Neutral Citation Number: [2019] EWHC 2007 (Admin)

Case No: CO/1017/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2019

Before :

MR C M G OCKELTON, VICE PRESIDENT OF THE UPPER TRIBUNAL

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Between :

The Queen on the application of Warren Farm (Wokingham) Limited	**Claimant**
- and -	
Wokingham Borough Council	**Defendant**

- -
- -

Mr A. Bowes (instructed by **Barlow Robbins Solicitors**) for the **Claimant**
Mr G. Williams (instructed by **SBS Legal Solicitors**) for the **Defendant**

Hearing date: 13 June 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR C M G OCKELTON, VICE PRESIDENT OF THE UPPER TRIBUNAL

C. M. G. Ockelton :

Introduction

1. Article 7 of the Town and Country Planning (England) (General Permitted Development) Order 2015 (SI 2015/596) ("the GPDO") is as follows:

> "7. Prior approval applications: time periods for decision
>
> Where, in relation to development permitted by any Class in Schedule 2 which is expressed to be subject to prior approval, an application has been made to a local planning authority for such approval or a determination as to whether such approval is required, the decision in relation to the application must be made by the authority –
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> (a) within the period specified in the relevant provision of Schedule 2,
>
> (b) where no period is specified, within a period of 8 weeks beginning with the day immediately following that on which the application is received by the authority, or
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> (c) within such longer period as may be agreed by the applicant and the authority in writing."

2. The question raised by these proceedings is whether paragraph (c) is an alternative to both paragraphs (a) and (b) or only to paragraph (b).

Context

3. By article 3(1) of the GPDO, planning permission is deemed to be granted for the classes of permitted development set out in Schedule 2; but by article 3(2), the permission granted by article 3(1) is "subject to any relevant exception, limitation or condition specified in Schedule 2".

4. One of the classes of permitted development set out in Schedule 2 is that in Class Q of the Schedule, development consisting of a change of use of a building and any land within its curtilage from use as an agricultural building to use as a dwellinghouse, together with building operations reasonably necessary to convert the building for use as a dwellinghouse. Detailed limitations on the scope of the permitted development are contained in paragraph Q.1, "Development not permitted". Paragraph Q.2, "Conditions" imposes a condition that is differently expressed according to the precise development proposed, but has the effect that in all cases within Class Q,

> "Development is permitted subject to the condition that before beginning the development the developer must apply to the local planning authority for a determination as to whether the prior approval of the authority will be required as to [certain matters] and the provisions of paragraph W (prior arrival) of this Part apply in relation to that application."

5. The format of class Q follows the model of a number of other classes in Schedule 2, which include a condition requiring prior approval; generally (and perhaps as the GPDO stands at present always) in accordance with paragraph W.

6. Paragraph W is divided into numbered subparagraphs. Subparagraph (2) sets out the procedure for making the application to the local planning authority, and subparagraph (3) provides that an application may be refused if the authority considers either (a) that the proposed development does not meet the requirements of permitted development in the relevant class, or (b) that it does not have enough information to determine whether the proposed development meets the requirements of permitted development in the relevant class. When an application is not refused for this reason, subparagraphs (5)-(10) set out the procedure to be adopted by the authority in relation to consultation, notices and decision-making; but by subparagraph (4), subparagraphs (5)-(10) do not apply if the application has been refused under subparagraph (3). I do not need to set any of these subparagraphs out; but I observe that the requirements of a notice under subparagraph (2) do not specifically include the information the lack of which might prompt refusal under subparagraph (3)(b). It follows that there is no scope for an argument that refusal under paragraph (3)(b) is in any way equivalent to a decision that there has been no valid application within the meaning of subparagraph (2); and indeed no such argument was raised before me.

7. Subparagraph (11) is as follows:

> "(11) The development must not begin before the occurrence of one of the following -
>
> (a) the receipt by the applicant from the local planning authority of a written notice of their determination that such prior approval is not required;
>
> (b) the receipt by the applicant from the local planning authority of a written notice giving their prior approval; or
>
> (c) the expiry of 56 days following the date on which the application under sub-paragraph (2) was received by the local planning authority without the authority notifying the applicant as to whether prior approval is given or refused."

8. For completeness I should also set out subparagraph (12):

> "(12) The development must be carried out –
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> (a) where prior approval is required, in accordance with the details approved by the local planning authority;
>
> (b) where prior approval is not required, or where sub-paragraph (11)(c) applies, in accordance with the details provided in the application referred to in sub-paragraph (1),

> unless the local planning authority and the developer agree otherwise in writing."

