

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT (QUEEN'S BENCH)
THE HON. MR JUSTICE JAY
CO33722015

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/12/2016

Before:
LORD JUSTICE BRIGGS
and
LORD JUSTICE SALES

Between:

**The Queen on the Application of Skelmersdale Limited
Partnership**

Appellant

- and -

West Lancashire Borough Council

First Respondent

St Modwen Developments (Skelmersdale) Ltd

**Second
Respondent**

Nathalie Lieven QC (instructed by **Mishcon De Reya**) for the **Appellant**
James Maurici QC (instructed by **West Lancashire Borough Council**) for the **1st Respondent**
Douglas Edwards QC and Sarah Sackman (instructed by **Winckworth Sherwood LLP**) for
the **2nd Respondent**

Hearing date: 30th November 2016

Judgment Approved

Lord Justice Sales:

1. This is an appeal from the decision of Jay J whereby he dismissed a claim for judicial review of a condition of a planning permission granted by the First Respondent (“the Council”) on 5 June 2015. The planning permission was for a new retail-led development on a site of about 5 hectares in the town centre of Skelmersdale, known as the St Modwen site.
2. The developer of the St Modwen site is the Second Respondent (“SMD”). The Appellant (“SLP”) is the owner of an already existing shopping mall in Skelmersdale town centre, known as the Concourse Centre. The object of the judicial review proceedings brought by SLP is to show that the relevant condition (“condition 5”) of the planning permission cannot stand, with the result that the grant of planning permission should be quashed in view of the importance of that condition.

Factual background

3. The Council has been concerned for some years that the town centre of Skelmersdale is rather run-down and lack-lustre and requires revitalisation as a strategic development site. Its Local Plan includes as policy SP2 a policy to achieve that object.
4. Policy SP2 provides that “Proposals for the enhancement, regeneration and redevelopment of Skelmersdale Town Centre within the Strategic Development Site ... will be supported” and sets out a series of key principles and key development aims of the strategic site. The St Modwen site is within the strategic development site area. Key development aim 2(i) in the Local Plan states:

“To enhance the Town Centre offer and to ensure the long-term vitality and viability of the Town Centre, including the Concourse Centre, new development is required to link the Concourse and Asda/West Lancashire College and must include a range and mix of uses including retailing (food and non-food), leisure, entertainment (including a cinema), office space, residential and green space. Any scheme should not harm to viability and vitality of the Concourse Centre and must provide sufficient linkage to the Concourse.”
5. SMD’s application to develop the St Modwen site was assessed against policy SP2, among others. SMD adduced a report from retail consultants in support of its application. The Council, however, preferred to seek advice from its own independent retail consultants, Peter Brett Associates LLP (“PBA”).
6. PBA produced an up-to-date report dated 9 February 2015 (“the PBA report”). This highlighted the commercial fragility of the Concourse Centre, which had experienced closures of retail outlets and an increase in its vacancy rate. PBA referred to key development aim 2(i), above. It was concerned that if retailers with significant retail units in the Concourse Centre gave up those units in order to lease new units on the St Modwen site, that would damage the viability and vitality of the Concourse Centre. PBA regarded Home Bargains and Wilko as particularly key anchoring retailers in the Concourse Centre, because they occupied substantial units at either end of the centre.

However, PBA considered that its concern could be addressed by the Council imposing occupancy restrictions in conditions, which might also need to be backed up by “an associated legal agreement”.

7. The report of the Council’s planning officer for members of the Council’s planning committee on the application for planning permission recommended that it should be granted, subject to a condition to protect the vitality and viability of the Concourse Centre. The planning officer made extensive reference to the report by PBA, which was also available to committee members. The officer report included the following:

"6.15 It is criterion 2(i) of Policy SP2 that is critical in this instance and the requirement that any *scheme should not harm the vitality and viability of the Concourse Centre*. It would certainly not be the intention of the Council to allow development that would be harmful to the Concourse, rather, it is critical that any new development acts as a catalyst in improving the town centre as a whole to the overall benefit of the Concourse.

