Case No: C1/2010/2041

Neutral Citation Number: [2011] EWCA Civ 553
IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM ADMINISTRATIVE
MR JUSTICE BEATSON
CO/1646/2010

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/05/2011

Before :

LORD JUSTICE RIX
LADY JUSTICE SMITH
and
SIR DAVID KEENE

- -

Between :

AVON ESTATES LTD	**Appellant**
- and -	
(1) WELSH MINISTERS	**Respondent**
(2) CEREDIGION COUNTY COUNCIL	

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Rupert WARREN (instructed by **Clarke Willmott LLP**) for the **Appellant**
Jonathan MOFFETT (instructed by **Treasury Solicitors**) for the **Welsh Ministers**
Paul STINCHCOMBE (instructed by **Ceredigion County Council)**

Hearing dates: 11 March 2011

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Judgment
As Approved by the Court

SIR DAVID KEENE:

Introduction

1. This appeal raises a novel point of law about the status and effect of conditions attached to a planning permission granted for a limited period, once that limited period has expired. Of course, a failure to remove the permitted building or to cease the permitted use after that specified period will normally be vulnerable to enforcement action under Part VII of the Town and Country Planning Act 1990, but what is the position if the planning authority does not take such action during the years in which it could, so that the permitted development becomes immune from enforcement action by virtue of section 171 B of that Act ("the 1990 Act")? Can other restrictive conditions on the planning permission, such as an occupancy condition, still be enforced?

2. It must be borne in mind that planning permissions granted for a limited period, though recognized in section 72 (1)(b) and section 72 (2) of the 1990 Act, are unusual, if not rare. The Departmental Circular 11/95 on the Use of Conditions in Planning Permissions warned (as did its predecessor, Circular 1/85) against the granting of what it called "Temporary Permissions", except in very limited circumstances. It is perhaps because such permissions are unusual creatures that the precise point of law now in issue does not seem to have been determined in previous authority.

The Facts

3. The land in question lies close to the Welsh coast and is within an area of great landscape value. Between the years 1964 and 1973 a total of four planning permissions were granted for "the erection of holiday bungalows" or in one case the erection of "semi-detached chalets". In each case, there was a condition stating that:

> "The permission hereby authorised shall expire and the site be restored to its former use on or before …"

a stated date. That date varied, being 31 July 1985 in two of the permissions and 31 July 1995 in the other two. Nothing turns on the difference in the specified dates.

4. Each permission then contained a condition requiring the proposed bungalows to be maintained to the satisfaction of the planning authority "throughout this period". Then in each case there was a condition limiting occupancy to only part of the year. Thus the 1964 permission stated as its third condition:

> "The holiday bungalows shall be occupied only during the period 1st March to 31st October".

The same wording appeared in the second permission, dated 17 May 1965, while the other two permissions contained similar wording but referring to a somewhat longer part of the year. Nothing turns on those differences.

5. In fact, the bungalows remained in existence long after the date specified for the expiry of the permissions. No enforcement action was taken to secure their removal and the restoration of the site to its former use, and at a public inquiry in September

2009 it was agreed between the appellant and the local planning authority that the bungalows, of which there were by now 42 in number, were immune from enforcement action. It was also agreed that they had been occupied seasonally for more than four years but also that they had not been occupied outside the periods in the year referred to in the permissions.

6. In 2008 the appellant sought a certificate of lawfulness of existing use under section 191 (1) of the 1990 Act. The use described in the application was "use of buildings as 42 dwelling houses". Before any decision had been made on that application, a further application was submitted, this time under section 192 (1), for a certificate of lawfulness of the proposed use of one of the bungalows "as a dwelling house", and reference was made to Class C3 of the Use Classes Order 1987 (use as a single dwelling house (whether or not as a sole or main residence)). That building was, in effect, chosen as a test case for a section 192 certificate.

