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Three cases in the Supreme Court

Richard Harwood QC

Celina Colquhoun

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We will observe the minute's silence at 11 am and start the seminar after it concludes

POST LAMBETH – INTERPRETATION OF PERMISSIONS

TUESDAY 28th APRIL 2020 –
“39 FOR 39”

CELINA COLQUHOUN

CONTENTS:

- **LAMBETH** – ref to TRUMP – [LDC - s73 omitted conditions]
- **THORNTON HALL** [JR - PP omitted conditions]
- **UBB** – ref to EX P SHEPWAY [LDC]

Basic Principles of Interpretation:

- Cautious approach ie implication of terms (I'm Your Man) and use of extraneous materials (Exp Shepway)
 - PP is a public document
 - May be relied on by parties unrelated to those originally involved
 - Planning conditions may be used to support criminal proceedings

LAMBETH LBC v SSCLG

- SUCCESSFUL APPEAL AGAINST LPA REFUSAL OF S.192 CLEUD [UNRESTRICTED RETAILS USE]– RELIANCE MADE UPON TERMS/EFFECT OF EARLIER S73 PERMISSION
- LPA HAD FAILED TO REPEAT CONDITIONS IMPOSED ON ORIGINAL PERMISSION IN S.73 DECISION ALTHOUGH 'MEANT' TO LEAVE SOME RESTRICTIONS IN PLACE
- MISTAKE...ALTHOUGH "clear what Lambeth meant to do in a very broad sense"
- LPA IN CLEUD APPEAL (AND SUBSEQUENTLY) ARGUED STRICT INTERPRETATION – CA AGREED WITH HC – THERE MAY BE SOME ROOM TO READ IN OTHER DOCS/INFORMATION BUT LIMITED

LAMBETH LBC v –SSCLG [cont]

Supreme Court

- REVERSED CA & HC AS WELL AS INSPECTOR
- FOCUS ON DECISION NOTICE ITSELF “For: Variation...” AND CONTAINED ORIGINAL & PROPOSED
- INTREPRETATION OF PP SEE SC IN TRUMP

“dangers in an approach which may lead to the impression that there is a special set of rules” [53 PER LD CARNWATH]

- OBJECTIVE TEST – “REASONABLE READER”

LAMBETH LBC v –SSCLG [cont]

Supreme Court

- OBJECTIVE TEST –
 - LOOK AT IN CONTEXT OF CONSENT AS A WHOLE
 - NATURAL & ORDINARY MEANING OF RELEVANT WORDS
 - OVERALL PURPOSE OF CONSENT
 - COMMON SENSE
- *MAINTAINED NO IMPLICATION OF LIMITATION OR WHOLLY NEW CONDITION AS PER “I’M YOUR MAN” BUT NOT WHOLLY EXCLUDED IN PRINCIPLE – RESTRAINT*
- TAKE DECISION NOTICE AT ‘FACE VALUE’ AND LOOK TO INCONSISTENCY IN S.73 CIRCS

THORNTON HALL

- MATTER OF ACCEPTED FACT CONDITIONS MISTAKENLY OMITTED ON FACE OF TEMP PERMISSION NOTICE
- EXCEPTIONAL & 'EXTREMELY UNUSUAL' - EXTENSION TO ALLOW JR TO COMMENCE 5 YRS + POST DECISION
- ORIGINAL NOTICE “significantly misrepresented the outcome of the local authority's decision-making on the application before it”
- HALL OWNERS THEN RELIED UPON PP LATER TO KEEP MARQUEES IN PLACE POST END OF TEMP

THORNTON HALL cont

- ON SUBSTANTIVE CLAIM CA UPHELD KERR J'S JUDGMENT
- NO DEBATE IN JUDGMENT ABOUT INTERPRETATION BUT ABOUT 'JUSTICE' & 'DETRIMENT TO GOOD PUBLIC ADMINISTRATION'
- FACTORS (CONDUCT OF PARTIES):
 - ATTEMPTS TO CONCEAL ERROR
 - LPA THEN ACCEPTED ERROR AND SUPPORTED JR
 - OWNERS KNEW AND RELIED UPON
 - ERROR WOULD NOT HAVE BEEN OBVIOUS UNTIL END OF TEMP PERIOD

