Neutral Citation Number: [2016] EWCA Civ 378

Case No: C1/2014/4059

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MR RHODRI PRICE LEWIS Q.C.
[2014] EWHC 3860 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 April 2016

Before:

Lord Justice Jackson
Lady Justice King
and
Lord Justice Lindblom

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Between:

R. (on the application of XPL Ltd.)	**Appellant**
- and -	
Harlow Council	**Respondent**

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- -

Ms Megan Thomas (instructed by **Sharpe Pritchard LLP**) for the **Appellant**
Mr Wayne Beglan (instructed by **Holmes & Hills LLP**) for the **Respondent**

Hearing date: 10 February 2016

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Judgment Approved

Lord Justice Lindblom:

Introduction

1. This appeal concerns a breach of condition notice served by a local planning authority under section 187A of the Town and Country Planning Act 1990. The notice required the company operating a bus depot to cease the "running of engines" of coaches and buses at the depot outside the hours specified in a condition prohibiting the "repairs or maintenance of vehicles or other industrial or commercial activities (other than the parking of coaches and other vehicles …)". Is it a lawful breach of condition notice?

2. The appellant, XPL Ltd., is the bus company operating the depot, which is at Plot 17 on the Harlow Business Park, Roydon Road in Harlow. The respondent, Harlow Council, is the local planning authority. XPL appeals, with permission granted by Sullivan L.J., against the order dated 28 November 2014 of Mr Rhodri Price Lewis Q.C., sitting as a deputy judge of the High Court, by which he dismissed XPL's claim for judicial review of the breach of condition notice served on them by the council on 3 June 2014. The notice alleged a breach of a condition 4 on the planning permission granted by the council for the use of the site as a "coach park/depot (sui generis use)" on 6 July 2011. It required XPL to cease the running of engines of coaches and buses outside the hours specified in condition 4. The deputy judge held that the council had not acted unlawfully in serving a breach of condition notice in those terms. XPL says he was wrong to do so.

The issues in the appeal

3. There are two issues in the appeal. Before he could decide whether the council's breach of condition notice was lawfully served, the deputy judge had to ascertain the meaning of condition 4. We must consider whether his understanding of the condition was correct. That is the first issue. The second is whether the deputy judge was right to conclude that the restriction in the condition, properly understood, bites on the running of coach and bus engines on the site outside the permitted hours. If it does, the breach of condition notice was lawfully served. If it does not, the service of the notice was unlawful. Sullivan L.J. granted permission to appeal on XPL's grounds relating to those two issues. He refused permission on a further ground in which it was contended that the council had fallen into error because when it issued the notice it ignored, as a material consideration, the fact that XPL's buses and coaches "have a necessary warm up time in order to engage the braking system (inter alia)". That ground, he said, added nothing of substance to the principal grounds.

XPL and its depot

4. XPL provides bus services throughout Harlow and the surrounding area, among them services that take children to and from school. It runs coaches for commuters, including some that travel to London and back. It also hires coaches for private use. It began operating at the depot on Harlow Business Park in 2012. The business park is in an area allocated for employment uses in use classes B1, B2 and B8 in the Replacement Harlow Local Plan. Plot 17 is a site of about half a hectare at its north-

eastern end. The nearest dwelling, St Julian's Farmhouse in Roydon Road, is about 40 metres away to the north-east, and there are others nearby. When XPL made their application for planning permission for its use of the site as a coach park and depot, it was vacant.

5. The application for planning permission for the use of the land as a "coach park/depot" was considered by the council's Development Management Committee on 6 July 2011. In her report to the committee the council's Planning and Building Control Manager explained that planning permission was sought solely for a change of use of the site from its lawful use in use classes B1 and B2 to a sui generis use as a bus and coach depot, that the site would "initially be used to accommodate some 30 to 40 coaches [sic] with associated car parking for drivers (although the application form indicates there could be scope for up to 50)", and that the drawing submitted with the application showing a building at the northern end of the site was "only a concept drawing".