9. I have set out article 7 of the GPDO above in paragraph 1. At this stage I need only point out that although article 7 relates solely to the prior approval process, it is not within paragraph W of Schedule 2, nor is it within Schedule 2.

The facts and the claim

10. The claimant proposed to change the use of Warren Grain Barn, Wokingham, RG40 5QY to use as a dwellinghouse. On 12 November 2018 it submitted to the defendant an application in the form required by paragraph W(2), which the defendant received on 15 November. It is common ground that the period of 56 days thereafter expired on 10 January 2019.

11. On 8 January 2019 the defendant asked the claimant for an extension of time. The reason was that the defendant thought that a notice needed, under the provisions of paragraph W(7), to be displayed for 21 days, which had not happened. In fact it appears that the defendant was mistaken, because subsequent events show that the defendant was minded to refuse the application under subparagraph (3); and the notice requirements apply only if the application is not refused under subparagraph (3). The claimant queried whether there was power to agree an extension of time; the defendant pointed to article 7, and the claimant agreed, in the interests of expediency, an extension to 31 January.

12. On 30 January the defendant made a decision refusing prior approval on the ground that inadequate information had been submitted to demonstrate compliance with the conditions in paragraph Q.2. No development has yet taken place

13. The Claimant claims that the decision of 30 January was of no legal effect because it was too late. The claim was issued on 13 March. Permission was granted by HHJ Alice Robinson sitting as a judge of this Court.

The arguments

14. It is convenient to deal with the defendant's arguments first, because they are in the Summary Grounds of Defence, as a result of which the claimant's skeleton argument for the hearing was able to respond to them. On behalf of the defendant Mr Williams argues that article 7 should be given its ordinary meaning, which, he says means that paragraph (c) should be regarded as an alternative to either paragraph (a) or paragraph (b): if it were intended to be confined to paragraph (b) it would have been incorporated within paragraph (b) rather than given a paragraph of its own in the same hierarchy as the other two. Reading the article in that way would not necessitate a conflict with paragraph W(11) of Schedule 2, because there are three alternative ways of avoiding a conflict.

15. First, paragraph W(11) can be given its literal meaning. It merely says that the development must not begin before the expiry of the 56 days. That would still be the case if the time had been extended by agreement. Nothing in paragraph W(11) says that a development may begin as soon as the time has expired. It is interpreting the words in the latter way (that is to say, reading the words as though they said

something that they do not say) that cases the conflict. Further, Mr Williams submits that reading the provisions in the way he suggests promotes good administration, because where the parties have agreed a longer period it is right that the authority should have that longer period to make its decision. There is no reason why the possibility of extension of time available within article 7 should be rendered ineffective by the developer being able to start work at the end of the 56 days even if a decision has not been made within the extended time period.

16. Alternatively, in order to implement what Mr Williams submits is the plain meaning of article 7, the necessary words should be read into paragraph W(11)(c), for example by adding, after "56 days", "(or such other period as is agreed under article 7)". This would specifically align the provisions of paragraph W(11) with other provisions in planning legislation allowing time limits to be extended by agreement.

17. Alternatively again, paragraph W(11) could be read as implying a deemed receipt date for the application where there has been an agreement to extend time. As I understand this suggestion, the application to the present facts would be as follows. When the application was made, its receipt date was 15 November 2018. From that date until 8 January 2019 paragraph W(11) fell to be applied using 15 November 2018 as the date on which the application was received. On 8 January, the time was extended, by agreement, by 21 days. The effect would be that 21 days would be added to the actual date of receipt, to produce a deemed date of receipt of 7 December 2018, from which the 56 days would now be calculated.

