Planning case law update

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1. Recent case law on permitted development and prior approval under the GPDO

DUNNETT INVESTMENTS LIMITED v THE SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT [2017] EWCA Civ192

This case concerned the proper construction of a condition limiting permitted development rights under the GPDO.

The background to this case was that planning permission was granted to Dunnett in 1982 for use of premises as industrial office premises. The LPA attached a condition to the permission as follows:

"Use of this building shall be for purposes falling within Class B1 (business) as defined in the T&CP (Use Classes) Order 1987, and for no other purpose whatsoever, without express planning permission from the LPA first being obtained"

Dunnett then applied for change of use from Class B1 (a) offices to Class C3 dwellings under the GPDO, i.e.: they applied for a CLU. This application was refused by the Council on the basis that the condition and the reasons for it showed a clear intention to limit the scope of the planning permission to Class B1 use, the use permitted, to satisfy the LPA regarding details of the proposal on account of its particular character and location. The condition therefore prevented a change of use under the GPDO without express planning permission.

Dunnett appealed. The Inspector dismissed the appeal and Dunnett then applied under section 288 to quash the Inspector's decision. That appeal was dismissed by Patterson J.

It was common ground that GPDO rights can be taken away by a planning condition (see **Duncan Developments v Secretary of State for the Environment** [1993]. The Appellant argued however that the Judge had erred in finding that the condition precluded reliance on PD rights granted under the GPDO. The Appellant contended that the condition did not explicitly take away GPDO rights. There was a statutory acknowledgement in the GPDO that a change of use of a building from office to residential is generally acceptable and ought to be permitted. Reliance on such a general permission could only be taken

away by a planning condition in clear and unambiguous terms. The Appellant contended that the condition was not unambiguous, in particular because the condition could be read on the basis that "express planning consent" applied equally to permission granted under the GPDO, i.e. by the Secretary of State.

The Court of Appeal's Judgment:

The Court of Appeal dismissed the appeal and rejected the above arguments. The starting point for their consideration of their condition was the decision in **Trump International v Scottish Ministers** [2015] UKSC74.: So long as appropriate caution is exercised, there is no bar to implying words in planning conditions. To exclude the application of the GPDO the words used in a relevant condition taken in context must evidence an intention on the part of the LPA to make such an exclusion. The Court of Appeal concluded that the LPA had intended such an exclusion, their reasoning being as follows:

1. The general intention of Parliament or of the Secretary of State in making the order was that a change of use from office to residential should be permitted. That general intention was subject to the ability of LPAs to exclude that right by imposing an appropriate condition.

2. The meaning of the condition was clear. Express consent from the LPA could not be read sensibly to include planning permission granted by the Secretary of State under the GPDO.

3. The Appellant's construction of the condition left it with no meaning. If "without express planning permission" means planning permission whether given by the LPA or by the Secretary of State, the condition has no discernible purpose. The condition could not sensibly be read as excluding rights under the Use Classes Order.

4. The context was relevant. The context included a stated reason for making the condition being to enable the Council to exercise control over development. This desire to exercise control was inconsistent with the Appellant's reliance on GPDO rights. The Council was anxious to maintain close control over the planning use to which the site was put. The purpose of this was to protect the sensitivity of the area from potentially unsympathetic uses.

The case is useful in elucidating the correct approach to the construction of conditions limiting GPDO rights.

EATHERLEY v LONDON BOROUGH OF CAMDEN AND IRELAND [2016] EWHC 3108

The issue in this case was the extent of PD rights to create basement space beneath a dwelling house. This has been the subject previously of conflicting decisions.

The Appellant sought JR to challenge a decision of Camden LBC to grant an LDC under section 192 of the TCPA. The development was the excavation of a single storey basement under a terraced house in North London. The Appellant was a neighbour of the developer.

Mr Eatherley (the developer) had applied for an LDC for a proposed excavation of 2.5 metres depth on the basis that it was permitted development under Class A part 1 schedule 2 of the TCP (GPD) England Order 2015 being "enlargement, improvement or other alteration of a dwelling house". This was challenged by Mr Ireland on the basis that there were in effect two operations involved here, namely (a) the enlargement of a dwelling house (b) an engineering operation for which permission was required under Section 55. The Claimant argued that the proposed development included a substantial engineering operation which was not within the PD rights relied upon in the certificate. The Council had misdirected itself by concluding that engineering works were not a separate activity of substance.

