Neutral Citation Number: [2018] EWCA Civ 844

Case No: C1/2017/2870

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEALFROM THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION
PLANNING COURT
MRS JUSTICE LANG
CO/130/2017

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 April 2018

Before :

LORD JUSTICE LEWISON
LORD JUSTICE HAMBLEN
and
LORD JUSTICE COULSON

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Between :

	LONDON BOROUGH OF LAMBETH	**Appellant**
	- and -	
	(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT **(2) ABERDEEN ASSET MANAGEMENT** **(3) NOTTINGHAMSHIRE COUNTY COUNCIL** **(4) HHGL LIMITED**	**Respondent**

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Mr Matthew Reed QC (instructed by **Lambeth Legal Services**) for the **Appellant**
Ms Sasha Blackmore (instructed by the **Government Legal Department)** for the **1st Respondent**
Mr Christopher Lockhart-Mummery QC (instructed by **Freeths LLP)** for the **3rd Respondent**

Hearing dates: 21 & 22 March 2018

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Judgment Approved**Lord Justice Lewison:**

Introduction

1. Under section 192 of the Town and Country Planning Act 1990 ("the Act") if a person wishes to ascertain whether any proposed use of buildings or other land would be lawful he may apply to the planning authority for a certificate to that effect ("a CLEUD"). Section 191 (2) provides that a use is lawful if no enforcement action may be taken against it. In the case of a change of use that would be the case if the change of use did not involve development; or did not require planning permission. In the present case Aberdeen Asset Management Ltd ("Aberdeen") applied to Lambeth LBC for a CLEUD to the effect that it would be lawful to use a building fronting Streatham Vale, and currently used as a Homebase store, for unrestricted retail purposes within class A1 of the Town and Country Planning (Use Classes) Order 1987. That class encompasses the

retail sale of goods, other than hot food, where the sale is made to visiting members of the public. Lambeth refused the certificate, but the Secretary of State granted it on appeal. Lambeth's application to quash that decision failed before Lang J, whose judgment is at [2017] EWHC 2412 (Admin); [2017] PTSR 1494. With her permission Lambeth appeals.

The problem

2. The problem arises because of the way in which Lambeth dealt with an application to vary a condition attached to a previous planning permission which had been granted subject to a condition restricting the range of goods permitted to be sold from the site. In a very loose sense it is clear enough what Lambeth meant to do. It meant to extend the range of goods permitted to be sold, but not to grant unrestricted permission for class A1 use. However, it purported to restrict the range of goods permitted to be sold, not by imposing a condition, but by a restricted description of the permitted development.

3. The significance of the distinction between a restricted description of the permitted development and the imposition of a condition restricting what has been permitted lies in the consequences for planning control. Section 171 A of the Act provides:

> "(1) For the purposes of this Act—
>
> (a) carrying out development without the required planning permission; or
>
> (b) failing to comply with any condition or limitation subject to which planning permission has been granted,
>
> constitutes a breach of planning control."

4. It can be immediately seen that there are two distinct forms that a breach of planning control may take. One is the carrying out of development without planning permission, where planning permission is required. The other, which occurs whether or not development takes place, is a failure to comply with a condition. A change of use may amount to the carrying out of development, but only where the change of use is material: section 55 (1). However, section 55 (2) provides that certain activities are not to be taken to amount to development. Among these are:

> "in the case of buildings or other land which are used for a purpose of any class specified in an order made by the Secretary of State under this section, the use of the buildings or other land or, subject to the provisions of the order, of any part of the buildings or the other land, for any other purpose of the same class"

5. It follows that a change from one retail use to another, for example by extending or changing the nature of the goods sold, does not amount to development, as long as both uses fall within class A1. It cannot, therefore, be the subject of enforcement action under section 171A (1) (a).

The facts

6. I can take the planning history largely from the judge's careful judgment.

7. On 17 September 1985, planning permission was granted on appeal ("the 1985 permission") by the Secretary of State for "the erection of a DIY retail unit for Texas Homecare and an industrial building for Cow Industrial Polymers on land at Streatham Vale, Streatham", subject to a number of conditions.

8. Condition 6, as set out in the Secretary of State's decision letter, provided:

> "6. The retail unit hereby permitted shall be used for the retailing of goods for DIY home and garden improvements and car maintenance, building materials and builders' merchants goods and for no other purpose (including any other purpose in Class I of the Schedule to the Town and Country Planning (Use Classes) Order 1972 or in any provision equivalent to that Class in any statutory instrument revoking and re-enacting that Order)."

9. In the decision letter, the Secretary of State explained the reason for the condition:

> "16. …..Because the traffic generation and car parking requirements of certain types of large retail stores are substantially greater than those of the DIY unit proposed and could be excessive at this site, it is necessary to restrict the right to change to other types of retail unit…..".

10. The permission was implemented by construction of a DIY retail store but not the proposed industrial building.

11. On 30 June 2010, Lambeth granted planning permission ("the 2010 permission") for:

> "Variation of Condition 6 (Permitted retail goods) of planning permission Ref. No 83/01916 (Erection of a DIY retail unit for Texas homecare and an industrial building for cow industrial polymers) granted on 17.09.85 to allow for the sale of a wider range of goods to include DIY home and garden improvements, car maintenance, building materials and builders merchants

> goods, carpets and floor coverings, furniture, furnishings, electrical goods, automobile products, camping equipment, cycles, pet and pet products, office supplies and for no other purpose in Class A1 of the Schedule to the Town and Country Planning (Use Classes) Order 1987 (as amended)."

