Neutral Citation Number: [2015] EWCA Civ 1060

Case No: C1/2014/3992

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT AT BIRMINGHAM
The Hon Mr Justice Hickinbottom
[2014] EWHC 3809 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/10/2015

Before :

LORD JUSTICE RICHARDS
LORD JUSTICE FLOYD
and
LORD JUSTICE SALES

- -

Between :

The Queen on the application of Robert Hitchins Limited	**Claimant / Respondent**
- and -	
Worcestershire County Council	**Defendant/ Appellant**
- and -	
Worcester City Council	**Interested Party**

- -
- -

John Hobson QC and Stephen Whale (instructed by **Worcestershire County Council Democratic Services**) for the **Appellant**
Anthony Crean QC and John Hunter (instructed by **Eversheds LLP**) for the **Respondent**
The Interested Party did not appear and was not represented on the appeal

Hearing date : 13 October 2015

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Approved Judgment

Lord Justice Richards :

1. This appeal relates to two planning permissions which were in identical terms save that the first permission was subject to a planning obligation to make a financial contribution towards transport strategy whereas the second permission, granted at a later date, was free from that obligation. The central question is whether the developer, having begun the development under the first permission and having thereby become liable for the first instalment of the transport contribution, switched horses following the grant of the second permission and carried out the rest of the development under that second permission, thereby avoiding liability to pay further instalments of the transport contribution. Hickinbottom J held on the evidence before him that the developer had so acted and that no further instalments of the transport contribution were payable. He granted a declaration accordingly. An appeal is now brought against his order.

The facts

2. The factual background is set out in some detail in Hickinbottom J's judgment. I will pick out only those points necessary for an understanding of the issues in the appeal.

3. The proceedings relate to a site in Worcester. The relevant planning permissions for the site were applied for by, and granted to, Robert Hitchins Limited ("RHL"), the respondent to this appeal. As described below, RHL subsequently sold its entire interest in the site to BDW Trading Limited ("BDW"), which is the actual developer of the site but is not a party to the proceedings. The local planning authority is Worcester City Council, which is an interested party in the proceedings but has played no active part in them. The relevant highway authority is Worcestershire County Council, the appellant before this court.

4. In June 2012, RHL applied for planning permission to develop the site with up to 200 dwellings. On the transport implications of the proposed development, the City Council deferred to the County Council as the highway authority. The County Council sought a financial contribution of some £1 million towards the transport and infrastructure services set out in the Worcester Transport Strategy. RHL argued that no such contribution was lawful or appropriate. But the judgment below describes the commercial pressures to which RHL was subject at the time, as a result of which it was very anxious to obtain planning permission for the site, and to sell the site on, quickly, This led to a negotiation about the transport contribution which resulted in a compromise, the terms of which were reflected in an agreement under section 106 of the Town and Country Planning Act 1990 ("the 1990 Act"), made by deed dated 22 January 2013 and entered into between the City Council, the County Council, RHL and Lloyds Bank plc ("the First Section 106 Agreement").

5. By paragraph (3) of the fourth schedule to the First Section 106 Agreement, RHL agreed:

> "To pay to the County Council the Worcester Transport Strategy Contribution … in three equal instalments, the first instalment to be paid on or before the Commencement Date the second instalment to be paid on or before the occupation of no more than 50% of the Dwellings on the Development and the

> third instalment to be paid on or before the occupation of no more than 75% of the Dwellings on the Development …."

The "Worcester Transport Strategy Contribution" was defined by clause 1 as a sum equivalent to £4,530 in respect of each dwelling on the Development, which equated to a total contribution of £819,930 for the 181 dwellings for which reserved matters approval was in due course granted (see below). "The Development" was defined in turn, by clause 2.5, by reference to the content of the application for planning permission. The "Commencement Date" was defined by clause 1 as the date on which the Development permitted by the planning permission was begun. According to the terms of the First Section 106 Agreement and by virtue of section 106(3), the obligation to pay the transport obligation ran with the land and was to be enforceable against any person deriving title from RHL.

6. On completion of the First Section 106 Agreement, outline planning permission ("the First Planning Permission") was granted.

7. It was RHL's case that the First Section 106 Agreement was entered into without prejudice to its contention that the requirement to pay a transport contribution was unlawful and without prejudice to legal steps in the future to avoid payment of the sum agreed. The judge found that there was no evidence that that intention was ever made manifest to the City Council or the County Council. The First Section 106 Agreement did, however, provide in clause 4.5 that –

> "Nothing in this Deed shall be construed as prohibiting or limiting any right to develop any part of the Land in accordance with a planning permission (other than the [First] Planning Permission) granted by the City Council or the County Council or by the First Secretary of State on appeal or by reference to him after the date of this Deed."

