authority, could operate so as to prevent an interested third party from questioning whether development has validly begun and whether the planning permission is still extant. This is not a remote possibility: the commencement of judicial review proceedings by Aldergate and Mr Christian in the present case demonstrates how such issues extend beyond merely the developer and the local authority. Yet those third parties did nothing to give rise to any legitimate expectation on the appellant's part.

56.. Mr Lowe invited us to say that legitimate expectation could never operate so as to enable the developer to begin development validly and effectively in breach of condition. I am not prepared to adopt so absolute a proposition. It is possible that circumstances might arise where it was clear that there was no third party or public interest in the matter and a court might take the view that a legitimate expectation could then arise from the local planning authority's conduct or representations. But, as was said in the *Coghurst Wood* case, one suspects that such cases will be very rare. The situation which normally arises in a planning context is very different from that which obtains in cases such as *Unilever* , where the issue is essentially one as between the individual and the public body, in that case the Inland Revenue. Legitimate expectation has a far greater role to play in such circumstances.

57.. I turn then to the facts of the present case. It is true that for a long time the officers of the local planning authority assumed that development had started under the outline permission, and this view was expressed on a number of occasions. Even though they were aware that a number of conditions had not been complied with, they assumed that the works carried out amounted to an implementation of the outline permission. On the other hand, nothing shows that they applied their minds during that period to the legal issue of whether such works could *lawfully* amount to a start of development under that permission. It seems that they, like the appellant's executives and staff, simply assumed that those works had implemented the permission. Neither party appears to have been aware of the *Whitley* principle, until the respondent was advised by counsel on 17 June 1999.

58.. The issue whether the works carried out in breach of condition amounted to a start to “the development to which the permission relates” within the meaning of section 92(2) of the Act was and is essentially a legal one, to be determined in the last resort by the courts. It is not simply a matter for the local planning authority, and it means that any view expressed on it by the local planning authority is in a very different category from the normal case of a legitimate expectation that a public body will exercise its powers in a particular way. Moreover, insofar as the doctrine of legitimate expectation is to be seen as “rooted in fairness”, as it was put by Bingham L.J. in *R v Inland Revenue Commissioners, ex parte MFK Underwriting Agents Limited [1990] WLR 1545* , 1570, it is relevant that the appellant itself, as a substantial house-building company, had access to legal advice, had it wished to take it. It was as capable as was the local planning authority of informing itself as to the legal consequences of commencing development in breach of condition and of the problems in establishing that this amounted to a start of development under the outline permission.

59.. When these considerations are put into the legal context of the statutory code, I am wholly unpersuaded that any expectation on the appellant's part that its works would be treated as a lawful implementation of the outline permission was a legitimate one. Nor do the respondent's actions amount to an abuse of power. I do not accept that the appellant had no reason to anticipate until 14 February 2000 that the works carried out on site might not be regarded as a valid start to the permitted development. It was given a clear warning by the letter of the 23 December 1999 from Mrs Brown, but it should also have been alerted by Aldergate's application for judicial review in early November 1999. That application raised this very point, and while that application was not made by the respondent, the issues which it identified were patently going to have to be given careful consideration by the respondent.

60.. So a warning bell should have sounded some nine months before the outline permission was due to expire in the event of non-implementation. The evidence does not establish that this was an insufficient period of time for the applicant to have prepared applications capable of securing the approval of the local planning authority under the outstanding conditions or, if necessary, of the Secretary of State on appeal. The latter possibility is of relevance, because there is an exception to the *Whitley* principle established by the decision in *Whitley* itself. So long as the developer applies before the deadline for the outstanding approval or approvals, and those approvals are given (either by the authority or by the Secretary of State on appeal) after the deadline, preventing enforcement action from being taken, work done before the deadline in accordance with the scheme ultimately approved can amount to a start to development. The permission will have been lawfully implemented. The possibility of invoking that exception existed in the present case. The appellant applied in time for the outstanding approvals and, on refusal by the respondent, lodged an appeal in respect of one with the Secretary of State and failed to appeal the other. But, for reasons which remain shrouded in mystery, the appellant failed to pursue its appeal, which in due course lapsed.

61.. This part of the history is relevant to the issue of whether it would be unfair to allow the respondent to contend that there has not been a lawful start to development. The appellant had a method available by which it might have been able to achieve retrospective authorisation for the works it had carried out on site. It did not avail itself of that method.

Conclusion

62.. For the reasons I have set out, the appellant cannot be regarded as having established a legitimate expectation that its works carried out on site in breach of condition would be regarded as a lawful commencement of development under the outline permission for the purpose of sections 56 and 92(2) of the Act. Nor was there any lawful waiver of conditions, whether generally or to the extent of allowing phased development. Conditions on a planning permission must either be complied with, at least in substance (see the *Flintshire* case), or if it is sought to vary or discharge them, the mechanism laid down by Parliament in section 73 of the Act, or in appropriate circumstances in section 73A , must be utilised. That was not done in this case.

63.. In the light of the conclusions which I have reached on the appellant's contentions, it is unnecessary to deal with the argument raised in the respondent's notice that the officers of the local planning authority has no authority, actual or ostensible, to waive any of the conditions. If the authority had no power to waive the conditions by non-statutory means, then nor did its officers. That is not to say that the conduct of an authority's officers will be irrelevant to an issue of legitimate expectation. It may be rare that a legitimate expectation of the kind asserted in this appeal will arise in respect of a planning condition, but if and when it does the conduct of the local planning authority's officers is likely to be germane to a consideration of the issue. This, however, is not one of those rare cases.

64.. It follows that I would dismiss this appeal.

Mr Justice Bodey:

65.. I agree.

Lord Justice Brooke:

66.. I also agree.

Order: Appeal dismissed.