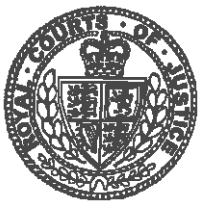

Neutral Citation Number: [2017] EWCA Civ 192

Case No: C1/2016/1383

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT (QUEEN'S BENCH DIVISION)
THE HON MRS JUSTICE PATTERSON
[2016] EWHC 534 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/03/17

Before :

LORD JUSTICE PATTEN
and
LORD JUSTICE HICKINBOTTOM

Between :

DUNNETT INVESTMENTS LIMITED

Appellant

- and -

(1) THE SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2) EAST DORSET DISTRICT COUNCIL

Respondents

Christopher Katkowski QC and **Alistair Mills** (instructed by **Hewitsons LLP**) for the **Appellant**
Sasha Blackmore (instructed by **Government Legal Department**) for the **First Respondent**
The Second Respondent neither appeared nor was represented

Hearing date: 16 March 2017

Approved Judgment

Lord Justice Hickinbottom:

Introduction

1. This appeal concerns a narrow issue of construction of a planning condition in the following terms:

> "1. This use of this building shall be for purposes falling within Class B1 (Business) as defined in the Town and Country Planning (Use Classes) Order 1987, and for no other purpose whatsoever, without express planning consent from the Local Planning Authority first being obtained.
>
> 2. In order that the Council may be satisfied about the details of proposal due to the particular character and location of this proposal."

The Secretary of State contends that this condition excludes the right to change the use of the relevant land under the Town and Country Planning (General Permitted Development) Order 1995 (SI 1995 No 418) as amended ("the GPDO"). The Appellant contends that it does not.

2. The issue has arisen as follows.

3. The relevant land is situated on Cobham Road, Ferndown, Dorset ("the Site"). On 1 March 1982, planning permission was granted for the Site for new industrial and office premises, but subject to strict conditions, including, so far as relevant to this appeal:

> "6. The buildings shall be first used by [the applicant] for carrying on of their undertaking of the design, manufacture and marketing of precision electronic automatic test equipment.
>
> 7. This permission shall enure for the benefit of the applicant for the five years from the date hereof and thereafter it shall enure for the benefit of the applicant or of a company or person engaged in the design, manufacture and marketing of precision electronic automatic test equipment only provided that in the event of the applicant being liquidated whether voluntary or otherwise, or otherwise ceasing trade within the said five years of the date hereof then this permission shall enure for the benefit of a company or person engaged in the design, manufacture and marketing of precision electronic automatic test equipment.
>
> 8. Notwithstanding the provision of the Town and County Planning General Development Orders 1977 to 1981 there shall be no direct means of vehicular or pedestrian access to the development hereby permitted from Brickyard Lane, other than the maintenance only access shown on the plan hereby

> approved provided to serve the public utilities proposed to be in the south-east corner of the development.
>
> ...
>
> 10. Notwithstanding the provisions of the Town and Country Planning General Development Orders 1977 to 1981 the level of land hatched green on the approved plan shall be lowered so that the land and anything on it shall not be more than 0.600m above the level of the carriageway; and the resultant visibility splays shall be kept free of all obstructions at all times."

4. The reason for the imposition of condition 7 was said to be:

> "To enable the Local Planning Authority to exercise proper control over the development and because the site is in an area where new industrial development would not normally be permitted."

The reason for the imposition of conditions 8 and 10 was that they were "in the interests of highway safety".

5. On 25 February 2005, on an application to the Second Respondent ("the Council") as the local planning authority, condition 7 was varied to allow "Full B1 Use", i.e. any use as described as Use Class B1 in Schedule 1 Part 2 of the Town and Country Planning (Use Classes) Order 1987 (SI 1987 No 764) as amended ("the UCO"), namely (a) offices other than for financial and professional services, (b) research and development, or (c) any industrial process, in each case "being a use which can be carried out in any residential area without detriment to the amenity of that area...". That variation was made with the condition as set out above. It is uncontroversial that paragraph 2 of that in fact gives the reason for the new condition set out in paragraph 1. The following Informative Note was also attached to the new permission:

> "This permission should be read in conjunction with the planning permission dated the 1 March 1982 for the erection of the building..., including the planning conditions which remain in full force and effect with the exception of Condition No 7 which has been varied by planning consent hereby permitted."