8. In March 2013, before the development permitted by the First Planning Permission was begun, RHL sold its interest in the site to BDW. Although the obligation in the First Section 106 Agreement to pay the transport contribution then became an obligation of BDW, RHL agreed under the sale agreement with BDW to observe and perform the obligation to pay that contribution. BDW agreed to RHL submitting a second planning application for the site, in identical terms to that granted by the First Planning Permission save for the omission of the obligation to pay the transport contribution; and if that second planning application was successful, BDW agreed that it would make an application for approval of reserved matters under the second planning permission and "… in such circumstances [BDW] shall either only implement the [Second] Planning Permission, or if the [First] Planning Permission … has already been implemented, [BDW] shall ensure that once the aforementioned approval of reserved matters has been granted, any further development at the [site] is carried out under the [Second] Planning Permission".

9. In May 2013, reserved matters approval for 181 dwellings was granted under the First Planning Permission. In October 2013 the development permitted by that permission was begun by BDW, triggering liability to pay the first instalment of the transport contribution under the First Section 106 Agreement. That instalment was paid by RHL to the County Council in November 2013.

10. In the meantime, in April 2013, as envisaged in its agreement with BDW, RHL submitted a second planning application for the site. The proposed development was identical to that permitted by the First Planning Permission. The only material difference in the application was that no transport contribution was proposed.

11. The City Council failed to determine the second application in time. RHL then made a non-determination appeal to the Secretary of State under section 78 of the 1990 Act. By a decision letter dated 10 January 2014, an inspector appointed by the Secretary of State allowed the appeal and granted outline planning permission ("the Second Planning Permission") for the same development as was permitted by the First Planning Permission but without any obligation to provide a transport contribution. He held that a planning obligation to secure the transport contribution sought by the County Council would not meet the requirements of regulation 122 of the Community Infrastructure Levy Regulations 2010 ("the CIL Regulations"). By this time a section 106 undertaking ("the Second Section 106 Agreement") had already been entered into by BDW, by deed dated 10 December 2013, in terms that were materially identical to those of the First Section 106 Agreement save for the omission of an obligation to provide a transport contribution.

12. There were then two sets of legal proceedings. The first was a statutory challenge by the County Council to the inspector's decision to grant the Second Planning Permission without any obligation to provide a transport contribution. That challenge was dismissed. The second was a judicial review claim by RHL seeking various forms of relief against the County Council. The one ground on which RHL was given permission to proceed was a claim for a declaration to the effect that it could not lawfully be required to pay further instalments of the transport contribution under the First Section 106 Agreement if, upon grant of reserved matters approval under the Second Planning Permission, the developer chose to continue the development pursuant to the Second Planning Permission rather than the First Planning Permission. That is the issue decided by Hickinbottom J and to which the present appeal relates.

13. By deed dated 25 June 2014, BDW entered into a further undertaking to the City Council and the County Council, expressed as a unilateral undertaking under section 106 ("the Unilateral Undertaking"). The background was explained in the recitals, which included the following:

> "(F) Pursuant to the Second Planning Permission the Owner [BDW] has by a Reserved Matters Application … applied to the Council for the Reserved Matters Approval.
>
> (G) The Owner intends to implement the Second Planning Permission and the Reserved Matters Approval. The Owner enters into this Undertaking in order to dispense with the implementation of the First Planning Permission and to dispense with the discharge of the obligations under the First Section 106 Agreement and to implement the Second Planning Permission and the Reserved Matters Approval and comply with the terms of the Second Section 106 Agreement.
>
> …

> (I) The Owner does not intend that this Undertaking will take effect unless and until the City Council grant the Reserved Matters Approval and the period of six weeks starting on the date printed or stamped on the Reserved Matters Approval has expired without any proceedings being commenced by a third party to challenge the grant of the Reserved Matters Approval …."

14. By clause 4.1, BDW undertook to comply with the obligations set out in Schedule 1 in relation to the relevant land. Schedule 1 provided as follows:

> "**Covenants**
>
> 1. Subject to Clause 3 of the Second Section 106 Agreement the Owner hereby covenants with the City Council and the County Council from the Commencement Date:
>
> 1.1 to discharge the obligations under the Second Section 106 Agreement in relation to the Land;
>
> 1.2 to dispense with the implementation of the First Planning Permission; and
>
> 1.3 to dispense with the discharge of the obligations under the First Section 106 Agreement in relation to that Land;
>
> PROVIDED THAT clause 3.1 has been satisfied."

