*4317 Lambeth London Borough Council v Secretary of State for Housing, Communities and Local Government and others

Positive/Neutral Judicial Consideration

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Supreme Court

Lord Reed DPSC , Lord Carnwath , Lady Black , Lord Lloyd-Jones , Lord Briggs JJSC

2019 May 21; July 3

Planning—Planning permission—Conditions—Proposed wording of planning permission that permission granted for sale of non-food goods only—Decision notice quoting proposed wording but no condition specifically set out—Whether permission containing condition restricting sales to non-food items—Correct approach to interpretation of planning permission— Town and Country Planning Act 1990 (c 8), s 73

Certain retail premises were used as a DIY store and garden centre pursuant to planning permission granted in 1985 which contained a condition restricting sales to specific types of non-food goods. A further, slightly wider, planning permission was granted in 2010 which also restricted sales from the premises to non-food items. In 2014, following an application under section 73 of the Town and Country Planning Act 1990 [1] to vary the relevant condition so as to further widen the types of goods which could be sold, the local planning authority granted fresh planning permission. The planning authority's decision notice referred to the "Original wording" which excluded non-food items and the "Proposed wording" for the amended condition as being: "The retail unit hereby permitted shall be used for the sale and display of non-food goods only and … for no other goods." However, the list of conditions subject to which the planning permission was granted did not include any express restriction on the type of goods that could be sold. The manager of the premises subsequently applied for a certificate of lawfulness of

proposed use or development, certifying that the premises could lawfully be used for unrestricted retail use including the sale of food. The planning authority refused the application on the ground that the 2014 permission restricted retail use to the sale of non-food goods. On the manager's appeal, an inspector appointed by the Secretary of State granted the certificate, finding that the 2014 permission contained no condition to that effect. The judge refused the planning authority's application under section 288 of the 1990 Act to quash the inspector's decision and the Court of Appeal upheld his decision.

On appeal by the local planning authority—

Held , allowing the appeal, that, whatever the legal character of a document, the focus was to find the natural and ordinary meaning of the words used, viewed in their particular context and in the light of common sense; that the operative part of the 2014 grant of planning permission was clear and unambiguous; that the local planning authority had approved what had been applied for, which was the variation of one condition from the original wording to the proposed wording, in effect substituting one for the other; that there was nothing to indicate an intention to discharge the original wording altogether, or in particular to remove the restriction on the sale of non-food goods; that such an interpretation was in accordance with the statutory context; and that, accordingly, no permission had been granted for the sale of food items (post, paras 19, 27–35, 43).

Trump International Golf Club Scotland Ltd v Scottish Ministers [2016] 1 WLR 85 , SC(Sc) applied.

Per curiam . (i) Section 73 of the Town and Country Planning Act 1990 does not specify what is to happen if a local planning authority wishes to change some ***4318** conditions in an existing planning permission but leave others in place. However, following government guidance, it is highly desirable that all conditions to which a new planning permission will be subject should be restated in the new permission and not left to a process of cross-referencing, and that grants under section 73 are couched in terms which properly reflect the nature of the statutory power (post, paras 13, 42).

Dictum of Sullivan J in *Reid v Secretary of State for Transport, Local Government and the Regions [2002] EWHC 2174 (Admin)* at [59] approved.

(ii) It is difficult to envisage circumstances in which it would be appropriate to use implication for the purpose of supplying a wholly new planning condition, as opposed to interpretation of an existing condition (post, para 27).

(iii) It will always be a matter of construction whether a later planning permission on the same piece of land is compatible with the continued effect of an earlier permission. In the present case, following implementation of the 2010 permission, the conditions would in principle remain binding unless and until discharged by performance or further grant. The 2014 permission did not in terms authorise non-compliance with the 2010 conditions, nor did it contain anything inconsistent with their continued operation. Accordingly, they would remain valid and binding, not because they were incorporated by implication in the new permission, but because there was nothing in the new permission to affect their continued operation (post, para 38).

Dictum of Lord Scarman in *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment [1985] AC 132* , 144, HL(E) applied.

Decision of the Court of Appeal [2018] EWCA Civ 844; [2019] PTSR 143 reversed.

The following cases are referred to in the judgment of Lord Carnwath JSC:

Attorney General of Belize v Belize Telecom Ltd [2009] UKPC 10; [2009] 1 WLR 1988; [2009] Bus LR 1316; [2009] 2 All ER 1127; [2009] 2 All ER (Comm) 1 , PC
Brayhead (Ascot) Ltd v Berkshire County Council [1964] 2 QB 303; [1964] 2 WLR 507; [1964] 1 All ER 149; 62 LGR 162 , DC
Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38; [2009] AC 1101; [2009] 3 WLR 267; [2009] Bus LR 1200; [2009] 4 All ER 677; [2010] 1 All ER (Comm) 365 , HL(E)
Crisp from the Fens Ltd v Rutland County Council (1950) 1 P & CR 48 , CA
I'm Your Man Ltd v Secretary of State for the Environment [1998] 4 PLR 107; 77 P & CR 251
Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment [1985] AC 132; [1984] 3 WLR 32; [1984] 2 All ER 358; 82 LGR 488 , HL(E)
Powergen United Kingdom plc v Leicester City Council [2000] JPL 1037 , CA
Pye v Secretary of State for the Environment, Transport and the Regions [1999] PLCR 28; [1998] 3 PLR 72