After the informative, under the heading "Notes to the Applicant: Appeals to the Secretary of State", the right of appeal to the Secretary of State under section 78 was confirmed, and the procedure for appealing set out.

6. The buildings on the Site thereafter changed to office use, in effect being used as a business centre.

7. On 17 January 2014, the Appellant applied to the Council, under Part 3 of Schedule 2 to the GPDO, for a determination as to whether prior approval would be required for the change of use of the Site from Class B1(a) (offices) to Class C3 (dwelling houses). The application letter referred to Class J in that part of the GPDO, which generally permits such a change of use, but which requires the developer to apply to the local

planning authority before beginning the development for a determination as to whether prior approval would be needed in respect of various specified matters.

8. On 17 March 2014, the Council purported to refuse the Appellant's application, because of the condition imposed on 25 February 2005. The Council said that:

> "It is considered that this condition restricts the use of the building to B1 and for no other use whatsoever, and removes permitted development rights to change to any other use that may ordinarily be undertaken under the [GPDO]".

It is common ground that, although that letter purported to refuse the application for prior approval, it did not properly do so – so that the Council never properly responded to that application – but that letter made clear that the Council did not consider that the proposal fell within the GPDO at all, because rights under the GPDO had been excluded by the condition.

9. On 2 July 2014, the Appellant applied to the Council for a lawful development certificate for a proposed use for the Site, namely Use Class C3. The Council refused that application on 28 October 2014. In doing so, it said:

> "This condition and reason shows a clear intention to limit the scope of the planning permission to only the use permitted (Class B1), and that this was done to satisfy the Council regarding the details of the proposal on account of its particular character and location.
>
> It is the Council's view that the use of the [Site] remains restricted by this condition to Use Class B1.... It consequently prevents a change of use to the proposed C3 (dwellings) use without express planning permission.
>
> A planning application is therefore required for the proposed use, and the application for a Certificate of Lawful Development/Use must fail, as any works to implement the proposal would be unlawful."

10. The Appellant appealed, but, on 30 September 2015, its appeal was dismissed by an inspector appointed by the Secretary of State.

11. The Appellant applied under section 288 of the Town and Country Planning Act 1990 ("the 1990 Act") to quash the inspector's decision. That application was dismissed by Patterson J in a judgment dated 11 March 2016 ([2016] EWHC 534 (Admin)).

12. The Appellant, through Christopher Katkowski QC and Alistair Mills of Counsel, now appeals against that judgment.

The Grounds

13. Mr Katkowski relies upon three, interrelated grounds. He contends that the judge erred in restricting the meaning of "express planning consent", as used in the condition, in that (i) she wrongly found that it was restricted to planning permission

granted by the local planning authority and/or granted on an application (Ground 1); or, in the alternative, (ii) she wrongly found that the Appellant's application for prior approval fell outside the term (Ground 2). Finally, he submits that the judge erred in finding that the condition precluded reliance upon permitted development rights granted under the GPDO (Ground 3).

14. In granting permission to appeal, Lindblom LJ indicated that he considered the question likely to be determinative of this appeal was that most starkly raised in Ground 3, namely whether the condition, properly construed, excludes the operation of the GPDO. I agree; and, after setting out the relevant legal framework, it is to that question I shall first turn.