Clause 3.1 provided for the obligations to come into effect by reference to the date of the reserved matters approval as referred to in recital (I). "Commencement Date" was defined accordingly.

15. Reserved matters approval under the Second Planning Permission was granted on 6 August 2014. Since there was no challenge to it, the obligations under the Unilateral Undertaking came into effect six weeks later, on 18 September 2014. It is clear that by that date a number of dwellings on the site had been completed and a number were partially completed: the evidence before the judge was that 63 dwellings had been completed as at 23 October 2014.

The issues before Hickinbottom J

16. In order to understand the limited scope of the present appeal, it is necessary to examine the issues before the judge below and how he dealt with them. They arose within the framework of the one ground on which RHL had been granted permission to apply for judicial review.

17. The case advanced by Mr Crean QC on behalf of RHL related to RHL's obligation, under its agreement with BDW, to observe and perform the obligation to pay the transport contribution under the First Section 106 Agreement. There was no dispute about the first instalment of the transport contribution, which had already fallen due and had been paid. But, as the judge summarised the argument:

> "41. … In respect of the second and third instalments, on the proper construction of the First Planning Permission and First Section 106 Agreement, these only become due on the occupation of 50% and 75% of the 181 dwellings respectively – a construction conceded by Mr Hobson, during the course of the hearing, as correct – and, as at 18 September 2014, less than 50% of the dwellings were occupied, and so neither the second nor third instalment was payable. Where more than one planning permission is extant for the same land, a developer may choose which planning permission to implement. Once reserved matters approval had been granted in respect of the Second Planning Permission, and the developer's obligations in the [Unilateral Undertaking] came into effect on 18 September 2014, it was open to BDW to choose to forgo any further implementation of the First Planning Permission in favour of implementing the Second Planning Permission. When looked at objectively, that is exactly what BDW did. Paragraph 1.2 of Schedule 1 to the [Unilateral Undertaking], when properly construed, made it clear that, from 18 September 2014, BDW ceased to perform material operations within the development under the First Planning Permission. They were entitled to act under the Second Planning Permission, which they did as soon as they performed a material operation within the development after that date. Any material operation after that date could only be performed under the Second Planning Permission. Any dwellings completed after that date, were completed under the permission granted in the Second Planning Permission; and, under that grant, no transport contribution is due.
>
> 42. Therefore, Mr Crean submitted that the County Council could not lawfully demand any further contribution towards the transport strategy from [RHL] or any subsequent owners of the Site …."

18. The County Council's challenge to that case was relatively limited in scope. After summarising RHL's case in the way I have set out, the judge proceeded to outline Mr Hobson QC's submissions on behalf of the County Council. He then said, at paragraph 45, that the ground of claim for which RHL had permission gave rise to three issues:

> "(i) Whether, after the reserved matters approval perfected the Second Planning Permission and as a matter of law, the developer was able to elect to continue and complete the development under the Second Planning Permission rather than the First Planning Permission.
>
> (ii) If so, whether the developer, on the evidence available, in fact elected to continue and complete the development under the Second Planning Permission.
>
> (iii) If so, what relief, if any, is appropriate."

19. On issue (i), the judge considered that, as a matter of law, the developer was, after the reserved matters approval perfected the Second Planning Permission, able to elect to continue and complete the development under the Second Planning Permission rather than the First Planning Permission. Indeed, he said that at the hearing before him, Mr Hobson did not argue with any vigour to the contrary. It was common ground between counsel that, where two planning permissions exist in respect of the same land, as a matter of principle, a developer may choose between them. The judge referred in that respect to the observations of Sullivan J (as he then was) in *Pye v Secretary of State for the Environment* [1998] 3 PLR 72, as approved by the Court of Appeal in *R v Leicester City Council, ex p. Powergen UK Limited* [2000] 81 P&CR 5, and said that there was no reason why the principles set out in *Pye* should not be of general application in all cases where there are multiple extant planning permissions for the same site. Referring to *Pilkington v Secretary of State for the Environment* [1973] 1 WLR 1527, the judge said that steps taken in pursuance of one planning permission may make it impossible in practice to implement a second permission where the two permissions are for inconsistent developments. But at paragraph 50 he distinguished the present case from that situation:

