
OPINION: IMPLEMENTATION OF PLANNING PERMISSION REF: HGY/2017/2886

INTRODUCTION

1. I am instructed by Nick Walker of Watson Farley & Williams to opine in respect of the lawful implementation of planning permission, reference HGY/2017/2886, permitting the development of land at Brook Road and Mayes Road, London N22.

SUMMARY

2. On the basis of the papers before me, my views are as follows. In essence, it is my opinion that the works of *demolition* to a 5m long part of the sett/pavied structure of the car park on the land to which planning permission, reference HGY/2017/2886 ("the 2021 Planning Permission") satisfied, on the 11th February 2023, the description in section 56(4)(aa) of the Town and Country Planning Act 1990. In consequence, sections 56(1)-(3) were satisfied. By operation of law under section 56(1), thereby, the development permitted was then begun and section 75(1) treats that planning permission (from that date) to enure with the whole of the geographical area of the land to which that planning permission relates.
3. The basis for my opinion is as follows. Properly interpreted in accordance with the case law on the construction and interpretation of a planning permission, it is clear that the *reach* of the conditions to which the 2021 Planning Permission is subject extends to *above ground level* or to specified below ground matters relating to Crossrail 2 alone, or covers works of a particular nature that are not here applicable. Further, and in particular, it is a feature of all save one of the conditions that relates to commencement that "demolition" works is expressly carved out from the compass of the requirements of those conditions by the phrase "save for demolition". Thus the works of demolition to the structure of the car park surface cannot be and are not caught by the requirements of such conditions. It follows that some works of demolition can occur, and here have occurred, with the result in law that the development has been properly begun as the logically prior and lawfully permissible building operation to certain matters required by the conditions to be otherwise done first.
4. So far as (for example), Condition 41 does not contain a saving for demolition, that condition concerns the details only of *revised* layout plans, being revisions to plans that – as that condition records - have already also been expressly approved by the 2021 Planning Permission. In my opinion, and as was held in *Hart*, 'revisions' to simultaneously approved plans cannot qualify as a (so-called) "condition precedent".
5. So far as there are any, if any, breaches of condition, these can only be ordinary breaches of condition.

ANALYSIS

6. My Analysis is set out in **Appendix A** to this Opinion.

FACTS

7. The Facts are set out in **Appendix B** to this Opinion.

LAW

8. The Law is set out in **Appendix C** to this Opinion.

CONCLUSIONS

9. I have set out my opinions in Summary at the outset and do not repeat it herein. If I can be of any further assistance, please do not hesitate to contact me by email or in Chambers.

CHRISTIAAN ZWART

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11th May 2023

APPENDIX A

ANALYSIS

10. The following is apparent.
11. The Town and Country Planning Act 1990 regulates the development of land. Section 55 defines the meaning of “development” as encompassing both the making of a material change in the use of the land and also “the carrying out of building operations”. The same section also defines the scope of “building operations” to include “demolition of buildings” and also other operations normally undertaken by a person carrying on business as a builder.
12. The Act requires under section 57 that planning permission is required for “development”. Where permission is granted under, as here, section 70, conditions may be imposed upon a planning permission. The types of conditions imposed must include the condition that imposes under section 91 a statutory time limit upon the lifetime of the planning permission. Here, that provision is reflected in Condition 1 of the planning permission granted. Following a grant of planning permission, section 75 ensures that the permission enures with the land until the expiry of the period imposed by dint of section 91, or, the development is begun, then for the time being and for the benefit of those interested in the land.
13. Section 56 provides for statutory criteria that, if satisfied, result to disengage the limitation on the lifetime of the permission that is truncated by section 91 (and here, by Condition 2 of the permission). Thus, if the criteria are satisfied, then a planning permission enures for all time instead of only (as here) two years.
14. The common law has provided a series of cases that hold that the undertaking of development in breach of a planning condition cannot equate to the making of a lawful start on the development for the purposes of section 56. See, for example, the *Whitley* case and the *Hammerton* case. The first of those cases created (and *Hammerton* explained) “the *Whitley* exception” to the situation where an unlawful start occurs, being in essence, that, *because* it would be public law unlawful for the planning authority to enforce against the particular breach, works that would otherwise have been undertaken in breach of condition can *nevertheless* count in law as properly satisfying a description in section 56 so as to result in a lawful start on the development. Indeed, the *Whitley* case was an example of the exception in that case. That case concerned a developer who had made applications under conditions before works had commenced, and then carried out some works but before he had received the required approval that arrived after the date on which the planning permission would have expired. The Court held that it would have been unfair (as a matter of public law) to have held that the permission had elapsed for want of that approval where the developer was awaiting the formal approval of the authority under each condition *before* he started the works. Thus, as an exception, those works satisfied the statutory description for commencement.

