Supreme Court

*DB Symmetry Ltd and another *v* Swindon Borough Council

[On appeal from Swindon Borough Council v Secretary of State for Housing, Communities and Local Government and another]

[2022] UKSC 33

2022 July 12;
Dec 14

Lord Reed PSC, Lord Hodge DPSC, Lord Kitchin, Lord Sales, Lady Rose JJSC

Planning Planning permission Conditions Grant of planning permission for commercial development Condition requiring construction of access roads so as to ensure each unit served by fully functional highway Whether condition requiring developer to dedicate access roads as public highways Whether condition so construed capable of being lawfully attached to planning permission Town and Country Planning Act *1990* (c *8*), ss *70*, *72*

The owners of a site comprising land within a wider area allocated by the local planning authority for strategic development obtained planning permission for a

Southwark London Borough Council v Transport for London [2018] UKSC 63; [2020] AC 914; [2018] 3 WLR 2059; [2019] PTSR 1; [2019] 2 All ER 271, SC(E)
Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759; [1995] 2 All ER 636, HL(E)
Trump International Golf Club Scotland Ltd v Scottish Ministers [2015] UKSC 74; [2016] 1 WLR 85; [2017] 1 All ER 307, SC(Sc)
Westminster Bank Ltd v Beverley Borough Council [1969] 1 QB 499; [1968] 3 WLR 671; [1968] 2 All ER 1199, CA; [1971] AC 508; [1970] 2 WLR 645; [1970] 1 All ER 734, HL(E)
Wheeler v Leicester City Council [1985] AC 1054; [1985] 2 All ER 151, CA

The following additional cases were cited in argument:

Attorney General v Horner (1884) 14 QBD 245, CA
Baden s Deed Trusts, In re [1969] 2 Ch 388; [1969] 3 WLR 12; [1969] 1 All ER 1016, CA
Bank of Credit and Commerce International SA v Ali [2001] UKHL 8; [2002] 1 AC 251; [2001] ICR 337; [2001] 1 All ER 961, HL(E)
Bradford (City of) Metropolitan Council v Secretary of State for the Environment (1986) 53 P & CR 55, CA
Bugajny v Poland (Application No 22531/05) (unreported) 6 November 2007, ECtHR
Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb [2020] UKSC 38; [2020] 1 WLR 4117; [2020] Bus LR 2242; [2021] 2 All ER 1, SC(E)
Grampian Regional Council v Secretary of State for Scotland 1984 SC (HL) 58, HL(Sc)
Hitchins (Robert) Builders Ltd v Secretary of State for the Environment [1978] 2 EGLR 125
Kingston-upon-Thames Royal London Borough Council v Secretary of State for the Environment [1973] 1 WLR 1549; [1974] 1 All ER 19, DC
Langston v Langston (1834) 2 Cl & Fin 194
Pedgrift v Oxfordshire County Council (1991) 63 P & CR 246, CA
Pham v Secretary of State for the Home Department [2015] UKSC 19; [2015] 1 WLR 1591; [2015] 3 All ER 1015, SC(E)
R v South Northamptonshire District Council, Ex p Crest Homes plc (1994) 93 LGR 205, CA
R (Sainsbury s Supermarkets Ltd) v Wolverhampton City Council [2010] UKSC 20; [2011] 1 AC 437; [2010] 2 WLR 1173; [2010] PTSR 1103; [2010] 4 All ER 931, SC(E)
Shanley (M J) Ltd v Secretary of State for the Environment [1982] JPL 380
Thomas v Bridgend County Borough Council [2011] EWCA Civ 862; [2012] QB 512; [2012] 2 WLR 624; [2012] PTSR 441, CA
Westminster Renslade Ltd v Secretary of State for the Environment (1983) 48 P & CR 255
Wyre Forest District Council v Secretary of State for the Environment [1990] 2 AC 357; [1990] 2 WLR 517; [1990] 1 All ER 780, HL(E)