> "*Pilkington* has no application in this case; because, although the two planning permissions in this case were alternatives (in the sense that, if one were pursued, the other could not be pursued at the same time because it is conceptually impossible for a development to be both subject to, and at the same not subject to, a particular requirement), they were not inconsistent in the sense that the development in each case was identical. Therefore, at whatever stage the development had reached, a change in authorisation from one planning permission to the other would not be impossible and indeed would not cause any difficulties, conceptually or in practice.
>
> …
>
> But, here, we are not talking about two different developments – as I have explained, the development in the First and Second Planning Permissions is identical. We are not considering the equivalent of two houses – but rather the same house – occupying the same footprint on the self-same plot. Whatever part of the development has been completed, it would clearly be possible to carry out the development in accordance with the Second Planning Permission in the light of that which has been done pursuant to the First Planning Permission."

20. Thus the principle for which RHL contended was established. Issue (ii) then concerned RHL's contention that as a matter of fact, on the available evidence, BDW had elected to proceed with the development under the Second Planning Permission. The judge was satisfied that, from 18 September 2014, BDW had in fact elected to continue and complete the development under the Second Planning Permission. That finding is the focus of the appeal to this court and I will return to it in that context.

21. Issue (iii) concerned the question of relief. The judge considered it just and convenient to make a declaratory order as sought by RHL.

The scope of the appeal

22. There are three grounds of appeal::

> "Ground 1: Interpretation of paragraph 1.2 of Schedule 1
>
> The judge was wrong to interpret paragraph 1.2 of Schedule 1 to the Unilateral Undertaking such that it did not mean "to dispense with the beginning of the First Planning Permission";
>
> Ground 2: Evidence of material operation under authorisation of Second Planning Permission
>
> The judge was wrong to conclude that, from 18 September 2014, material operations were carried out under the Second Planning Permission.
>
> Ground 3: Unlawful building operations
>
> The judge ought to have concluded, applying *Sage v Secretary of State for the Environment, Transport and the Regions* [2003] 1 WLR 983 or in any event, that any building operation carried out under the Second Planning Permission was unlawful. He was wrong not to do so."

23. The appellant's skeleton argument contains the unequivocal statement that those three grounds all relate to issue (ii) as identified and discussed by the judge below. Ground 3 does not fall obviously within that description but it raises only a short separate point. Some of Mr Hobson's submissions under grounds 1 and 2 appeared in practice to be directed towards the judge's issue (i), but the grounds of appeal themselves do not relate to that issue and the County Council has not sought or obtained permission to appeal against the judge's finding on that issue.

24. Mr Hobson also expended a certain amount of energy addressing section 106A of the 1990 Act, which contains a procedure for the modification and discharge of planning obligations entered into under section 106. He went so far as to suggest that the issue in the appeal was whether BDW could unilaterally transfer from the First Planning Permission to the Second Planning Permission "in order to avoid" its obligations under the First Section 106 Agreement and "thus to circumvent" the procedure laid down in section 106A. He stressed that the obligation to pay the transport contribution under the First Section 106 Agreement served a planning purpose and that its validity was not affected by the inspector's finding, in the context of the application for the Second Planning Permission, that such an obligation did not meet the requirements of regulation 122 of the CIL Regulations.

25. In my judgment, however, that line of argument is of no real assistance to the County Council. RHL does not dispute the validity of the First Section 106 Agreement or of the obligation under it to pay the transport contribution. It accepts that in so far as development carried out pursuant to the First Planning Permission triggered a liability to pay an instalment of the transport contribution, that instalment was payable. But RHL was entitled to apply for the Second Planning Permission and to argue before the

inspector, as it did successfully, that that permission should be granted without any obligation to pay a transport obligation. Its simple position is that if, as a matter of fact, development was carried out from 18 September 2014 pursuant to the Second Planning Permission rather than the First Planning Permission, no further liability to pay the transport contribution accrued from that date; the judge found on the evidence that the development was so carried out as a matter of fact; and the real question in the appeal is whether the judge was wrong to make that finding.