7. When no decision was made on either application, the appellant (the owner of the land) appealed. The two appeals were determined by an inspector appointed by the Welsh Ministers, the First Respondents. A number of matters were raised in the course of the appeals which are no longer relevant. Although the whole site was known as Gilfach Holiday Village, the inspector ruled that each bungalow was individually and separately occupied and was physically and functionally separate from each other and thus each was a separate planning unit. He went on to find, referring to the decision in *Gravesham Borough Council v Secretary of State for the Environment* (1982)47 P and C.R. 142, that each bungalow constituted a dwelling house within Class C3 of the Use Classes Order. However, he also concluded that, though the "temporary conditions" on the planning permissions had become spent over 14 years earlier, the seasonal use condition in each permission had not been breached and so those conditions "remain extant": para. 21. Thus, while he allowed the appeal in respect of the certificate of lawful existing use, the certificate he granted for the 42 buildings for use as dwelling houses was "subject to the conditions imposed in those permissions [i.e. the four permissions between 1964 and 1974], with the exception of those conditions requiring each permission to expire and the site to be restored to its former use on or before a specified date".

8. Taken strictly, that certificate would seem to leave in being not only the seasonal occupancy conditions but also those requiring the bungalows to be maintained to the satisfaction of the local planning authority throughout the periods specified, but no-one suggests that those latter conditions still have any effect. As for the appeal in respect of the certificate of proposed lawful use, the inspector noted that the proposed use made no reference to the restriction contained in the seasonal condition and so he dismissed that appeal. In essence, that decision was based on the same proposition which guided his decision on the first appeal, namely that the seasonal conditions in the planning permissions were still "extant".

9. The appellant challenged those decisions under section 288 of the 1990 Act, but was not successful. Beatson J. held that a permission granted for a limited period, to use the statutory words in section 72 (2), did not "cease to exist" after the expiry of that period:

> "What has expired is the time within which the use should have ceased and the restoration should have occurred". (para. 42).

Only that breach of condition had acquired immunity from enforcement action. The judge noted that the 1990 Act did not use the word "expire" and that there was no exception in section 75 in respect of a planning permission granted for a limited period. (That is the provision which states in sub-section (1) that a grant of planning permission

> "shall (except in so far as the permission otherwise provides) enure for the benefit of the land and of all persons for the time being interested in it.")

10. Looking at the wording of these particular permissions, the judge noted that the occupancy conditions (as he termed the seasonal use conditions) did not refer to the period referred to in the time limit conditions and so he concluded that the seasonal restrictions were intended to apply after the end of that period. He contrasted the wording of those conditions with the wording used in the maintenance conditions. For all those reasons he found that the seasonal use conditions were still effective and that the inspector had been right on this issue.

11. The judge also dealt with whether the applicant was entitled to a certificate of lawful use which went beyond the use which had actually taken place "in accordance with the seasonal occupancy conditions". On this, he concluded that there was no such entitlement, relying on a passage in Circular 10/97, Annex 8, dealing with such certificates. Paragraph 8.17 therein, to the extent cited by the judge, reads:

> "In all cases the description must be more than simply a title or label, if future interpretational problems are to be avoided. The LDC should therefore state the characteristics of the matter so as to define it unambiguously. This is particularly important for uses which do not fall within any "use class" (that is, a "sui generis" use). So for example a LDC for a caravan site might typically include the number and type or size of caravan *found to be lawful at the application date* and, where the use is seasonal, the calendar dates on which the use then took place"(original emphasis).

The Statutory Context

12. Certificates of lawfulness of an existing use or a proposed use of land are dealt with by sections 191 and 192 respectively of the 1990 Act. It is unnecessary to set out those provisions in full. It is sufficient to note that "lawful", as applied to uses, operations or failures to comply with a condition on a planning permission, is so defined as to mean that it applies if the time for taking enforcement action has expired: section 191(2) and (3). So the issue of enforceability (or lack of it) is at the heart of the concept. That in turn takes one to the issue of whether the seasonal use condition on each of those permissions was still extant and enforceable as a condition at the time when the certificates under sections 191 and 192 were applied for.

13. The power to attach conditions to a planning permission derives from two separate sections of the 1990 Act. The general power is to be found in section 70 (1), which in so far as material for present purposes provides:

"70(1) Where an application is made to a local planning authority for planning permission –

(a) subject to sections 91 and 92, they may grant planning permission, either unconditionally or subject to such conditions as they think fit; or …"

Much litigation has taken place on what conditions may legitimately be imposed under this provision. Then section 72 (1) deal with two specific types of condition, one of which is relevant to this appeal:

"72(1) Without prejudice to the generality of section 70 (1), conditions may be imposed on the grant of planning permission under that section –

(a)…

(b) For requiring the removal of any building or works authorised by the permission, or the discontinuance of any use of land so authorised, at the end of a specified period, and the carrying out of any works required for the reinstatement of land at the end of that period."