Cranston J concluded that there must come a point at which the excavation underpinning and support for a basement becomes a different activity from the enlargement improvement or alteration of the dwelling house. The planning committee had asked itself the wrong question. It should not have asked itself whether the engineering works were part and parcel of making a basement, but whether they constituted a separate activity of substance. If they had asked the right question they would then have needed to assess the traditional planning impacts of the engineering works to decide whether they amounted to a separate activity of substance. JR was granted.

KEENAN v WOKING BC [2017] EWCA Civ 438

The Court of Appeal in this case considered the effect of an LPA's failure to respond in 28 days to an application under the T&CP (GPDO) Order 1995 for a determination as to whether it's prior approval would be required for a hardcore track which the Appellant alleged was permitted development of agricultural land.

The Appellant farmer challenged a Planning Inspector's decision to dismiss his appeals against two Enforcement Notices in respect of a farm in the Green Belt. One of these notices related to the construction without permission of a hardcore track.

The Inspector concluded that it had not been shown that the section of track subject to the EN was reasonably necessary for the purpose of agriculture or forestry. The issue on the appeal was whether the effect of the Council's failure to respond within 28 days to an application for a determination as to whether it's prior approval would be required for siting and means of construction of the track, was that the track had planning permission.

The relevant provisions of the GPDO 1995 were as follows:

Article 3 grants PP for the classes of development in schedule 2. Article 3 (2) provides that any such PP is subject to any relevant exception limitation or condition specified in schedule 2.
Part 6 of schedule 2 (agriculture: buildings and operations):

Class A part 6 permits development comprising any excavation or engineering operations reasonably necessary for the purpose of agriculture within that unit. Paragraph A2 of class A provides that development consisting of the formation or alteration of a private way is permitted subject to conditions. Condition (iii) provides that the Applicant must give the LPA notice and must not start work until 28 days after receiving a determination. That prior approval is not required, i.e. permission is deemed to have been granted upon the expiry of 28 days.

The Court of Appeal's Judgment:

The Court of Appeal dismissed the Appeal. Taken in context paragraph A2(1) simply meant that a development that properly constituted permitted development was subject to specified conditions. None of these provisions came into effect if in fact the development proposed did not fall within the description of "permitted development". The conditions of paragraph A(2)(i) which required a developer to apply to the LPA for a determination as to whether prior approval would be required for siting and means of construction of a private way, did not impose a duty on the LPA to decide whether or not the development was in fact permitted development under Class A. Nor did it confer power on the LPA to grant PP for development outside the defined class of permitted development. The sole and limited function of this provision was to enable the LPA to determine whether its own "prior approval" would be required for those specified details. If the LPA grants prior approval the developer may proceed and the condition will be discharged – but of course he could not proceed if in fact the development was not "permitted development". Thus, if the LPA fail to make a determination within the 28-day period the developer equally could proceed but only if the development was in fact "permitted development".

You rely on the same principles apply to Class A of part 7 (forestry).

Since the Inspector here had found that this was not "permitted development" the failure to respond within the 28 days did not entitle the developer to proceed.

EAST HERTFORDSHIRE DC v SSCLG AND TEPPER [2017] EWHC 465

This case concerns the relevant criteria for the grant of prior approval for the conversion of agricultural buildings to dwellings.
The interested party (Mr Tepper) applied for prior approval for conversion of an agricultural barn to a dwelling under Class Q of schedule 2 part 3 of the 2015 GPDO. Class Q sets out a series of conditions for entitlement to PD. Condition 1(e) is *"whether the location or siting of the building makes it otherwise impractical or undesirable for the building to change from agricultural use to C3 use (dwelling house)".*

The provisions of paragraph W apply to Class Q and require the LPA to have regard to the NPPF of March 2012 in so far as relevant to the subject matter of the prior approval, as if the application were a planning application. An Explanatory Memorandum to paragraph W explains its purpose, namely: that new development rights are created in order to make it easier for businesses to make the best use of their premises.