The Legal Background

15. All statutory references in this judgment are to the 1990 Act, unless otherwise appears.

16. Save for exceptions irrelevant to this appeal, sections 55(1) and 57(1) of the 1990 Act provide that planning permission is required for any "development" of land, including any material change of use. Section 58(1) sets out how planning permission may be obtained. It provides, so far as relevant to this appeal:

> "Planning permission may be granted—
>
> (a) by a development order…;
>
> (b) by the local planning authority (or, in the cases provided in this Part, by the Secretary of State) on application to the authority in accordance with a development order;
>
> …"

17. Section 59 provides, under the heading "Development orders: general":

> "(1) The Secretary of State shall by order (in this Act referred to as a 'development order') provide for the granting of planning permission.
>
> (2) A development order may either—
>
> (a) itself grant planning permission for development specified in the order or for development of any Class specified; or
>
> (b) in respect of development for which planning permission is not granted by the order itself, provide for the granting of planning permission by the local planning authority (or, in the cases provided in the following provisions, by the Secretary of State) on application to the authority in accordance with the provisions of the order."

18. Section 59(2) therefore provides for two different means whereby planning permission may be obtained, namely (a) directly by the Secretary of State through a development order which provides that particular types of development be granted permission and (b) on application, by the local planning authority, which must determine whether permission should be granted on the merits of the application and in accordance with any procedure laid down by the Secretary of State. Where the planning authority refuses planning permission, section 78 gives the applicant a right of appeal to the Secretary of State.

19. In respect of section 59(2)(a), section 60(1) provides that planning permission granted by a development order may be either unconditional or subject to conditions as specified in the order. It continues:

> "(2A) Without prejudice to the generality of subsection (1), where planning permission is granted by a development order for development consisting of a change in the use of land in England, the order may require the approval of the local planning authority, or of the Secretary of State, to be obtained—
>
> (a) ...
>
> (b) with respect to matters that relate to the new use and are specified in the order."

20. The GPDO is a development order, made under section 59(2)(a), which itself grants planning permission. Article 3 of the Order provides, so far as relevant:

> "3.—(1) ... [P]lanning permission is hereby granted for the Classes of development described as permitted development in Schedule 2.
>
> (2) Any permission granted by paragraph (1) is subject to any relevant exception, limitation or condition specified in Schedule 2.
>
> ...
>
> (4) Nothing in this Order permits development contrary to any condition imposed by any planning permission granted or deemed to be granted under Part III of the [1990] Act otherwise than by this Order."

21. Class J of Schedule 2 to the GPDO, added as from 30 May 2013 by article 6(2) of the Town and Country Planning (General Permitted Development) (Amendment) (England) Order 2013 (SI 2013 No 1101), provides that the following class be permitted development:

> "Development consisting of a change of use of a building and any land within its curtilage to a use falling within Class C3 (dwelling houses) of the Schedule to the Use Classes Order

> from a use falling within Class B1(a) (offices) of that Schedule."

22. Paragraph J2 of the same schedule imposes a prior approval condition upon such permission:

> "Class J is permitted subject to the condition that before beginning the development, the developer shall apply to the local planning authority for a determination as to whether the prior approval of the authority will be required as to—
>
> (a) transport and highways impacts of the development:
>
> (b) contamination risks on the site; and
>
> (c) flooding risks on the site
>
> and the provisions of paragraph N shall apply in relation to any such application."

An applicant may appeal a refusal of prior approval to the Secretary of State (section 78(1)(b)).

23. Paragraph N of the same schedule sets out the procedure to be followed for the prior approval process. So far as relevant, it provides:

> "(1) The following provisions apply where under this Part a developer is required to make an application to a local planning authority for a determination as to whether the prior approval of the authority will be required.
>
> ...
>
> (8) The local planning authority shall, when determining an application—
>
> ...;
>
> (b) have regard to the National Planning Policy Framework... as if the application were a planning application;
>
> ...
>
> (9) The development shall not be begun before the occurrence of one of the following—
>
> (a) the receipt by the applicant from the local planning authority of a written notice of their determination that such prior approval is not required;

> (b) the receipt by the applicant from the local planning authority of a written notice giving their prior approval; or
>
> (c) the expiry of 56 days following the date on which the application was received by the local planning authority without the authority notifying the applicant as to whether prior approval is given or refused."