12. Thus, the condition in the 1985 permission was varied so as to permit the sale of a wider range of goods, not extending to food goods. The varied condition was set out in the 2010 permission as Condition 1:

> "1. The retail use hereby permitted shall be used for the retailing of DIY home and garden improvements and car maintenance, building materials and builders merchants goods, carpets and floor coverings, furniture, furnishings, electrical goods, automobile products, camping equipment, cycles, pet and pet products, office supplies and for no other purpose (including the retail sale of food and drink or any other purpose in Class A1 of the Schedule to the Town and Country Planning (Use Classes) Order 1987 (as amended) or in any provision equivalent to that Class in any statutory instrument revoking and re-enacting that Order.
>
> 2. Details of refuse and recycling storage …. shall be submitted to and approved in writing by the Local Planning Authority prior to first commencement of any of the additional retail uses hereby permitted. The refuse and recycling storage facilities shall be provided in accordance with the approved details prior to commencement of the development and shall thereafter be retained as such for the duration of the permitted use. ….
>
> 3. A strategy for the Management of Deliveries and Servicing shall be submitted to and approved in writing by the Local Planning Authority prior to first commencement of any of the additional retail uses hereby permitted. Deliveries and servicing shall thereafter be carried out solely in accordance with the approved details….."

13. It will be seen that in addition to the condition restricting use, there were two other conditions.

14. On 20 November 2013, Lambeth refused an application for variation of Condition 1 of the 2010 permission which would inferentially have permitted the retail sale of food. The first reason given for the refusal was that:

> "The applicant has not demonstrated to the Council's satisfaction that the potential trip generation and related traffic impact that

could occur through the opening of a food retailer which the variation would permit, would not lead to an adverse impact on traffic flow and highway safety on the surrounding highway network where traffic flow already reaches unacceptable levels at peak times. In particular the council considers that the increase in potential trip generation has been underestimated …"

15. On 7 November 2014, Lambeth granted planning permission ("the Decision Notice") in the following terms:

"DECISION NOTICE

DETERMINATION OF APPLICATION UNDER SECTION 73. TOWN AND COUNTRY PLANNING ACT 1990

The London Borough of Lambeth hereby approves the following application for the variation of condition as set out below under the above mentioned Act.

In accordance with the statutory provisions your attention is drawn to the statement of Applicant's Rights and General Information attached.

Application Number: 14/02553/VOC. Date of Application 19.05.2014. Date of Decision: 06.11.2014.

Development At: Homebase Ltd 100 Woodgate Drive, London SW16 5YP

For: Variation of condition 1 (Retail Use) of Planning Permission Ref: 10/01143/FUL (Variation of Condition 6 (Permitted retail goods) of planning permission Ref. 83/01916 (Erection of a DIY retail unit for Texas homecare and an industrial building for cow industrial polymers) granted on 17.09.85 to allow for the sale of a wider range of goods to include DIY home and garden improvements, car maintenance, building materials and builders merchants goods, carpets and floor coverings, furniture, furnishings, electrical goods, automobile products, camping equipment, cycles, pet and pet products, office supplies and for no other purpose in Class A1 of the Schedule to the Town and Country Planning (Use Classes) Order 1987 (as amended) Granted on 30.06.2010.

Original Wording:

The retail use hereby permitted shall be used for the retailing of DIY home and garden improvements and car maintenance, building materials and builders merchants goods, carpets and

floor coverings, furniture, furnishings, electrical goods, automobile products, camping equipment, cycles, pet and pet products, office supplies and for no other purpose (including the retail sale of food and drink or any other purpose in Class A1 of the Schedule to the Town and Country Planning (Use Classes) Order 1987 (as amended) or in any provision equivalent to that Class in any statutory instrument revoking and re-enacting that Order.

Proposed Wording:

The retail unit hereby permitted shall be used for the sale and display of non-food goods only and, notwithstanding the provisions of the Town and Country Planning (General Permitted Development) Order 1995 (or any Order revoking or re-enacting that Order with or without modification), for no other goods.

Approved Plans

April 2008, drafted by WYG Transport Open Space Map (110034/1), Transport Assessment Report Dated 08

Summary of the Reasons for Granting Planning Permission:

In deciding to grant planning permission, the Council has had regard to the relevant policies of the development plan and all other relevant material considerations. … Having weighed the merits of the proposals in the context of these issues, it is considered that planning permission should be granted subject to the conditions listed below.

Conditions

1. The development to which this permission relates must be begun not later than the expiration of three years beginning from the date of this decision notice.

Reason: To comply with Section 91(1)(a) of the Town and Country Planning Act …

2. Prior to the variation her[e]by approved being implemented a parking layout plan at scale of 1:50 indicating the location of the reserved staff car parking shall be submitted to and approved in writing by the Local Planning Authority. The use shall thereafter be carried out solely in accordance with the approved staff car parking details.

Reason: To ensure that the approved variation does not have a detrimental impact on the continuous safe and smooth operation

of the adjacent highway …..

3. Within 12 months of the development hereby approved details of a traffic survey on the site and surrounding highway network shall be undertaken within 1 month of implementation of the approved development date and the results submitted to the local planning authority. If the traffic generation of the site, as measured by the survey, is higher than that predicted in the Transport Assessment submitted with the original planning application the applicant shall, within 3 months, submit revised traffic modelling of the Woodgate Drive/Streatham Vale/ Greyhound Lane junction for analysis. If the junction modelling shows that junction capacity is worse than originally predicted within the Transport Assessment, appropriate mitigation measures shall be agreed with the council, if required, and implemented within 3 months of the date of agreement.

Reason: to ensure that the proposed development does not lead to an unacceptable traffic impact on the adjoining highway network (Policy 9 of the London Borough of Lambeth Unitary Development Plan (UDP) 2007: Policies saved beyond 5 August 2010 and not superseded by the LDF Core Strategy January 2011) Policies S4 of the Core Strategy 2011."