6. The officer recommended that planning permission be granted. Under the heading "… Impact on amenity", she said the council had "a duty to protect the amenities enjoyed by occupiers of existing buildings from inappropriate development, in terms of overlooking, loss of daylight/sunlight and outlook, but also in terms of noise and disturbance". She referred to Policy BE17 of the local plan, which states:

> "Planning permission will be granted if noise sensitive developments are located away from existing sources of noise and potentially noisy developments are located in areas where noise will not be such an important consideration, or adequate provision has been made to mitigate adverse effects of noise likely to be generated or experienced by others."

She acknowledged that "the proposed use, with its associated comings and goings of coaches and drivers' vehicles, would result in a higher level of activity on the site than present, given that [it] is currently vacant". But in her view the proposed use would not be "significantly materially different, in terms of noise and disturbance, from that associated with a general industrial (B2) use, such as the extant permission for a Food Production Factory". The site was on a business park, where such "employment uses are expected to be located". The "operations likely to be carried out from any future building associated with the coach depot, such as repairs, servicing, etc. would fall within the type of operations generally carried out on a motor repair/service site, which falls within a B2 use class". She noted the "views of the residents relating to hours of operations of the use", and therefore suggested that if planning permission were granted "a condition should be attached to the permission to restrict the days/hours of operation in respect to any repair or maintenance of vehicles at the site".

Condition 4

7. The council's decision notice describes the "Proposal" for which planning permission was being granted as "Use of site as coach park/depot (sui generis use)". Eight conditions were imposed. Condition 4 and the reason given for its being imposed on the planning permission state:

> "No repairs or maintenance of vehicles or other industrial or commercial activities (other than the parking of coaches and other vehicles associated with the Coach Park/Depot hereby permitted) shall take place at the site except between the hours of 8.00 am and 6.00 pm on Mondays to Fridays, 8.00 am to 1.00 pm on Saturdays, and not at any time on Sundays or public holidays, unless otherwise agreed in writing with the Local Planning Authority.
>
> REASON: To ensure that any industrial operations associated with the use do not prejudice the amenity of neighbouring residents and to accord with Policy BE17 of the Adopted Replacement Harlow Local Plan, July 2006."

Section 187A of the 1990 Act

8. Section 187A of the 1990 Act provides:

> "(1) This section applies where planning permission for carrying out any development of land has been granted subject to conditions.
> (2) The local planning authority may, if any of the conditions is not complied with, serve a notice (in this Act referred to as a "breach of condition notice") on –
> (a) any person who is carrying out or has carried out the development; or
> (b) any person having control of the land,
> requiring him to secure compliance with such of the conditions as are specified in the notice.
> …
> (5) A breach of condition notice shall specify the steps which the authority consider ought to be taken, or the activities which the authority consider ought to cease, to secure compliance with the conditions specified in the notice.
> …
> (9) If the person responsible is in breach of the notice he shall be guilty of an offence.
> … ."

The breach of condition notice

9. Complaints about noise coming from the site were made by a neighbouring resident in June 2012, and again in August 2013. On the second occasion the complaint was partly about engine noise in the early hours of the morning. Other complaints followed, also about engine noise before 8 a.m.. The council's environmental health officer told the complainant that the noise did not amount to a statutory nuisance. But noise measurements taken in March 2014 showed there was noise coming from the site from about 5.30 a.m., and that it was loud enough to interfere with the sleep of local residents.

10. On 10 April 2014, after correspondence with XPL in which the council expressed its concern about "the starting up and revving of coach engines" before 8 a.m., the council served a breach of condition notice. The notice alleged a breach of condition 4,