APPEAL from the Court of Appeal

By a decision letter dated 6 November 2018 a planning inspector (Wendy McKay) appointed by the rst defendant, the Secretary of State for Housing, Communities and Local Government (since succeeded by the Secretary of State for Levelling Up, Housing and Communities), allowed an appeal by the second defendant developer, DB Symmetry Ltd, under section 195 of the Town and Country Planning Act 1990, against a refusal by the local planning authority, Swindon Borough Council, to grant a certi cate of lawfulness of proposed use or development in respect of the access roads

within a development at Symmetry Park, South Marston, Swindon being for private use with permission of the estate owners and management company only and herself issued a certi cate of lawfulness to that e › ect.

On 1

Reason: to ensure that the roads are laid out and constructed in a satisfactory manner.

14 Condition 38 is headed Foot/Cycleways and provides:

The proposed footways/footpaths shall be constructed in such a manner as to ensure that each unit, before it is occupied or brought into use, shall be served by a properly consolidated and surfaced footway/footpath to at least wearing course level between the development and highway.

Reason: to ensure that the development is served by an adequate means of access.

15 Several other conditions were imposed in the interests of safety. Those included condition 34, which required parking and turning areas to be constructed in accordance with Swindon BC s parking standards; condition 40, which related to a minimum footway width for a proposed bus shelter; condition 42, which laid down the minimum distance between entrance gates and the back edge of the highway; condition 43, concerning the gradient of private accesses from the highway within ten metres from junctions with the public highway ; condition 44, which prohibited bringing the development into use until required visibility splays for all private accesses were provided to the required standard; and condition 45, which required detailed junction analysis of junctions with the north-south access road.

16 The planning obligation under the section 106 agreement required the east-west spine road to be constructed to base course level to the site boundary in accordance with condition 39 of the planning permission within one year from the rst occupation of area A. It also required the north-south link to the wider NEV, that is the north-south access road south of the roundabout, to be constructed to base course level to the site boundary within one year of the rst occupation of area B, again in accordance with condition 39. The planning obligation stated that the nal alignment of those roads which were shown indicatively o[(is)(8es2(the)-391.6(tillutr)t)-9

of this appeal that the commercial reality was that, if condition 39 did not have the meaning for which Swindon BC contended, DBSL could seek a nancial contribution from the owners and developers of neighbouring development sites to the south of the A420 in return for a licence to use the main access roads within the site or their dedication as public highways. On 19 June 2017 DBSL applied under section 192 of the 1990 Act for a certi cate of lawfulness of proposed use or development (the certi cate) to the e›ect that the formation and use of private access roads in the site as private access roads was lawful. Swindon BC refused to grant the certi cate by a decision dated 21 August 2017.

19 DBSL appealed to the Secretary of State, whose planning inspector, having considered the parties written submissions, allowed the appeal. She stated in para 20 of her decision:

> In my view, condition 39 simply imposes a requirement concerning the manner of construction of the access roads and requires them to be capable of functioning as a highway along which tra–c could pass whether private or public. It does not require the constructed access roads to be made available for the use by the general public. I believe that a reasonable reader would adopt the appellant s understanding of the term highway as used in the context of the condition as a whole with the clear reference to the construction of the roads as opposed to their use or legal status. The distinct inclusion of the term public highway in the reason for imposing condition 39 reinforces my view on that point.

The inspector interpreted the section 106 agreement as requiring only the construction of the two roads to base course level and not that they be made available to public use. On the certi cate she gave as the reason for issuing the certi cate the following:

> The proposed use of the access roads within the development site for private use only would be in accordance with conditions 37 and 39 of [the] planning permission . . . and the terms of the section 106 legal agreement dated 2 June 2015. The private use of the access roads in connection with the development is therefore authorised by that planning permission and would be lawful.

