*372 Henry Boot Homes Ltd v Bassetlaw DC

Positive/Neutral Judicial Consideration

Court
Court of Appeal (Civil Division)

Judgment Date
28 November 2002

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[2002] EWCA Civ 983
[2003] 1 P. & C.R. 23

Court of Appeal

(Brooke L.J. , Keene L.J. and Bodey J.):

November 28, 2002 [1]

H1 *Town and country planning—Outline planning permission for housing development with five-year time-limit—Reserved matters approval granted with conditions requiring various details to be approved prior to commencement of development—Development commencing without such approvals—Correspondence from local planning authority seeking such approvals—No enforcement action taken—Local planning authority representing that planning permission was valid then later stating development was in breach of planning control—Time-limit for implementation expires—Whether conduct of local planning authority acts as waiver of conditions precedent or gives a legitimate expectation that permission validly implemented*

H2. The appellant owned a large site which had outline planning permission for residential development dated August 2, 1995. That permission contained the usual time-limit condition which required development to begin not later than either five years from the date of the permission or two years from the final approval of the reserved matters. The reserved matters' application was approved on December 5, 1995 subject to conditions, most of which required details such as drainage or floor levels to be agreed in writing with the respondent authority before development commenced. Works amounting to material operations began on January 16, 1996 but at that time there had not been compliance with one of the conditions attached to the outline permission, nor with seven conditions attached to the reserved matters approval. In correspondence between the two parties in December 1995 and April and May 1996 the respondent reminded the appellant that they should fully comply with all the outstanding conditions. In the meantime, a question had arisen about the circumstances in which the appellant's predecessor-in-title had secured the original planning permission from the respondent's Planning Committee. As a result of an independent investigation by Mr Richard Phelps, the respondent began to consider whether it should revoke the planning permission or modify it so as to control the part of the site not yet developed. It wrote to the appellant in May 1996 suggesting that full compliance with the condition requiring part of a particular estate road to be built would be inadvisable at that time. Discussions took place between the parties and in 1998 the appellant submitted a planning application for the undeveloped part of the site. The respondent sought legal advice and was told that the planning permission might not be valid. Its planning officers had been treating the permission as valid and as having been implemented and had said so in writing. In February 2000 the appellants were told of the uncertainty about validity and duly submitted applications for approval of those matters in the outstanding conditions. The appellants withdrew the 1998 applications for the undeveloped part of the site. The Committee approved the applications in respect of two of the conditions but refused those relating to six other conditions. On July 31, 2000 (the day before the permission expired), the appellant submitted an application to extend the time limit on the outline permission. It was refused but there was no appeal against it. Sixty-three dwellings that had already been built on the site were eventually granted full planning

permission. The respondent sought, and was ***373** granted, declarations in the High Court that the development authorised by the outline permission was not commenced prior to August 2, 2000, and that the permission was no longer extant. The Court refused to grant the appellant 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 and that it would be unlawful to resile from that. The appellant appealed to the Court of Appeal.

H3. Held, dismissing the appeal, that there is a mechanism laid down in ss.73 and 73A of the Town and Country Planning Act 1990 for achieving the waiver of conditions. A local planning authority has no general power to do it by nonstatutory means. Although not the case here, legitimate expectation might conceivably operate so as to enable a developer to commence development validly and effectively in breach of condition in the rare circumstances where there is no third party or public interest in the matter and the authority's conduct or representations warranted it.

H4 Cases referred to:

(1) *Agecrest v Gwynedd County Council [1998] J.P.L. 32*
(2) *Coghurst Wood Leisure Park Ltd v Secretary of State for Transport, Local Government and the Regions [2002] EWHC Admin 1091*
(3) *Etheridge v Secretary of State for the Environment (1984) 48 P. & C.R. 35*
(4) *Leisure Great Britain plc v Isle of Wight Council (1999) 80 P. & C.R. 370*
(5) *Oakimber Limited v Elmbridge Borough Council (1991) 62 P. & C.R. 594*
(6) *Pioneer Aggregates Ltd v Secretary of State for the Environment [1985] 1 A.C. 132*
(7) *R. v East Sussex County Council Ex p. Reprotech (Pebsham) Limited [2002] UKHL 8, [2002] 4 All E.R. 58*
(8) *R. v Flintshire County Council Ex p. Somerfield Stores Limited [1998] P.L.C.R. 336*
(9) *R. v Inland Revenue Commissioners Ex p. MFK Underwriting Agents Limited [1990] W.L.R. 1545*
(10) *R. v Inland Revenue Commissioners Ex p. Unilever plc [1996] S.T.C. 681*
(11) *R. v Leicester City Council Ex p. Powergen United Kingdom plc [1999] 4 P.L.R. 91 and (2001) 81 P. & C.R. 47*
(12) *R. v North and East Devon Health Authority Ex p. Coughlan [2001] Q.B. 213*
(13) *R. v Secretary of State for the Environment Ex p. Percy Bilton Ltd (1975) P.& C.R. 154*
(14) *Tesco Stores v North Norfolk District Council [1999] J.P.L. 920*
(15) *Whitley and Sons v Secretary of State for Wales (1992) 64 P. & C.R. 296*