That type of condition is further referred to in the next subsection, section 72(2), as follows:

"72(2) A planning permission granted subject to such a condition as is mentioned in subsection (1) (b) is in this Act referred to as planning permission granted for a limited period."

14. The reason why the time limit on the authorisation in such a case is secured by way of condition, rather than in the description of the development permitted, is not difficult to identify. It flows from the definition of "development" in section 55 (1) as meaning the carrying out of building, engineering, mining or other operations or the making of a material change in the use of any buildings or other land. Under a temporary permission, that is a permission granted for a limited period, no "development" as such takes place at the end of the authorised period of time: the buildings (if any) are already there on site, the material change of use has already taken place, and the continued existence of the buildings and/or the continuation of the use does not constitute development. Thus the time limit on the permitted development can only be achieved by a condition to that effect, since that may be enforced in its own right even though no development takes place at that point in time.

15. The other type of condition given specific approval by section 72 (1) is a condition relating to other land controlled by the applicant for planning permission, so long as such a condition appears to be expedient for the purposes of or in connection with the development authorised by the permission. That limitation on such a condition has some similarity to the principle well-established in the case law that any condition must relate "fairly and reasonably" to the permitted development: *Pyx Granite Co. Ltd. v Ministry of Housing and Local Government* [1958] 1 QB 554 at 572; *Fawcett*

Properties Limited v Buckingham County Council [1961] AC 636 at 674, 678-9, and 685.

16. Enforcement action is provided for in Part VII of the 1990 Act. Section 172 (1) empowers the local planning authority to issue an enforcement notice where it appears to them that there has been a breach of planning control and that it is expedient to issue the notice, having regard to the development plan and any other material considerations. A breach of planning control is defined by section 171A (1):

> "171A(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."

But there are time limits on taking enforcement action, set by section 171 B:

> "171B(1) Where there has been a breach of planning control consisting in the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land, no enforcement action may be taken after the end of the period of four years beginning with the date on which the operations were substantially completed.
>
> (2) Where there has been a breach of planning control consisting in the change of use of any building to use as a single dwelling house, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach.
>
> (3) In the case of any other breach of planning control, no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach."

17. It is also to be observed that the 1990 Act makes special provision in respect of conditions which may be imposed on permissions for mineral extraction. Such permissions are limited in their duration, automatically by virtue of Schedule 5, para. 1, but they are treated as something quite separate and different from permissions "granted for a limited period" within the meaning of section 72 (1) (b) and 72 (2). They are expressly excluded from that definition by Schedule 5, para. 6 (1). That same schedule makes express provision for aftercare conditions to be imposed on mineral extraction permissions, to operate after the time limited for the mineral extraction has expired.

The Submissions.

18. The appellant contends that the seasonal use condition in each permission was no longer extant at the dates of the applications for certificates in 2008 and 2009 and that the inspector was wrong to find otherwise. Mr Warren on its behalf puts the construction of these permissions at the forefront of his case, but drawing support from the statutory framework. He submits on construction that each permission and its conditions must be interpreted as a whole and in such a way as to avoid internal inconsistency. To attribute force to the seasonal use condition after the date when the buildings were no longer authorised by the permission and when the land was required to be restored to its former use without any buildings would be, it is said, illogical and internally inconsistent. If the seasonal use condition had expressly provided for its application for, say, 20 years after the time limit on the authorisation of the buildings, one would be faced with major problems of interpretation and doubt would be cast on the meaning of the first condition, the time-limit condition. Moreover, any lawful condition must relate to the permitted development, fairly and reasonably, and it is difficult to see how one could have a lawful condition with permanent effect relating to the use of buildings which by the same permission are only allowed to exist temporarily.

19. As for the statutory context, Mr Warren submits that the terms of section 72 mean that the permission and the conditions attached to it expire and cease to have effect at the end of the specified period. He acknowledges that the condition requiring restoration of the site to its former use may involve some work after that period and, of course, that that condition may be enforced thereafter until the time for enforcement action has passed. Such a condition relates to and acknowledges the temporary nature of the development permitted. But other than that, conditions attached to a permission which has expired are no longer enforceable. The appellant places some reliance, if only by way of analogy, on the Court of Appeal decision in *Adur District Council v Secretary of State for the Environment* [1999] EWCA Civ 1937; [2000] 1 PLR 1, a decision to which I shall return.