24. In respect of section 59(2)(b) (development orders which provide for planning permission to be granted by local planning authorities on application to them), section 62 reiterates that:

> "A development order may make provision as to applications for planning permission made to a local planning authority."

The Town and Country Planning (Development Management Procedure) (England) Order 2015 (SI 2015 No 595), made under sections 59 and 62, is the development order which generally sets out the procedure for obtaining planning permission by way of application to the local planning authority.

25. Two other provisions of the statutory scheme are relevant to this appeal.

26. First, section 192 of the 1990 Act sets out a procedure for obtaining a certificate of lawfulness of proposed use or development. It provides:

> "(1) If any person wishes to ascertain whether—
>
> (a) any proposed use of buildings or other land; or
>
> (b) any operations proposed to be carried out in, on, over or under land,
>
> would be lawful, he may make an application for the purpose to the local planning authority specifying the land and describing the use or operations in question.
>
> (2) If, on an application under this section, the local planning authority are provided with information satisfying them that the use or operations described in the application would be lawful if instituted or begun at the time of the application, they shall issue a certificate to that effect; and in any other case they shall refuse the application."

The issue of a certificate of lawfulness means that no application for planning permission will be necessary in respect of the proposed use or operations. A refusal of a certificate may be appealed to the Secretary of State (section 195(1)).

27. Second, article 3(1) of the UCO provides that:

> "… [W]here a building or other land is used for a purpose of any class specified in the Schedule, the use of that building or

that land for any other purpose of the same class shall not be taken to involve development of the land."

In other words, where there is a change of use, but the use still falls within the same UCO class, planning permission is not required, not because it is "development" which is permitted by order (as in the GPDO) but because it is deemed not to be "development" at all.

The Meaning of the Condition: The Appellant's Case

28. Patterson J, at paragraphs 55-64 of her judgment, found that the wording of paragraph 1 of the condition, read with the reason for its imposition in paragraph 2, excluded the operation of the GPDO. Mr Katkowski submits that she was wrong to do so, the main bones of his argument being as follows.

29. Mr Katkowski accepts that the ability to rely upon the GPDO can, as a matter of law, be taken away by a planning condition. However, the condition here does not explicitly preclude planning permission under the GPDO. Whilst such preclusion can be implied, in section 59(2)(a) and the GPDO there is a statutory acknowledgment that the change of use of a building from office to residential is generally acceptable, and an express statutory intention that such change should generally be permitted. The ability to rely upon that permission can only be removed in a planning condition by clear and unambiguous language. However, it is said, the wording of the condition is not unambiguous. The phrase "express planning consent" is equally applicable to permission granted under the GPDO as that granted on an application to the local planning authority. Mr Katkowski submitted that no party considered that "from the Local Planning Authority" can be read literally, as the Secretary of State accepts that, where a local planning authority refuses an application for planning permission, and permission is granted by the Secretary of State herself upon appeal, that must be included in the scope of the exclusion in the tail wording of the condition. If the words "or the Secretary of State" are to be read in after the phrase "from the Local Planning Authority", a limitation of the scope of planning permission to that granted by the Secretary of State on appeal is not warranted. Properly construed, it must also include permission granted by the Secretary of State under the GPDO.

The Meaning of the Condition: Authorities

30. Mr Katkowski and Miss Blackmore for the Secretary of State agreed that the starting point for consideration of the correct approach to the interpretation of planning conditions is now Trump International Golf Club Scotland Limited v Scottish Ministers [2015] UKSC 74; [2016] 1 WLR 85 ("Trump International").