16. The approval required under Condition 2 of the 2014 permission in relation to a parking layout plan was granted on 7 May 2015.

17. On 25 May 2015 Lambeth granted a variation of condition 6 of the 1985 planning permission (as varied by the 2010 permission) to allow the use of 185 square metres of the existing Homebase sales area for the sale of A1 non-food goods by a Catalogue Showroom Retailer.

Section 73

18. Section 73 of the Act, which gave Lambeth the power to make the decision that it did, provides so far as material:

> "(1) This section applies … to applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted.
>
> (2) On such an application the local planning authority shall consider only the question of the conditions subject to which planning permission should be granted, and—

> (a) if they decide that planning permission should be granted subject to conditions differing from those subject to which the previous permission was granted, or that it should be granted unconditionally, they shall grant planning permission accordingly, and
>
> (b) if they decide that planning permission should be granted subject to the same conditions as those subject to which the previous permission was granted, they shall refuse the application."

19. As I have said it is clear what Lambeth meant to do in a very broad sense. But that is not the question. The question is: what did Lambeth in fact do? The application was an application for the variation of a condition attached to the 2010 permission. Condition 2, and the reasons for it, also referred to the "variation". As the application made clear, it was not seeking specific permission to sell food, because the wording proposed by Aberdeen was restricted to the sale of "non-food goods". However, the technical trap, into which it is said that Lambeth fell, is that approval of an application under section 73 requires the grant of a fresh planning permission, rather than merely a variation of an existing one. This is made clear by section 73 (2) (a) which requires the planning authority to "grant planning permission accordingly". The grant of a fresh planning permission under section 73 leaves the original planning permission intact, so that the landowner has a choice which to implement: *Powergen United Kingdom plc v Leicester City Council* [2000] JPL 1037, approving *Pye v Secretary of State for the Environment* [1998] 3 PLR 72.

20. The Decision Notice recognised this because it said that in deciding "to grant planning permission", the Council had had regard to the relevant policies and other material considerations. It follows from this that the Decision Notice must be read as a free-standing grant of planning permission. However, it failed to repeat any of the conditions imposed on the previous planning permissions and, more importantly, failed to express the new description of the use as a condition, rather than as a limited description of the permitted use.

21.

It is because section 73 requires the grant of a fresh planning permission that the relevant PPG advises:

> "It should be noted that the original planning permission will continue to exist whatever the outcome of the application under section 73. To assist with clarity, decision notices for the grant of planning permission under section 73 should also repeat the relevant conditions from the original planning permission, unless

they have already been discharged."

22. This advice is also reflective of the words of section 73 (2) (a) which requires a local planning authority, if it decides that different conditions should be imposed, to grant planning permission "accordingly": that is to say in accordance with the conditions upon which it has decided that planning permission should be granted.

Interpretation of planning permissions

23. The current approach to the interpretation of planning permissions and similar public documents was considered by the Supreme Court in *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2015] UKSC 74; [2016] 1 WLR 85. In fact the case did not concern planning permission; but a permission granted under the Electricity Act 1989. So strictly speaking their Lordships' observations were *obiter*; although they have since been applied in this court: *R (Skelmersdale Limited Partnership) v West Lancashire BC* [2016] EWCA Civ 1260; *Dunnett Investments Ltd v Secretary of State for Communities and Local Government* [2017] EWCA Civ 192. We may, therefore, take them as representing the law. As Lord Hodge pointed out in *Trump* at [33]:

> "There is a modern tendency in the law to break down divisions in the rules on the interpretation of different kinds of document, both private and public, and to look for more general rules on how to ascertain the meaning of words. In particular, there has been a harmonisation of the interpretation of contracts, unilateral notices, patents and also testamentary documents."

24. Where a public document differs from cases of that kind is not so much in the court's approach to the meaning of words, but in the range of material that it can take into account in determining that meaning, as Lord Hodge went on to explain in the same paragraph,

> "Differences in the nature of documents will influence the extent to which the court may look at the factual background to assist interpretation. Thus third parties may have an interest in a public document, such as a planning permission or a consent under section 36 of the 1989 Act, in contrast with many contracts. As a result, the shared knowledge of the applicant for permission and the drafter of the condition does not have the relevance to the process of interpretation that the shared knowledge of parties to a contract, in which there may be no third party interest, has. There is only limited scope for the use of extrinsic material in the interpretation of a public document, such as a planning permission or a section 36 consent."

25. But having regard to the more limited range of material that can be taken into account in ascertaining the meaning of words in a public document, the ultimate question is still the same, namely:

> "… 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."

26. Agreeing with Lord Hodge, Lord Carnwath said at [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."

27. So the first question is whether the reasonable reader would understand the words of the decision notice to mean that the planning permission granted permission for unrestricted A1 use. In my judgment he plainly would not. It limited the goods that it permitted to be sold to "non-food goods".

28. In apparently reaching the contrary conclusion at [51] the judge held that, by reference to a line of authority beginning with *I'm Your Man Ltd v Secretary of State for the Environment* (1998) 77 P & CR 251 which would have been known to a reasonable reader of the decision notice, the reasonable reader would have concluded that "there were no restrictions on retail sale". *I'm Your Man* concerned the grant of planning permission for use of a building for "sales, exhibitions and leisure activities for a period of seven years." Mr Purchas QC decided two points. The first was whether there was an implied power to impose limitations on permission granted otherwise than by a Development Order. He answered that question: "No". The second was whether a continuation of the use beyond the seven year period would amount to a material change of use. He answered that question in the same way. *I'm Your Man* was considered by the Divisional Court in *R (Altunkaynak) v Northamptonshire Magistrates Court* [2012] EWHC 174 (Admin). That concerned the grant of planning permission for:

> "Conversion of shop to restaurant kitchen and hot food takeaway *as an extension to the present premises at number 15*" (Emphasis added)

29. The question was whether there was a breach of planning control when the kitchen continued to be used, but not as an extension to premises at number 15. At [39], approving *I'm Your Man*, Richards LJ said:

> "The relevant principle, drawn from the wording of the statute, is a general one: if a limitation is to be imposed on a permission granted pursuant to an application, it has to be done by condition."