Ground 1: the interpretation of the Unilateral Undertaking

26. The first ground of appeal concerns the interpretation of paragraph 1.2 of Schedule 1 to the Unilateral Undertaking, whereby BDW covenanted "to dispense with the implementation of the First Planning Permission" from the Commencement Date of the Second Planning Permission, which in the event was 18 September 2014. Mr Crean's case before the judge was that by that paragraph, on its true construction, BDW's reliance on the authorisation granted by the First Planning Permission was objectively abandoned with effect from that date, so that any operations within the development thereafter could only have been, and were, authorised by the Second Planning Permission. Mr Hobson's argument on behalf of the County Council was that "the implementation" of a planning permission in this context meant the beginning of the development authorised by the planning permission, so that on the true construction of the paragraph BDW had covenanted to dispense with the beginning of the development authorised by the First Planning Permission; but since that development had already been begun and that could not be undone, the paragraph was of no effect. (By section 56(2) of the 1990 Act, development shall be taken to be begun for relevant purposes on the earliest date on which any material operation comprised in the development begins to be carried out.)

27. The judge rejected Mr Hobson's argument, holding:

> "68. In all the circumstances, I consider the true construction of paragraph 1.2 is tolerably clear: looked at objectively and against the relevant background, the party using those words (BDW) would reasonably have been understood to mean that, once the [Unilateral Undertaking] took effect on 18 September 2014, it would not … progress the development in terms of any material operation under the authorisation of the First Planning Permission."

By the first ground of appeal, Mr Hobson submits that the judge's construction of the paragraph was wrong.

28. As to the principles of interpretation of a contractual provision, neither counsel thought it necessary to go beyond the summary contained in the judgment of Lord Neuberger (with whom Lord Sumption and Lord Hughes agreed) in *Arnold v Britton* [2015] UKSC 36, [2015] 2 WLR 1593, a case concerning the provisions of a lease:

> "15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties

would have understood them to be using the language in the contract to mean' …. And it does so by focussing on the meaning of the relevant words … in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions ….

16. For present purposes, I think it is important to emphasise seven factors.

…

18. Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it ….

19. The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made ….

20. Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed ….

21. The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to

> take into account a fact or circumstance known only to one of the parties.
>
> …"

29. Mr Hobson pointed out that the Unilateral Undertaking is not a bilateral commercial contract but a unilateral deed with the status of a public document registrable as a local land charge and enforceable by the local planning authority. I accept that appropriate adjustment must be made to the principles summarised in *Arnold v Britton* in order to reflect the unilateral character of the document, but since the document is enforceable as a contract and was entered into in connection with a commercial development, it seems to me that the principles remain applicable in their essential features: for example, the need to focus on the meaning of the relevant words in their documentary, factual and commercial context; the application of an objective test; and the relevance of commercial common sense.

30. It is common ground that the term "implementation" in relation to a planning permission is not the subject of statutory definition and, although frequently used, does not have a single specific meaning. The judge noted the parties' agreement that the term is ambiguous. It can be used to refer to the *beginning* of the development authorised by a planning permission. We were referred to an example of that usage in a judgment of mine, in *Greyfort Properties Ltd v Secretary of State for Communities and Local Government* [2011] EWCA Civ 908, [2012] JPL 39, at paragraph 39. It can also be used to refer more generally to the *carrying out* or *completion* of the development authorised by a planning permission. Examples of that usage are to be found in the respective judgments of Jonathan Parker LJ and Longmore LJ in *Staffordshire County Council v NGR Land Developments Limited* [2002] EWCA Civ 856, [2003] JPL 56, at paragraphs 11 and 64: the latter paragraph refers to a planning permission "which had been partly or wholly implemented".

31. Mr Hobson's argument, as it was below, is that paragraph 1.2 is to be interpreted as a covenant on the part of BDW to dispense with the *beginning* of the development authorised by the First Planning Permission. He submitted that "implement" is used in recital (G) of the same document to connote "begin" and that "implementation" in paragraph 1.2 has the same meaning. He did not shy away from the fact that on this construction the covenant was ineffective: the development authorised by the First Planning Permission had already been begun by the date of the Unilateral Undertaking, so that its beginning could not be dispensed with. He submitted that that is not a reason for rejecting the construction, given that the immediately adjoining provision, paragraph 1.3, was on any view an ineffective covenant: it was not open to BDW unilaterally "to dispense with the discharge of the obligations under the First Section 106 Agreement", since those obligations could only be modified or discharged through the operation of the statutory procedure contained in section 106A of the 1990 Act.