15. Whether or not works done are or are not in breach of a planning condition depends upon the correct and lawful construction and interpretation of the terms of the particular condition in each case. In turn, the terms of the condition form part of a wider planning permission. The law on the correct interpretation of a planning permission was considered in the *Trump* case that considered the relevant case law in the High Court and Court of Appeal. In essence, it remains settled law that: firstly, the meaning of a planning permission is firstly a question of law; secondly, the terms of a permission fall to be interpreted within the four corners of the planning permission document itself; thirdly, that the approach to interpretation is objective because the potential reliance by a third party on a planning permission means that the subjective approach to interpretation of private contracts cannot be applied to the public document that is a planning permission.
16. Whether or not, when properly construed and interpreted, a given planning condition does in law and fact result to prevent works being done *before* the particular provisions of a planning condition have been lawfully discharged, has been considered also in a number of cases. The key case is that of *Hart Aggregates* in which the High Court considered the ('so-called') "condition precedent" that so requires both something to be done or an approval to be obtained from the local planning authority *in default of which* the works done before the gaining of that approval fall to then be treated as having been done in breach of condition. See *Hart*. In *Hart*, the Court considered in depth the indiscriminate use of the 'so-called' "condition precedent" and held that a condition is only a "condition precedent" to works beginning the development if the terms of the condition *expressly prohibit* the development from occurring *before* the required approval has been forthcoming. Thus, that Court held: (My emphasis added)
- 60. In my judgment, the principle argued for by the defendant applies only where a condition expressly prohibits any development before a particular requirement, such as the approval of plans, has been met...*
17. Further, the High Court also held that a requirement to provide matters of "detail" also could not result in a condition qualifying as a "condition precedent", particularly where an element had been approved by the permission itself in any event.
18. Applying the foregoing to the facts of the situation relating to planning permission, reference HGY/2017/2886 ("the 2021 Planning Permission"), the following is apparent.
19. Condition 1 of the 2021 Planning Permission requires that the development be begun no later than the 21st February 2023, being two years after the date of that permission.
20. The evidence in the photographs and the letter dated 16th February 2023 from PSA Design records the occurrence of supervised actual works on the 11th February 2023 in relation to the land to which the 2021 Planning Permission relates. The nature of the works satisfies both sections 56(4)(aa) and (c) of the Town

and Country Planning Act 1990 because they are works comprised of the laying of any underground pipe to part of a trench that is to contain foundations. The Plan, reference D4002-D-01, Revision P2 (dated 16th February 2023) shows, by reference to the area coloured yell on the inset plan, the location of the pipe works as being abutting and on the same line as part of the external wall of the building known as “Core 4”. In my opinion, those works properly qualify within the scope of section 56(4)(c).

21. However, the logically prior operational development to the installation of part of the below ground drainage was the actual carrying out of *some* work of demolition to the surface of the car park in the form of the breaking up of the surface structure comprised of paviors and the mechanical excavation of some of the supporting material immediately below those paviors. Section 56(4)(aa) refers to the need for “some works” of demolition and, as the photographs make clear, some works were done. The nature of the works done was the removal or part demolition of a part of the surface of the car park. Section 56(4)(aa) requires the works be “of a building” and “building” is defined under the Town and Country Planning Act 1990 to include “any structure or part of a building as so defined”. The surface of the car park is necessarily a structure because it is comprised of *both* concrete paviors that are inter-linked to each other and are also supported in that inter-linked situation by a particular sub-base. Both elements were required to be destroyed by a mechanical digger in order to be able to carry out the subsequent operation of installing below ground drainage beneath the level of the paviors. In my opinion, that particular work of demolition properly satisfied on the 11th February 2023 section 56(4)(aa) *because* it cannot be said that the destruction of part of the car park surface was not *some* work of demolition of part of a structure. In essence, a feature of the planning conditions in this matter is that they exclude from their scope “demolition” from any of the development that is (under some conditions) expressly prohibited from being commenced. Thus, whilst a condition in this matter may or may not have been breached after the demolition works, in law, such a breach can only be regarded as a breach of condition *after* development had lawfully commenced – as opposed to a prior breach precluding a lawful beginning.
22. It follows that, on the 11th February 2023, the 2021 Planning Permission was in fact begun for the purposes of section 56 of the Town and Country Planning Act 1990 because sections 56(2) and (3) were then simultaneously satisfied. So too was section 56(1) satisfied. It further follows that, under section 75, the 2021 Planning Permission has not lapsed but enures for the benefit of the land to which that Permission relates, being land within the red line “off Brook Road and Mayes Road, N22”.
23. The 2021 Planning Permission is subject to a number of further conditions. When properly construed and interpreted in accordance with the law, do any of the conditions preclude the works that were actually done in relation to the land from being a lawful start on the development permission by that permission? In my opinion, none of the conditions to which the 2021 Planning Permission is subject have that result.

24. It is helpful to consider the planning conditions as a whole at the outset and at a high level. At such high level, the conditions divide in essence into two categories: a) those that require something to happen before the development “commences”; and b) those that requiring something to happen before “occupation”. The category of conditions that relate to “occupation” cannot preclude the commencement of development (as opposed to the subsequent “occupation” of the relevant part of the development).
25. In relation to the category of conditions that concern “commencement”, the terms of such conditions share the following features:
- a) the conditions sub-divide into categories of work by reference to ground level. Thus, Conditions 1, 2, 19, 21, 29, and 30 expressly relate to “above ground” or above grade” works. In my opinion, none of these conditions in law or fact can reach *below* ground or *below* grade to encompass works such as those that were actually carried out on the land on the 11th February 2023. It follows that the works done cannot have breached any of the foregoing conditions;
 - b) the conditions include a number of conditions that (read in isolation) expressly prohibit (“*no development ... shall commence...*”) development of the relevant phase from occurring *until* something has been done *and* approved by the local planning authority (for example, Conditions 9, 11, 14, 26, 34, 42, and 48, and also one (Condition 44) that does not expressly prohibit development from commencing but instead indicates that it may be (or may not be) prohibited: “the relevant phase of development hereby approved may not commence ...”. In my opinion, “may not” commence cannot qualify as an express prohibition on the commencement of the development but, instead, it is (at its highest) *ambivalent* of the resulting situation. In my further opinion, ambivalence (“may not”) cannot in law equate to an *express prohibition* on the commencement of development;
 - c) the conditions that include an express prohibition on development commencing also sub-divide into those that expressly prohibit development of the relevant phase and those (or that) which concern details. A example of the latter is Condition 41 that requires a “revised parking layout” to be submitted and approved prior to commencement. However, Condition 41 both concerns a parking layout in circumstances that Condition 41 expressly records in respect of the plans that have been “approved” (i.e. under Condition 2, and so are required to be adhered to by the terms of Condition 2) and contains no express prohibition. i.e. Condition 41 at most requires the *implication* of a prohibition. In my opinion, Condition 41 cannot in law be a “condition precedent” because it contain no *express* prohibition (as remains required by *Hart*), and it also concerns matter of detail because Condition 42 is drawn in the context where there is already an approved parking layout and only “revisions” are required to be made in relation to it. Such revisions are mere *details*. See *Hart*;