Reid v Secretary of State for Transport, Local Government and the Regions [2002] EWHC 2174 (Admin); 42 EG 158 (CS)
Trump International Golf Club Scotland Ltd v Scottish Ministers [2015] UKSC 74; [2016] 1 WLR 85; [2017] 1 All ER 307 , SC(Sc)

The following additional cases were cited in argument:

Arnold v Britton [2015] UKSC 36; [2015] AC 1619; [2015] 2 WLR 1593; [2016] 1 All ER 1 , SC(E)
Cherry Tree Investments Ltd v Landmain Ltd [2012] EWCA Civ 736; [2013] Ch 305; [2013] 2 WLR 481 , CA
Francis v Yiewsley and West Drayton Urban District Council [1958] 1 QB 478; [1957] 3 WLR 919; [1957] 3 All ER 529 , CA ***4319**
Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896; [1998] 1 All ER 98 , HL(E)
Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2015] UKSC 72; [2016] AC 742; [2015] 3 WLR 1843; [2016] 4 All ER 441 , SC(E)
Newark and Sherwood District Council v Secretary of State for Communities and Local Government [2013] EWHC 2162 (Admin)
Pink Floyd Music Ltd v EMI Records Ltd (Practice Note) [2010] EWCA Civ 1429; [2011] 1 WLR 770 , CA
R (Government of the Republic of France) v Kensington and Chelsea Royal Borough Council [2017] EWCA Civ 429; [2017] 1 WLR 3206 , CA
Scottish Widows Fund and Life Assurance Society v BGC International (formerly Cantor Fitzgerald International) [2011] EWHC 729 (Ch)

APPEAL from the Court of Appeal

By a CPR Pt 8 claim form the local planning authority, Lambeth London Borough Council, applied under section 288 of the Town and Country Planning Act 1990 to quash the decision dated 6 December 2016 of an inspector appointed by the Secretary of State for Communities and Local Government (now the Secretary of State for Housing, Communities and Local Government) to grant a certificate of lawfulness of proposed use or development under section 192(1)(a) of the 1990 Act to the first interested party, Aberdeen Asset Management Ltd, certifying that certain premises used as a DIY and garden centre (of which the first interested party was the manager, the second interested party, Nottinghamshire County Council, was the owner and the third interested party, HHGL Ltd, was the leaseholder), could lawfully be used for unrestricted retail use including the sale of food. The grounds of challenge were that the current 2014 planning permission for the premises included a condition restricting sales to non-food items, either as a matter of interpretation or by implication, and that a condition which set a three-year time limit for the commencement of development was valid and had not been complied with. By a decision dated 3 October 2017 Lang J [2017] PTSR 1494 refused the application, holding, inter alia: (i) that the intended purpose had not been given legal effect by the wording of the 2014 permission because of flawed drafting, and it was not possible to interpret the conditions in the 2014 permission as including the "proposed

wording"; and (ii) that, without a condition limiting use, the permitted use was a retail use subject to appropriate conditions.

By an appellant's notice dated 23 October 2017 and with permission of the judge the local planning authority appealed on the grounds, inter alia, that (1) the judge had erred in her conclusions as to the wording of the 2014 permission, wrongly having rejected implication of the proposed condition; (2) alternatively, the judge had not correctly interpreted the 2014 permission and her decision ought not to be interpreted in a manner which would restrict the use of the relevant premises to non-food retailing; and (3) the judge had erred in her interpretation of section 91 of the Town and Country Planning Act 1990 , either because section 91(4) did not exclude the application of section 91 , or because the condition was capable of being imposed under other powers and was thus not invalid. On 20 April 2018 the Court of Appeal (Lewison, Hamblen and Coulson LJJ) [2019] PTSR 143 upheld the judge's decision.

The local planning authority appealed with permission of the Supreme Court (Baroness Hale of Richmond PSC, Lord Carnwath and Lady ***4320*** Arden JJSC) given on 31 October 2018. The agreed issues for consideration were: (1) The correct approach to the interpretation of a planning permission, including (a) the factors and material which might be taken into account in interpreting a planning permission, (b) whether, and if so how, the principles contained in *Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101* were applicable to the interpretation of a planning permission, (c) whether a restriction on the use permitted by a planning permission might only be imposed by a condition on the permission and (d) whether the 2014 permission should be interpreted so as to contain a restriction on the sale of goods from the premises. (2) The correct approach to implication in the context of a planning permission, including (a) whether it was possible to imply additional words into an existing condition, (b) whether it was possible to imply a whole condition into a planning permission, (c) whether, and if so how, the tests for implication in the context of commercial contracts were applied to planning permissions, (d) whether a condition might be implied into a planning permission only where the reason for the condition was apparent on the face of the permission and (e) whether a restriction on the sale of retail goods from the premises should be implied into the 2014 permission.

The facts are stated in the judgment of Lord Carnwath JSC, post, paras 1–6.

Matthew Reed QC and *Matthew Henderson* (instructed by *Legal Services and HR Director, Lambeth London Borough Council*) for the local planning authority.

Daniel Kolinsky QC and *Sasha Blackmore* (instructed by *Treasury Solicitor*) for the Secretary of State.

Christopher Lockhart-Mummery QC and *Yaaser Vanderman* (instructed by *Freeths llp*) for the second interested party.

