Hillside: other matters

for 20 April 2023

James Burton

Topics

- End to the *Sage* confusion re. completion and implications.
- How to "vary" an existing permission to legitimise departure (and the proposed new s.73B).
- LPA's duty (?) to consider another application or permission, beyond the app. before it?

End to the *Sage* confusion re. completion

- *Hillside* finally ends the confusion caused by the *dicta* of *Lord Hobhouse* in *Sage v SSETR* [2003] UKHL 22, at [23]:

> *"As counsel for Mr Sage accepted, if a building operation is not carried out … fully in accordance with the permission, the whole operation is unlawful. She contrasted that with a case where the building has been completed but is then altered or improved …"*

- That holds for development done without planning permission (s.171B(1) time runs from substantial completion), but not for incomplete development under a permission (& nb "exact compliance" with permission not required – test of materiality, *Hillside* [69-70]).

Implications of end to *Sage* confusion

- CoA in *R (Robert Hitchins Ltd) v Worcestershire CC* [2015] EWCA Civ 1060 [49] had *already* stated that development done in accordance with permission but not completed lawful.
- But as *Sage obiter* remained undisturbed by SC, doubt existed.
- *Now* clear developer may build only so far under permission, without planning consequence for what *has been built*, unless e.g. s.106 contains specific terms (if LPA serves completion notice, no planning consequence for what has been built to date (sanction is the loss of permission to continue building)).
- Consequence/s: developer opportunities re. distribution of infrastructure (e.g. AH) over schemes/LPAs subjecting large schemes to particular scrutiny re. infrastructure (e.g

How to "vary" an existing permission to legitimise departure #1

- *At present* only variation power is s.96A. If outside s.96A, and if s.73 no use: need a full application.
- The *Hillside* appellant (belatedly) made it the centrepiece of its SC case that post-1987 "drop in" permissions had in fact been variations of the original 1967 permission and its Master Plan.
- But s.96A allows (only) "non-material variation", s.73 allows a new permission with different conditions (only – operative part remains, & also s.73 conditions *limited* to those that could be imposed on original permission *(Finney, Cadogan*)).
- If s.96A/s.73 no use: make a full application seeking to authorise development in accordance with an earlier permission but with specified modifications [*Hillside*: 48].

How to "vary" an existing permission to legitimise departure #2

- Whilst this might be colloquially described as a "variation", the true position is that any grant is to carry out the development described in the original permission as modified to accommodate the development specifically authorised by the new permission (and nb s.73A allows for retrospective PP).
- However, if an application for a permission described as a "variation" is to have this effect *'ordinarily it would have to be accompanied by a plan which showed how the proposed new permission incorporated the changes indicated into a coherent design for the whole site*' and *'use of the "variation" label by itself is not sufficient'*: Hillside [76]
- Drop-ins in *Hillside* fell well short.

& if clause 102 of the Levelling Up and Regeneration Bill comes into force?

- Clause 102 (of the Bill that went from Commons to Lords) would insert a new s.73B into the principal Act, headed:

'73B Applications for permission substantially the same as existing permission'

- Such an application would concern only "existing permissions" granted on an application not under s.73, 73A or 73B (though the applicant may also "identify" a s.73 or s.73B permission granted by reference to the existing permission).
- Test: whether the LPA *'is satisfied that its effect will not be substantially different from that of the existing permission'.*
- A matter of planning judgment. Gives LPAs a wide margin.

After section 73A insert—

"73B Applications for permission substantially the same as existing permission

(1) An application for planning permission in respect of land in England is to be determined in accordance with this section if the applicant—

(a) requests that it be so determined,

(b) makes a proposal as to the conditions (if any) subject to which permission should be granted, and

(c) identifies an existing planning permission by reference to which the application is to be considered ("the existing permission").

(2) The existing permission must not have been granted—

(a) under section 73, section 73A or this section, or

(b) other than on application.

(3) The applicant may also identify, for the purposes of an application to be determined in accordance with this section, a planning permission—

(a) that was granted under section 73 or this section by reference to the existing permission, or

(b) that forms part of a sequence of planning permissions granted under section 73 or this section, the first of which was granted by reference to the existing permission.