d) of the remaining conditions that include an express prohibition on development commencing before an approval is secured from the local planning authority, the express *scope* under each such condition is itself restricted to not being able to cover *all* types of development. Thus, whilst each of these types of conditions includes the express phrase "... the development hereby permitted shall not be commenced [...] until ...[something has been done] and approved in writing by the local planning authority", the gap in the "[...]" here is "(save for demolition)". Consequently, *none* of the remaining conditions expressly preclude "any" development from commencing but are each restricted to development other than demolition. However, section 56(4)(aa) of the Town and Country Planning Act 1990 provides "any work of demolition of a building" as a category of works that results to commence the development permitted by a planning permission under section 56(2). In my opinion, it follows that *none* of the remaining conditions can qualified as encompassing "any" development that occurs and none can be properly construed as precluding demolition as a lawful start of development; and, lastly

e) the correct *scope* of each of the conditions also requires careful reading. Thus, for example, Condition 42 relates to a remediation strategy, whereas Condition 45 addresses "further development" if, after commencement, contamination of the land emerges. In a more particular example, on its proper construction, and lawfully interpreted, Condition 11 (Crossrail 2 safeguarding) addresses an approval in writing from the local planning authority in respect of items (i)-(iii) of Condition 11 *and no more*. Thus, whilst Condition 11 speaks of method statements for "all of the ground floor structures, foundations and basements and for any other structures below ground level, including piling and any other permanent installations", on the proper construction of Condition 11, the scope of those items is itself conditioned to be exclusively such of those items as "which (i) accommodate the proposed location of the Crossrail 2 structures...". Indeed, the remaining provisions of Condition 11 reinforce this construction as limiting the scope of Condition 11 to items (i)-(iii) and no more. In this matter, the scope of Condition 11 cannot extend to encompass the below ground works done. There is no evidence that any below ground matters overlap with Crossrail 2 features or its safeguarding zone. Thus, it follows that the works done here cannot be said to have been done in breach of Condition 11.

26. In light of the foregoing, it can be properly said, and it is my opinion, that the result is this: the works of demolition to the setted/pavied surface and its integral supporting base structure of part of the car park within the immediate perimeter of Core 4 of the development permitted by the 2021 Planning Permission satisfied section 56(4)(aa) of the Town and Country Planning Act 1990. In my opinion, that Planning Permission was lawfully begun on the 11th February 2023 by those particular works to that land.

APPENDIX B

FACTS

27. There is between Brook Road and Mayes Road, London N22, an area of land on which currently stands a building and a large area of car park (“the Land”). The photographs show the car park to comprise a wide area of interlinked setts or pavers that are able to bear the load of delivery lorries and other vehicles maneuvering across their surface without the surface collapsing. The setts are supported by a bed of apparent sand/cement that ensures that the surface structure does not itself collapse into the ground below. Photographs taken on the 11th February 2023 show that the setts were required to be percussively destroyed in order to enable access to the ground below their situation.
28. On the 22nd February 2021, Haringey Council granted conditional planning permission, reference HGY/2017/2886 (“the 2021 Planning Permission”), under section 70 of the Town and Country Planning Act 1990 for the development of the Land.
29. Condition 1 of the 2021 Planning Permission required the development to be begun not later than the expiration of 2 years from the date of that permission, failing which the permission shall be of no effect. Conditions 2 to 53 require the provision of a range of further types of information, either before commencement of works, or occupation, or by reference to the relevant phase of the development, or by reference to commencement of “above ground development” or require that certain things be done.
30. The express terms of Condition 11 read as follows: (Both emphases added)
- The relevant phase of the development hereby permitted shall not be commenced (save for demolition) until detailed design and Construction method statements for all of the ground floor structures, foundations and basements and for any other structures below ground level, including piling and any other temporary or permanent installations and for ground investigations have been submitted to and approved in writing by the Local Planning Authority **which**: -*
- i) Accommodate the proposed location of the Crossrail 2 structures including temporary works*
 - ii) Accommodate ground movement arising from the construction thereof*
 - iii) Mitigate the effects noise and vibration arising from the operation of Crossrail 2 within its tunnels and other structures.*
- The development shall be carried out in all respects in accordance with the approved design and method statements. All structures and works comprised within the development hereby permitted which are required by paragraphs 1(i), 1(ii) and 1(iii) of this condition on [sic] shall be completed, in their entirety, before any part of the building(s) hereby permitted is/are occupied. No alteration to these aspects of the development shall take place without the approval of the Local Planning Authority in consultation with Crossrail 2.*
- Reason To ensure safeguarding of future Crossrail 2 route.*
31. The express terms of Condition 42 read as follows: (Emphasis added)
- Prior to each phase of development approved by this planning permission no development (save for demolition) shall commence until a remediation strategy to deal with the risks associated with contamination of the site has been submitted to, and approved in writing by, the Local Planning Authority...*