(2) The statutory review

20 On 14 December 2018 Swindon BC applied to the High Court for statutory review of the inspector s decision under section 288 of the 1990 Act. In a judgment dated 1 July 2019 Andrews J quashed the inspector s decision. In summary, Andrews J analysed the dispute as a question of the construction of condition 39. Counsel for the Secretary of State and DBSL both referred her to Hall v Shoreham but did not argue that that decision rendered condition 39 unlawful if it were construed in the manner for which Swindon BC argued. Instead, counsel relied on that case and subsequent case law as an important aspect of the factual and legal context against which the planning permission fell to be construed.

21 Andrews J, after citing authorities on the interpretation of planning conditions, focused her attention on the meaning of the word highway . Noting that section 336 of the 1990 Act applied de nitions from the

Highways Act 1980, including bridleway , footpath and highway , except insofar as the context otherwise requires , she discussed the de nition of highway in the Highways Act 1980 but did not nd it

(*3*) The appellant s challenge

(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, . . . (c) any other material considerations.

Section 72 of the 1990 Act makes further provision for the imposition of planning conditions. It provides so far as relevant:

(1) Without prejudice to the generality of section 70(1), conditions may be imposed on the grant of planning permission under that section (a) for regulating the development or use of any land under the control of the applicant (whether or not it is land in respect of which the application was made) or requiring the carrying out of works on any such land, so

(7) The Acquisition of Land Act 1981 shall apply to the compulsory acquisition of land under this section.

Section 227:

(1) The council of any county, county borough, district or London borough may acquire by agreement any land which they require for any purpose for which a local authoritycqt(T-3635(bse)-396.7(authorsedr)-37192(to)-365

such part of the cost of the works as may be speci ed in or determined in accordance with the agreement.

35 By these means the highway authority, which may or may not be the same as the local planning authority, can arrange by agreement with the developer that a road be constructed at the developer s expense and then dedicated as a highway maintainable at public expense. If a highway is maintainable at public expense, it vests in the highway authority: section 263. This involves the vesting in the highway authority of those rights in the vertical plane of the highway which are necessary to enable them to perform their statutory functions including control, repair and maintenance: Southwark London Borough Council v Transport for London [2020] AC 914, paras 8 and 12 per Lord Briggs JSC. If the highway is not maintainable at public expense it remains vested in the owner of the soil but is subject to public rights of passage.

(5) Analysing the statutory provisions and case law in relation to planning conditions

36 The wording of sections 70 and 72 of the 1990 Act and their statutory predecessors does not expressly set clear limits on the scope of planning conditions. Section 70 speaks of the local planning authority imposing such conditions as they think t . Section 72 speaks of regulating the development or use of any land under the control of the applicant , but that section is expressly without prejudice to the generality of section 70(1). Nonetheless, those statutory provisions relating to planning conditions do not exist in a vacuum but fall to be interpreted in the

applied Lord Denning s dictum in

and summarised the principles laid down in that case. The first was that the conditions should not make a fundamental alteration in the general law relating to the rights of the person on whom they were imposed, unless the power to do so is expressed in the clearest possible terms. He held that the interference with Hall s rights of property such as their right to prevent other people from passing over their land did not breach this principle. The second principle, which was the principle affirmed in Pyx Granite, that the conditions imposed must fairly and reasonably relate to the permitted development, was not breached because the conditions were in connection with the permitted development. It was the third principle [that] the conditions imposed must not be so unreasonable that it can be said that Parliament clearly cannot have intended that they should be imposed (p 247) that he found to be breached. He expressed concern that a requirement in effect to dedicate the ancillary road to the public could result in Hall having no redress if the road became choked with traffic or required repair because of the weight of traffic. He also expressed concern that Hall would be at the mercy of the adjoining landowners once its temporary access was closed after the construction of the ancillary road and without remedy if access along the ancillary road were obstructed. The local planning authority could have reserved a strip of land for the ancillary road and at the appropriate time could acquire the land compulsorily under the Highways Act 1959, on payment of compensation. While Hall and the adjoining owners could relieve themselves of the burden of upkeep of the road by requiring the council to declare the highway maintainable at public expense, they would receive no compensation for having constructed the road at their own expense.