6.20 ...The loss of any of the main retailers would represent a serious blow to the Concourse. PBA advise that if the Council are minded to approve the proposed development, it should seek to put in place some form of controls designed to secure the long term presence of the larger and key retailers in the Concourse. Normally such controls alluded to could be secured under the terms of Paragraph 26 of the NPPF [National Planning Policy Framework], but the NPPF impact test specifically applies to applications for retail, leisure and office developments "outside of town centres", whereas the proposed site is within the town centre. However, given that Part 2(i) of Policy SP2 in the Local Plan states "Any scheme should not harm the vitality and viability of the Concourse Centre ..." I believe that it would be justifiable for the Council to impose occupancy conditions.

6.21 PBA also consider that the key to protecting the long-term vitality of the Concourse is to ensure that existing anchor stores are prevented from relocating to the St. Modwen site. I agree with this assessment...

6.23 In the light of the above advice, I am satisfied that the proposed development complies with both the aims of Policy SP2 and IF1 of the Local Plan and references to town centre development within the NPPF provided that a mechanism is put in place by way of condition, which seeks to minimise the risk of key anchor stores relocating from the Concourse into the new scheme, thereby offering some form of protection to the viability and viability [sic] of the Concourse. See condition 5 below. Subject to this condition, it is considered that this proposal is acceptable in principle.” [emphasis in original]

8. The proposed condition was along the lines of what became condition 5. The final form of condition 5 was set out in an updated report from the planning officer, as follows:

"(i) Otherwise than in the circumstances set out at (ii) below, for a period of five years from the date on which the development is first occupied, no retail floorspace hereby approved shall be occupied by any retailer who at the date of the grant of this permission, or within a period of 12 months immediately prior to the occupation of the development hereby approved, occupies retail floorspace which exceeds 250 sqm [Gross External Area] within The Concourse Shopping Centre Skelmersdale.

(ii) Such Occupation shall only be permitted where such retailer as identified in (i) above submits a scheme which commits to retaining their presence as a retailer within The Concourse Shopping Centre Skelmersdale for a minimum period of 5 years following the date of their proposed occupation of any retail floorspace hereby approved, and such scheme has been approved in writing by the Local Planning Authority."

9. The reason given for condition 5, as was later also set out in the planning permission, was:

"To ensure that those retailers which presently occupy the key units in The Concourse retain a presence in The Concourse for a reasonable period of time in order to protect the vitality and viability of The Concourse in accordance with Policy IF1 and SP2 of the West Lancashire Local Plan 2012-2027 Development Plan Document and the NPPF."

10. I should mention here that, unlike condition 5, other conditions in the planning permission which required matters to be submitted and approved by the Council (condition 3: approval of finished levels of all parts of the buildings; condition 4: approval of construction materials) also included express provision that development should be carried out in accordance with the approved details, commonly called an implementation clause.
11. Before the grant of planning permission, SLP wrote to the Council to complain about the merits and lawfulness of condition 5. At a meeting of the planning committee on 19 March 2015 there was a discussion regarding the enforceability of condition 5, and the Council's planning officers advised members that they were satisfied as to its efficacy.

The judgment below

12. The three principal grounds for claiming judicial review below, which were rejected by the judge, are repeated in the grounds of appeal: (1) condition 5(ii) does not require a retailer to enter into any legally binding commitment to retain their presence as a

retailer in the Concourse Centre and it is not possible to imply an implementation clause, with the result that it is ineffective to achieve its intended objective; (2) condition 5 is so vague as to be unlawful and unenforceable; and (3) condition 5 would fail to achieve its intended purpose. In substance, (2) and (3) are aspects of the same issue and Miss Lieven QC for SLP presented them as such. Rolled up within (3), but which is really a separate fourth ground of complaint, is (4) the members of the planning committee were not given accurate or adequate advice by planning officers regarding possible difficulties regarding the enforceability of condition 5.

13. The judge held in relation to ground (1) that the word “commits” in condition 5(ii) means commits by way of undertaking a legally binding commitment to the Council by way of a direct contractual relationship between the retailer in question and the Council, with the result that no further implementation clause is required in order to give condition 5 practical effect (the judge indicated, obiter, that he would not have felt able to imply an implementation clause if he was wrong about the meaning of “commits”). In relation to grounds (2) and (3), the judge held that condition 5 has a determinate meaning and is not so vague as to be unlawful or unenforceable. In relation to ground (4) he held that the planning committee members were given sufficient advice about condition 5.