32. The express terms of the first sentences of Condition 9, 14, 26, 34, 45, 48, and 51 are similarly expressed, in particular, in respect of the words in brackets in Conditions 11 and 42, save that Condition 44 uses the phrase (my emphasis) “may not commence (save for demolition)” and not “shall not commence”.
33. None of the conditions other than Conditions 11 and 42 *expressly* prohibit the carrying out of development before commencement of development.
34. In early September 2022, a number of applications were made to the local planning authority to discharge the requirements of all of the foregoing conditions attached to the 2021 Planning Permission.
35. On the 6th September 2022, on behalf of the developer, the Furness Partnership emailed TfL with structural engineering drawings about the Development in relation to Condition 11.
36. On the 12th September 2022, TfL emailed the Furness Partnership in relation to the pile foundation design for Phase 1 of the development permitted by the 2021 Planning Permission, noting that the “foundation design does not appear to be shown in the drawings”. The Furness Partnership confirmed to TfL that “the *zone of Phase 1 does not overlap with the tunnel route or exclusion zones so any piles installed, regardless of depth, should not overlap*”. On the 13th September 2022, TfL emailed the Furness Partnership confirming that the “pile foundation design for this building within Phase 1 will accommodate the future Crossrail 2 infrastructure... Given the distance of the distance between the Phase 1 building and the proposed Crossrail 2 running tunnels and the fact that the analysis considered the worst case scenario, I am minded to accept the report’s conclusions”.
37. On the 29th September 2022, the local planning authority responded to the submissions under the conditions and confirmed that submissions had been received by it under Conditions 11, 13, 14, 15, 16, 16, 17, 20, 42, 44 and 47.
38. On the 15th November 2022, the local planning authority approved under section 96A of the Town and Country Planning Act 1990 the non-material amendment to the 2021 Planning Permission. The amendments related to the terms of Conditions 2-4, 9, 26, 34, 41, 49 and 51.
39. Subsequently, a number of applications under the Conditions were validated the local planning authority, from about 22nd December 2022, including 13, 14, 15, 20, 47 and, reference HGY/2022/2610, under Condition 11, and, reference HGY/2022/2615, under Condition 42.
40. On the 11th February 2023, Austringer Capital Ltd “supervised” on the Land: a) the percussive breaking up of a 5m long strip of the concrete sett/pavied structure of the car park surface and its supporting base; b); removal of a 5m long strip of concrete setts from the surface of the car park on the Land; c) excavation of a trench below the ground surface level of the car park; and d) the installation and construction of part

of the foul drainage pipe bedded in concrete in the bottom of the trench (in the location identified in yellow on Plan Reference D4002-D-01, Revision P2). Those works comprised the excavation of the ground on the Land and the installation of a foul drainage inspection chamber and a run of foul drainage pipe in an about North-West /South-East axis. Austringer Capital Ltd also took photographic evidence of the foregoing works to the Land.

41. On the 16th February 2023, PSA Design evaluated the photographs of works to install below ground drainage pipework within part of Core 4 of the development permitted by the 2021 Planning Permission. By reference to a Plan entitled “Core 4 – Proposed Foul Drainage, As Built – Feb 2023”, reference D4002-D-01, Revision P2, PSA Design confirmed the location of the works on the drainage plan within that drawing.
42. The ordinary meaning of “structure” includes: “a thing which is built or constructed. ... [A]ny framework of or fabric of assembled material parts”. (See the Oxford Shorter Oxford English Dictionary, 6th Edition).

APPENDIX C

LAW

Town and Country Planning Act 1990

43. The Town and Country Planning Act 1990 regulates the development of land. By section 55(1), “development” is defined to include as follows: (Emphasis added)

- 1) *Subject to the following provisions of this section, in this Act, except where the context otherwise requires, “development,” means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.*
- 1A) *For the purposes of this Act “building operations” includes—*
 - a) *demolition of buildings;*
 - b) *rebuilding;*
 - c) *structural alterations of or additions to buildings; and*
 - d) *other operations normally undertaken by a person carrying on business as a builder.*

44. By section 56: (Emphasis added)

- 1) *Subject to the following provisions of this section, for the purposes of this Act development of land shall be taken to be initiated –*
 - a) *if the development consists of the carrying out of operations, at the time when those operations are begun;*
 - b) *if the development consists of a change in use, at the time when the new use is instituted;*
 - c) *if the development consists both of the carrying out of operations and of a change in use, at the earlier of the times mentioned in paragraphs (a) and (b).*
- 2) *For the purposes of the provisions of this Part mentioned in subsection (3) development shall be taken to be begun on the earliest date on which any material operation comprised in the development begins to be carried out.*
- 3) *The provisions referred to in subsection (2) are sections 61L(5) and (7), 85(2), 86(6), 87(4), 89, 91, 92, 94 and 108(3E)(c)(i)*
- 4) *In subsection (2) “material operation” means –*
 - a) *any work of construction in the course of the erection of a building;*
 - aa) *any work of demolition of a building;*
 - b) *the digging of a trench which is to contain the foundations, or part of the foundations, of a building;*
 - c) *the laying of any underground main or pipe to the foundations, or part of the foundations, of a building or to any such trench as is mentioned in paragraph (b);*
 - d) *any operation in the course of laying out or constructing a road or part of a road;*
 - e) *any change in the use of any land which constitutes material development...*