31. The case concerned a consent by the Scottish Ministers under section 36 of the Electricity Act 1989 to construct and operate an offshore windfarm, the main issue being as to whether the Ministers had the power to grant a section 36 consent to a company that did not already have a licence to generate, transmit or supply electricity. The Supreme Court found that they did have such a power. However, it also considered a challenge to a condition of the consent that a design statement be submitted for prior approval, made on several bases including the contention that the condition was invalid as it was unenforceable because there was no mechanism by which the Ministers could require the developer to construct the windfarm in

accordance with the design statement. Lord Hodge JSC (with whom the rest of the court agreed) found that there was such a mechanism, within another condition that required construction of the development in accordance with a construction method statement, which itself could include provision for the implementation of the design statement. Therefore, to determine the appeal, it was not necessary for the court to consider the construction of the challenged condition; and, in particular, whether it was possible to imply into it an obligation to construct the development in accordance with the design statement. Nevertheless, having heard full argument, the court made some important observations on the implication of words into conditions. The lead judgment was given by Lord Hodge, but Lord Carnwath JSC also made a valuable contribution on the issue.

32. Lords Hodge and Carnwath each noted the significant differences in the relevant wording of the Electricity Act 1989 and the planning Acts (see [32] and [45] respectively); but it is clear that both considered the general approach to the interpretation of conditions in formal legal documents of all kinds to be similar. As Lord Carnwath put it (at [66]):

> "As will have become apparent,... and in agreement with Lord Hodge JSC, I do not consider it is right to regard the process of interpreting a planning permission as differing materially from that appropriate to other legal documents."

Lord Mance JSC, referring to the construction of commercial documents, also emphasised that the same general approach applies (see [42]-[44]).

33. As to that approach, Lords Hodge (at [32]) and Carnwath (at [60]) confirmed that, so long as appropriate caution was exercised, there was no bar to implying words into conditions, in a planning context as much as any other. As Lord Carnwath put it:

> "There is no reason in my view to exclude implication as a technique of interpretation, where justified in accordance with the familiar, albeit restrictive, principles applied to other legal documents. In this respect planning permissions are not in a special category".

34. In respect of the approach to the interpretation of conditions, the general principles were set out by Lord Hodge, as follows:

> "33. Whether words are to be implied into a document depends on the interpretation of the words which the author or authors have used. The first question therefore is how to interpret the express words....
>
> 34. When the court is concerned with the interpretation of words in a condition in a public document such as a section 36 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....
>
> 35. Interpretation is not the same thing as the implication of terms. Interpretation of the words of a document is the precursor of implication. It forms the context in which the law may have to imply terms into a document, where the court concludes from its interpretation of the words used in the document that it must have been the intended that the document would have a certain effect, although the words to give it that effect are absent... While the court will, understandably, exercise great restraint in implying terms into public documents which have criminal sanctions, I see no principled reason for excluding implication altogether."

This approach thus requires an open-textured approach to the objective exercise of construction of planning conditions, with due regard to the natural and ordinary meaning of the relevant words, but also consideration of the context (including purpose) and common sense.

35. Other members of the court, whilst agreeing with Lord Hodge, emphasised that they did not consider interpretation and implication as discrete and sequential analytical steps. As I have said (see paragraph 33 above), Lord Carnwath described implication as "a technique of interpretation". Lord Mance said that, whilst the necessity of implication must be judged objectively:

> "42. ... I would not encourage advocates or courts to adopt a too rigid or sequential an approach to the processes of consideration of the express terms and of consideration of the possibility of an implication. Without derogating from the requirement to construe any contract as a whole, particular provisions of a contract may I think give rise to a necessary implication, which, once recognised, will itself throw light on the scope and meaning of other express provisions of the contract.
>
> 43. This applies whether one is concerned, as in this case, with a public document in the interpretation of which there is, as Lord Hodge JSC notes in [33], limited scope for the use of extrinsic material or with, for example, a commercial contract, where the overall aim is to give effect to the parties' assumed intentions, objectively assessed against the background of their wider relationship and the circumstances of which both must be taken to have been aware.
>
> 44. In the light of the above at least, it appears to me helpful to recognise that, in a broad sense as Lords Neuberger and Lord Clarke of Stone-cum-Ebony JSC recognise in [Marks and Spencer plc v BNP Paribas Securities Trust Company (Jersey) Limited [2015] UKSC 72; [2016] AC 742] at [26] and [76], the

> processes of consideration of express terms and of the possibility that an implication exists are all part of an overall, and potentially iterative, process of objective construction of the contract as a whole."