and required the cessation of "all commercial and industrial activities at the site (including the operation of the engines of any coaches and buses parked at the site and associated with the Coach Park/Depot) and any maintenance and repair outside the permitted hours specified within condition 4". Further correspondence followed. In an e-mail dated 2 May 2014 to the council's Development Management Officer, Mr Gatland, XPL's planning consultant, Mr Keir, confirmed that "any operating of the engines outside the specified hours covered by the condition will only be for the purposes of parking or "unparking" of coaches at the end or beginning of the day". Responding on behalf of the council, in an e-mail dated 3 June 2014, Mr Gatland said it was "not the parking of vehicles on the site that is causing the problems but that vehicle engines are being started up and left running for long periods of time in the early morning (from 5am onwards) before they are driven off the site". This, said Mr Gatland, was "causing disturbance to neighbours, and is deemed to be a commercial activity which the LPA is entitled to seek to control by condition 4". The carrying out of DVSA checks, he said, "is clearly associated with commercial operations, and is not merely the parking or un-parking of vehicles, and as such should not be taking place outside the hours permitted by condition 4".

11. The council proceeded to serve a further breach of condition notice – the notice with which these proceedings are concerned – and to withdraw the notice it had served on 10 April 2014.

12. Paragraph 4 of the notice dated 3 June 2014 alleged a breach of condition 4. In paragraph 5, under the heading "What You Are Required To Do", it stated:

> "As the person responsible for the breach of condition specified in paragraph 4 of this notice, you are required to comply with the stated condition by taking the following steps:
> (1) Cease the running of engines of any passenger carrying vehicles (i.e. coaches and buses) at the site and associated with the coach park/depot (except when the vehicles are being moved onto the site to park) outside the permitted hours specified within condition 4. This includes the running of engines in association with the carrying out of any daily checks that may be necessary before passenger carrying vehicles parked at the site are brought into use to undertake commercial passenger transport services."

The period for compliance was 28 days, beginning on the date on which the notice was served.

13. When the council served the notice, its Development Manager, Ms Fitzgerald, sent a letter to Mr Marino of XPL, dated 3 June 2014, setting out "a summary of the operations" considered by the council to be "acceptable for the business operating at the site to undertake outside the hours on the condition, and those which should only be undertaken during the specified hours":

> "1. The moving of passenger carrying vehicles (i.e. coaches and buses) onto the site to park is acceptable at any time between Monday and Saturday. This is specifically permitted by the condition.

> 2. The manoeuvring of vehicles around the site in connection with the carrying out of maintenance or repair of vehicles is not acceptable before 8am or after 6pm on Mondays and Fridays or before 8am and after 1pm on Saturdays, or at any time on Sundays and public holidays. The condition specifically rules out repairs or maintenance of vehicles associated with the coach park/depot outside the permitted hours.
>
> 3. The running of passenger carrying vehicle engines at the site in connection with the carrying out of any daily walk around checks that may be necessary in order to ensure the vehicles are road worthy before they leave the site to carry out commercial bus services, or in connection with the carrying out of any maintenance or repair, is not permitted before 8am or after 6pm on Mondays to Fridays or before 8am and after 1pm on Saturdays or at any time on Sundays and public holidays. The carrying out of checks is part of the commercial bus service operation."

Ms Fitzgerald's letter repeated Mr Gatland's previous comments about checks being undertaken on vehicles while their engines were running.

14. Still further e-mail correspondence then followed. In an e-mail to Mr Gatland dated 12 June 2014 Mr Keir explained the need for bus engines to be run before the vehicle could move off so that sufficient air pressure could be built up "to enable air brakes and air suspension etc to operate safely and effectively". This, he said, could take "between 4 and 10 minutes". Mr Gatland's response, on the same day, said that Mr Keir's e-mail served to reinforce the council's view "that the parking and manoeuvring of vehicles onto the site and the manoeuvring (or un-parking) of vehicles off the site are fundamentally different activities by virtue of the requirement … to run a vehicle's engine for between 4 and 10 minutes to achieve a certain air pressure, which is not necessary when vehicles are simply parked".