30. The limitation in question was limitation on use as a kitchen and hot food takeaway. What Richards LJ did not say was that the description of the permitted use itself could somehow be ignored. This point emerges clearly, in my judgment, from the next two cases in this line of authority: namely *Cotswold Country Park Ltd v Secretary of State for Communities and Local Government* [2014] EWHC 1138 (Admin), [2014] JPL 981 and *Wall v Winchester City Council* [2015] EWCA Civ 563, [2015] JPL 1184.

31. In the *Cotswold* case Hickinbottom J correctly said at [15]:

> "the grant identifies what can be done—what is permitted—so far as use of land is concerned; whereas conditions identify what cannot be done—what is forbidden. Simply because something is expressly permitted in the grant does not mean that everything else is prohibited. Unless what is proposed is a material change of use—for which planning permission is required, because such a change is caught in the definition of development—generally, the only things which are effectively prohibited by a grant of planning permission are those things that are the subject of a condition, a breach of condition being an enforceable breach of planning control."

32. He held that planning permission had been granted for development which was clearly described on the face of the permission as the stationing of 54 caravans. He went on to hold that there was no restriction to that number in the form of a condition. He concluded at [30]:

> "Therefore, whilst I accept that the Inspector acknowledged the principle derived from *I'm Your Man*, I have come to the firm conclusion that he failed properly to apply it. He failed to respect the difference between a limitation of numbers of caravans in the description in the grant (present in this case), and a limitation of such numbers in the form of a condition (not present in this case). In that failure, unfortunately, the Inspector (and the Council before him) materially erred in law, because only the latter was capable of imposing a limitation at law."

33. Having reached that conclusion, he remitted the case to the inspector to decide whether the siting of six additional caravans for residential purposes would amount to a material change of use. What he did not hold was that the development permitted by the planning

permission already granted permission for those additional caravans.

34. In *Wall* planning permission was granted for "change of use of agricultural land to travelling showpeoples' site". The planning authority alleged a breach of planning control by "the material change of use of the Land from use as a Travelling Showperson's site to a use for siting caravans/residential mobile homes for occupation by persons who are not Travelling Showpersons".The inspector decided that the principle in *I'm Your Man* meant that there was no restriction on the kind of person who could use the site and that, consequently, there was no breach of planning control. This court held that he was wrong. Sullivan LJ approved the passage at [15] in Hickinbottom J's judgment which I have quoted. Having reviewed a number of previous cases he said at [22]:

> "It can be seen that in none of these cases was there an alleged change of use from the permitted use to some other use. If such a change is alleged in an enforcement notice, then in the absence of any condition limiting the use of the site to the permitted use, the question in every case will be: has the alleged change of use taken place and, if so, is it a material change of use for planning purposes? If the answer to either of these questions is "no" there will have been no development, so planning permission will not be required. If the answer to both these questions is "yes" there will have been development and planning permission will be required."

35. He added at [26]:

> "It is possible that the use of the word "limitation" in the judgments has contributed to the misunderstanding of the effect of the *I'm Your Man* line of authorities. The simple proposition which should not be lost sight of is that the use for which a planning permission is granted must be ascertained by interpreting the words in the planning permission itself. Whether other uses would or would not be materially different from the permitted use is irrelevant for the purpose of ascertaining what use is permitted by the planning permission. If the permitted use has been implemented, and a change to the permitted use takes place, then it will be a question of fact and degree whether that change is a material change of use."

36. In this case, I have no real doubt that it would be wrong to conclude that the decision notice *permitted* the sale of goods other than non-food goods. So to hold would be directly contradictory of the words of the grant. However, ultimately I consider that this does not matter in practical terms; because a change of use from the retail sale of non-food goods to the retail sale of food (other than hot food), both of which are in Class A1, would not amount to development; and thus would not require planning permission. The

legal effect of the Decision Notice, is, therefore, as the judge decided. It may be that this is really what the judge meant to say by her phrase "there were no restrictions on retail sale."

37. It follows from this that the enlargement of the range of goods sold, while remaining in Class A1, would not amount to a breach of planning control of the kind identified in section 171A (1) (a). It would, in short, be lawful. Thus Lambeth can only prevent the change of use, and hence the grant of the CLEUD, if it can successfully argue that the change of use would be a breach of condition, thus falling within section 171A (1)(b). That is the task that Mr Matthew Reed QC has undertaken.

Interpretation of the Decision Notice

38. Mr Reed puts his argument in two ways: first by the implication of a condition; and second as a matter of interpretation of the decision notice. By either of these routes he argues that the description in the Decision Notice of the limited range of goods that can be sold must be treated as if it were a condition. Although that was the order in which Mr Reed argued the two routes, the logical order in which to take them is: interpretation first and implication second, while recognising that the overall process of determining the scope and meaning of an instrument is an iterative one: *Marks & Spencer plc v BNP Paribas Securities Trust Co (Jersey) Ltd* [2015] UKSC 72; [2016] AC 742 at [28]; *Impact Funding Solutions Ltd v Barrington Support Services Ltd* [2016] UKSC 57; [2017] AC 73 at [31]; *Trump* at [33] and [42]; *Dunnett* at [34]. The objective of the exercise is not to determine what the parties meant to do in the broad sense, but what a reasonable reader would understand by the language they in fact used.