(4) A development order must set out how an applicant is to do as mentioned in subsections (1) and (3).

(5) Planning permission may be granted in accordance with this section only if the local planning authority is satisfied that its effect will not be substantially different from that of the existing permission.

(6) Planning permission may not be granted in accordance with this section in a way that differs from the existing permission as to the time by which a condition requires—

(a) development to be started, or

(b) an application for approval of reserved matters (within the meaning of section 92) to be made.

(7) In determining an application in accordance with this section, the local planning authority must limit its consideration to those respects in which the permission being applied for would, if granted in accordance with the proposal under subsection (1)(b), differ in effect from—

(a) the existing permission, and

(b) each planning permission (if any) identified in accordance with subsection (3).

Section 70(2) is subject to this subsection.

(8) If the local planning authority decides not to grant planning permission in accordance with this section, it must refuse the application.

(9) For the purposes of this section, the effect of a planning permission is to be assessed by reference to both the development it authorizes and any conditions to which it is subject.

(10) In assessing the effect of an existing planning permission for the purposes of subsection (5) (but not for the purposes of subsection (7)), any change to the permission made under section 96A is to be disregarded.

(11) The following provisions apply in relation to the condition under paragraph 13 of Schedule 7A (biodiversity gain condition)—

(a) nothing in this section authorises the disapplication of the condition;

(b) the condition is to be disregarded for the purposes of subsections (1)(b), (5) and (7);

(c) where—

(i) the existing planning permission is subject to the condition,

(ii) a biodiversity gain plan ("the earlier biodiversity gain plan") was approved for the purposes of the condition as it attaches to that permission,

(iii) planning permission is granted in accordance with this section, and

(iv) that planning permission is consistent with the post-development biodiversity value of the onsite habitat as specified in the earlier biodiversity gain plan, the earlier biodiversity gain plan is to be…

…regarded as approved for the purposes of the condition as it attaches to the planning permission granted in accordance with this section.

(12) Nothing in this section authorises the disapplication of the condition under section 90B (condition relating to development progress reports in England).

(13) In relation to an application for planning permission that is made to, or is to be determined by, the Secretary of State, a reference in this section to the local planning authority is to be read as a reference to the Secretary of State.

(14) The preceding provisions of this section apply in relation to an application for permission in principle as if—

(a) each reference to planning permission were a reference to permission in principle, and

(b) the provisions of this section relating to conditions were omitted.

(15) Permission in principle granted in accordance with this section is to be taken, for the purposes of section 70(2ZZC), as having come into force when the existing permission in principle identified under subsection (1)(c) came into force."

LPA's duty (?) to consider another application or permission, beyond the app. before it?

- *Hillside* at [86]: *'As explained in…Pilkington…it is the duty of the (LPA) to regard every application for (PP), unless it refers to an earlier permission, as a proposal for a separate and independent development and to consider the application on its own merits'* (emphasis added)
- *Pilkington per* Lord Widgery CJ at p.1531E-H (approved by Lord Scarman in *Pioneer Aggregates* at pp.144-145):

  (1) a landowner may apply for as many planning permissions as they wish, whether compatible or not.

  (2) generally an LPA is under no duty to relate one to the other to check for incompatibility/contradiction.

- But, there will be "special cases" where (2) does not apply.

Special cases and implications

- Lord Widgery CJ gave one (*obiter*) example of a "special case" in *Pilkington* at p.1531F-H: *'where one application deliberately and expressly refers to or incorporates another'.*
- What if application is to e.g. complete another app. or existing permission, yet in fact both cannot be built - *Hillside* physical impossibility rule means at some point build must stop.
- Is the other application or existing permission a mandatory material consideration for the LPA? Is the risk of breach of planning control if the application is granted a mandatory material consideration?
- To be answered by CoA in *R (Fiske) v Test Valley BC* (hearing October 2023)

Thank you for listening

and now for Q&A...