32. In my view, there are strong reasons for rejecting a construction that would produce such a result. As the judge below pointed out:

> "66. In the case of paragraph 1.2, given that there is a viable alternative construction of the words used, BDW could not sensibly have intended to 'dispense with the beginning of the

> First Planning Permission' at a time when it well knew that that Planning Permission had long-since begun: the development under that planning permission commenced on 8 October 2013, the covenant was given on 25 June 2014. Where more than one construction is reasonably open, it is a tenet of construction of commercial documents that the parties intended something of effect rather than a provision which is entirely empty …."

33. Moreover, it is obvious from the background that BDW intended by the covenant to switch planning horses as from the relevant Commencement Date, by ceasing to carry out the development pursuant to the First Planning Permission and by carrying it out thereafter pursuant to the Second Planning Permission. That is precisely what was contemplated by the provisions relating to the Second Planning Permission in the agreement between RHL and BDW for the sale of the site (see paragraph 8 above). In that agreement, the references to "implementing" the planning permissions were again ambiguous, but BDW was clearly agreeing that from the time of reserved matters approval under the Second Planning Permission it would carry out any development at the site under the Second Planning Permission, not the First Planning Permission. BDW's intention, objectively determined, to act in the way contemplated by that agreement is signalled clearly by recital (G) to the Unilateral Undertaking itself (where, contrary to Mr Hobson's submission, "implement" can sensibly be read as referring to the carrying out, not just the beginning, of the development authorised by the relevant planning permission). Against the documentary, factual and commercial background, and to give it a meaning that avoids ineffectiveness, paragraph 1.2 should plainly be interpreted, in my view, in the way in which it was interpreted by the judge.

Ground 2: evidence of material operations under the authorisation of the Second Planning Permission

34. Having interpreted paragraph 1.2 in the way he did, the judge went on to find that BDW carried out operations on the site after 18 September 2014 pursuant to the Second Planning Permission, not the First Planning Permission, with the consequence that no further instalments of the transport contribution became payable. He said:

> "68. … On or very soon after [18 September 2014], undoubtedly material operations within the development were carried out. As reliance on the First Planning Permission had been given up, those material operations could only have been carried out under the Second Planning Permission ….
>
> 69. For those reasons, on the evidence available, I am satisfied that, from 18 September 2014, the developer in fact elected to continue and complete the development under the Second Planning Permission."

35. The second ground of appeal challenges that finding. Mr Hobson submitted first that the finding was inconsistent with the judge's earlier rejection, at paragraph 54 of his judgment, of RHL's reliance on the operations carried out after 18 September 2014 as evidence that the development continued after that date pursuant to the Second Planning Permission. As the judge put it in that paragraph, "the simple fact that the

operations in that development continued after 18 September 2014 cannot of itself assist with the question, under which planning permission were those operations performed". For my part, however, I see no inconsistency between that statement, with which I agree, and the judge's ultimate finding that the operations were carried out from 18 September 2014 under the Second Planning Permission. In reaching his ultimate finding, the judge had of course factored in the effect of paragraph 1.2 of Schedule 1 to the Unilateral Undertaking. That paragraph, interpreted in the way the judge interpreted it, seems to me to be clear-cut objective evidence that operations were carried on from 18 September 2014 under the Second Planning Permission. It is evidence that wholly justifies the judge's conclusion.

36. It follows that in my view it does not matter that, as Mr Hobson pointed out, it was impossible to tell from evidence on the ground whether operations were being carried out under the Second Planning Permission rather than the First Planning Permission. One would not expect any difference in the operations themselves, since the terms of the two planning permissions were identical.

37. Mr Hobson conceded that a switch from one planning permission to another could in principle have been made in respect of identifiable plots on the site that were not yet developed, but he submitted that that was not what was done here and that such a switch was not possible in respect of partially completed buildings. He said that it is necessary to attribute each element of what is taking place on site to a particular planning permission: there needs to be a comprehensible explanation of what is being done, delineating the scope of each planning permission, which cannot be done in relation to partially completed buildings. I cannot accept that argument. If the development authorised by one planning permission is identical to that authorised by the other planning permission, it would be absurd if a switch between the two permissions could only be made where a demarcation between the two could be demonstrated physically on the ground.