Discussion

14. I agree with the judge’s decision on all four grounds. In view of his ruling on ground (1) regarding the meaning of the word “commits” in condition 5(ii), with which I agree, it is unnecessary and inappropriate to say anything about the issue whether, if the interpretation of “commits” were wrong, an implementation clause could be read into condition 5 by implication. I take each ground of appeal in turn.

Ground (1): interpretation of “commits” in condition 5(ii)

15. Guidance as to the interpretation of the terms of a grant of planning permission is given in the judgment of Lord Hodge JSC in *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2015] UKSC 74; [2016] 1 WLR 85, at paras. [33]-[34]. As Lord Hodge explains, there is only limited scope for the use of extrinsic material in the interpretation of a public document such as a planning permission ([33]), but reference to some extrinsic materials, such as the application for permission, may be legitimate ([34]). In this case, it is common ground that the PBA report and the officer’s reports, which are all on the publicly available planning file, are legitimate aids to construction of condition 5.
16. In fact, however, I consider that the judge was plainly correct in his interpretation of the word “commits” in condition 5(ii), without the need for reference to these extrinsic materials. Lord Hodge explains at [34] that the interpretation of a condition in a planning consent involves asking “what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole”; “This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense.”

17. In our case, the purpose of condition 5 is clear, to maintain the viability and vitality of the Concourse Centre by ensuring that retailers with significant units in the Concourse Centre should not be able to decamp from there to go to the St Modwen site, but should be required to maintain their units at the Concourse Centre even if they decide that they want a unit at the St Modwen site as well. That objective could only be fulfilled if the retailers in question are made subject to a legally binding commitment holding them to that position. In this context, the phrase “submits a scheme which commits to retaining their presence as a retailer [etc]” in condition 5(ii) plainly means, “submits a scheme which includes a legally binding obligation on them to retain their presence as a retailer [etc]”. That is the natural and ordinary meaning of the word “commits”. This interpretation accords with a common sense view of what the Council was seeking to achieve.
18. Moreover, the fact that the planning permission contained conditions 3 and 4, which expressly included implementation clauses, serves to emphasise the (already obvious) point that by the conditions in the planning permission the Council was seeking to achieve practical enforceability of schemes which required its approval. The obvious reason why condition 5(ii) did not include an implementation clause is that none was required, precisely because the word “commits” connotes a legally binding commitment.
19. Yet further, reference to the relevant extrinsic materials in the form of the PBA report and the officer reports confirms and further supports this interpretation. The PBA report indicated that to meet concerns regarding the impact of the St Modwen site on the Concourse Centre legally binding obligations would be required to prevent significant retailers simply decamping from the latter to the former. The principal officer report was to similar effect.

Grounds (2) and (3): effectiveness of condition 5 to secure its objective

20. It is common ground that, at the very least, it is possible for a retailer who is a significant retailer at the Concourse Centre within the scope of condition 5(i) who wishes to open a retail unit at the St Modwen site to present a scheme under condition 5(ii) which would involve it in undertaking direct contractual obligations to the Council pursuant to an agreement to be entered into pursuant to section 106 of the Town and Country Planning Act 1990 at the time of approval of the scheme and the grant of a leasehold interest in a unit at the St Modwen site to that retailer. This is sufficient to show that condition 5 can be operated in a manner which accords with its natural meaning, as explained above. It is unnecessary to explore further whether there might be other ways in which a contractual regime could be introduced in reliance on section 106 or, possibly, based on other powers to contract which the Council might have.
21. At trial there was some debate whether condition 5 could be enforced in practice, in view of the difficulties of obtaining specific performance of a contract to carry on a business: see *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1. But as the judge pointed out in his judgment at [65], the relevant contract with a retailer can include a negative covenant not to occupy retail floorspace at the St Modwen site unless that retailer continues to retain its presence as a retailer at the Concourse Centre and all that would be required to enforce the contract in a manner effective to protect the Concourse Centre against the risk of a retailer

decamping to the St Modwen site would be negative injunctive relief to enforce that negative covenant. In the event, Miss Lieven did not seek to revive this objection by SLP in her submissions.