Mr Keir's evidence

15. In his second witness statement in support of the claim, dated 20 October 2014, Mr Keir explains XPL's "operational requirement to 'unpark' buses and coaches at their site in the Harlow Business Park before 8:00am and secondly the operational requirement to run the engines of the buses for a few minutes prior to moving because of the long established mechanical safety procedures governing heavy goods vehicles and air suspension buses and coaches" (paragraph 2). Mr Keir produces XPL's bus routes and timetables, all of which, he explains, "involve the commencement of activities on the site or 'unparking' of the buses and coaches prior to 8:00am" (paragraph 3). He refers, for example, to services 741 and 741A, which takes commuters from Bishop's Stortford and Harlow to London. The first bus on service 741 leaves the depot at 5 a.m., for a first departure from Bishop's Stortford railway station at 5.41 a.m.; the first bus on service 741A leaves the depot at about 6 a.m.. Buses on these routes return to the depot in the evening, between 7 and 8.45 p.m. (paragraph 5). Having illustrated the point with this and several other bus services, Mr Keir says "the requirement for buses to leave their depot before usual working hours is not unusual or inordinate to any degree", and "no bus depot would be able to provide a public bus service if it was restricted to the Council's interpretation of the meaning of

condition 4" (paragraph 11). As for the need for a bus engine to be run before the vehicle is driven off, Mr Keir refers to his understanding that a "bus with an air powered brake system and air suspension system cannot be driven off until the air assisted braking system and, if appropriate, air suspension system has reached [operational] pressure", and that this can be done within a period of at most five minutes. It is not necessary to rev the engine (paragraph 15).

What does condition 4 mean?

16. As the parties agree, and as the deputy judge acknowledged in paragraph 12 of his judgment, the general rule relating to the interpretation of a planning permission that is clear, unambiguous and valid on its face, is that regard may only be had to the planning permission itself, including the conditions, if any, imposed upon it and the reasons given for those conditions in the decision notice itself (see, for example, the judgment of Upjohn L.J. in *Miller-Mead v Minister of Housing and Local Government* [1963] 2 Q.B. 196, at p.224). The planning permission and its conditions must be construed as a whole, as a "reasonable reader" would (see, for example, the judgment of Arden J., as she then was, in *Carter Commercial Developments Ltd. v Secretary of State for Transport, Local Government and the Regions* [2003] J.P.L. 1048, at paragraph 27). If there is ambiguity in the wording of the permission, one can look at extrinsic material, including the application, to resolve it (see Keene J., as he then was, in *R. v Ashford Borough Council, ex parte Shepway District Council* [1999] P.L.C.R. 12, at p.19).

17. In the recent decision of the Supreme Court in *Trump International Golf Club Scotland Ltd. and Another v Scottish Ministers* [2015] UKSC 74 that principle was endorsed by Lord Hodge in paragraphs 33 and 34 of his judgment (with which the other members of the court agreed). In paragraph 33 he said there is "only limited scope for the use of extrinsic material in the interpretation of a public document, such as a planning permission …". In support of that proposition he cited Keene J.'s decision in *Shepway* and the decision of this court in *Carter Commercial Developments Ltd.*, in particular paragraph 13 of the judgment of Buxton L.J. and paragraph 27 of the judgment of Arden J.. It was "also relevant to the process of interpretation that a failure to comply with a condition in a public law consent may give rise to criminal liability". In paragraph 34 he went on to say this:

> "When the court is concerned with the interpretation of words in a condition in a public document such as a section 36 [of the Electricity Act 1989] 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. Whether the court may also look at other documents that are connected with the application for the consent or are referred to in the consent will depend on the circumstances of the case, in particular the wording of the document that it is interpreting. Other documents may be relevant if they are incorporated into the consent by reference … or

> there is an ambiguity in the consent, which can be resolved, for example, by considering the application for consent."

In his judgment Lord Carnwath said this, at paragraph 66:

> "… I do not think it is right to regard the process of interpreting a planning permission as differing materially from that appropriate to other legal documents. As has been seen, that was not how it was regarded by Lord Denning in the *Fawcett* case [1961] [A.C. 636]. 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. …"

18. When she began her submissions on the appeal Ms Megan Thomas, for XPL, said she was not contending that condition 4 is "legally invalid". She submitted, however, that the condition must be construed reasonably so as not to frustrate the use approved by the planning permission. Construed as the deputy judge had construed it, the condition would prevent "any meaningful public transport bus service" being run from the site (see, for example, the judgment of Sir Douglas Frank Q.C. in *Kent County Council v Secretary of State for the Environment and Burmah Oil* [1977] 33 P. & C.R. 70, at p.79).