18. For the claimant, Mr Bowes submits that the governing provision is article 7(a). The determination has to be made within the period specified in the relevant provision of Schedule 2, which in this case was 56 days. He says that article 7(c) does not apply, for reasons based on the construction of article 7 and its context. First, there is nothing in article 7 indicating that article 7(c) is to be read with both of the preceding provisions such as "or in either case" (as is found, for example, in article 34(2)(c) of the Town and Country Planning (Development Management Procedure) (England) Order 2015 (SI 2015/595) on the similar subject of time limits for determining planning applications). Further, if article 7(c) is read as applying to article 7(a), one would expect a reference within paragraph W(11) to the possibility of a different time period agreed between the parties and there is none. Mr Bowes submits that the Court should resist the temptation to write words into legislation where there is no need to do so, and there is no need if article 7 is interpreted in the way he suggests. Finally, the proposal to deem a date of receipt when there is, after receipt, an agreement to vary the time limit, is difficult to reconcile with the provisions such as that in article 2(9), setting out the process for calculation of the date of receipt of a document sent electronically

Discussion and conclusions

19. It appears that I can derive no help from any previous decisions on this point as there are none; and before 2015 there was no equivalent of article 7. Further, it is clear that the GPDO does not adopt a consistent drafting position in relation to lists. Looking, for example, at paragraph Q.1 in Schedule 2 (where exceptions are set out under the heading "development not permitted") there is, at (a), a list with the conjunction "or" inserted after each item except the last; at (k) a list apparently of alternatives in which

the word "or" is not used at all; and in the (so to speak) macro-list of items (a) to (m), there is an "or" only before the last item.

20. In modern drafting the custom is to use a conjunction only immediately before the last item in a list; and *Bennion on Statutory Interpretation* gives as a general rule at section 258 that:

> "Where a provision consists of several numbered paragraphs with the word "or" before the last paragraph only, that word is taken to be implied before the previous paragraphs after the first."

21. It seems to me, however, that that cannot be regarded as concluding the issue here, for a number of reasons. First, in any event, any assumption as to how a list is to be read must yield to the specific context, as Phillips v Price [1957] 1 Ch 181 tends to show. There Harman J was asked to say that a list of the form "*a; b; c; d or e*" meant that the alternative to *e* was *a and b and c and d*. He concluded that that could not be so, largely because in the list in question *b* referred to a statutory duty which ought to be regarded as operating even if *a, c* and *d* were not present. The result was as *Bennion* suggests, but it was reached by examining the provisions rather than by applying a rule. Secondly, the GPDO is what *Bennion* would call "disorganised" composition, as the examination above of paragraph Q.I shows, and "the technique of interpretation applied to any enactment can only be as exact as the method of drafting permits" (section 141). Thirdly, implying the "or" between subparagraphs (a) and (b) in article 7 does lead to a considerable difficulty, as I shall explain.

22. In order to do so I return to Mr Williams' submissions. He says that reading the article in that way causes no inconsistency, or alternatively that any contradiction can be avoided by one of two proposed implied insertions into the text of paragraph W(11).

23. In my judgment it is not right to say that no inconsistency is caused. Mr Williams relies on the fact that paragraph W(11)(c) says merely that development shall not commence before the expiry of the 56 days, not that development may commence when the 56 days has expired. But that is exactly what paragraph W(11)(c) does say, when read in context. In order to see that, one only has to look at the structure of the GPDO. As noted above, article 3 gives planning permission for the permitted developments, subject to (amongst other things) relevant conditions. The conditions for present purposes are those imposed by paragraph Q.2, which include making the application to which paragraph W applies.

24. The contents of paragraph W are, by this means imposed as conditions to which development in class Q is subject. The conditions are, essentially, the making of the application, and then, unless the application is refused under paragraph W(3), or the process under paragraph W(5)-(10) takes place, simply waiting until one of the events in W(11) takes place. The condition is indeed that the development does not take begin before one of those events takes place, but that is the condition the fulfilment of which (provided that all other conditions are fulfilled) generates the operation of the principal provision of article 3, that is to say the grant of planning permission. When the developer has met all the conditions, including not beginning the development too

early, he has planning permission and is at liberty to commence development. In context therefore, although paragraph W(11) is expressed negatively, if the not beginning too early was the last condition to be met, its effect is positive.

25. Clearly there is nothing in paragraph W(11) itself to impose a further condition of not commencing the development if a period of 56 days has passed without a decision from the local planning authority, whatever the reason might be. So it is said that such a provision, that is to say, an additional condition, should be implied. The purpose is to enable article 7(c) to have effect in these circumstances.

26. Now I agree that if article 7(c) is to have effect in these circumstances something of this sort is necessary. But that is begging the question. The need to imply words into paragraph W(11)(c) in order to give effect to article 7(c) in a case where a period is specified cannot itself be a reason for giving effect to article 7(c): indeed the contrary proposition is more rational, that is to say that if giving article 7(c) the effect sought means implying a new condition into paragraph W(11), it is likely that the effect sought is not that intended by the legislator. There are perhaps further pointers in that direction.