45. By section 57:

- 1) *Subject to the following provisions of this section, planning permission is required for the carrying out of any development of land...*

46. Section 70:

- 1) *Where an application is made to a local planning authority for planning permission –*

- a) subject to section 62D(5) and sections 91 and 92, they may grant planning permission, either unconditionally or subject to such conditions as they think fit; or*
 - b) they may refuse planning permission.*
- 2) In dealing with an application for planning permission or permission in principle the authority shall have regard to —*
 - a) the provisions of the development plan, so far as material to the application, ...*
 - b) any local finance considerations, so far as material to the application, and*
 - c) any other material considerations. ...*

47. By section 75:

- 1) Without prejudice to the provisions of this Part as to the duration, revocation or modification of planning permission or permission in principle, any grant of planning permission or permission in principle to develop land 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...*

48. By section 91:

- 1) Subject to the provisions of this section, every planning permission granted or deemed to be granted shall be granted or, as the case may be, be deemed to be granted, subject to the condition that the development to which it relates must be begun not later than the expiration of —*
 - a) the applicable period, beginning with the date on which the permission is granted or, as the case may be, deemed to be granted; ..*

49. By section 191:

- 1) If any person wishes to ascertain whether —*
 - a) any existing use of buildings or other land is lawful;*
 - b) any operations which have been carried out in, on, over or under land are lawful; or*
 - c) any other matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful,**he may make an application for the purpose to the local planning authority specifying the land and describing the use, operations or other matter...*
- 2) If, on an application under this section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, operations or other matter described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case they shall refuse the application...*

50. By section 336:

- 1) In this Act, except in so far as the context otherwise requires and subject to the following provisions of this section and to any transitional provision made by the Planning (Consequential Provisions) Act 1990 — ...*
 - “building” includes any structure or erection, and any part of a building, as so defined, but does not include plant or machinery comprised in a building; ...*
 - “land” means any corporeal hereditament, including a building, and, in relation to the acquisition of land under Part IX, includes any interest in or right over land; ...*

Case Law

Interpretation of Planning Permission

51. In *R v Ashford Borough Council, Ex p Shepway District Council* [1999] PLCR 12, the High Court held:

The legal principles applicable to the use of other documents to construe a planning permission are not really in dispute in these proceedings. It is nonetheless necessary to summarise them:

- (1) *The general rule is that in construing a planning permission which is clear, unambiguous and valid on its face, regard may only be had to the planning permission itself, including the conditions (if any) on it and the express reasons for those conditions: see Slough Borough Council v. Secretary of State for the Environment (1995) J.P.L. 1128 , and Miller-Mead v. Minister of Housing and Local Government [1963] 2 Q.B. 196 .*
- (2) *This rule excludes reference to the planning application as well as to other extrinsic evidence, unless the planning permission incorporates the application by reference. In that situation the application is treated as having become part of the permission. The reason for normally not having regard to the application is that the public should be able to rely on a document which is plain on its face without having to consider whether there is any discrepancy between the permission and the application: see Slough Borough Council v. Secretary of State (ante); Wilson v. West Sussex County Council [1963] 2 Q.B. 764 ; and Slough Estates Limited v. Slough Borough Council [1971] A.C. 958 .*
- (3) *For incorporation of the application in the permission to be achieved, more is required than a mere reference to the application on the face of the permission. While there is no magic formula, some words sufficient to inform a reasonable reader that the application forms part of the permission are needed, such as "... in accordance with the plans and application ..." or "... on the terms of the application ...," and in either case those words appearing in the operative part of the permission dealing with the development and the terms in which permission is granted. These words need to govern the description of the development permitted: see Wilson (ante); Slough Borough Council v. Secretary of State for the Environment (ante).*
- (4) *If there is an ambiguity in the wording of the permission, it is permissible to look at extrinsic material, including the application, to resolve that ambiguity: see Staffordshire Moorlands District Council v. Cartwright (1992) J.P.L. 138 at 139; Slough Estates Limited v. Slough Borough Council (ante); Creighton Estates Limited v. London County Council , The Times, March 20, 1958.*
- (5) *If a planning permission is challenged on the ground of absence of authority or mistake, it is permissible to look at extrinsic evidence to resolve that issue: see Slough Borough Council v. Secretary of State (ante); Co-operative Retail Services v. Taff-Ely Borough Council (1979) 39 P. & C.R. 223 affirmed (1981) 42 P. & C.R. 1 .*

52. In *Carter Commercial Developments Ltd v Secretary of State for Transport, Local Government and the Regions* [2003] JPL 1048, the English Court of Appeal held:

27. I start from the position that this planning permission is not to be construed like a commercial document, but is to be given the meaning that a reasonable reader would give to it, having available to him only the permission, the variation, the application form and the Lewin Fryer report referred to in condition 4 in the planning permission itself. I start from that approach on the basis of the propositions contained in R v Ashford Borough Council, ex parte Shepway District Council [1999] P.L.C.R. 12 at 19, paras (1), (2), (3) and (4). Those paragraphs make it clear that there are very strict limitations on the extrinsic material that can be used in construing an application, including a permission, but none of the documents to which I have referred, in my judgment, constitute extrinsic material which, as Keene J said

at proposition (4) in that case, should only be referred to if there is an ambiguity in the wording of the provision.