19. The correct interpretation of the condition in its context, said Ms Thomas, is that it prohibits repairs and maintenance of buses, and similar activities, on the specified days and at the specified hours, but not any other activities. She relied on the "ejusdem generis" rule of statutory interpretation – classically described in section 379 of "Bennion on Statutory Interpretation" (6th edition) as "a principle of construction whereby wide words associated in the text with more limited words are taken to be restricted by implication to matters of the same limited character". The phrase "[no] repairs or maintenance of vehicles or other industrial or commercial activities" embraces only such "industrial or commercial activities" as are similar to repairing or maintaining vehicles. The concept of "parking" in the condition includes both the manoeuvre of parking a bus when it arrives at the site and also its departure from the site, which Ms Thomas described as "un-parking". That understanding of the word "parking" is, she said, its natural and ordinary meaning, and is supported by the model condition in Circular 11/95 "The Use of Conditions in Planning Permissions". The reason given for the imposition of the condition shows the council was seeking only to ensure that "industrial operations" would not disturb neighbouring residents – which is scarcely surprising as the site is on an industrial estate. One should not read into the condition a restriction on buses leaving the site. But the council had sought to achieve such a restriction through the breach of condition notice.

20. Ms Thomas' alternative submission was that the planning permission is ambiguous on its face, in that condition 4 and the reason given for its imposition are, in an important respect, inconsistent and imprecise. The condition itself refers to "industrial or commercial activities", whereas the reason refers only to "any industrial operations…". The reason does not make clear whether or why "commercial" activities were considered to be potentially harmful to "the amenity of neighbouring residents". Contrary to the conclusion of the deputy judge (at paragraph 35 of his judgment), it is necessary to look at extrinsic material, in particular the planning

officer's report to committee, where it is plain that, in the officer's view, the activities that ought to be controlled were "repairs and maintenance".

21. I cannot accept those submissions. In my view, as Mr Wayne Beglan submitted on behalf of the council, the deputy judge's approach to construing the condition was right, and his interpretation of it correct.

22. It is common ground in this court that condition 4 is a legally valid planning condition. I see no reason to disagree. The condition satisfies the three *Newbury* tests – relevance to planning, a reasonable relationship to the development permitted, and reasonableness in the sense of its not being perverse (see *Newbury District Council v Secretary of State for the Environment* [1981] A.C. 578, in particular the speech of Lord Scarman at p.618G to p.619H).

23. The deputy judge sought to ascertain the true meaning of the condition, when read in the context of the planning permission as a whole, including its conditions with their reasons. He acknowledged, rightly, that a planning permission and its conditions "must be read as a whole and be given the meaning that a reasonable reader would give them without any special knowledge and without looking at any extrinsic material except in particular circumstances …" – and that such circumstances did not arise here (paragraph 30 of the judgment).

24. In my view the condition and its reason are not difficult to understand. The restrictions it contains are clearly framed, with the obvious intention of precluding a wide range of activities outside the specified days and hours, and with the obvious purpose, spelt out in the reason for its imposition, of ensuring that "the amenity of neighbouring residents" is not harmed. The range of activities prevented outside the 10 hours between 8 a.m. and 6 p.m. on Monday, Tuesday, Wednesday, Thursday and Friday, the five hours between 8 a.m. and 1 p.m. on Saturday, and at any time on Sunday is defined in deliberately broad terms. The restrictions are not confined merely to the "repairs or maintenance of vehicles". They extend to other activities potentially harmful to residential amenity. They include "other industrial or commercial activities (other than the parking of coaches and other vehicles associated with the Coach Park/Depot hereby permitted …". Those additional words would have been unnecessary if the scope of the restrictions in the condition had been limited to the activities involved in repairing and maintaining vehicles. They were clearly included to expand the range of restricted activities beyond the repair and maintenance of vehicles.