The Council decided the application by applying the criteria in paragraph 55 of the NPPF and found that the grant of approval here would result in the creation of a dwelling in an isolated location, and where there was a lack of sustainable transport. The Inspector allowed the appeal and granted approval. She referred to the PPG as the most up to date guidance on the interpretation of Class Q and attached substantial weight to it. She referred to paragraph 108 of the PPG which states that the PD right does not apply a test in relation to sustainability of location. This is deliberate as the right recognises that many agricultural buildings will not be in a village settlement. That the LPA would not normally grant Planning Permission for a new dwelling is not a sufficient reason for refusing prior approval. The Inspector did not agree that there was a conflict between the PPG and the requirements of the GPDO, having regard to the very clear guidance set out in paragraphs 108 – 109 of the PPG.

Dove J dismissed the Council's appeal but upheld the Inspector's reasoning. He concluded as follows:

1. In agreement with Ouseley J in **R (Patel) v SSCLG** [2016] the requirements for an application for prior approval are much less prescriptive than for an application for Planning Permission.
2. Class Q creates a qualified entitlement, qualified by satisfaction of the conditions set out.
3. The purpose of the new PD right is clearly to create more homes and increase housing supply. The legislation has in mind the development of residential uses in locations which would not ordinarily be contemplated by the undiluted application of the policies in the framework relating to location.
4. The term "undesirable" in Class Q calls for a planning judgment from the decision-maker framed by the particular context in which it arises, namely an application for prior approval of a form of permitted development for the purpose of increasing the supply of housing, and not an application for PP.
5. Assessment of the location has to be examined through the prism of the purpose of the legislation. To apply with the same rigour the policies of the Framework in respect of accessibility of residential development to a Class Q prior approval process as would be applied to an application for Planning Permission would frustrate the purpose of introduction of the class – namely to increase the supply of housing through conversion of agricultural buildings.
6. Thus the LPA had erred in applying to an application for prior approval of an agricultural dwelling the same reasoning as would have applied in the case of an application for permission of a new dwelling, and had improperly refused on accessibility grounds.

2. Enforcement

MIARIS v SSCLG [2016] EWCA Civ75

This was an appeal against an Enforcement Notice under ground (f) of section 174(2) of the TCPA where the Appellant complained that the steps required by the notice exceeded what was necessary to remedy "injury to amenity". The issue in this case: can such an appeal be brought where there is no appeal under ground (a) and no deemed application for PP.

Enforcement Notice alleged an unauthorised change of use from restaurant to include use as a drinking establishment and nightclub. The notice required the restaurant to stop (a) use as a drinking establishment (b) use as a nightclub (c) DJs performing at the premises. The appeal was brought under ground (f) but not under ground (a).
The Inspector declined to consider the representations on planning merits on the basis that in a ground (f) appeal it was not appropriate to consider whether the steps taken exceeded those needed to remedy a breach of planning control. The ground (f) appeal could not be turned into something else by arguing that the amenities of neighbours were not harmed by the drinking.

The Deputy Judge held that the ground (f) appeal could not in these circumstances have been entertained where there is no ground (a) appeal and the Appellant seeks to argue that the steps taken exceed those necessary to remedy a breach of planning control because this would allow the Appellant to address the planning merits of the case. He could however argue the appeal on the sole basis that the notice exceeds what is necessary to prevent injury to amenity.

The Court of Appeal agreed with the Deputy Judge. In its allegations of planning harm the LPA made plain that it was not just concerned with injury to amenity. It's reasons referred to other planning considerations: increase of pedestrian movements, change of pattern and timeframe of movements, detrimental effects on the wellbeing of nearby residents.

ARNOLD v SSCLG [2017] EWCA Civ231

The Enforcement Notice in this case required demolition of a dwelling comprising an arts and crafts building built without planning permission in the Green Belt and in an AONB. The house was extended on such a scale as to render it a new structure. The Appellants built two large extensions believing they were exercising PD. On appeal the Inspector held the scale of development amounted to a new dwelling.

The Appellants had submitted four applications for PP for alternative forms of development. These had not been determined by the Council. They submitted that one or other of these schemes should be granted permission under section 177(1)(a) which entitles the SS on determination of an appeal under section 174 to grant permission in respect of matters stated in the EN as constituting breach of planning control whether in relation to the whole or part of those matters, or in relation to the whole or part of the land.