28. The reasonable reader for this purpose is to be contrasted with, for instance, the testator into whose armchair the court is enjoined to place itself in order to construe a will, or the position of parties to a commercial contract from whose standpoint the court will construe a commercial contract having regard to all the background information reasonably available to them. This is a public document, to which very different principles apply. Unfortunately, the reasonable reader of this permission would not have had available to him to assist him the submissions of the two counsel experienced in the field who have appeared today on this appeal, or the judgment of the judge, who is also very experienced in this field, and I would express my debt to all of them...

53. In *Trump International Golf Club Ltd v Scottish Ministers* [2016] 1 WLR 85, the Supreme Court considered whether condition 14 of a consent issued under section 36, Electricity Act 1989 (concerning a detailed design statement prior to the commencement of development) was void for uncertainty. It held that there was no principled reason for excluding implied terms (where necessary) into public documents, including potentially, planning permissions. In that case, it was able to interpret the condition as including an obligation to adhere to its terms by recourse to the wider terms of the consent and its known context.

54. The Supreme Court held that the correct approach to the interpretation of a public consent document (in that case, an electricity consent) was as follows:

*33. Whether words are to be implied into a document depends on the interpretation of the words which the author or authors have used. The first question therefore is how to interpret the express words, in this case the section 36 consent. There is a modern tendency in the law to break down divisions in the rules on the interpretation of different kinds of document, both private and public, and to look for more general rules on how to ascertain the meaning of words. In particular, there has been a harmonisation of the interpretation of contracts, unilateral notices, patents and also testamentary documents. This can be seen, for example, in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 per Lord Clarke of Stone-cum-Ebony JSC at paras 14–23 (contracts), *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 per Lord Steyn at pp 770C–771D and Lord Hoffmann at pp 779H–780F (unilateral notices), *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2005] 1 All ER 667, per Lord Hoffmann, at paras 27–35 (patents), and *Marley v Rawlings* [2015] AC 129, per Lord Neuberger of Abbotsbury PSC at paras 18–23 (testamentary documents). Differences in the nature of documents will influence the extent to which the court may look at the factual background to assist interpretation. Thus third parties may have an interest in a public document, such as a planning permission or a consent under section 36 of the 1989 Act, in contrast with many contracts. As a result, the shared knowledge of the applicant for permission and the drafter of the condition does not have the relevance to the process of interpretation that the shared knowledge of parties to a contract, in which there may be no third party interest, has. There is only limited scope for the use of extrinsic material in the interpretation of a public document, such as a planning permission or a section 36 consent: *R v Ashford Borough Council, Ex p Shepway District Council* [1999] PLCR 12, per Keene J at pp 19C–20B; *Carter Commercial Developments Ltd v Secretary of State for Transport, Local Government and the Regions* [2003] JPL 1048, per Buxton LJ at para 13 and Arden LJ at para 27. It is also relevant to the process of interpretation that a failure to comply with a condition in a public law consent may give rise to criminal liability. In section 36(6) of the 1989 Act the construction of a generating station otherwise than in accordance with the consent is a criminal offence. This calls for clarity and precision in the drafting of conditions.*

34. When the court is concerned with the interpretation of words in a condition in a public document such as a section 36 consent, it asks itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense. Whether the court may also look at other documents that are connected with the application for the consent or are referred to in the consent will depend on the circumstances of the case, in particular the wording of the document that it is interpreting. Other documents may be relevant if they are incorporated into the consent by reference (as in condition 7 set out in para 38 below) or there is an ambiguity in the consent, which can be resolved, for example, by considering the application for consent.

35. Interpretation is not the same as the implication of terms. Interpretation of the words of a document is the precursor of implication. It forms the context in which the law may have to imply terms into a document, where the court concludes from its interpretation of the words used in the document that it must have been intended that the document would have a certain effect, although the words to give it that effect are absent. See the decision of the Privy Council in *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 per Lord Hoffmann, at paras 16–24 as explained by this court in *Marks and Spencer plc v BNP Paribas Securities Trust Co (Jersey) Ltd* [2015] 3 WLR 1843, per Lord Neuberger of Abbotsbury PSC, at paras 22–30. While the court will, understandably, exercise great restraint in implying terms into public documents which have criminal sanctions, I see no principled reason for excluding implication altogether.

36. In my view assertions, such as are found in *Trustees of the Walton-on-Thames Charities v Walton and Weybridge Urban District Council* (1970) 21 P & CR 411, *Salmon LJ*, at p 418 and *Widgery LJ*, at p 420, and in the *Sevenoaks District Council* case [2005] 1 P & CR 186, *Sullivan J* at para 45, that there can never be an implied condition in a planning permission are too absolute. To say that is not to undervalue the importance of the advice of the Secretary of State and now the Scottish Ministers in Planning Circular 4/98 that planning conditions should be precise and clear. In para 29 of Annex A to the circular it is stated:

“The framing of conditions requires great care, not least to ensure that a condition is enforceable. A condition, for example, requiring only that ‘a landscaping scheme shall be submitted for the approval of the planning authority’ is incomplete since, if the applicant were to submit the scheme and even obtain approval for it, but neglect to carry it out, it is unlikely that the planning authority could actually require the scheme to be implemented. In such a case, a requirement should be imposed that landscaping shall be carried out in accordance with a scheme to be approved in writing by the planning authority; and the wording of the condition must clearly require this ...”

