September 2015

R (on the application of John Hubert) v Carmarthenshire County Council [2015] EWHC 2327

Planning Permission Conditions; "Tailpieces" And The "Benevolent" Approach To Construction

In 2014, planning permission was granted for a large wind turbine in rural Carmarthenshire. Concerned at the potential impact on amenity, the Claimant – who lived close to the development - launched judicial review proceedings. The expected effects on amenity for those living nearby were described by the planning officer as "very unpleasant" and that the development would have "significant adverse visual impact… which could be considered as resulting in significant adverse impacts to residential amenity". Nevertheless, he recommended planning permission be granted and the planning committee agreed with the recommendation, resolving to grant planning permission subject to certain conditions.

After the judicial review application was lodged, the developer applied for a further planning permission in 2015 for the same development and was again granted planning permission. Both decisions were challenged by the Claimant and the cases conjoined for the substantive hearing before Cranston J. The Claimant raised a number of grounds for both judicial reviews, but succeeded only on the challenge to the lawfulness of one of the conditions in the decision notice.

The "Tailpiece" Condition

The first planning permission included a "tailpiece" condition which stated that:

"the wind turbine hereby approved shall be 40m to the centre of the hub and 67m to blade tip, unless given the written approval of the Local Planning Authority".

The tailpiece clause appeared to allow for the developer to depart from the restrictions by agreement with the Local Planning Authority's approval. The effect of this, argued the Claimant, would be to allow significant changes to the specifications of the turbine outside the usual planning process and without, for instance, the procedural requirements of EIA screening and consultation.

Midcounties

The Claimant's arguments rested on the principles established in R (Mid Counties Co-operative Limited) v Wyre Forest DC [2009] EWHC 964 (Admin). In Midcounties, one of the conditions in the permission notice for a new supermarket required that the floor space for the development should not exceed the specified maximum "unless otherwise agreed in writing with the Local Planning Authority".

The "tailpiece" condition was held to be unlawful as

"… on its face [it] does enable development to take place which could be very different in scale and impact from that applied for, assessed or permitted and it enables it to be created by means wholly outside any statutory process. It undermines the effect of specifying floorspace limits. I do not consider that a public document such as a planning permission should contain such a provision… no question of severing the condition from the planning permission could arise. The floor space limits are of central importance" [para 70].

Benevolent Construction

The Defendant sought to defend the tailpiece in the present case by arguing, firstly, that the conditions should be construed "benevolently". The principle of benevolent construction is set out by Elias LJ in Hulme v Secretary of State of Communities and Local Government [2011] EWCA Civ 638, para 13.

In brief, they require that conditions in planning decisions must be construed in the context of a decision letter as a whole. A condition would be void for uncertainty if it can be given no meaning or no sensible or ascertainable meaning. Furthermore, conditions cannot be implied into the permission.

Significantly, the Defendant argued, the planning permission was specified to be for "a maximum tip height of 67 meters" and that a larger turbine could not therefore be permitted. Additionally, limits had been set by other conditions in the decision notice which related to noise. The conclusion should therefore be that a larger turbine could not be constructed on the basis of the existing conditions, whatever the tailpiece suggested.

Limits Of Benevolent Construction

However, Cranston J agreed that there was a strong link between the turbine's dimensions and the possible environmental effect:

"The words of the tailpiece would permit variations in height so that the scale and impact of the Turbine would be different from that for which permission was granted. The breadth of the words means that it cannot be construed as being limited to minor variation. Here, what the condition on its face allows is for variation, up or down, and without any restriction either way, on the dimensions the Council assessed and specified in its first part" [Para 33].

Cranston decided therefore that the tailpiece could not be saved by benevolent construction.

"It would be quite wrong for the planning permission here, having been subject to planning debate and democratic decision-making in the Council, to be capable of being side-stepped by use of the tailpiece. The tailpiece must be severed from condition 21".

Condition Requiring Trial Run And Highway Works On Land Outside The Control Of The Developer

Cranston then went on to consider another of the conditions ("condition 24") which the Claimant had argued was also unlawful. The condition specified that:

"prior to the commencement of the development an escorted and video recorded trial run of the abnormal loads should be carried out to the satisfaction of the Local Highway Authority. Thereafter, proposals for any highways improvements that may be required shall be submitted to the written approval of the Local Planning Authority and conducted in accordance with the approved details."

The next condition ("condition 25") in the decision notice added that:

"Prior to the commencement of the development, a Construction Traffic Management Plan shall be submitted to the satisfaction and written approval of the Local Planning Authority."

The Claimant proposed three reasons why condition 24 was unlawful: firstly, it required works to be carried out on land that was not within the control of the Local Planning Authority. It was therefore ultra vires. Secondly, the condition was positively worded: it required a trial run to be conducted before development commenced and furthermore contained no similar provision in respect of the carrying out of the improvements to the highway for the delivery of the turbine - which were merely required to be carried out at some point after the trial run. Thirdly, the Claimant argued that the condition was flawed because the planning committee was wrongly advised by the planning officer that the condition could be enforced in respect of third party land.

There had been disagreement between the parties over whether privately owned third party land would be required for the development or whether it fell under the ownership of the Highways Authority. Cranston J decided that private third party land was not required which, he ruled, meant that the Claimant's first and third arguments on the unlawfulness of this condition were based on "faulty premises".

Cranston J then applied the "benevolent" construction to the second of the arguments:

"It seems to be that [Mr Hunter's argument] fails if one adopts the principle of a benevolent construction Elias LJ captured in Hulme v Secretary of State for Communities and Local Government [2011] EWCA Civ 638 [13 to 14]. The words "prior to the commencement of the development" can be taken to apply to all the requirements referred to in the condition. That is likely what was intended and is the most sensible construction of the condition. That construction is strengthened when condition 24 is read in the context of the permission as a whole and particularly condition 12 and 25 which impose related obligations, condition 12 as regards an obligation in relation to landscaping and condition 25 as regards a Construction Traffic Management Plan".

"Mr Hunter submits the condition 25 is bad because it lacks any implementation clause so that even if such details can be required to be submitted and approved under it there is nothing to say that [the applicant] must carry out the development in accordance with the approved plan. But the Claimant does not challenge 25 so that submission goes nowhere. The point is that conditions 24 and 25, when read together indicate that all the requirements specified in condition 24 must be performed prior to the commencement of the *development".

Therefore whereas Cranston J found that the formula for benevolent construction did not save the tailpiece, the condition on access could be read more benevolently.

However, Cranston J's reasoning on this ground does not sit well with the decision in Pedgrift v Oxfordshire County Council (1992) 63 P&CR 246, 252. In that case. The key principles set out by Glidewell LJ were that "a condition requiring the carrying out of works may validly be imposed only if the works are to be carried out on land either within the application site or on other land "under the control of the applicant." Thus, a condition purporting to require the carrying out of works on land neither within the application site nor within the control of the applicant is outside the powers of the Act. In relation to such a condition, the reasonableness of the condition is irrelevant."

In the present case, even if the land over which works are required were owned by the Highways Authority and not private land, it was not under the control of the applicant. Therefore, it is difficult to reconcile this decision with that of Pedgrift.

Comment

The setting of conditions in decision notices is a delicate art and one which requires consideration of lawfulness, consequences and enforceability. Without such careful drafting, environmental protection may be compromised. Although in his judgment Cranston decided that the "tailpiece" condition could not be saved, defects elsewhere could be interpreted leniently: a positive condition could be read in terms of other conditions.

The judgment seems to suggest that the benevolent approach to construction can get around fundamental problems in drafting even though, on a practical basis, enforceability may be difficult.

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