The court took time for consideration.

3 July 2019. LORD CARNWATH JSC (with whom LORD REED DPSC, LADY BLACK, LORD LLOYD-JONES and LORD BRIGGS JJSC agreed)

handed down the following judgment.

Introduction

1. This appeal concerns the permitted uses of a retail store in Streatham in the area of the London Borough of Lambeth ("the council"). Planning permission was originally granted by the Secretary of State in 1985, but the use was limited by condition to sale of DIY goods and other specified categories, not including food sales. Following implementation, the permitted categories were extended by later consents (under section 73 of the Town and Country Planning Act 1990), the most recent being in 2014 ("the 2014 permission"), which is in issue in this case. The second respondent sought a certificate from the council determining that the lawful use of the store extended to sales of unlimited categories of goods including food. A certificate to that effect was refused by the council, but granted by a planning inspector on appeal, and upheld by the lower courts. The council, as local planning authority, appeals to this court. ***4321**

The planning history in more detail

2. The original permission, granted by the Secretary of State on 17 September 1985 ("the 1985 permission"), was subject to a number of conditions, including, at para 6:

> "The retail unit hereby permitted shall be used for the retailing of goods for DIY home and garden improvements and car maintenance, building materials and builders' merchants goods and for no other purpose (including any other purpose in Class I of the Schedule to the Town and Country Planning (Use Classes) Order 1972 [(SI 1972/1385)] or in any provision equivalent to that Class in any statutory instrument revoking and re-enacting that Order)."

The exclusion of use for other purposes, including those within Use Class I, had the effect of excluding (inter alia) food sales. The following reason was given in the decision letter, at para 16:

> "Because the traffic generation and car parking requirements of certain types of large retail stores are substantially greater than those of the DIY unit proposed and could be excessive at this site, it is necessary to restrict the right to change to other types of retail unit …"

3. On 30 June 2010, the council granted a further planning permission ("the 2010 permission") expressed to be for "Variation of Condition 6" of the 1985 permission to "allow for the sale of a wider range of goods" as specified, not including food sales, and again excluding other uses within the relevant use class (now Class A1). Although it is common ground that this permission was granted under section 73 , there was no specific reference to that section in the document, which referred simply to the 1990 Act. This permission included, as a separate condition 1, the same enumeration of permitted uses and exclusions as in the terms of the grant, and the following reason was given for the condition: "In order to ensure that the level of traffic generation is such as to minimise danger, obstruction and inconvenience to users of the highway and of the accesses."

4. There were in addition two new conditions which had not been in the 1985 permission:

> "2. Details of refuse and recycling storage to serve the development shall be submitted to and approved in writing by the local planning authority prior to first commencement of any of the additional retail uses hereby permitted. The refuse and recycling storage facilities shall be provided in accordance with the approved details prior to commencement of the development and shall thereafter be retained as such for the duration of the permitted use.
>
> "3. A strategy for the Management of Deliveries and Servicing shall be submitted to and approved in writing by the local planning authority prior to first commencement of any of the additional retail uses hereby permitted. Deliveries and servicing shall thereafter be carried out solely in accordance with the approved details."

Reasons were given for each condition.

5. The permission now in issue was granted on 7 November 2014. (The application is not before us.) In this case the grant referred in terms to section 73 . It is necessary to set out the operative parts in full: ***4322**

> **"Decision Notice**

> *"Determination of Application Under Section 73—Town and Country Planning Act 1990*
>
> "The London Borough of Lambeth hereby approves the following application for the variation of condition as set out below under the above mentioned Act …
>
> "Development At: Homebase Ltd, 100 Woodgate Drive, London SW16 5YP.
>
> "For: Variation of condition 1 (Retail Use) of Planning Permission Ref: 10/01143/FUL (Variation of condition 6 (Permitted retail goods) of planning permission Ref 83/01916 … Granted on 30.06.2010.
>
> "Original Wording:
>
> "The retail use hereby permitted shall be used for the retailing of DIY home and garden improvements and car maintenance, building materials and builders merchants goods, carpets and floor coverings, furniture, furnishings, electrical goods, automobile products, camping equipment, cycles, pet and pet products, office supplies and for no other purpose (including the retail sale of food and drink or any other purpose in Class A1 of the Schedule to the Town and Country Planning (Use Classes) Order 1987 [(SI 1987/764)] (as amended) or in any provision equivalent to that Class in any statutory instrument revoking and re-enacting that Order).
>
> "Proposed Wording:
>
> "The retail unit hereby permitted shall be used for the sale and display of non-food goods only and, notwithstanding the provisions of the Town and Country Planning (General Permitted Development) Order 1995 [(SI 1995/418)] (or any Order revoking and re-enacting that Order with or without modification), for no other goods."

(I should note in passing that the reference in the revised form of condition to the General Development Order, rather than the Use Classes Order, appears to be a mistake, as Mr Lockhart-Mummery for the second interested party suggested. Neither he nor any of the parties saw it as significant to the issues in the appeal.)

> "Approved plans …

"Summary of the reasons for granting planning permission:

"In deciding to grant planning permission, the council has had regard to the relevant policies of the development plan and all other relevant material considerations … Having weighed the merits of the proposals in the context of these issues, it is considered that planning permission should be granted subject to the conditions listed below.