39. The first question must be: what material can be taken into account either in interpreting the Decision Notice or in deciding whether a condition is to be implied? In *Trump* Lord Carnwath said at [66]:

> "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. … It must also be borne in mind that planning conditions may be used to support criminal proceedings. Those are good reasons for a relatively cautious approach, for example in the well established rules limiting the categories of documents which may be used in interpreting a planning permission (helpfully summarised in the judgment of Keene J in the *Shepway* case [1999] PLCR 12, 19–20). 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."

40. The principles set out by Keene J in *R v Ashford Borough Council, Ex p Shepway District Council* [1999] PLCR 12, so far as relevant to our case, are as follows:

> "(1) The general rule is that in construing a planning permission which is clear, unambiguous and valid on its face, regard may only be had to the planning permission itself, including the conditions (if any) on it and the express reasons for those conditions….
>
> (2) This rule excludes reference to the planning application as well as to other extrinsic evidence, unless the planning permission incorporates the application by reference. In that situation the application is treated as having become part of the permission. The reason for normally not having regard to the application is that the public should be able to rely on a document which is plain on its face without having to consider whether there is any discrepancy between the permission and the application… :
>
> (3) For incorporation of the application in the permission to be achieved, more is required than a mere reference to the application on the face of the permission. While there is no magic formula, some words sufficient to inform a reasonable reader that the application forms part of the permission are needed, such as "… in accordance with the plans and application …" or "… on the terms of the application …," and in either case those words appearing in the operative part of the permission dealing with the development and the terms in which permission is granted. These words need to govern the description of the development permitted…
>
> (4) If there is an ambiguity in the wording of the permission, it is permissible to look at extrinsic material, including the application, to resolve that ambiguity:"

41. Lord Hodge referred to these principles with approval at [34] but went on to say at [35]:

> "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."

42. In *Skelmersdale* this court recorded that it was common ground that a report by retail consultants and the planning officer's report to committee "which are all on the publicly available planning file" were legitimate aids to construction of a condition. That was so, even though the condition was not, in the event, ambiguous and the court reached its conclusion without reference to that extrinsic material; although Sales LJ went on to say that reference to that material reinforced his conclusion. In *Dunnett* Hickinbottom LJ held at [38] ix) that a condition attached to a planning permission had to be construed in the context of the planning history of the site.

43. The judge held at [46] that in our case it was permissible to consider the previous planning permissions and the application for a variation of the condition. She said:

> "… I consider that the 2014 permission was ambiguous on its face. Despite the stated approval of the variation of the condition as to use, which restricted sale to non-food goods, the "Conditions" in the permission did not include any condition restricting use to the sale of non-food goods. Because of the ambiguity I conclude that it is permissible to consider the 1985 and 2010 permissions, and application for the variation in 2014. The 2014 application document was not available, but the Claimant stated that the application had been for a variation in the terms of the "Proposed Wording" and not for an unconditional grant of permission, and the other parties did not dispute this. Furthermore, all these documents were referred to in the 2014 permission, and extracts quoted from those documents were incorporated into the 2014 permission, which is a further reason why it is permissible to consider them when interpreting the 2014 permission."

44. Although Mr Lockhart-Mummery QC disputed the judge's conclusion that the Decision Notice was ambiguous, he did not dispute her conclusion that the planning history of the site was a legitimate aid to construction. The judge went on to say at [47]:

> "On my reading of the 2014 permission, it seems probable that [Lambeth's] intended purpose was to vary the condition so as to widen the range of goods which could be sold from the premises (not limiting it to the specific list of goods in the 2010 permission), whilst retaining the restriction on the sale of food items. The Decision Notice stated that it "hereby approves the following application for the variation of condition set out below". It then set out the existing condition and the proposed variation in wording. The terms of the "Proposed Wording" were sufficiently clear and precise to form the basis of a condition."

45. In the light of those findings Mr Reed argues that the Decision Notice described itself as

doing no more than approving a "variation of condition" in two previous planning permissions. For technical reasons, however, a variation of a condition under section 73 takes effect as the grant of a fresh planning permission. In order to give effect to Lambeth's intention and also to that of the applicant for the variation of the condition, the limited description of the use must therefore be read as if it were itself a condition.

46. This argument has been put in two quite different ways, one in writing and the other orally. In his skeleton argument Mr Reed argued that in the light of that technical requirement, the Decision Notice must therefore be interpreted as authorising the continuation of the uses authorised by those two planning permissions subject only to the approved variation of condition. He argued that this interpretation is reinforced by consideration of the continuing relevance of conditions attached to the 2010 planning permission. Condition 2 of that permission required continuing retention of approved refuse and recycling storage; and condition 3 required servicing and deliveries to be carried out solely in accordance with approved details. The reasonable reader of the Decision Notice could not be taken to understand that Lambeth was abandoning those two conditions.

47. The consequence, Mr Reed argued, is that the Decision Notice should be interpreted as if it contained another condition, viz:

> ""the use shall be carried on in accordance with the conditions attached to the 2010 permission as stated to have been varied by this permission"."

48. This argument was not pressed orally. Instead Mr Reed argued that that the wording under "Proposed Wording" in the Decision Notice was capable of standing as a condition; and that the modification required to give effect to Lambeth's intention was to read the phrase:

> "… planning permission should be granted subject to the conditions listed below…"

as if it read:

> "… planning permission should be granted subject to the conditions listed *above and* below…"

49. In his oral submissions he made it clear that he was not suggesting that conditions 2 and 3, which had been imposed on the 2010 permission, could be transposed into the Decision Notice. One immediate objection to Mr Reed's argument is that having regard to the "natural and ordinary meaning" of the relevant words, "below" cannot mean or include "above" any more than "black" can include "white". But that, I accept, is not conclusive.