38. Before discussing the remainder of Mr Hobson's submissions on this ground, it is convenient to mention two points raised by way of an application by the County Council to adduce fresh evidence. The application was opposed by RHL, but in the event of the application being allowed RHL sought to put in evidence in reply. The court considered the material *de bene esse*, reserving a decision on whether to admit it. The two points at which the material was directed were these:

    i) The County Council adduced evidence that, although the First Section 106 Agreement had been registered against the title for the site at HM Land Registry, neither the Second Section 106 Agreement nor the Unilateral Undertaking had been so registered. It was accepted that both documents were registrable but it was suggested that the fact that only the First Section 106 Agreement had been registered was evidence that that agreement was still effective and that the development was being carried out pursuant to the First Planning Permission. The point strikes me as hopeless. In my judgment, no inference of that kind can be drawn from the mere omission to register the two later documents.

    ii) The County Council adduced a chain of emails showing that payment by BDW of the second instalment of an "education contribution" payable under whichever section 106 agreement applied had been attributed by an employee

> of Barratt Homes West Midlands (a company in the same group as BDW) to the First Planning Permission and the First Section 106 Agreement. This was put forward as clear evidence that BDW continued to regard the First Section 106 Agreement as effective and that the development was being carried out pursuant to the First Planning Permission. RHL's evidence in response, in the form of a letter from Barratt Homes, shows that the attribution of the payment was a simple mistake by someone who was not a direct employee of BDW and had recently commenced work on a short term temporary contract. In those circumstances, I do not think that the emails could sensibly be relied on as objective evidence of any weight that the development was being carried out from 18 September 2014 pursuant to the First Planning Permission rather than the Second Planning Permission.

39. Since in my view the fresh evidence could lead nowhere, I would refuse to admit it; but I have made clear that if it were admitted it would not affect my conclusion.

40. I come to Mr Hobson's remaining arguments on the second ground of appeal. They appeared to be a back-door attempt to challenge the judge's finding on his issue (i) (see paragraphs 18-19 above), which, as already mentioned, is not the apparent subject of this ground of appeal and is not identified in Mr Hobson's skeleton argument as the subject of challenge (see paragraphs 22-23 above). Nevertheless I will consider them.

41. Mr Hobson submitted that the development carried out on site after 18 September 2014 cannot in law have been pursuant to the Second Planning Permission since, given the amount of development already carried out by that date pursuant to the First Planning Permission, only part of the development authorised by the Second Planning Permission could still be built, and that part (if built) could not reasonably be said to be "an implementation of or part of the implementation of the scheme permitted by the Second Planning Permission" (I quote from paragraph 23 of Mr Hobson's skeleton argument, without venturing a view as to the meaning of "implementation" in that passage). I confess to finding the argument difficult to understand. I do not see why the fact that some development had already been carried out pursuant to the First Planning Permission should prevent the carrying out of further development pursuant to the Second Planning Permission, given the complete consistency between the two permissions.

42. In support of his argument, Mr Hobson referred to the judgments of Buxton J in *R v Arfon Borough Council, ex p. Walton Commercial Group Ltd* [1997] JPL 237 and of the Court of Appeal in *Staffordshire County Council v NGR Land Developments Ltd and Roberts* (cited above). Each case involved consideration of the test laid down by Lord Widgery CJ in *Pilkington v Secretary of State for the Environment* (cited above) as to the circumstances in which two planning permissions could lawfully be implemented in respect of the same site. The gist of it is given in paragraph 56 of the judgment of Jonathan Parker LJ in the *Staffordshire* case:

> "The ratio of the decision in *Pilkington*, in my judgment, is that development pursuant to the earlier permission could not be carried out in accordance with its terms since the earlier permission contemplated that the remainder of the site would consist of a smallholding, whereas development carried out in

> implementation of the later permission – i.e. the building of a house on the centre of the site – had … 'destroyed' the smallholding. I respectfully agree with the observations of Buxton J in *Arfon* on the concept of physical impossibility in the context of *Pilkington*. It was physically possible to build the bungalow on site A, since that part of the site remained vacant. But it was not possible to carry out the physical development permitted by the earlier permission in a manner which accorded with the terms of that permission …."

43. In the present case, however, as Hickinbottom J held when considering his issue (i), there was no inconsistency between the two planning permissions; and the fact that some development had been carried out pursuant to the First Planning Permission did not make it impossible to carry out the physical development permitted by the Second Planning Permission in a manner which accorded with the terms of that permission. The judgments in the *Arfon* case and the *Staffordshire* case contain nothing to cast doubt on the correctness of Hickinbottom J's approach to *Pilkington* or of the conclusion he reached on issue (i).