41 Bearing in mind that the council could acquire the land for the ancillary road by compulsory purchase on payment of compensation, Willmer LJ concluded that the impugned conditions were so unreasonable as to be ultra vires. In reaching that conclusion he referred to a judgment of the Judicial Committee of the Privy Council in Colonial Sugar Refining Co Ltd v Melbourne Harbour Trust Comrs [1927] AC 343, in which Lord Warrington

ancillary roads. Contrary to the views of the other Lord Justices, he considered the condition to be void for uncertainty. Turning to the Wednesbury challenge, he stated, correctly in my view, that the local authority s power to attach conditions to a planning permission is, on the face of it, unlimited but that a question of vires arose. Observing that compensation would be payable if the land were to be acquired compulsorily under the Highways Acts, he stated (p 256):

> It may be that it is within the power of the authority to require an applicant to grant his neighbour a right of way over his land as a condition of its development. It is not in my judgment within the authority s powers to oblige [the applicant] to dedicate part of his land as a highway open to the public at large without compensation, and this is the other possible interpretation of the condition. As was pointed out to us in argument, the Highways Acts provide the local authority with the means of acquiring lands for the purpose of highways, but that involves compensation of the person whose land is taken, and also the consent of the Minister.

43 Pearson LJ interpreted condition 3 as providing for the construction of an accommodation road and requiring Hall to give a right of passage over

46 This is how the decision in Hall v Shoreham has been understood in case law thereafter. In R v Hillingdon London Borough Council, Ex p Royco Homes Ltd [1974] QB 720, the Divisional Court held that planning conditions, which purported to require that houses in a residential development, for which planning permission was sought, were to be occupied by people on the council s housing waiting list and with security of

when the land had been designated in the development plan for such acquisition: the 1947 Act, section 38. Compulsory acquisition under the 1947 Act was therefore not an option. The provision of expanded powers of acquisition, which are now in section 226 of the 1990 Act, was not enacted until the Town and Country Planning Act 1968, section 28, but the introduction of those wider powers of acquisition in the planning legislation

Lord Scarman identi ed the third test as the application to planning law of the more general public law test of Wednesbury unreasonableness (p 619). Viscount Dilhorne (p 600) cited Hall v Shoreham as an example of the third test.

52 Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759 (Tesco Stores Ltd) concerned the question whether a planning obligation to build a link road o › ered by a developer was su – ciently related

developer of compensation to which he would otherwise have been entitled. A

Under the title of Improper Conditions , para 13 stated:

> It is a general principle that no payment of money or other consideration can be required when granting a statutory consent except where there is speci c authority. Conditions requiring, for example, the cession of land for road improvement or for open space should not therefore be attached to planning permissions . . . B

54 Government policy on the scope of planning conditions has remained substantially the same in relation to the payment of money and the dedication of roads as public highways. In the (1995) DOE Circular 11/95 it is stated: C

> Conditions Requiring a Consideration for the Grant of Permission
>
> 83. No payment of money or other consideration can be required when granting a permission or any other kind of consent required by a statute, except where there is speci c statutory authority. Conditions requiring, for instance, the cession of land for road improvements or for open space, or requiring the developer to contribute money towards the provision of public car parking facilities, should accordingly not be attached to planning permissions. However, conditions may in some cases reasonably be imposed to oblige developers to carry out works on land within the application site, to overcome planning objections to the development e g provision of an access road. Further advice on this and on agreements with developers to cover such matters is given in Planning Obligations (DOE Circular 16/91, WO 53/91.) . . . D E
>
> Annex B: Conditions which are unacceptable
>
> 4. To require that the land in front of the buildings shall be made available for future road widening. This condition improperly requires land to be made available as part of the highway (para 72).
>
> 5. To require that a lay-by shall be constructed and thereafter assigned to the highway authority (para 72) . . . F

Similarly, in the 2014 National Planning Practice Guidance it is stated:

> Are there circumstances where planning conditions should not be used? . . .
>
> Conditions requiring land to be given up:
>
> Conditions cannot require that land is formally given up (or ceded) to other parties, such as the Highway Authority . . . G

Those statements of government policy are not legally binding but they demonstrate an established understanding as to the scope of planning conditions which is relevant to the interpretation of condition 39, which is the second issue on this appeal.