25. The council's purpose in formulating the restrictions as widely as it did is plain in the reason it gave for imposing the condition, which is – I paraphrase – to ensure that there will be no harm to the "amenity of neighbouring residents", and to meet the requirements of Policy BE17 of the local plan. The policy is effectively incorporated into the reason by reference. The word "amenity" in the reason for the condition gains its full sense from the policy. The policy deals with the harm that "potentially noisy developments" might cause to others. The reference to it in the reason for condition 4 confirms that the purpose of the condition is to protect neighbouring residents from noise generated by the permitted use of the site as a "coach park/depot". One of the sources of noise associated with the use of a site as a "coach park/depot", indeed the

most obvious, will be the vehicles used by the operator – coaches and buses themselves.

26. What then is the natural and ordinary meaning of the language in the condition? As Mr Beglan submitted, and as the deputy judge observed (in paragraph 33 of his judgment), the words "repairs", "maintenance", "industrial" and "commercial" all bear their ordinary English meaning. The presence of all four concepts in the condition demonstrates the breadth of the restrictions imposed. As for the phrase "other industrial or commercial activities", the word "other" must mean that the activities involved in the "repairs or maintenance of vehicles" are themselves "industrial or commercial activities". The ambit of "other industrial or commercial activities" is intentionally large. This is clear from the sole specific exception to it, introduced by the words "other than". The exception is "the parking of coaches and other vehicles associated with the Coach Park/Depot hereby permitted". Whether the "parking" of such vehicles was regarded by the council as an "industrial activity" or – as seems more likely – a "commercial" one, does not matter. It is obviously one or the other, because it is explicitly an exception to the generality of those activities. And it can hardly be said to be an activity similar to "repairs or maintenance". It is an "industrial or commercial" activity of a quite different kind.

27. I think that is in itself enough to defeat the submission for which Ms Thomas sought to deploy the "ejusdem generis" principle, borrowing it from the realm of statutory construction. Like the deputy judge – who rejected the same submission (in paragraph 33 of his judgment) – I do not accept that the "ejusdem generis" principle has any place in the interpretation of planning conditions. The suggestion that it does is novel. But in any event I see no need to resort to it here. What we have to do is to construe the words the council used in the condition to give it a sensible meaning as a restriction on a use approved by a planning permission. I think Mr Beglan was right to submit that, in condition 4, the words "repairs or maintenance" do not represent a "genus", limiting the sense of the words "other industrial or commercial activities". Read in a straightforward way, the phrase "other industrial or commercial activities" in this planning condition can only mean what the words say, no more and no less. One should not read into the condition some additional, qualifying word or words, so that the phrase becomes, for example, "other <u>similar</u> industrial or commercial activities" or "other industrial or commercial activities <u>of that kind</u>" (my emphasis). On the true construction of the condition, therefore, "other industrial or commercial activities" can be activities quite unlike "repairs or maintenance". Otherwise, on the logic of Ms Thomas' submission, it would be necessary to regard the excepted activity of "parking" as an activity akin to "repairs or maintenance".

28. I reject the submission that the concept of "parking" in condition 4 is to be regarded as including the removal of a vehicle from the place where it has been parked. That is to distort the natural and ordinary meaning of the word. To "park" a vehicle is to bring it to a halt and to leave it temporarily where it is; the relevant definitions in the Shorter Oxford English Dictionary (5th edition) are "[to] bring (a vehicle) to a halt in a stationary position intended to be clear of the flow of traffic", and "[to] leave [it] in a convenient place until required". It is not a verb one can use to describe the action of moving the vehicle from the place where it has been left – which is the activity Mr Keir described in correspondence with the council and in his evidence as "unparking". The exception in the condition for "the parking of coaches and other vehicles

associated with the Coach Park/Depot hereby permitted" relates to the parking of coaches and buses when they return to the depot in the evening, not to their engines being started and run for some five minutes before they can depart from the site at the beginning of the working day. It also relates to the parking of vehicles used by the operator's employees, which is not contentious in these proceedings.