44. Mr Hobson submitted further that there is an obvious absurdity in different parts of the same development – even different parts of the same house, in the case of houses partially constructed as at 18 September 2014 – being governed by two different planning permissions, each with its own related set of conditions and planning obligations. I accept that if the two planning permissions were mutually inconsistent, there would be real force in the point. But where they are materially identical, I do not think that any absurdity arises. In those circumstances, as the judge said in the passage quoted at paragraph 19 above, "a change in authorisation from one planning permission to the other would not be impossible and indeed would not cause any difficulties, conceptually or in practice". The fact that the First Planning Permission was subject to a planning obligation to pay a transport contribution, whereas the Second Planning Permission was not, does not give rise to any such difficulties or have any material effect on the analysis.

45. Accordingly, even if it were open to Mr Hobson to challenge under this ground the judge's finding on issue (i), the arguments he advanced would not in my view be sufficient to make good such a challenge.

Ground 3: unlawful building operations

46. The third ground of appeal is the only one that challenges on its face the *lawfulness* of any building operations carried out under the Second Planning Permission. It is based on a short passage in the judgment of Lord Hobhouse in *Sage v Secretary of State for the Environment, Transport and the Regions* (cited above):

> "23. When an application for planning consent is made for permission for a single operation, it is made in respect of the whole of the building operation. There are two reasons for this. The first is the practical one that an application for permission partially to erect a building would, save in exceptional circumstances, fail. The second is that the concept of final permission requires a fully detailed building of a certain

> character, not a structure which is incomplete. This is one of the differences between an outline permission and a final permission: section 92 of the Act. As counsel for Mr Sage accepted, if a building operation is not carried out, both externally and internally, fully in accordance with the permission, the *whole* operation is unlawful. She contrasted that with a case where the building has been completed but is then altered or improved …" (original emphasis).

47. Mr Hobson's submission was that the Second Planning Permission covered the whole of the development but that building operations on the site could not be carried out "fully" in accordance with that permission because part of the development had already been built under the First Planning Permission. The consequence, in his submission, was that any operations carried out under the Second Planning Permission were unlawful.

48. That submission takes the passage in Lord Hobhouse's judgment out of context and deploys it in a way that Lord Hobhouse cannot have intended. *Sage* involved an appeal against an enforcement notice requiring the removal of what was alleged to be an uncompleted dwelling house built without planning permission. The issue that Lord Hobhouse was addressing concerned the construction of section 171B(1) of the 1990 Act, which provides that "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". The landowner's argument was that the operations were substantially completed (and time therefore began to run) when they reached the stage at which no further breach of planning control was involved in completing the development, i.e. when all that remained were operations against which, taken by themselves, no enforcement action could be taken. The House of Lords rejected that argument, holding that a "holistic" approach should be adopted, so that, in the words of Lord Hope at paragraph 6, "regard should be had to the totality of the operations which the person originally contemplated and intended to carry out". Lord Hobhouse's observations at paragraph 23 were part of the reasoning leading up to his adoption of that holistic approach. His point was that if a building operation does not accord with the planning permission for it, the whole of that operation is unlawful; so that, if for example, a building is built in a way that departs from the planning permission, the whole building (not just the departure) is unlawful. He was *not* saying that if a building is built in a way that conforms with the planning permission but is not completed, the whole building is unlawful; let alone was he addressing the situation where a building is completed pursuant to two identical planning permissions relied on one after the other.

49. There are further problems about Mr Hobson's argument. First, it is inconsistent with his concession that a switch from one planning permission to another could in principle have been made in respect of identifiable plots on the site that were not yet developed (paragraph 37 above). Secondly, it would mean, as Mr Crean pointed out, that if planning permission was granted for 200 houses of which 150 were progressively built out in accordance with the plans and were occupied, all the dwellings so built and occupied would be unlawful unless and until the remaining 50

dwellings were built, even if the 150 were all individually in accordance with the plans and there was no breach of any condition of the permission. That proposition is unsupported by authority and cannot in my view be right. Thirdly, where a development has been begun in accordance with planning permission but has not been completed, section 94 of the 1990 Act permits the local planning authority in defined circumstances to serve a completion notice stating that the planning permission will cease to have effect at the expiration of a further period specified in the notice. This implies that a development may be commenced but not completed yet still remain lawful, since otherwise there would be no need for the notice provisions: the local planning authority could rely instead on its normal powers of enforcement in respect of unlawful development.

50. Accordingly, I do not consider there to be any substance in the third ground of appeal.

Conclusion

51. For the reasons given, I would dismiss the appeal.

Lord Justice Floyd :

52. I agree.

Lord Justice Sales :

53. I also agree.