H5. Appeal to the Court of Appeal by Henry Boot Homes Limited against a decision of Sullivan J. in the Queen's Bench Division of the High Court whereby he granted declarations sought by Bassetlaw District Council that the development authorised by an outline planning permission for housing dated August 2, 1995, was not commenced prior to August 2, 2000 and that the outline permission was no longer extant. He refused to grant a declaration that the company had a legitimate expectation that the Council would treat the development authorised by that outline permission and detailed approval as having commenced within the time limit. The planning permission related to a site at Hallcroft Road, in the valley of the River Idle at Retford in Nottinghamshire. The facts are set out in detail in the judgment of Keene L.J.
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H6 Representation

David Holgate, Q.C. and Timothy Morshead for the appellant.
Mark Lowe, Q.C. and Jonathan Clay for the respondent.

Keene L.J.:

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: s.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: s.56(4) .

3. The conditions imposing the time limits are to be found in ss.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 Ltd, 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 ***375** 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 s.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." (s.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 August 2, 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 s.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: ***376**

> "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 ldots;"

10. On September 8, 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 November 17, 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 December 5, 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.
> *377
> 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 five years of the date of the outline permission, that is to say by August 2, 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 s.56 of the Act began on January 16, 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 December 8, 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 February 2, 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 April 24 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 ***378** 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. Paragraph 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 p. Oxby [1998] P.L.C.R. 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 six 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 May 2, 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 December 5, 1995. There are a ***379*** 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 July 4, 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 ***380** 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 February 24, 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 December 22, 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 August 7, 1998 and September 11, 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 ***381*** allocation of this site for housing development. One of those objectors was another house-builder, Aldergate Properties Ltd ("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 February 12, 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 March 3, 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 May 14, 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 June 17, 1999 that development commenced in breach ***382** 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 August 18, 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 s.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 October 20, 1999 Aldergate sent a letter before action and on November 5, 1999, before any planning permission had been granted as a result of the August 18, 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 November 9, 1999. On December 23, 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 February 14, 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 ***383*** 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 s.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 February 25, 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. Avigorous correspondence followed, but in any event on March 10, 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 December 5, 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 March 15, 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 August 1, 2000. They added that no new development would be undertaken until the recent (March 10) applications were approved.

33. By now, the respondent had clearly received further advice from Counsel, since Mrs Brown referred in a letter dated March 27, 2000 to a number of decisions in the courts, including *Whitley and Sons v Secretary of State for Wales [1992] 64 P. & C.R. 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 ***384** the Council could lawfully deal with recent applications. On the same day, March 30, 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 July 7, 2000. The applications went to the Council's Planning Committee on July 19, 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 July 31, 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 August 1, 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 July 31, 2000, it submitted two applications under s.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 s.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 August 2, 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 ***385** 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 s.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 para.20(1) of Sch.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 Ltd v Elmbridge Borough Council [1991] 62 P. & C.R. 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 s.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. & C.R. 370* , where the authorities to this effect are reviewed at pp.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 ***386** permission was not commenced prior to August 2, 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 July 4, 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 February 14, 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 p Unilever plc [1996] S.T.C. 681* and *R. v North and East Devon Health Authority Ex p. 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 s.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,

Arts 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 ***387** referred to him for decision: s.77 of the Act. The only requirement is that such an application should be in writing (*R. v Flintshire County Council Ex p. Somerfield Stores Ltd [1998] P.L.C.R. 336* , 351 and *Tesco Stores v North Norfolk District Council [1999] J.P.L. 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 s.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] J.P.L. 32* . That case shows that, where a local planning authority waives the need for such compliance, development can commence for the purpose of ss.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 p. 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 p.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 ***388** comprehensive. Of particular relevance for present purposes is the introduction by s.49 of the Housing and Planning Act 1986 of what is now s.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" (s.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 s.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 s.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 s.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 p. Powergen United Kingdom plc [1999] 4 P.L.R. 91* at 101G–H:

> "… s.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 s.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."

***389** The reasoning of Dyson J. was endorsed when that case went to the *Court of Appeal: see (2001) 81 P. & C.R. 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 p. Reprotech (Pebsham) Ltd [2002] UKHL 8, [2002] 4 All E.R. 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 s.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 s.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 s.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 ****390*** *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 nonstatutory 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 June 17, 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 s.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 p. MFK Underwriting Agents Ltd [1990] W.L.R. 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 February 14, 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 December 23, 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 ss.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 ***392** 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 s.73 of the Act, or in appropriate circumstances in s.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.

Bodey J.:

65. I agree.

Brooke L.J.:

66. I also agree.

H7 Representation

Solicitors— Hammonds Suddards Edge , Leeds; Legal Services Department , Bassetlaw District Council.

Order

H8. *Reporter* —Megan Thomas.

Appeal dismissed. ***393**

Footnotes

1 Paragraph numbers as assigned by the court.