50. In cases that concern the interpretation of a document, reliance on previous cases

interpreting different documents is seldom helpful, except to the extent that they lay down questions of principle. However, Mr Reed took us to the decision of Sullivan J in *R (Reid) v Secretary of State for Transport* [2002] EWHC 2174 (Admin), so I need to deal with it. That case also concerned the variation of a condition imposed on a planning permission. That permission had been granted subject to 12 conditions. The landowner applied for the retention of the use of the land without compliance with condition 2. The local authority granted the application. The relevant parts of the decision notice read:

> "Proposed Development: FULL: RETENTION OF USE OF LAND WITHOUT COMPLIANCE WITH CONDITION 2 (IMPROVEMENTS TO PUBLIC HIGHWAY) ATTACHED TO PLANNING PERMISSION REF: 11/90/1632 DATED 23.6.92 FOR USE OF LAND AND BUILDINGS AS TRANSPORT DEPOT AND CREATION OF NEW VEHICULAR ACCESS
>
> "The Council as District Planning Authority hereby gives notice of its decision to APPROVE Planning Permission for the application set out above subject to the following conditions:
>
> Conditions
>
> None."

51. Sullivan J reasoned that the planning authority had approved "the application set out above". One therefore had to ask: what was the application? The answer to that question was: the retention of a use without compliance with one (only) of the conditions imposed on the planning permission authorising that use in the first place. That interpretation gave full force to the phrase "retention of use" which described the subject matter of the permission granted under section 73. In that context, the word "None" under the heading "Conditions" could be interpreted as "no additional conditions". I do not consider that *Reid* lays down any point of principle. All that it decides is that on the particular wording of that case the conditions attached to the previous planning permission continued to apply to the new one. As the judge correctly observed at [53] Sullivan J did not decide that a description of permitted use itself operated as a condition. Moreover, as was held in *Government of the Republic of France v Royal Borough of Kensington and Chelsea* [2017] EWCA Civ 429 at [117] the mere fact that one consent refers to a previous consent is not enough to incorporate by reference the conditions attached to the previous consent. Moreover, since Mr Reed's oral submissions abandoned the previous argument that conditions attached to the 2010 permission could be carried forward into the Decision Notice, *Reid* has even less relevance than might at first sight have appeared.

52. The reasonable reader of the Decision Notice must be notionally equipped with some knowledge of planning law and practice. The distinction between a limited description of a permitted use and a condition is a well-known distinction. The reasonable reader would also know that the government's own guidance stated that any conditions applicable to planning permission granted under section 73 must be explicitly stated. He would know the general structure of a planning permission which will set out a summary

of the application, describe the development permitted by the permission and, in a separate part of the permission, will set out any conditions imposed on the grant of planning permission with reasons for those conditions. He would notice that there were some conditions attached to the grant which were explicitly stated in the Decision Notice, and that the Decision Notice stated that Lambeth had decided that "planning permission should be granted subject to the conditions listed below". If he had looked back over the planning history he would also have seen the 2010 approval of a variation to the condition, which did specify the permitted range of goods in the form of a condition. That had not been repeated in the Decision Notice. He would also have noticed that the decision notice in 2010 had imposed two conditions (relating to refuse and recycling on the one hand, and management of deliveries on the other) which had also not been repeated in the Decision Notice. If he had considered the 2013 refusal he would have seen that Lambeth was not satisfied at that time that the applicant had demonstrated that increased traffic would not lead to adverse impacts. But he would have seen that the Decision Notice of 2014 referred to a traffic assessment which Lambeth had considered. He would also have noticed that condition 3 required a traffic survey and the implementation of mitigation measures if junction capacity was worse than predicted. He might reasonably have concluded that Lambeth had been sufficiently satisfied on this second application to grant conditional permission, with the safety net of condition 3.

53. Accordingly. sympathetic though I am to Lambeth's position, this submission seems to me to go well beyond interpretation. It is not a question of rearranging words that appear on the face of the instrument (as in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 AC 1101). It is a question of adding a whole condition, which has a completely different legal effect to the words that Lambeth in fact used.

54. It is true that in *Chartbrook* Lord Hoffmann said at [25]:

> "… there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant. In my opinion, both of these requirements are satisfied."

55. However, it is also noteworthy that he took the view that to interpret the formula in that case "in accordance with ordinary rules of syntax makes no commercial sense" (see [16]) and that that interpretation was "arbitrary and irrational" (see [20]). The typical case in which the principle applies is where the clause in question is an obvious nonsense, although this is not a prerequisite. As Lord Neuberger explained in *Pink Floyd Music Ltd v EMI Records Ltd* [2010] EWCA Civ 1429 (not reported on this point at [2011] 1 WLR 770):

> "One is normally looking for an outcome which is "arbitrary" or

"irrational", before a mistake argument will run."

56. In the contractual context, a corrective interpretation cannot be used to supply a whole clause which the parties have mistakenly forgotten to include: *Cherry Tree Investments Ltd v Landmain Ltd* [2012] EWCA Civ 736, [2013] Ch 305 at [131] and [144]. As the quotation from Lord Hoffmann demonstrates, a corrective interpretation can only be invoked where something has gone wrong with the *language* of the contract, as opposed to something having gone wrong with the implementation of the bargain, or the mistaken failure to exercise a power: *Honda Motor Europe Ltd v Powell* [2014] EWCA Civ 437; [2014] Pens LR 255. Although the Decision Notice probably did not achieve the result that Lambeth wanted it to achieve, I do not consider that it can be said that the result is arbitrary or irrational. Nor, in my judgment, has anything gone wrong with the language of the Decision Notice. What went wrong was Lambeth's failure to exercise a power that it had under the Act.