Commencement of Development

55. In *R(oao Hammerton) v London Underground Ltd* [2002] EWHC 2307 (Admin), the High Court considered the question of development commenced in breach of a condition attached to a planning permission for redevelopment of the Bishopsgate Goods Yard. H, the secretary of a railway heritage society, sought declarations that planning permission and listed building consent granted to L in 1997 for the construction of an extension to the East London railway line, involving the demolition of a goods yard area of considerable historical interest, had lapsed and that the construction of the extension would be unlawful. H also challenged L's refusal to give an undertaking that it would not demolish the yard, contending that (1) material operations had not commenced within the five year period as required by the Town and

Country Planning Act 1990 section 56 or, alternatively, (2) any such operations had been commenced in breach of conditions attached to the permission and the consent.

56. The High Court considered the “Whitley Exception” and held in particular, as follows:

100. *Development which itself constitutes a breach of planning control cannot satisfy the requirements of section 56 and the statutory condition in section 91 or the bespoke version which may be imposed; development will not have been begun as required. The permission would then lapse in accordance with the time limiting condition in the normal course of events. This principle has been clearly stated in e.g. Oakimber Ltd v Elmbridge Borough Council (1991) 62 P & CR 594 Court of Appeal, and F.G. Whitley & Sons v Secretary of State for Wales 1992 3 PLR 72, Court of Appeal.*
101. *However, it is not invariably the case that development started in breach of condition is ineffective to commence development; in certain exceptional circumstances it may suffice to prevent the permission lapsing. It is the extent of those exceptional circumstances which is in issue here.*
102. *In Whitley itself, the Court of Appeal mitigated the rigours of that approach in a case where, although the conditions expressly required mineral workings to take place only in accordance with approved details and required the prior submission and approval of a landscaping scheme before mineral workings commenced, the submission of details preceded the commencement of workings but approval was not obtained until after their commencement and indeed after the time at which on a strict approach to the wording of the conditions, the time for commencement had passed. However, no enforcement proceedings had been taken by the time of the approval of the details and some of the workings had become immune from enforcement.*
103. *Woolf LJ held first that it did not matter whether the works relied on as commencing development preceded the obtaining of approvals, if those approvals were forthcoming within the timescale of the life of the permission. Any other approach “would be technical in the extreme”. Although enforcement action could theoretically be taken, there would be no practical possibility of it succeeding once the approval had been obtained.*
104. *He then dealt with whether approvals had to be obtained by the time limited for implementing the permission. He said at p84A:*
“Although the development has to be commenced by this date, the conditions do not expressly require the approval to be obtained by this date. There is, however, a clear implication that the developer will have applied for permission before that date. As long as the developer has applied for the approval, I would not draw the implication that the approval must be obtained by this date. It must have been reasonably obvious to Parliament that there would be many situations where although a developer had made a timeous decision to apply for approval, that approval, through no fault of the developer, could not be obtained until after the expiration of the time limits for implementing the permission. Where this happens and the developer had already implemented the permission by commencing operations pending the outcome of approval, it could be grossly unfair to the developer to regard him as being time barred. Indeed, the operations which took place to comply with the time-limit may be a matter which would not be affected by the terms of the approval, although they would still contravene a blanket prohibition the commencement of operations. Alternatively, they may be of no significance from a planning point of view so no reasonable planning authority would contemplate enforcement action. I cannot accept that it was intended that in these circumstances a planning permission should be of no effect”
122. *I draw the following points from those cases.*
123. *(1) The starting point is clear : development in breach of planning control is normally ineffective to commence development because it is unlawful. But there are exceptions as the Whitley case shows. Whitley has not been disapproved in the House of Lords. They cover the situations first,*

where before the deadline has passed the necessary consents have been obtained even though development commenced before they were obtained, and secondly, where the necessary consents were sought before the expiry of the deadline and obtained after it but before any enforcement action had been taken. The approach of the Court of Appeal was seen as a sensible and practical approach which allowed for the realities of any authority rationally taking enforcement proceedings in such a situation. The Court did not contemplate one way or another the making of further exceptions and it did not address the position where the developer has failed to do required works as opposed to a failure to obtain approvals for details...

127. (5) *I consider that the principle discernible in Woolf LJ's reasoning is that where it would be unlawful, in accordance with public law principles, notably irrationality or abuse of power, for a local planning authority to take enforcement action to prevent development proceeding, the development albeit in breach of planning control is nevertheless effective to commence development. Three of the passages from his judgment, to which I have referred in paragraph 104, related his approach to the rational availability of enforcement proceedings. Enforcement action may still be taken to remedy the breach by requiring compliance with the condition. But the development cannot be stopped from proceeding...*

57. In *R (oao of Hart Aggregates Ltd) v Hartlepool BC* [2005] 2 P&CR 31, the High Court considered the question of so-called "conditions precedent". The claimant (H) sought judicial review of the local authority's decision to decline H's application under the Environment Act 1995 for new conditions in relation to an earlier planning permission. The earlier permission had been granted in respect of a quarry and contained a condition (Condition 10) relating to the restoration of the land that had been quarried. The local authority had refused to grant new conditions on the basis that the earlier permission had lapsed due to a failure to comply with Condition 10, which it regarded as a 'condition precedent'. Thus, it had argued, it had no power to consider the application. At the time of the instant case, quarrying had taken place for more than 30 years. The court had to interpret Condition 10. H submitted that, under Condition 10, a restoration scheme did not have to be agreed with the local authority if the quarried areas were to be filled to the levels shown on plans that accompanied the original planning application. D submitted that Condition 10 was a condition precedent as it required the local authority to approve a restoration scheme prior to the commencement of quarrying.