"Conditions

"1. The development to which this permission relates must be begun not later than the expiration of three years beginning from the date of this decision notice. Reason: To comply with the provisions of section 91(1)(a) of the Town and Country Planning Act …

"2. Prior to the variation [hereby] approved being implemented a parking layout plan at scale of 1:50 indicating the location of the reserved staff car parking shall be submitted to and approved in writing by the ***4323*** local planning authority. The use shall thereafter be carried out solely in accordance with the approved staff car parking details.

"Reason: To ensure that the approved variation does not have a detrimental impact on the continuous safe [and] smooth operation of the adjacent highway …

"3. Within 12 months of implementation of the development hereby approved details of a traffic survey on the site and surrounding highway network shall be undertaken within one month of implementation of the approved development date and the results submitted to the local planning authority. If the traffic generation of the site, as measured by the survey, is higher than that predicted in the transport assessment submitted with the original planning application the applicant shall, within three months, submit revised traffic modelling of the Woodgate Drive/Streatham Vale/Greyhound Lane junction for analysis. If the junction modelling shows that junction capacity is worse than originally predicted within the transport assessment, appropriate mitigation measures shall be agreed with the council, if required, and implemented within three months of the date of agreement.

"Reason: to ensure that the proposed development does not lead to an unacceptable traffic impact on the adjoining highway network …"

There was no specific reference to conditions 2 and 3 of the 2010 permission.

6. On 10 June 2015, the second respondent applied to the council for a certificate of lawfulness of proposed use or development (under section 192 of the 1990 Act) for unrestricted use of the store. This was refused by the council on 12 August 2015, but the appeal was allowed by the inspector by a decision letter dated 6 December 2016. The letter gave a certificate of lawfulness for use described as: "The use of the premises … for purposes within Use Class Al of the Town and Country Planning (Use Classes) Order 1987 (as amended) without restriction on the goods that may be sold." The reason given was: "No condition was imposed on [the 2014 permission] to restrict the nature of the retail use to specific uses falling within Use Class A1 …"

The statutory framework

7. It is unnecessary to set out the familiar provisions of the 1990 Act relating to the definition of development, and to the granting of planning permission. It is to be noted however that the extension of the categories of goods to be sold within the store did not in itself amount to "development" (within the meaning of 1990 Act, section 55) requiring planning permission. The erection of the building and the commencement of sales under the 1985 permission no doubt involved both operational development and a material change of use. Thereafter a change to sale of other categories (at least those within the relevant class under the current Use Class Order) would not involve any breach of planning control unless restricted by an appropriate condition.

8. Section 73 of the Act, on which the council relied in granting the 2010 and 2014 permissions, is headed "Determination of applications to develop land without compliance with conditions previously attached". It provides: ***4324**

> "(1) This section applies … 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."

9. The background to this section (formerly section 31A of the Town and Country Planning Act 1971) was described by Sullivan J in *Pye v Secretary of State for the Environment, Transport and the Regions [1999] PLCR 28* , 44–45:

> "Prior to the enactment of (what is now) section 73 , an applicant aggrieved by the imposition of 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 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 …
>
> "Whilst 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 unamended. 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."

This passage was approved by the Court of Appeal in *Powergen United Kingdom plc v Leicester City Council [2000] JPL 1037* , para 28, per Schiemann LJ. ***4325**

10. Sullivan J's comment that such applications are "commonly" referred to as applications to "amend" the conditions was echoed by Schiemann LJ, who noted, at para 1, that such an application is commonly referred to as "an application to modify conditions imposed on a planning permission". This usage is also consistent with the wording used in the statute under which section 31A was originally introduced. It was one of various "minor and consequential amendments" introduced by section 49 of and Schedule 11 to the Housing and Planning Act 1986 , described as "(d) applications to vary or revoke conditions attached to planning permission".

11. It is clear, however, that this usage, even if sanctioned by statute, is legally inaccurate. A permission under section 73 can only take effect as an independent permission to carry out the same development as previously permitted, but subject to the new or amended conditions. This was explained in the contemporary Circular 19/86, para 13, to which Sullivan J referred. It described the new section as enabling an applicant, in respect of "an extant planning permission granted subject to conditions", to apply "for relief from all or any of those conditions". It added: "If the authority do decide that some variation of conditions is acceptable, a new alternative permission will be created. It is then open to the applicant to choose whether to implement the new permission or the one originally granted."

12. Although the section refers to "development" in the future, it is not in issue that a section 73 application can be made and permission granted retrospectively, that is in relation to development already carried out. This question arose indirectly in the courts below, in the context of a dispute about the validity of the time limit condition (condition 1), which required the "development to which this permission relates" to be begun within three years. The Court of Appeal [2019] PTSR 143 upheld the inspector's decision that this condition was invalid, in circumstances where the relevant "development" had been carried out many years before. Lewison LJ said, at para 79:

> "… I cannot see that the decision notice granted planning permission for any prospective development. The mere widening of the classes of goods that were permitted to be sold by retail does not amount to development at all. Conformably with the definition of 'development' in section 55 the only development to which the application could have related was the original erection of the store and the commencement of its use as a DIY store. It was that development that was permitted subject to the conditions that the application was designed to modify; and it was the planning permission permitting that development to which the decision notice referred."