57. Mr Purchas QC considered a similar situation in *I'm Your Man*, albeit in the context of an argument about implication. He said:

> "In the present case, the relevant application was for a temporary period, thus effectively volunteering a condition in accordance with what is now paragraph 110 of the annex to Circular 11/95. The imposition of a temporary condition was plainly open to the 1995 Inspector. His failure to impose such a condition might well have been open to criticism. His decision, however, became immune from challenge after six weeks by virtue of section 284 of the 1990 Act. That does not provide grounds for implying a condition to that effect in what is a public document, conferring rights in connection with the use of land. In my judgment, accordingly, the permission as granted became effectively a permanent permission."

58. I agree; and these observations are just as pertinent to the argument based on a corrective interpretation.

59. There is a further objection to Mr Reed's suggested interpretation. Under article 31 (1) (a) of the Town and Country Planning (Development Management Procedure) (England) Order 2010 which applied at the relevant time "where planning permission is granted subject to conditions, the notice shall state clearly and precisely their full reasons for each condition imposed." To impose a condition without giving reasons for it would be a breach of statutory duty. It is one of the principles of contractual interpretation that one should prefer a lawful interpretation to an unlawful one. There is nothing in the Decision Notice which could amount to a clear, precise and full reason for treating the description of the use as a condition. Although Mr Reed suggested that the first reason given for the 2013 refusal could stand as the reason, I consider that to be untenable. The requirement to give reasons is applicable to "the notice". It may be that "the notice" might extend to

another document incorporated by reference; but that is not this case. Although the Decision Notice does cross-refer both to the original planning permission and also to previous approved variations, it does not mention the refusal at all. There would be no reason for a reasonable reader of the Decision Notice to suppose that a reason for an unexpressed condition was contained in a document which was simply part of the background.

60. In addition the tests applicable to the imposition of a condition are of long standing, and are summarised in paragraph 206 of the NPPF. In short, planning conditions should only be imposed where they are necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects. Whether a condition meets these tests is essentially a question to planning judgment to be exercised in relation to the particular application under consideration. The exercise of that planning judgment is a matter for the local planning authority. It cannot be exercised by the court in seeking to interpret a planning permission where there is no evidence that the local planning authority has carried out that exercise.

61. I do not, therefore, consider that the failure can be cured by a corrective interpretation. In the context of a private law contract, Mr Reed's argument would be capable of being dealt with by the equitable doctrine of rectification. But that route is not available in a public law case. Lambeth does have a statutory power to modify the planning permission, but that has the consequence that compensation might become payable.

62. I am, therefore, unable to accept Mr Reed's argument on interpretation. So the next question is whether an additional condition can be implied.

Implication

63. In *Trump* the Supreme Court went on to consider whether it was possible to imply words into a condition into a document such as a planning permission. They held that it was, although the court must be careful in doing so. As Lord Hodge put it at [35]:

> "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."

64. Once again, it seems to me that the limited range of available extrinsic evidence is a critical factor. In the case of a private contract, recourse to the background facts may be the reason why a term is implied. That is not possible in a public document. However, even in the case of a public document a term may be implied where that term is intrinsic in the language of the document itself. The distinction between the two routes to implication was clearly explained in the decision of this court in *Bratton Seymour Service Co Ltd v Oxborough* [1992] BCLC 693, upon which Lord Hoffmann

commented in *Attorney-General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988. He said:

> "[35] … This was a case about the extent of the background which is admissible in construing articles of association. The company was set up to acquire and manage a property divided into flats which also included "amenity areas" (tennis courts, swimming pool, gardens). It was argued that there should be implied into the articles of association an obligation on the part of each flat owner/member to contribute to the expenses of maintaining the amenity areas. The implication was said to be derived from the circumstances in which the property was acquired and the terms of the conveyance to the company.
>
> [36] The decision of the Court of Appeal was that these background facts were not admissible to construe the meaning of the articles. Without them, there was not the slightest basis for implying such an obligation. Because the articles are required to be registered, addressed to anyone who wishes to inspect them, the admissible background for the purposes of construction must be limited to what any reader would reasonably be supposed to know. It cannot include extrinsic facts which were known only to some of the people involved in the formation of the company.
>
> [37] The Board does not consider that this principle has any application in the present case. The implication as to the composition of the board is not based upon extrinsic evidence of which only a limited number of people would have known but upon the scheme of the articles themselves and, to a very limited extent, such background as was apparent from the memorandum of association and everyone in Belize would have known, namely that telecommunications had been a state monopoly and that the company was part of a scheme of privatisation."

65. In *Trump* Lord Carnwath made a similar point in considering the case of *Crisp from the Fens Ltd v Rutland County Council* (1950) 1 P & CR 48. That was a case in which this court read words in to a condition attached to a planning permission. Lord Carnwath commented at [64]:

> "The intention of the authority was apparent, not from extrinsic evidence, but from the terms of the document itself. It was that which enabled words to be added by implication to the terms of the condition."

66. In referring to the terms of the document itself I do not consider that Lord Carnwath was excluding reference to other documents which had been incorporated by reference into

the document itself, particularly in the light of what he said at [66] (quoted above).

67. Mr Reed's submission was based on what *the parties* intended. In the case of a document like a planning permission, whose benefit runs with the land, there is little scope, in my judgment, for the intention of the parties. Lord Hodge made this point in *Trump* at [33] (quoted above).

68. In the sphere of private contracts it is now established that there are, in essence, two routes to the implication of a term. Either the term must be necessary to give business efficacy to the contract; or it must be so obvious that it goes without saying: *Impact Funding Solutions* at [31]. "Business efficacy" will not be achieved if, without the implied term, the contract would lack commercial or practical coherence. It is to be noticed that in this context the relevant purpose is the purpose of the *contract*: not simply the purpose of one of the *contracting parties*. Given the public and permanent nature of a planning permission it is not easy to see how these tests can be directly applied without some modification.