58. The issue for determination was whether the 1971 permission had lapsed because Condition 10 had *not* been complied with, in that a restoration scheme had not been agreed by the local planning authority before extraction commenced. This gave rise to two questions: (1) Did the fact that no restoration scheme had been agreed mean that Condition 10 was not complied with? (2) If Condition 10 had not been complied with, what was the effect of that non-compliance? Did it mean that the 1971 permission had to be treated as not having been implemented despite the fact that the original quarry had been worked for the last 34 years.

59. The High Court granted the application and held that H's interpretation of condition 10 was the correct interpretation. The condition had to be interpreted as it appeared in the schedule of conditions to the planning permission and in the context of the permission as a whole. It held that a condition could only be deemed to be a condition precedent, any development in contravention of which was unlawful, where the condition expressly prohibited any development before the condition was met.

60. In more particular, the High Court held: (Emphasis added)

3. Twenty conditions were set out in an attached schedule. For present purposes, the following conditions are relevant: ...

10. The worked out areas shall be progressively back-filled and the areas restored to levels shown on the submitted plan or to a level to be agreed by the Local Planning Authority in accordance with a restoration scheme to be agreed by the Local Planning Authority before extraction is commenced.

9. After the grant of planning permission quarrying commenced and has continued up to the present day. It is common ground that no restoration scheme was ever submitted or agreed under condition 10.

...

56. To take another example, canvassed in submissions, where planning permission is granted for the erection of a large dwelling house. Detailed plans accompany the application. All of the details are satisfactory, but the local planning authority do not like the design of one of the dormer windows. A condition is therefore imposed upon the planning permission requiring revised details of the dormer window to be submitted to and approved by the local planning authority before development commences. The development commences. No revised plans of the dormer window are submitted and the omission is realised only when the house is complete. Has the entire house been constructed without planning permission, or has there simply been a breach of the condition in respect of the dormer window? Consistent with the defendant's approach to non-compliance with conditions precedent, Mr Porten submitted that the former answer was correct.

57. I do not accept that such an outcome would give effect to Parliament's intention in enacting the planning code insofar as it relates to the commencement of development authorised by planning permission. The 1990 Act draws a clear distinction between development without planning permission and development in breach of condition; see section 171(A)(1)(a) and (b). It is important that that distinction is not blurred by an indiscriminate use of the judge-made term "condition precedent".

58. Going back to first principles, the starting point should be the proposition that there is no scope for implied conditions in a planning permission. If a local planning authority wishes to impose any obligation upon an applicant by way of a requirement or prohibition, it should do so in express terms, because failure to comply with the condition may, ultimately, lead to prosecution for failure to comply with a breach of condition notice and/or an enforcement notice; see sections 179 and 187(A) of the 1990 Act. The need for a local planning authority to spell out any requirement or prohibition in clear terms applies with particular force where the condition is said to prevent not merely some detail of the development, but the commencement of any development pursuant to the planning permission.

59. If condition 10 is read in the context of the planning permission as a whole, it is simply concerned with the back-filling and restoration of the worked out areas. Other conditions govern the removal of topsoil and overburden and the extraction of the limestone. If Durham County Council had wished to prohibit any extraction before a restoration scheme for the worked out areas was agreed, it could have said so by imposing a condition expressly to that effect, similar in form to condition 2 in Whitley, "No extraction shall take place except in accordance with a restoration scheme to be agreed ..."; or it could have imposed the standard form of conditions that are imposed on grants of outline planning permission: "details of [a restoration scheme] shall be submitted to and approved by the Local Planning Authority before any development takes place".

60. Such a prohibition should not be implied merely because a condition, which is apparently concerned not with extraction but with the back-filling and restoration of the worked out areas once extraction has been completed in those parts of the quarry, requires a restoration scheme to be agreed "before extraction is commenced".

61. Condition 10 is a "condition precedent" in the sense that it requires something to be done before extraction is commenced, but it is not a "condition precedent" in the sense that it goes to the heart of the planning permission, so that failure to comply with it will mean that the entire development, even if completed and in existence for many years, or in the case of a minerals extraction having continued for 30 years, must be regarded as unlawful.

62. In my judgment, the principle argued for by the defendant applies **only** where a condition **expressly prohibits** any development before a particular requirement, such as the approval of plans, has been met. Condition 10 is not such a condition. If it had been breached some 34 years ago, the effect of that breach would have been to render any restoration in breach of condition, and therefore unlawful. Other activities permitted by the 1971 permission, such as extraction, would not have been rendered unlawful.

62. This approach accords with the note of caution introduced by Beldam L.J. in the concluding paragraph of his judgment in *Oakimber*, cited, with no indication of disagreement, by Woolf L.J. on pp.80 to 81 of *Whitley* (see para.40 above)...