36. Although the approach to the construction of different types of public document is similar, the relevant factors that bear upon that construction, and their weight, will be fact-specific. Consequently, as is so often the case, legal and factual context is vital (see Lord Carnwath at [66]). Thus, as Lord Mance identified in the quoted passage above, there is less scope for using extrinsic evidence in the interpretation of a public document such as a planning permission than in, say, a private commercial contract. Other factors that are relevant to the construction of planning conditions were identified by Lord Carnwath at [66]: they include the fact that a planning permission is a public document which may be relied upon by parties unrelated to those originally involved, and that planning conditions may be used to support criminal proceedings (e.g. under section 187A of the 1990 Act which makes the failure to comply with a breach of condition notice a criminal offence). In Lord Carnwath's opinion:

> "These are good reasons for a relatively cautious approach.... But such considerations arise from the legal framework within which planning permissions are granted. They do not require the adoption of a completely different approach to their interpretation."

37. In relation to the interpretation of, specifically, a planning condition which is said to exclude the operation of the GPDO, other authorities are of some assistance. From them, the following themes can be discerned.

i) It is rightly common ground that a planning condition on a planning consent can exclude the application of the GPDO (see Dunoon Developments v Secretary of State for the Environment and Poole Borough Council (1993) 65 P&CR 101 ("Dunoon Developments")).

ii) Exclusion may be express or implied. However, because a grant of planning permission for a stated use is a grant of permission for only that use, a grant for a particular use cannot in itself exclude the application of the GPDO. To do that, something more is required (see, e.g., Dunoon Developments at [107] per Sir Donald Nicholls VC).

iii) In Carpet Décor (Guilford) Limited v Secretary of State for the Environment (1981) 261 EG 56, Sir Douglas Frank QC sitting as a Deputy High Court Judge said that, because in the absence of such a condition the GPDO has effect by operation of law, the condition should be in "unequivocal terms". Although "unequivocal" was used by Mr Katkowski in his written argument, during the course of debate he accepted that that term was now less appropriate, given the modern trend away from myopic focus upon the words without proper reference to their full context. However, he submitted (and I accept) that, to exclude the application of the GPDO, the words used in the relevant condition, taken in their full context, must clearly evince an intention on the part of the local planning authority to make such an exclusion.

The Meaning of the Condition: Discussion and Conclusion on Ground 3

38. Despite Mr Katkowski's considerable efforts, I am unpersuaded by his submissions. I consider that, for the reasons she gave, Patterson J's finding on this issue was correct: on its proper construction, the condition does exclude the operation of the GPDO. In coming to that conclusion, I have particularly taken into account the following.

i) Mr Katkowski relied heavily upon the intention – ultimately that of Parliament, or at least the Secretary of State who is democratically-accountable – as exhibited in the GPDO that, generally, a change of use from office to residential should be permitted. However, as article 3(4) (quoted at paragraph 20 above) makes clear, that general intention is made expressly subject to the ability of planning authorities to exclude that right by imposing an appropriate condition. This amounts to no more than a submission that that general intention will only be replaced by a clearly worded condition that sufficiently evinces an intention to override it.

ii) Looking first at the words used, I do not consider the construction of the condition either difficult or unclear. Read straightforwardly and as a whole, as Patterson J found (notably at [43]-[44]), the natural and ordinary meaning of the words used is that the condition allows planning permission for other uses but restricted to that obtained upon application from the Council as local planning authority, and excludes planning permission granted by the Secretary of State by means of the GPDO. In particular, with due respect to Mr Katkowski's submissions to the contrary, in my view, "express planning consent *from the Local Planning Authority*" cannot sensibly include planning permission granted *by the Secretary of State* through the GPDO. It means what it says, i.e. planning permission granted by the local planning authority.