13. I agree with that analysis, which is not I understand in dispute before this court. However, it leaves open the question as to the effect of the new permission on conditions which have already taken effect following implementation of the earlier permission. The section does not assist directly. It envisages two situations: either (a) the grant of a new permission unconditionally or subject to revised conditions, or (b) refusal of permission, leaving the existing permission in place with its conditions unchanged. It does not say what is to happen if the authority wishes to change some conditions but leave others in place. As will be seen (para 20 below), the ***4326** Court of Appeal cited government guidance indicating that "to assist with clarity" planning decisions under section 73 "should also repeat the relevant conditions from the original planning permission". However, as I read this, it was given as advice, rather than as a statement about the legal position. Although the current status of the 2010 conditions is not directly in issue in the appeal, it is of some background relevance and has attracted conflicting submissions. I shall return to this aspect later in the judgment.

14. For completeness, before leaving this discussion of section 73 , I should note that Circular 19/86 (referred to above) described its predecessor as "complementing" section 32 of the Town and Country Planning Act 1971 (later, section 63 of the 1990 Act), which at the time made specific provision for retrospective permissions ("Permission to retain buildings or works or continue use of land"). That section has since been repealed and partially replaced by section 73A of the 1990 Act: see the Planning and Compensation Act 1991, Schedule 7 . Whatever the precise significance of this change, it is not suggested that it has any relevance to the issues in this appeal and neither side has sought to rely on section 73A .

Principles of interpretation

15. We have received extensive submissions and citations from recent judgments of this court on the correct approach to interpretation. Most relevant in that context is *Trump International Golf Club Scotland Ltd v Scottish Ministers [2016] 1 WLR 85* . An issue in that case related to the interpretation of a condition in a statutory authorisation for an offshore wind farm, requiring the developer to submit a detailed design statement for approval by Ministers. One question was whether the condition should be read as subject to an implied term that the development would be constructed in accordance with the design so approved.

16. In the leading judgment Lord Hodge JSC, at paras 33–37, spoke of the modern tendency in the law to break down divisions in the interpretation of different kinds of document, private or public, and to look for more general rules. He summarised the correct approach to the interpretation of such a condition, at para 34:

> "When the court is concerned with the interpretation of words in a condition in a public document such as a section 36 consent, it asks itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense."

17. He rejected a submission that implication had no place in this context:

> "32. [Counsel] submits that the court should follow the approach which Sullivan J adopted to planning conditions in *Sevenoaks District Council v First Secretary of State [2005] 1 P & CR 186* and hold that there is no room for implying into condition 14 a further obligation that the developer must construct the development in accordance with the design statement. In agreement with Lord Carnwath JSC, I am not persuaded ***4327** that there is a complete bar on implying terms into the conditions in planning permissions …
>
> "35. … While the court will, understandably, exercise great restraint in implying terms into public documents which have criminal sanctions, I see no principled reason for excluding implication altogether."

In the instant case, had it been necessary to do so, he would, at para 37, have "readily drawn the inference that the conditions of the consent read as a whole required the developer to conform to the design statement in the construction of the windfarm".

18. In my own concurring judgment, having reviewed certain judgments in the lower courts which had sought to lay down "lists of principles" for the interpretation of planning conditions, I commented, at para 53:

> "… I see dangers in an approach which may lead to the impression that there is a special set of rules applying to planning conditions, as compared to other legal documents, or that the process is one of great complexity."

Later in the same judgment, I added, at para 66:

> "Any such document of course must be interpreted in its particular legal and factual context. One aspect of that context is that a planning permission is a public document which may be relied on by parties unrelated to those originally involved … It must also be borne in mind that planning conditions may be used to support criminal proceedings. Those are good reasons for a relatively cautious approach, for example in the well established rules limiting the categories of documents which may be used in interpreting a planning permission … But such considerations arise from the legal framework within which planning permissions are granted. They do not require the adoption of a completely different approach to their interpretation."

19. In summary, whatever the legal character of the document in question, the starting point—and usually the end point—is to find "the natural and ordinary meaning" of the words there used, viewed in their particular context (statutory or otherwise) and in the light of common sense.

The Court of Appeal's reasoning

20. It is unnecessary to review in any detail the reasoning of the inspector or the High Court, since the issues, and the competing arguments, are fully discussed in the judgment of the Court of Appeal [2019] PTSR 143. Having set out the planning history and the terms of section 73 , Lewison LJ (paras 19–22) identified what he saw as the problem. While he acknowledged that it was "clear what [the council] meant to do in a very broad sense", he said:

> "19. … But that is not the question. The question is: what did Lambeth in fact do? The application was an application for the variation of a condition attached to the 2010 permission … the technical trap, into which it is said that Lambeth fell, is that approval of an application under section 73 requires

> the grant of a fresh planning permission, rather than merely a variation of an existing one." ***4328**
>
> "20. … It follows from this that the decision notice must be read as a free-standing grant of planning permission. However, it failed to repeat any of the conditions imposed on the previous planning permissions and, more importantly, failed to express the new description of the use as a condition, rather than as a limited description of the permitted use."

He noted, at para 21, the advice given in the relevant Planning Policy Guidance note ("PPG"):

> "It should be noted that the original planning permission will continue to exist whatever the outcome of the application under section 73 . To assist with clarity, decision notices for the grant of planning permission under section 73 should also repeat the relevant conditions from the original planning permission, unless they have already been discharged."