UBB WASTE ESSEX LTD

- JR BY UBB OF DECISION BY WPA TO GRANT CLOPUD SOUGHT BY WDA NOT OPERATOR UBB
- SEPARATE ONGOING DISPUTE B/W UBB & WDA
- INTERPRETATION OF PERMISSION FOR FACILITY – WHETHER TYPE OF WASTE “SOURCE SEGREGATED GREEN WASTE” (SSGW) FROM HWRCs COULD BE DELIVERED & PROCESSED
- LIEVEN J QUASHED CLOPUD

UBB WASTE ESSEX LTD cont

- REF TO LAMBETH and TRUMP
- ALSO TO EX PARTE SHEPWAY – RE USE OF EXTRANEIOUS MATERIALS (WHERE INCORPORATED OR WHERE AMBIGUOUS OR ABSENCE OF AUTHORITY)
- LIEVEN J ON ‘REASONABLE READER’ OF PERMISSION EMPHASISED NOT SAME AS APPROACH TO COMMERCIAL DOCUMENT AND PARTY TO THAT BUT STILL LEGAL DOCUMENT

UBB WASTE ESSEX LTD cont

- LIEVEN J'S FACTORS:
 1. REASONABLE READER = PERSON “with some knowledge of planning law and the matter in question” & COMMON SENSE
 2. LOOK TO PLANNING PURPOSE OR INTENTION OF PERMISSION –
LOOK TO REASONS FOR CONDITION AND/OR INCORPORATED DOCS
NOT INTENTION OF PARTIES
 3. TAKE HOLISTIC VIEW OF INCORPORATED DOCS
 4. EXTRINSIC PUBLIC DOCUMENTS SUCH AS ORs EVEN STILL BETTER
THAN PRIVATE UNINCORPORATED DOCS

UBB WASTE ESSEX LTD cont

- FACTORS IN THE CASE:
 - PP ON ITS FACE USED TERM 'MBT' DEFINED IN ES (AN ID) AS 'RESIDUAL WASTE TREATMENT PROCESS '
 - COPIOUS REFS IN ALL IDs TO RESIDUAL WASTE
 - DEF'S INTERP – THAT NO RESTRICTION ON HWRC WASTE BEING 'RESIDUAL' – LED TO 'VERY ODD RESULT' AS TO OTHER HWRC WASTE AND CONTRARY TO POLICY
 - NO AMBIGUITY BUT IN ANY EVENT OR AT TIME OF PP MADE CLEAR RESIDUAL WASTE

‘TAKE AWAY’ POINTS:

- MISTAKES & OMISSIONS ON FACE OF PERMISSION – MAY NOT BE FATAL – LESS ‘STRICT/CAUTIOUS’ APPROACH?
- REASONABLE READER = MORE LIKE “REASONABLE INDIVIDUAL WITH SOME UNDERSTANDING OF PLANNING”
- CAN IMPLY WORDS BUT NOT WHOLE NEW CONDITIONS INTO PERMISSION
- INCORPORATED DOCS TO BE LOOKED AT HOLISTICALLY
- LOOK AT PURPOSE OF PERMISSION & CONDITIONS

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Court

Presented by
Daniel Stedman Jones

MATERIAL CONSIDERATIONS

Material considerations:

2 main questions:

- What is/capable of being a material consideration?
- How much weight, if any, should be attributed to a MC in any given case?