The Appeal to the Court of Appeal: The issue taken to the Court of Appeal was whether the Inspector had properly considered the alternative schemes. The Inspector held that all four schemes fell outside the notice, that the parts of the building were not functionally and physically severable so as to permit PP to be granted for part, and that the alternatives were not acceptable to overcome the planning harm caused to the openness of the Green Belt. The Court of Appeal agreed with the High Court that the Inspector had properly considered the alternatives even though he had used the phrase "materially different" which was unfortunate since it was not the appropriate test. The essence of the Inspector's decision was his finding as a matter of fact and degree that the three modified forms of development were materially different from the deemed

application. It was not the Court's task to unpick the Inspector's findings as fact. He was entitled to make the findings that he did. Certainly his finding that it was not possible to split or sever the building into separate parts was a finding of fact. In the result the Court of Appeal found the Inspector had correctly addressed all issues.

KESTREL HYDRO v SSCLG [2016] EWCA Civ784 (Admin)

This important Court of Appeal decision deals with the issue:

when may an Enforcement Notice issued in respect of an unlawful change of use also require removal of buildings and other structures used in connection with that unlawful use? The further issue arising is: can an EN require the removal if as operational development it is immune from enforcement under the four year rule? Both issues were addressed in 1980 in **Murfitt v SS for E** [1980] 40 P & CR254 when the Divisional Court held that structures could be lawfully enforced against if they were "part and parcel" of the unauthorised change of use.

The relevant provisions of section 173:

> (1) The EN shall state the matters that appear to constitute a breach of planning control
> (2) EN shall state the steps which the LA require to be taken for activities which require cessation
> (3) those purposes are (a) remedying the breach by making the development comply with the terms of any PP granted, by discontinuing any use of land or by restoring the land to its condition before the breach took place.

The Appellant was operator of an adult member's club near Heathrow Airport and argued that the Murfitt principle needed to be re-examined and should be overruled. The LPA had issued an EN alleging material change of use of the premises from residential to mixed use, including business. The EN required the unlawfulness to cease and the removal of various buildings and structures which had been in place for more than four years. The Appellant contended that the requirement to remove these structures was Ultra Vires the statutory scheme.

The Court of Appeal however held the decision in Murfitt was good law. It was consistent with the statutory provisions. It is necessary in every case to focus on the true nature of the breach of planning control against which the LPA has enforced. The nature of the breach has to be set out in the notice. The provisions of section 173(3)(4) are directed to remedying the breach and include as a means of doing so restoring the land to its condition before the breach took place. If as here, the Inspector found that particular works are so intimately connected with the unauthorised use as to engage the principle in Murfitt it was open to him to conclude that the removal of those works was appropriate – not enough just to require the unauthorised use to cease. The court also found that the removal of the works was consistent with Article 1 of the First Protocol to the HRA as the minimum necessary step, not being a disproportionate interference with an individual's human rights.

R (JANE EASTWOOD) v THE ROYAL BOROUGH OF WINDSOR AND MAIDENHEAD [2016] EWCA Civ437

This case contains dicta of Sales LJ emphasising that in exercising its powers under section 187B of the TCPA the Court is exercising a discretion and is not acting as a rubber stamp to endorse a decision taken by the LPA. It also contains guidance on the exercise of powers under section 178 of the TCPA.

"The South Bucks case was concerned with the exercise of jurisdiction by a Court to grant injunctive relief pursuant to section 187B of the TCBA, and the point made by Lord Clyde and Lord Hutton was the unsurprising one that when a Court is invited to decide whether it should grant an injunction it should make up its own mind on the evidence before it whether it is appropriate to do so, rather than act merely as a rubber stamp to endorse a decision by a local planning authority which has applied to the Court for such an injunction. By contrast, in the present case, the Court is not being asked by the local planning authority to exercise the Court's own powers to grant injunctive relief in support of EN action; it is the local planning authority which is the relevant public authority deciding how it should act in the exercise of enforcement powers which have been directly conferred on it by Parliament under section 178 of the TCPA. In deciding how to exercise its powers under section 178, the Council has a discretion. It acts lawfully if its decision falls within the proper scope of that discretion, and in the present context, it will have done so if its decision is a rational one. As already pointed out above the Council's decision was a rational and a lawful one. As Sullivan L J and the Judge also observed, a further point of distinction from the South Bucks case is that it is possible for an injunction to be granted where no Enforcement Notice has been served, and in such a case it would be necessary for the Court to form its own view of proportionality. But here the necessary proportionality assessment had already been carried out by the Inspector and the Secretary of State".

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