This advice, he thought, was:

> "22. … reflective of the words of section 73(2)(a) which requires a local planning authority, if it decides that different conditions should be imposed, to grant planning permission 'accordingly': that is to say in accordance with the conditions upon which it has decided that planning permission should be granted."

21. Later in the judgment he addressed the submissions before the court. He noted that Mr Matthew Reed QC for the council put his argument in two ways: first by implication of a condition and second as a matter of interpretation. He thought it more logical to reverse the order, while accepting that the exercise was an "iterative" process, and observing that the objective was "not to determine what the parties meant to do in the broad sense, but what a reasonable reader would understand by the language they in fact used": para 38.

22. Having referred to the findings of the judge in the court below, he summarised Mr Reed's submission on the interpretation of the decision notice, at para 45:

> "In the light of those findings Mr Reed argues that the decision notice described itself as doing no more than approving a 'variation of condition' in two previous planning permissions. For technical reasons, however, a variation of a condition under section 73 takes effect as the grant of a fresh planning permission. In order to give effect to [the council's] intention and also to that of the applicant for the variation of the condition, the limited description of the use must therefore be read as if it were itself a condition."

23. In the critical paragraphs of the judgment, he gave his view of how the "reasonable reader" would have approached the matter:

> "52. The reasonable reader of the decision notice must be notionally equipped with some knowledge of planning law and practice. The distinction between a limited description of a permitted use and a condition is a well-known distinction. The reasonable reader would also know that the Government's own guidance stated that any conditions applicable to planning permission granted under section 73 must be explicitly stated. He would know the general structure of a planning permission which will set out a summary of the application, describe the ***4329** development permitted by the permission and, in a separate part of the permission, will set out any conditions imposed on the grant of planning permission with reasons for those conditions. He would notice that there were some conditions attached to the grant which were explicitly stated in the decision notice, and that the decision notice stated that [the council] had decided that 'planning permission should be granted subject to the conditions listed below'. If he had looked back over the planning history he would also have seen the 2010 approval of a variation to the condition, which did specify the permitted range of goods in the form of a condition. That had not been repeated in the decision notice. He would also have noticed that the decision notice in 2010 had imposed two conditions (relating to refuse and recycling on the one hand, and management of deliveries on the other) which had also not been repeated in the decision notice. If he had considered the 2013 refusal he would have seen that [the council] was not satisfied at that time that the applicant had demonstrated that increased traffic would not lead to adverse impacts. But he would have seen that the decision notice of 2014 referred to a traffic assessment which [the council] had considered. He would also have noticed that condition 3 required a traffic survey and the implementation of mitigation measures if junction capacity was worse than predicted. He might

> reasonably have concluded that [the council] had been sufficiently satisfied on this second application to grant conditional permission, with the safety net of condition 3.
>
> "53. Accordingly, sympathetic though I am to [the council]'s position, this submission seems to me to go well beyond interpretation. It is not a question of rearranging words that appear on the face of the instrument (as in *Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101*). It is a question of adding a whole condition, which has a completely different legal effect to the words that [the council] in fact used."

24. As a further point he noted the statutory requirement for the notice to state the reasons for any condition imposed. He said, at para 59:

> "To impose a condition without giving reasons for it would be a breach of statutory duty. It is one of the principles of contractual interpretation that one should prefer a lawful interpretation to an unlawful one. There is nothing in the decision notice which could amount to a clear, precise and full reason for treating the description of the use as a condition. Although Mr Reed suggested that the first reason given for the 2013 refusal could stand as the reason, I consider that to be untenable. The requirement to give reasons is applicable to 'the notice'. It may be that 'the notice' might extend to another document incorporated by reference; but that is not this case. Although the decision notice does cross-refer both to the original planning permission and also to previous approved variations, it does not mention the refusal at all. There would be no reason for a reasonable reader of the decision notice to suppose that a reason for an unexpressed condition was contained in a document which was simply part of the background."

25. Lewison LJ went on to deal with the alternative formulation, based on implication of a condition in the same form as the "proposed wording", holding that it failed to meet the stringent tests laid down by the authorities: ***4330** [2019] PTSR 143, paras 63–75. In particular he accepted a submission by Mr Christopher Lockhart-Mummery QC that the judgments in the *Trump case [2016] 1 WLR 85* (like the decision on which they relied: *Crisp from the Fens Ltd v Rutland County Council (1950) 1 P & CR 48*) decided no more than that implication might be made into

an extant condition that was incomplete; they did not contemplate the implication of a wholly new condition: para 72.

26. In this court Mr Reed for the council repeated and developed his arguments in the Court of Appeal. In line with the decision of the High Court in *I'm Your Man Ltd v Secretary of State for the Environment [1998] 4 PLR 107* , he did not seek to argue that the proposed wording could be treated as an enforceable "limitation". He accepted the need to establish that the permission was subject to a legally effective condition in that form. In summary he put his case in three ways: (a) as a matter of the correct interpretation of the permission; (b) by correction of an obvious error (by analogy with the contractual principles applied in *Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101*); (c) by the implication of a condition in the terms of the proposed wording (applying the principles in *Attorney General of Belize v Belize Telecom Ltd [2009] 1 WLR 1988*). The respondents generally adopted the reasoning of the Court of Appeal. Mr Daniel Kolinsky QC for the Secretary of State emphasised the need for clarity and certainty in a public document. For the third respondent (as freehold owner of the site), Mr Lockhart-Mummery reminded us that planning is a creature of statute, in which common law principles have a limited role; and also of the need for clear and specific words to exclude rights granted by provisions such as the Use Classes Order.