27. One is that relating to good administration. Where the legislator has fixed a period of time accompanied by inaction on the part of an authority as having a specified effect to the advantage of a developer, the authority is constrained to act promptly if it wishes to act at all, for the effect of time passing without a decision is that the development can proceed, as indicated above and as Lindblom LJ pointed out in another context in Keenan v Woking Borough Council [2018] PTSR 697 at [36].

28. Secondly, it promotes certainty. Where a positive effect can be the result of inaction, it is better if the period of inaction that will have that effect is subject to as little variation as possible.

29. Thirdly, the structure of the GPDO may tend to suggest that article 7 should not be seen as imposing a condition. As noted above, the grant of planning permission made by article 3 is subject to any relevant exception, limitation or condition specified in Schedule 2. Article 7 imposes a duty on the authority rather than a limitation on the grant of permission. It is not in schedule 2; and unlike articles 4 and 5 it does not on its face purport to impose any restriction on the grant made by article 3. It is therefore perhaps an unlikely source of a condition to which the grant is subject.

30. As it seems to me, all the difficulties envisaged and then avoided by Mr Williams arise if and only if article 7 has the meaning for which he contends. If article 7 is read in such a way that paragraph (c) is an alternative to paragraph (b) but not to paragraph (a), no such difficulties arise. That would mean treating cases where a period is specified differently from cases where a period is not specified. But there is every reason for a difference in treatment. Where no period is specified, there is no point at which, by the operation of the GPDR, inaction by the authority turns into a grant of planning permission. There is no equivalent of the 56-day period in paragraph W(11)(c): the condition imposed would no doubt be equivalent to paragraph W(11)(a) and (b) only. There is room here for the parties to agree a time for making the decision that will bring the waiting period to an end, without encroaching in any way upon a provision bringing the waiting period to an end in another way.

31. One can further see that this is right by considering article 7 on its own terms in the context of the rest of the GPDO. It is the provision that requires the authority to make a decision within a certain time. What time? Unless one is looking for difficulties, one would say (a) that where the expiry of a specified time has an effect that would make a subsequent decision nugatory, the decision must be made before the expiry of that time, but (b) in other cases, it is necessary to impose a time limit for a decision precisely because otherwise inaction by the authority would prevent the provisions of article 3 having their intended effect: if one of the requirements is to await a decision, and no decision is forthcoming, there is no grant of planning permission.

32. But this is exactly the area in which one would expect there to be scope for agreement between the parties. The legislator has not seen fit to appoint a particular time period in the particular circumstances; the condition can be met only by the authority making a decision; the default position imposed by article 7 is that the decision, which will bring the waiting period to an end, must be made within 56 days, unless the parties, presumably particularly the developer, who is the person affected by any delay, agree to an extension.

33. There is nothing untoward or particularly unusual in a set of rules that fix some time limits and make others subject to extension by agreement between the parties. The difference between the two sorts of time limit is particularly appropriate in the context of the process under consideration, because of the function of the GPDO in granting planning permission at the end of a specified period of time where such a time is specified, but otherwise only when the authority comes to make a decision.

34. There is of course a certain artificiality in the discussion: I was not shown any provision of the GPDO to which article 7(b) applies and it follows from the view that I have reached that if there is (at present) none, there is also no provision to which article 7(c) applies. But that does not impact on my conclusion. Where a period is specified, the deemed grant of planning permission takes place at the end of that period, so the authority's decision must be before that. If no period be specified, the deemed grant takes place only when a decision is made, and there is therefore scope for agreeing a time within which the authority has to make a decision. Article 7(c) is to be read as an alternative to article 7(b) only, not to article 7 (a).

35. It follows that the decision under challenge must be quashed as made without jurisdiction. The deemed grant of planning permission took place nearly three weeks earlier, on 10 January 2019.

36. There was discussion at the hearing about what the order should be if the claim was successful. I do not think it is appropriate to grant any relief other than the quashing order. A declaration is neither necessary nor desirable in what is a matter wholly about construction of a legislative instrument: the judgment serves as the declaration. And it would not be right to do anything else other than point out that the planning permission deemed to be granted extends only to development that both falls within both class Q and is in accordance with the details provided in the paragraph W application. Those factors are the effect of the general structure of the GPDO, and the specific terms of paragraph W(12)(b) respectively.