69. Be that as it may, one must first consider the purpose of the Decision Notice. Its primary purpose was to widen the range of goods that could be sold from the store. Plainly it achieved that purpose. Mr Reed argued that the Decision Notice purported to restrict the use to non-food goods and that if, for technical reasons, it failed to do so it would lack practical coherence. A document that fails to achieve its intended purpose cannot have practical effect. However, as Ms Blackmore submitted on behalf of the Secretary of State, the planning permission remains a valid consent for a retail use, whether or not it is subject to the proposed condition. The judge so held at [59]. I agree.

70. Although it may well be that the form of the Decision Notice did not achieve *Lambeth's* secondary purpose, I cannot say that as a document it lacked practical or commercial coherence.

71. Turning to the second test, as I have observed the reasonable reader must be equipped with some knowledge of planning law and practice. I have already described what the thought processes of such a person would have been in considering Mr Reed's argument on interpretation: see paragraph [52] above. Although I would accept that the reasonable reader might wonder whether Lambeth had made a mistake in 2014 in not restating the conditions attached to the previous permissions, I do not consider that it was so obvious that it went without saying.

72.

In addition, Mr Lockhart-Mummery submitted that the only point potentially at issue in *Trump* was whether an implication could be made into an extant condition that was incomplete.

That was the position in *Trump* itself; and was also the position in *Crisp from the Fens*. *Trump* did not contemplate the implication of a wholly new condition. To the extent that this court suggested otherwise (obiter) in *Government of the Republic of France* at [118] it was wrong or distinguishable.

73. Neither Lord Hodge nor Lord Carnwath expressed themselves in the limited way suggested. Nevertheless, to my mind there is considerable force in this submission. As I have said under article 31 (1) (a) of the Development Management Procedure Order 2010 "where planning permission is granted subject to conditions, the notice shall state clearly and precisely their full reasons for each condition imposed." The implication of a condition, unaccompanied by reasons, would contravene this requirement. The issue in *Government of the Republic of France* was slightly different. It did not concern the implication of a wholly new condition in a planning permission. Rather it concerned the inclusion by implication of conditions attached to a previous listed building consent in respect of which no reasons need to be given. One reason, in the sphere of private contracts, for rejecting an implied term is that it contradicts an express term of the contract. That cannot, of course, be directly applied to the statutory code which governs planning law. But the fact that a suggested implied condition would not conform to that code is, in my judgment, another powerful reason why no such condition should be implied unless the reason for the condition is apparent from the planning permission itself.

74. For the reasons I have already given, I do not consider that the court can make up that deficiency by inventing reasons for the imposition of a condition or transposing reasons from the 2013 refusal.

75. Accordingly, in agreement with the judge I do not consider that a new condition can be implied.

Validity of condition 1

76. The final point relates to the validity of condition 1 attached to the Decision Notice. I repeat it (and the reason given for it):

> "1. The development to which this permission relates must be begun not later than the expiration of three years beginning from the date of this decision notice.
>
> Reason: To comply with Section 91(1)(a) of the Town and Country Planning Act"

77. Section 91 (1) (a) provides:

> "Subject to the provisions of this section, every planning

> permission granted or deemed to be granted shall be granted or, as the case may be, be deemed to be granted, subject to the condition that the development to which it relates must be begun not later than the expiration of—
>
> (a) the applicable period, beginning with the date on which the permission is granted or, as the case may be, deemed to be granted"

78. The applicable period in England is three years. Section 91 (4) (b) provides that the section does not apply "to any planning permission granted for development carried out before the grant of that permission."

79. The question therefore arises: for what development (if any) did the Decision Notice grant permission? Given the terms of section 55 (2), quoted above, I cannot see that the Decision Notice granted planning permission for any prospective development. The mere widening of the classes of goods that were permitted to be sold by retail does not amount to development at all. Conformably with the definition of "development" in section 55 the only development to which the application could have related was the original erection of the store and the commencement of its use as a DIY store. It was that development that was permitted subject to the conditions that the application was designed to modify; and it was the planning permission permitting that development to which the Decision Notice referred. Because the relevant development was the original erection of the store, both Ms Blackmore and Mr Lockhart-Mummery submitted that section 91 (4) (b) of the Act applied.

80. It followed, therefore, that condition 1 was not *required* by section 91; and that consequently Lambeth's reason for imposing it was a bad one. If the reason given cannot justify the condition, then the condition is invalid. This seems to me to be right. But more fundamentally if (as I think) the extension of the range of retail goods on offer is not development at all, there is simply nothing on which condition 1 can bite.

81. In his skeleton argument Mr Reed argued that if (as I consider) section 91 did not require the imposition of that condition, Lambeth nevertheless had power to impose a condition to like effect under section 72. In my judgment he was wise to abandon that argument in oral submissions. If Lambeth had decided to impose a condition which it was not required by the Act to impose, it would have had to consider whether the imposition of that condition met the usual tests for imposing a condition, which I have summarised above.

82. Once again, whether these tests were met would have involved the exercise of planning judgment. If Lambeth had decided that they were, it would also have had to give reasons for its imposition. There is nothing to suggest that Lambeth in fact gave any consideration to the question whether such a condition could be justified; and the only

reason that it gave for the imposition of the condition does not withstand scrutiny. Accordingly, I agree with the judge that condition 1 is invalid.

Result

83. For these reasons, I would dismiss the appeal.

Lord Justice Hamblen:

84. I agree.

Lord Justice Coulson:

85. I also agree.