29. I do not see anything in the submission that in the reason for the condition one finds the expression "industrial operations associated with the use", whereas the condition itself refers not to "industrial activities" but to "industrial or commercial activities". Reading the condition together with its reason, one can readily understand the expression "industrial operations associated with the use" in the reason. That phrase does not reduce the scope of the restrictions in the condition. It must correspond to the various restricted activities, industrial and commercial alike. As the deputy judge said (in paragraph 35 of his judgment), it "does not mean the prohibition on commercial activities outside the permitted hours in the body of the condition is deprived of its effect". The submission that it has that effect is mistaken.

30. In my opinion, therefore, there is no ambiguity either in the condition itself or in the condition and its reason read together. It follows that there is no need to go in search of extraneous material – such as the officer's report to committee or any model condition relating to parking – as an aid to interpretation. Conditions and their reasons should be interpreted, if they can be, in a benevolent way, and not in a search for inconsistency or lack of precision (see, for example, the judgment of Sullivan J., as he then was, in the first instance judgment in *Carter Commercial Developments Ltd.* – [2002] EWHC 1200 (Admin), at paragraph 49). Here, on a common sense reading of condition 4, there is no inconsistency, and no imprecision. The condition is perfectly clear on its face. It does not particularize every kind of "industrial" or "commercial" activity to which its restrictions apply, and it does not have to do that to be clear. The phrase "industrial or commercial activities" is not opaque. As I have said, it has a sufficiently intelligible meaning.

31. Thus the correct interpretation of the condition is that it restricts to the specified days and hours any industrial or commercial activity at the site, including the repair and maintenance of coaches and buses, but with the exception of the parking of those and other vehicles associated with the permitted use.

32. As is agreed, none of the other conditions imposed on the planning permission affects that interpretation of condition 4.

33. The deputy judge said (in paragraph 34 of his judgment) that his interpretation of the condition would not make the planning permission unworkable. I agree. The restriction on the use of the depot in condition 4 may be severe in its implications for XPL's business, but even if that is so, it is nevertheless, in my view, a lawful and valid restriction on the development approved by the planning permission. It does not have the effect of preventing the site from being put to the use approved by the planning permission. And it is, as the deputy judge also held (in the same paragraph), a sufficiently precise and enforceable planning condition.

Is the breach of condition notice lawful?

34. The deputy judge concluded (in paragraph 31 of his judgment) that the words "no repairs or maintenance of vehicles or other industrial or commercial activities" were "wide enough to cover the activity of starting the engine of a bus or coach in readiness for its use in the business of running a coach park/depot as permitted on this site by the planning permission", no matter "whether the engine is started to carry out necessary checks or simply to prepare the vehicle to depart". This was, as he said, a "commercial activity". It was an activity, as he put it, "carried out as part of running the business and … therefore prohibited outside the hours specified by condition 4". He concluded (in paragraph 32) that the "[industrial] or commercial activities" restricted by the condition "include the activity of starting a bus or coach in readiness for its departure from the depot". Reading the condition "as [a] whole", he did "not accept that the exemption of "parking" means that running the engine of a bus or coach on site in readiness for its departure to pick up paying passengers is not a commercial activity caught by the prohibition" (paragraph 35).

35. Ms Thomas submitted that those conclusions of the deputy judge were wrong. She contended that the breach of condition notice purports to prevent an activity not prohibited by condition 4, and is therefore ultra vires. As Mr Gatland's e-mail to Mr Keir of 3 June 2014 explained, the council's position seems to be that "un-parking" is not a "commercial" activity, but the breach of condition notice prevents it (see paragraph 10 above). Plainly, a bus cannot leave the site unless its engine is running, but the breach of condition notice makes that a criminal offence outside the days and hours specified in condition 4. Properly construed, condition 4 does not prevent the running of coach and bus engines before they leave the site in the morning. And it is clear from Ms Fitzgerald's letter of 3 June 2014 that the breach of condition notice was not intended to prevent coaches and buses leaving the site and returning to it at times outside the specified days and hours (see paragraph 13 above). Had the council meant to impose such a constraint on the permitted use, condition 4 would have had to say so in the clearest possible terms.