Commentary

27. With respect to the careful reasoning of the courts below, I consider that an ordinary reading of the decision notice compels a different view. I find it unnecessary to examine in detail the more ambitious alternatives proposed by Mr Reed. However, I observe in passing (in agreement with Mr Lockhart-Mummery's submission as to the limited scope of the judgments in the *Trump case [2016] 1 WLR 85*) that it is difficult to envisage circumstances in which it would be appropriate to use implication for the purpose of supplying a wholly new condition, as opposed to interpretation of an existing condition.

28. On the issue of interpretation, Lewison LJ was of course right to say that the 2014 permission needs to be seen through the eyes of "the reasonable reader". However, such a reader should be assumed to start by taking the document at face value, before being driven to the somewhat elaborate process of legal and contextual analysis hypothesised in Lewison LJ's para 52. In essence Mr Reed's submission, in the simple form recorded by Lewison LJ at para 45 (para 22 above) was in my view correct. It is not necessarily assisted by the varying formulations and citations discussed in his submissions to this court. There is a risk of over-complication.

29. Taken at face value the wording of the operative part of the grant seems to me clear and unambiguous. The council "hereby approves" an application for "the variation of condition as set out below". There then follow precise and accurate descriptions of the relevant development, of the ***4331*** condition to be varied, and of the permission under which it was imposed. They are followed by statements first of the "Original wording", and then of the "Proposed wording"; the latter stating in terms that the store is to be used for the sale of "non-food goods only and

… for no other goods". "Proposed wording" in this context must be read as a description of the form of condition proposed in the application and "hereby" approved. In other words, the obvious, and indeed to my mind the only natural, interpretation of those parts of the document is that the council was approving what was applied for: that is, the variation of one condition from the original wording to the proposed wording, in effect substituting one for the other. There is certainly nothing to indicate an intention to discharge the condition altogether, or in particular to remove the restriction on sale of other than non-food goods.

30. The suggested difficulties of interpretation do not arise from any ambiguity in the terms of the grant itself. Nor do they raise any question about the extent to which it is permissible to take account of extraneous material. It is unnecessary to look beyond the terms of the document. In these respects the case differs from many of the authorities to which reference has been made in submissions. The arguments against this simple view turn, not on any lack of clarity in the grant itself, but on supposed inconsistencies, firstly with its statutory context, and secondly with the treatment of other conditions in the remainder of the document.

31. In respect of the statutory context, the objection is that this reading is inconsistent with the scope of the power under which the grant was made. Section 73 , referred to in terms in the permission, does not give the authority power simply to vary a condition in the previous permission. That purpose could only be achieved by the grant of a new permission, subject in terms to a condition in the revised form. Accordingly, it is said, it was not enough simply to approve the "proposed wording", without its terms being incorporated into the form of condition as required by section 73(2)(a) .

32. One problem with this argument is that it goes too far for the respondents' case. If section 73 gave no power to grant a permission in the form described, the logical consequence would be that there was no valid grant at all, not that there was a valid grant free from the proposed condition. The validity of the grant might perhaps have been subject to a timely challenge by an interested third party or even the council itself. That not having been done, there is no issue now as to the validity of the grant as such. All parties are agreed that there was a valid permission for something. That being the common position before the court, the document must be taken as it is.

33. It may be that insufficient attention was paid in the submissions below to the background of section 73 , as discussed earlier in this judgment. Once it is understood that it has been normal and accepted usage to describe section 73 as conferring power to "vary" or "amend" a condition, the reasonable reader would in my view be unlikely to see any difficulty in giving effect to that usage in the manner authorised by the section—that is, as the grant of a new permission subject to the condition as varied. If the document had stopped at that point, I do not think such a reader could have been left in any real doubt about its intended meaning and effect. The lack of a specific reason for the condition, to which Lewison LJ attached weight, is of little practical significance, given that this was the relaxation of a previous ***4332** condition for which the reason was well known, rather than the imposition of a new restriction. In any event the absence of a reason would not affect the validity of the condition: see *Brayhead (Ascot) Ltd v Berkshire County Council [1964] 2 QB 303* .

34. Turning to the second part of the notice, it is true that there are some internal inconsistencies. Its heading suggests that it is simply stating the reasons for the permission granted in the first part, rather than imposing a separate set of conditions. Further, the wording of the conditions themselves betrays some ambivalence about what has been approved. In some places it is referred to as "the development to which this permission relates", or "the proposed development", in others as "the variation hereby approved" or "the approved variation". (As I have already noted, the time limit condition was held by the courts below to be wholly invalid.)

35. However, reading the document as a whole, and taking the first part in the sense suggested above, the second part can be given a sensible meaning without undue distortion. It is explanatory of and supplementary to the first part. The permitted development incorporating the amended condition is regarded as acceptable, in accordance with the development plan, but only subject to the conditions set out. They are in other words additional conditions. They are designed to regulate the expanded use as permitted by the revised condition, dealing in particular with staff parking, and monitoring of the additional traffic impact.