20. On behalf of the Welsh Ministers, Mr Moffett urges caution in using the word "expiry" in respect of planning permissions, that being an expression not found in the 1990 Act. He submits that there is nothing in the definition of a permission granted for a limited period which precludes such a permission having other conditions which may continue after the end of the limited period. However, when pressed for an example of a condition which would do so and would still relate "fairly and reasonably" to the permitted temporary development, the only instance he could put forward was the very condition providing for the expiry of the permission and the restoration of the site found in the permissions involved in this appeal. Mr Moffett makes the fair, if somewhat technical, point that that condition must remain enforceable after the specified date for the expiry of the permission. However, unlike the judge below, he does not regard section 75, the provision that the permission enures for the benefit of the land, as shedding any light either way on this issue.

21. Mr Stinchcombe for the County Council adopts the arguments of the Welsh Ministers as to the statutory scheme and submits that a permission within section 72 (2), if it contains other conditions as well as the time limit condition, still survives. Neither it nor its conditions expire. It is simply that the time limit condition will in due course become immune from enforcement, but that does not mean that the other conditions

have acquired such immunity. A local planning authority, it is argued, can properly refrain from enforcing the time limit on the permitted use but may still enforce other conditions restricting that use.

22. Both respondents argue that one is concerned primarily with the construction of these permissions and their conditions. In some cases, it may well be that a condition no longer binds the land once the time limit condition can no longer be enforced. That was so in *Adur* but that is not inevitable. Mr Moffett contends that these planning permissions do not expire until the site has actually been restored to its former use, even if that post dates the date specified in the first condition (the "time limit" condition).

23. All parties agree that, if the appeal succeeds, the matter should be remitted to the inspector to re-consider the issue of the certificates and their terms, in the light of this court's decision.

Discussion

24. There is some common ground between the parties. All regard the construction of these particular permissions as being of prime importance. They differ on the issue of whether the statutory scheme in the 1990 Act allows for the possibility of conditions in a permission granted for a limited period remaining in force once the "time limit" condition has become unenforceable. That statutory context is nonetheless obviously relevant and I begin by considering it.

25. The case of *Adur* is of limited assistance on this aspect, because it was clearly decided principally as a matter of the interpretation of the actual permission and its conditions. It was a case concerning a 1991 permission granted for a limited period, during which time a port authority was entitled to use certain land for the storage of cars. That authorisation expired on 31 December 1991. There was also a condition, condition 2, that:

> "Notwithstanding the provisions of the Town and Country Planning (Use Classes) Order 1987 and the Town and Country Planning General Development Order 1988 (as amended), the site shall be used solely for storage of cars".

By the time the case reached the Court of Appeal, there was no dispute that the combined effect of the temporary permission and the use of the land by the port authority for port-related purposes was to render the site "operational land" for the purposes of the rights granted to port operators by the General Permitted Development Order 1995, the successor in this respect to the 1988 Order referred to in condition 2. So the effect of the temporary permission was far-reaching, and it was argued by the local planning authority that condition 2 was of continuing effect and so excluded those rights.

26. The court rejected that argument, pointing out the obvious inconsistency between a condition which granted <u>temporary</u> permission for the storage of cars and an allegedly continuing condition which not merely excluded the development order rights but expressly confined the use of the land to the storage of cars. Thus condition 2 could not be interpreted as applying beyond the end date on the temporary permission for

such storage. In the leading judgment, Pill L.J. said in terms that the question whether it would be possible to have a permanent restrictive condition on a temporary planning permission did not fall for decision on the facts of the case: page 7. Nonetheless, it is to be observed that he went on to add:

> "Similarly, a limitation imposed in condition 2 applies only while rights are being exercised under the 1991 permission. When reliance is no longer placed on the express grant, the condition does not have the effect of excluding development rights under the GPDO.": page 8.

27. That last point reflects a long-standing approach in planning law, running from *Mounsdon v Weymouth Borough Council* [1960] 1 QB 645 to cases like *Essex Construction Co. v East Ham Borough Council* [1965] 16 P and C.R. 220 and *Handoll v Warner Goodman* [1995] JPL 930, whereby a condition in a permission cannot be enforced if the landowner does not have to rely on the permission to authorise his development. Those cases, however, do not (unlike the *Adur* case) expressly deal with the situation where the landowner did need the permission originally to sanction his development and where the permission has been implemented.