iii) I was unimpressed by Mr Katkowski's submission that planning permission granted by the Secretary of State must be read in, because of the possibility that, where permission is refused by the planning authority to which application is made, the Secretary of State may grant permission on appeal; and, once that is read in, a restriction to a grant by the Secretary of State on appeal (as opposed to permission being granted directly by him through the GPDO) is unwarranted. First, appeal rights do not have to be read into the condition itself: they are automatic statutory rights, and in any event in this permission they were expressly spelled out (see paragraph 5 above). Second, in my view, it is clear that, in this condition, the focus is upon the source of the planning permission: and the intention of the condition is to include planning permission on the application to the local planning authority (whether or not appealed to the Secretary of State) and exclude permission granted by the Secretary of State through the GPDO.

iv) Indeed, in my view, the interpretation I favour does not require the reading in, or reading out, of any words. (Insofar as it does, then the addition of the words "or by the Secretary of State on appeal" is, in substance, a very modest addition compared with "or by the Secretary of State by any means".) On the other hand, the construction pressed by Mr Katkowski sensibly takes away all substance from the condition, leaving it entirely empty; the first part ("This use of this building shall be for purposes falling within Class B1 (Business) as

defined in the Town and Country Planning (Use Classes) Order 1987…") merely reiterating the scope of the grant, no more than emphasised by the second part ("…and for no other purpose whatsoever…"), whilst the third part or tail ("… without express planning consent from the Local Planning Authority first being obtained") being empty because it includes all means of granting planning permission whether by the planning authority or the Secretary of State. The condition thus has no discernible purpose. It is a tenet of construction, falling within the umbrella of "sensible" interpretation as championed in Trump International, that it must have been the intention that a condition has some content and purpose. In context, this condition could not sensibly have been merely emphatic, which it would be if Mr Katkowski's submission were correct.

v) In reply, Mr Katkowski submitted that, on his interpretation, the condition would not be entirely empty, because it does require planning permission to be obtained from the someone authorised to grant it, whether the local planning authority or the Secretary of State by one means or another; and would therefore exclude reliance upon the UCO, which enables change of use within a single UCO class without permission, for the reasons given above (see paragraph 27). That submission has some force in so far as it seeks to find some substance in an otherwise empty condition. However, if the purpose was merely to exclude rights under the UCO, leaving those under the GPDO, the condition could more easily have said so; and it fails to overcome the problems Mr Katkowski's interpretation strikes in the reference to "express planning consent *from the Local Planning Authority*". In my view, the substance Mr Katkowski submits he found, late, in the condition is illusory or, at best, artificial.

vi) Both Mr Katkowski and Miss Blackmore, rightly, accepted that the condition should be read and construed as a whole, in its full context. However, each, to an extent, sought to interpret it by means of deconstructing it into constituent parts. Insofar as such exegesis is necessary and appropriate, in my judgment it supports the construction which I favour.

vii) The first part of the condition sets out the scope of the permission. I respectfully agree with Patterson J (at [60]), the second part ("…and for no other purpose whatsoever…") is not, as Mr Katkowski would have it, merely emphatic of the scope of the planning permission, but is rather a clear and specific exclusion of GPDO rights. Whilst, as I have described, each case depends upon its own facts, it is noteworthy that, in Dunoon Developments (at pages 105-6), in finding that the words "limited to" a particular purpose did not exclude GPDO rights, Farquharson LJ compared that phrase with "… and for no other purpose…" as considered in the earlier case of The City of London Corporation v Secretary of State for the Environment (1971) 23 P&CR 169, which he considered was far more emphatic and (he suggested) possibly sufficient to exclude the operation of the GPDO. In this case, we have a more emphatic phrase still, namely "… and for no other purpose *whatsoever*…". Further, although we are concerned with rights under the GPDO and not the UCO, the interpretation of that phrase to exclude the operation of the GPDO is at least consistent with R (Royal London Mutual