22. Miss Lieven's submissions focused on whether condition 5(ii) should be interpreted so as to allow a significant retailer at the Concourse Centre within the scope of condition (i) substantially to reduce its presence there and in effect transfer the bulk of its activities to the St Modwen site. If that were the proper interpretation of condition 5(ii), then either the meaning of the phrase "retaining their presence as a retailer within [the Concourse Centre]" is too vague to be lawful in a condition of this kind or it is too open to having its effect undermined in practice that it cannot represent an effective answer to the Council's own concern to maintain the viability and vitality of the Concourse Centre by preventing significant retailers decamping from there to the St Modwen site. On the footing that this is the proper interpretation of condition 5(ii), Miss Lieven pointed out that if the Council refused to approve a scheme proposed by a relevant retailer involving a contractual arrangement which would allow the retailer to reduce its retail presence at the Concourse Centre to a minimal or much reduced level, then the retailer would be able to appeal against that decision to the Secretary of State and an Inspector on that appeal would require the Council to accept the proposed arrangement.
23. In my judgment, this argument is unsustainable because its premise is flawed. Condition 5(ii) does not bear the meaning which Miss Lieven seeks to ascribe to it.
24. Contrary to Miss Lieven's submission, and in line with the interpretive guidance given by Lord Hodge referred to above, I consider that the phrase "retaining their presence as a retailer within [the Concourse Centre]" in condition 5(ii) means "retaining the substance of their presence as a retailer at the level and at the time specified in condition 5(i) within the Concourse Centre". This accords with the natural and ordinary meaning of the words, which refer to retaining "their presence as a retailer" (so their presence at the level and time so specified) rather than retaining "a presence as a retailer", which would be the effect of Miss Lieven's proposed construction. It also accords with the scheme of condition 5 read as a whole, since Miss Lieven's proposed interpretation of condition 5(ii) would undermine in an irrational way the basic prohibition set out in condition 5(i).
25. The interpretation I favour also accords with the purpose of condition 5, which is to provide effective (not ineffective) protection for the Concourse Centre. It is further supported by the PBA report and the officer reports, which emphasised the importance in the context of protecting the Concourse Centre of including obligations to incentivise significant retailers in the Concourse Centre (in particular, anchor retailers there) to remain there at their existing level of retail activity.
26. On this interpretation of condition 5(ii) there is no difficulty posed by a relevant retailer at the Concourse Centre who puts forward a scheme pursuant to condition 5(ii) which involved a less stringent contractual obligation seeking to appeal a refusal of approval by the Council, since the Inspector on appeal would be bound to uphold the Council's decision as being a lawful application of the condition on its proper construction. If the Inspector failed to construe the condition properly, his own decision to allow the appeal would be vulnerable to being quashed for error of law on statutory review.

27. The parties are also agreed that if circumstances change and it becomes clear that the vitality and viability of the Concourse Centre have become secure as required by policy SP2 without the need for the restrictive obligations in condition 5 and any relevant contract to be in place, e.g. through some general revival in its fortunes or a general regeneration of the vitality of Skelmersdale town centre, mechanisms would exist which would allow for those stringent restrictive obligations to be relaxed or released. This might be achieved either by the Council choosing to waive compliance with condition 5, or by application by an interested retailer or other party to vary condition 5, or by the Council choosing to waive or relax the obligations on a retailer under a relevant contract made pursuant to condition 5. The availability of mechanisms enabling the relaxation of these requirements if circumstances change tends to reinforce my view that it is right to give them a clear substantive content in the first place as a matter of interpretation.

Ground 4: advice to planning committee members

28. In my judgment, there is nothing in this further ground and the judge was right to reject it. For the reasons set out above, condition 5 is effective to give protection to the Concourse Centre of the nature contemplated and called for in the PBA report and the advice in the officer's report sufficiently conveyed that. The planning committee specifically examined the question of the efficacy of condition 5 at a meeting. The Council's planning officers were correct in their advice that condition 5 would be effective, as I have explained above. There was no further requirement on them to say more by way of explanation. As Judge LJ said in *Oxton Farms v Selby District Council*, CA, unreported 18 April 1997, "an application for judicial review based on criticisms of the planning officers report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken". It cannot be said that the advice of planning officers in this case significantly misled the committee about material matters in any way at all, whether in the officer reports or at the meeting on 19 March 2015.

Conclusion

29. For these reasons, which reflect those given by the judge, I would dismiss this appeal.

Lord Justice Briggs:

30. I agree.