36. In my view those submissions are incorrect. I think the deputy judge was right to conclude as he did.

37. The breach of condition notice is not concerned with "the parking of coaches and other vehicles associated with the Coach Park/Depot". Condition 4 expressly permits that activity, which would, in my view, clearly include the parking of coaches and buses on their return to the depot at the end of the working day. There is nothing controversial about that. The condition does not prevent it, and the breach of condition notice does not require it to cease.

38. Our focus must be on the concept of "the running of engines of … coaches and buses" outside the permitted hours, which is the only activity attacked by the notice. We are not concerned with any other activity on the site. The issue we have to consider here is whether "the running of engines of … coaches and buses" on the site at any time outside the permitted hours, in preparation for those vehicles to be driven from the site for one commercial purpose or another, is inextricably part of that commercial purpose – referred to in the breach of condition notice as "commercial passenger transport services" – and hence within the scope of "other industrial or commercial activities

…" in condition 4. In a practical sense, the issue comes down to whether the running of these vehicles' engines in the early hours of the morning before they begin their day's work is an activity restricted by the condition, and so within the lawful reach of a breach of condition notice. It does not matter whether the engines are being run so that daily checks are carried out, or simply to enable the vehicle to be used with its brake system working properly, or indeed to be driven at all. The mechanical necessity for this to be done is not in itself in dispute. And as the deputy judge said (in paragraph 36 of his judgment), the council was aware when it took the decision to serve the notice "that buses and coaches have a "warm up time"". This was not a consideration that the council ignored.

39. In my view it is clear that at this bus depot – as it must be at any bus depot – "the running of engines of … coaches and buses" as a necessary activity in preparing to use those vehicles for commercial purposes, must be, of itself, a commercial activity or, at least, indispensably part of a commercial activity. I would have taken that view even in the absence of the evidence of Mr Keir (see paragraph 15 above). But in the light of that evidence there can be no doubt that the running of the engines of the buses and coaches in XPL's fleet is essential to the safe and efficient performance of its business. It is, in my view, an activity squarely within the "other industrial or commercial activities …" restricted by condition 4. It also clearly has the potential to "prejudice the amenity of neighbouring residents" – by generating noise disturbing to local residents – contrary to Policy BE17 of the local plan. And it is not in dispute that this activity has been occurring outside the hours permitted for "other industrial or commercial activities …" by the condition.

40. It follows that the council's breach of condition notice was properly directed at "the running of engines of any passenger carrying vehicles (i.e. coaches and buses) at the site and associated with the coach park/depot (except when the vehicles are being moved onto the site to park) outside the permitted hours specified within condition 4". That activity was clearly prohibited by condition 4. It was thus properly subject to the enforcement of planning control by the service of the breach of condition notice.

41. It is not the court's task to assist XPL in overcoming the commercial predicament it says it faces if the breach of condition notice is upheld. The deputy judge said (in paragraph 34 of his judgment) that "[a] bus depot may still be run from this site …". The effect of the notice is to enforce the restriction under condition 4. As the deputy judge also said (in the same paragraph), if this presents XPL with "commercial difficulties", it is open to them to make an application under section 73 of the 1990 Act, seeking a variation of the condition by extending the hours of the use or enlarging the exception, or both. If that were to be done, and the council refused the variation sought, XPL could pursue the matter on appeal to the Secretary of State. Whether there are also physical measures that might be taken to reduce vehicle noise emanating from the site, the most obvious being the erection of an acoustic barrier of some kind, is another question, though not one on which the court could, or should, offer any view of its own.

42. Leaving that speculation aside, I conclude, for the reasons I have given, that the council's breach of condition notice is lawful, and that the deputy judge was right to uphold it.

Conclusion

43. I would therefore dismiss the appeal.

Lady Justice King

44. I agree.

Lord Justice Jackson

45. I also agree.