Insurance Society) v Secretary of State for Communities and Local Government [2013] EWHC 3597 (Admin); [2014] JPL 458, in which Patterson J held that a condition which restricted use to "only" particular uses within Use Class A1 excluded the right to use the land for other Class A1 uses, because it effectively evinced an intention to identify acceptable uses within the class whilst prohibiting other unacceptable uses within that class unless and until the merits of such use had been tested by the planning authority upon an application for planning permission (see also The Rugby Football Union v The Secretary of state for Local Government, Transport and the Regions [2001] EWHC Admin 927; [2002] JPL 740, in which Ouseley J, at [56], found that the words "for no other use" had similar effect, on the basis that such words "have no other sensibly discernible purpose than to prevent some other use which might otherwise be permissible without planning permission"). The third part of the condition before this court makes it the more abundantly clear that automatic or direct GPDO rights are excluded, by requiring a planning application if such uses are to be pursued.

viii) Mr Katkowski submitted that, when the condition was imposed in 1995, it would not have occurred to anyone that the GPDO would later permit change of use from light industrial to residential use which, since 2013, it has. However, I do not consider that supports his case on this issue: in my view, the intent of the condition, clearly, was and is to proscribe all changes of use under the GPDO. I do not consider that conditions 8 and 10 in the original 1982 permission (see paragraphs 3 and 4 above) undermine that proposition. In my view, although I appreciate that those conditions were left unchanged in 1995, in making certain access and egress requirements "notwithstanding the provision of the [then current General Development Orders]" at a time when the use of the Site was very severely restricted, those conditions are not in any way inconsistent with the proposition that reliance upon GPDO rights was generally excluded by the condition found in the 1995 permission.

ix) Furthermore, the context in which the condition must be construed includes the planning history of the Site – which, importantly, shows that the Council was anxious to maintain close control over the planning use to which the Site was put – and, more importantly still, the reason for the condition as set out in its own paragraph 2. That confirms that it was imposed to enable the Council to maintain control over the use of the Site, by considering the merits of any proposal, in the light of its "particular character and location". In other words, as Patterson J put it (at [40]), "the sensitivity of the area to potentially unsympathetic uses was protected". That is inconsistent with reliance by an applicant upon rights under either the GPDO or the UCO. Again, I do not see any force in the submission that that clear reason is undermined by the reason expressed in the 1982 permission for the use then permitted, namely "to enable the [Council] to exercise proper control over the development and because the site is in an area *where new industrial development* would not normally be permitted" (emphasis added). The 1982 use was highly restricted, and the reason explained why a very narrow industrial use was being permitted. In my view, it does not undermine the clear words of the reason given for the more relaxed, but nevertheless considerably restricted, use permitted in 1995.

39. For all those reasons, I am quite satisfied that the condition does properly exclude the operation of the GPDO; and that Patterson J was correct to reject Ground 3.

Grounds 1 and 2

40. Having already considered the construction of the condition, I can deal with the Grounds 1 and 2 shortly. Given my conclusion on the interpretation of the condition, unsurprisingly I do not find either ground has been made good.

41. In respect of Ground 1, Mr Katkowski submits that the judge was wrong to restrict "express planning consent" to planning permission granted, upon application, by the Council as local planning authority. Whilst I accept that "express planning consent" might, in other circumstances, include planning permission granted directly by the GPDO, in this case the condition was for "express planning consent *from the Local Planning Authority*". For the reasons I have given, I consider that is restricted to planning permission granted as a result of an application made to the planning authority.

42. Nor do I consider there is any force in Ground 2, in which Mr Katkowski submits that Patterson J erred in finding that the Appellant's application for prior approval fell outside the term "express planning consent from the Local Planning Authority". Although the local planning authority has a role to play in prior approval under the GPDO (and that role requires it to take into account national planning policy), the planning permission is nevertheless granted, not by the authority, but by the Secretary of State as a result of the direct effect of the GPDO. Again, in my view, this ground does not add anything of substance to Ground 3.

Conclusion

43. For those reasons, which are in substance the same as those of Patterson J below, I would dismiss this appeal.

Lord Justice Patten:

44. I agree.