The first is a question of law and the second a matter of planning judgment for the decisionmaker

SC was revisiting the first of these questions in *Wright*

R (Wright) v Forest of Dean DC [2019] 1 WLR 6562

- The Facts:
 - The developer sought permission for a wind turbine
 - One feature was a community benefit fund
 - 4% of turnover would be distributed to community projects by a panel of local people
 - LPA took the fund into account as an MC
 - Permission granted
- Challenge and permission quashed by Dove J
- Upheld in CoA – Hickinbottom LJ

Principle 1 – The *Newbury* Test

- Giving the judgment of the court, at [32] Lord Sales reaffirmed the threefold test for conditions from *Newbury District Council v Secretary of State for the Environment* [1981] AC 578
- MCs must:
 1. be for a planning purpose
 2. fairly and reasonably relate to the development
 3. not be so unreasonable that no reasonable planning authority could have imposed it

Newbury Ctd

- Lord Sales JSC explained at [34]:

The equation of the ambit of “material considerations” with the ambit of the power to impose planning conditions is logical, because if a local planning authority has power to impose a particular planning condition as the basis for its grant of permission it would follow that it could treat the imposition of that condition as a material factor in favour of granting permission.

Newbury Ctd

- Citing Lord Parker CJ in *East Barnet Urban District Council v British Transport Commission* [1962] 2 QB 484 and Lord Scarman in *Westminster CC v Great Portland Estates* [1985] AC 661 he reminded that MCs concern the character of the use of land.

The test, therefore, of what is a material consideration in the preparation of plans or in the control of development . . . is whether it serves a planning purpose: see [Newbury], p 599 per Viscount Dilhorne. And a planning purpose is one which relates to the character of the use of land.

(Lord Scarman cited at [36] of Lord Sales's judgment)

Principle 2 – Materiality, not a Market

- Crucially, the test for materiality prevents the buying and selling of PPs
- Theme of another recent decision – see *Elsick Development Co Ltd v Aberdeen City and Shire Strategic Development Planning Authority* [2017] PTSR 1413 on planning obligations
- As the Court of Appeal had pointed out: the question was not whether the proffered benefits were desirable, but whether in planning terms they were material and whether they satisfied the criteria of materiality set out in the speech of Viscount Dilhorne in *Newbury*

Principle 3 – MCs not a Dynamic Concept

- Counsel for the Developer made the case that MCs are a dynamic concept which is capable of changing over time and in response to policy
- (To some extent supported by the SoS as intervener who invited the court to update *Newbury*)
- The court rejected this idea, drawing an important distinction between the *Newbury* criteria and cases, relied upon by the Developer but which in fact turned on policy justification.

MCs after *Wright*?

- Crucially, in the Supreme Court’s view:

“Statute cannot be overridden or diluted by general policies laid down by central government (whether in the form of the NPPF or otherwise), nor by policies adopted by local planning authorities.” [42]
- And:

“what qualifies as a “material consideration” is a question of law on which the courts have already provided authoritative rulings. The interpretation given to that statutory term by the courts provides a clear meaning which is principled and stable over time.” [45]

THANK YOU

Daniel Stedman Jones

R(Samuel Smith Old Brewery) v North Yorkshire County Council

The meaning of 'openness'
Presented by
Richard Harwood OBE QC

Green Belt principles

- NPPF (2012):
- “79. The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the essential characteristics of Green Belts are their openness and their permanence.”

Five Green Belt purposes

- to check the unrestricted sprawl of large built-up areas;
- to prevent neighbouring towns merging into one another;
- to assist in safeguarding the countryside from encroachment;
- to preserve the setting and special character of historic towns; and
- to assist in urban regeneration, by encouraging the recycling of derelict and other urban land.

(NPPF, para 80)

The critical distinction

- Inappropriate development – by definition harmful and only to be approved in very special circumstances
- Appropriate development – acceptable
- Includes agricultural buildings
- ‘mineral extraction’ provided it ‘preserve[s] the openness of the Green Belt and do not conflict with the purposes of including land in Green Belt’

Jackdaw Crag Quarry

- 6 hectare extension proposed
- Council considered preserved openness
- Court of Appeal said should have dealt with visual impact as part of ‘openness’ question

Lord Carnwath

- Material considerations: must, can, can't
- 'Over-legalisation'
- Openness in context of counterpart to urban sprawl and various categories in principle capable of being appropriate
- Visual impact can be a factor, with also reversibility, duration
- Not an error not to expressly refer to visual impact in this case

QUESTIONS?

EP 1 “39 FOR 39”

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