The other 2010 conditions

36. As I have said, we are not directly concerned in this appeal with the status of the other conditions in the 2010 permission, so far as still potentially relevant, notably conditions 2 and 3 relating respectively to treatment of waste and management of deliveries. However, some comment may be desirable, since the issue was subject to conflicting submissions before the Court of Appeal and in this court. At first sight it would seem surprising if the council, when relaxing the restrictions on sales, had not intended to maintain such requirements. No reason was given for releasing them, and it does not appear to have been requested in the application.

37. For the council, Mr Reed's position seems to have shifted during the course of the appeal below. Lewison LJ, at paras 46–47, recorded his initial submission that conditions 2 and 3 should be treated as incorporated into the new permission; the "reasonable reader of the decision notice could not be taken to understand that [the council] was abandoning them". However, this argument was not pursued in his oral submissions (judgment, paras 48 and 51), and he seems implicitly to have accepted that they would cease to be effective. In this court this issue was not dealt with in any detail in the written submissions. Questioned in argument, Mr Lockhart-Mummery for the third respondent submitted that conditions 2 and 3, not having been repeated in the new permission, must be taken as having lapsed altogether. In reply Mr Reed for the council took a rather different position to that initially taken in the Court of Appeal. His submission as I understood it was that the 2010 conditions, so far as still relevant, were not as such incorporated into the new permission; but they continued to have effect under the 2010 permission, so far as not inconsistent with anything in the new grant. ***4333**

38. Although we have not heard full argument, my provisional view is that Mr Reed's current submission is correct. It will always be a matter of construction whether a later permission on

the same piece of land is compatible with the continued effect of the earlier permissions: see the principles discussed in *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment [1985] AC 132* , 144. In this case, following implementation of the 2010 permission, the conditions would in principle remain binding unless and until discharged by performance or further grant. Conditions 2 and 3 were expressed to remain operative during continuation of the use so permitted. The 2014 permission did not in terms authorise non-compliance with those conditions, nor, it seems, did it contain anything inconsistent with their continued operation. Accordingly, they would remain valid and binding—not because they were incorporated by implication in the new permission, but because there was nothing in the new permission to affect their continued operation.

39. This approach to the interpretation of the decision notice seems to me consistent with the decision of Sullivan J in a case relied on by Mr Reed before the Court of Appeal: *Reid v Secretary of State for Transport, Local Government and the Regions [2002] EWHC 2174 (Admin)* . Permission for a transport depot had been granted subject to 12 conditions. The landowner applied for development described as "retention of the use of the land without compliance with condition 2 (improvements to public highway)": para 50. The local authority responded with a notice referring to the terms of the application, and expressed in these terms: "notice of its decision to APPROVE Planning Permission for the application set out above subject to the following conditions: Conditions None." Sullivan J held that the grant did not mean that the other conditions were no longer effective. He said, at para 58:

> "There is an apparent conflict between the description of the proposed development, which refers not to an existing use but to the retention of a permitted use without compliance with one condition in the 1992 planning permission, and the words 'Conditions: None'. One is left wondering what is to happen to the remaining conditions on the 1992 planning permission. Once it is accepted that both the application and the 1992 planning permission referred to in the application for permission may properly be considered for the purpose of construing the meaning of the 2002 permission, then the words 'Conditions: None' mean, in that context, no additional conditions beyond those which had been imposed upon the 1992 permission."

40. Lewison LJ saw this as a case turning on the particular wording of permission, which was held to have the effect that "the conditions attached to the previous planning permission continued to apply to the new one". He saw it as of no assistance in the present case, particularly given Mr Reed's abandonment before the Court of Appeal of the argument that the conditions attached to the 2010 permission could be carried forward into the new permission: [2019] PTSR 143, para 51.

41. As I read the judgment, however, Sullivan J did not intend to say that the other 11 conditions were by implication to be treated as included in the new permission, or that the old permission was superseded. Rather the new permission, confined as it was to the retention of the use without complying **4334* with condition 2, and involving no inconsistency with the old permission and the remaining conditions, had no effect on their continuing effect as conditions subject to which the development had been carried out. The words "Conditions: None" was indicating that there were to be no additional conditions beyond those already having effect under the earlier permission. By contrast, in the present case, the specific conditions in the 2014 permission were intended to be additional both to the varied condition, and to the others remaining in effect under the 2010 permission.

42. Sullivan J added the following comment [2002] EWHC 2174 at [59]:

> "I accept unreservedly that the drafting of the 2002 planning permission could have been much clearer. The inspector's observations as to good practice should be heeded by all local planning authorities. When issuing a fresh planning permission under section 73 , it is highly desirable that all the conditions to which the new planning permission will be subject should be restated in the new permission and not left to a process of cross-referencing. Good practice was not followed in the present case."

The present case illustrates the wisdom of that advice, which is also reflected in the PPG. Nothing in the present judgment is intended to detract from that advice, nor from the importance of ensuring that applications and grants under section 73 are couched in terms which properly reflect the nature of the statutory power.

Conclusions

43. For these reasons I would allow the appeal. The precise wording of the order should be agreed between the parties, or subject to further submissions.

Ms B L Scully, Barrister **4335*

Appeal allowed.

Footnotes

1 Town and Country Planning Act 1990, s 73 : see post, para 8.