28. Having said that, it is very difficult to conceive of a condition on a temporary permission under section 72 which could sensibly relate to a development, once that development has ceased to be authorised by the permission. The time limit and restoration condition itself does not provide an example which goes beyond its own scope, since that condition is expressly and precisely provided for by section 72 (1) (b). One cannot derive a general approval from that for conditions which bind the land once the development itself has ceased to be authorised and has become immune from enforcement action. Such enduring conditions would, to be lawful, still have to relate fairly and reasonably to the permitted development, which was and is to be seen as a temporary development. So although I would not wish to be categoric as to the impossibility of such enduring conditions, I do regard it as very unlikely that the statutory scheme allows for what can be described as a permanent condition on a temporary permission, other than the time limit condition itself. The latter is a very different animal: as Mr Warren put it, such a condition circumscribes the entire authorisation of the use. It is quite unlike a condition limiting in a certain respect a use which has become an unauthorised use.

29. It is also significant that Parliament has found it necessary to make special express provision for the situation where conditions are often required to apply after the authorisation of the permitted development has expired, namely in the case of mineral extraction. Aftercare conditions have had to be given explicit sanction by the statute in such cases: see paragraph 17 (ante).

30. Within that statutory context, I turn to the permissions and conditions which call for interpretation in this appeal. It is of course correct that the seasonal use condition in each permission has no express time limit on it and that it does not contain the phrase "throughout this period" as does the maintenance of the bungalows condition. The judge attached some significance to the apparent contrast between the wording of the maintenance condition and the seasonal use condition's wording in this respect, but I regard that significance as unjustified. The maintenance condition was imposing a

positive obligation on the landowner to maintain the bungalows and it was necessary to word the condition in such a way as to make it clear that this was a continuing obligation throughout the period to which the temporary permission related. No such additional words were needed for the seasonal use condition, which imposed a restriction patently intended to apply throughout the life of the permitted development.

31. There is no doubt that, when construing a permission and its conditions, the document must be read as a whole and in such a way as to avoid, if possible, internal inconsistency. In the present case, I accept Mr Warren's submission that it would be illogical and internally inconsistent when construing these permissions to give the seasonal use condition in each permission a life after the specified date. The inconsistency is not as glaring as in the *Adur* case, but it is nonetheless present, and it is a powerful objection to the continuing force of the seasonal use condition. The first condition in each permission makes it clear that permission is only being granted at all for a limited and specified period. To have a condition which contradicts that by assuming that development is being authorised for a longer period, albeit on a seasonal basis, would give rise to major problems of interpretation as to the duration of the authorisation. This would become obvious if the seasonal use condition had spelt out such longer duration expressly. If the permission had stated that the buildings were to be removed and their use as holiday bungalows were to cease by 31 July 1985 but the seasonal use condition was said to apply until, say, 1999, the difficulty would be readily apparent. The wording does not do that, but the interpretation advanced by the respondents is to that effect, albeit with no time limit at all.

32. I am not persuaded by Mr Moffett's attempt to interpret the time limit condition as authorising the restoration of the site after the specified date. The wording of the condition, with the expression "on or before", is not ambiguous. It sets an end date, by which time the site must have been restored to its previous use, though no doubt the planning authority would not take enforcement action if at the end date restoration was clearly well under way.

33. Planning conditions do not anticipate or provide for the consequences of the breach of other conditions in the way in which a contract might well. If a valid and effective condition is breached, the remedy is to be found in the statutory machinery for enforcement. A planning authority faced with a development which has failed to observe a time limit and restoration condition imposed under section 72 has entirely adequate enforcement powers available to it. If it sits on its hands until the time limit condition can no longer be enforced, it has only itself to blame.

34. In my judgment, the seasonal use conditions in these permissions applied during the period for which development was authorised by those permissions. The seasonal use conditions were, as a matter of objective construction, intended to be coterminous with the authorised development, with the result that the seasonal use restriction applied during that period for which these holiday bungalows were permitted. It follows that I would allow this appeal and, as is agreed in that event, remit the certificate appeals to the inspector to re-determine in the light of this court's decision.

Lady Justice Smith: I agree

Lord Justice Rix: I also agree