(6) The use of planning obligations H

55 It is not disputed that in this case Swindon BC could have achieved the dedication of the access roads as highways by means of a planning obligation under section 106 of the 1990 Act, the relevant provisions of which I set out in para 29 above. I accept as correct the parties

understanding in that regard. It has for some time been a matter of government policy that developers, rather than the public sector, should meet the external costs of a development, including the provision of infrastructure, such as roads, drainage, schools and community facilities, to accommodate the development. At the same time, government policy and the law have rejected the buying and selling of planning permissions where a local planning authority makes exorbitant demands of a developer or a developer o › ers planning gain which is not su – ciently related to its proposal in the hope of obtaining planning permission.

56 The law contributes to the avoidance of this mischief by

planning permission. In Tesco Stores Ltd

members of the public. Such a requirement is di›erent in principle from the imposition by a planning condition of a requirement that the landowner cedes rights to the public such as by dedicating roads within a development site as public highways. Wright therefore gives no support for the view that a local planning authority may use a planning condition to require the dedication of a road as a public highway. The options available to the planning authority to achieve such a result are obtaining an agreement from the landowner to create a planning obligation or the acquisition of the relevant land by compulsory purchase or agreement.

62 Secondly, Parliament also has intervened by imposing limits on the use of planning obligations in regulation 122 of the 2010 Regulations, which I have quoted in para 32 above. A planning obligation may constitute a reason for granting planning permission for the development only if three cumulative criteria are met: the planning obligation must be (a) necessary to make the development acceptable in planning terms, (b) directly related to the development, and (c) fairly and reasonably related in scale and kind to the development. As I have said, it is not disputed in this case that a planning obligation to dedicate the access roads as public highways would be a valid planning obligation and I see no reason why such a planning obligation would not have been a material consideration in the grant of planning permission for the development.

63 It may appear to some that it does no credit to the law for it to invalidate a planning condition requiring the dedication of roads within a development site as public highways in order to facilitate the development of neighbouring sites while allowing a planning authority to request a developer to enter into an agreement to achieve that result by means of a planning obligation and to treat the existence or non-existence of such an obligation as a material consideration in the determination of the planning application. It may be thought that the developer is faced with Hobson s choice: to agree to enter the agreement creating the planning obligation or face a refusal of its planning application. There is, however, a fundamental conceptual di›erence between a unilaterally imposed planning condition and a planning obligation: the developer can be subjected to a planning obligation only by its voluntary act, normally by entering into an agreement with the planning authority, and not by the unilateral act of the planning authority. Further, there may be more scope for a developer to negotiate the terms of an agreement under section 106 of the 1990 Act as the planning authority will often have an interest in encouraging development within its area. The options for the planning authority, which wants to give permission to a proposed development, therefore are to negotiate an agreement with the landowner or to exercise powers of compulsory acquisition and pay comp6.7(mat0ntocsl1e73(an6W6i)-7.7(ng)-5017r)]TJ0-1.1267.7(t13.

Parliament (being sovereign) can legislate so as to do so; but it cannot be taken to have conferred such a right on others save by express words. The position is analogous to a case where, under discretionary powers of administration conferred by Parliament, an authority has sought to impose a nancial charge on an individual. It is established that general words do not authorise the imposition of such a charge since no tax can be imposed save by express parliamentary language: see Attorney-General v Wiltshire United Dairies Ltd (1921) 19 LGR 534; (1922) 127 LT 822.

65 I do not need to consider article 1 of Protocol No 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms to support the view to which I have come. In conclusion on the rst issue, therefore, I would hold that a planning condition which purports to require a landowner to dedicate roads on its development site as public highways would be unlawful. I reach this conclusion without regret as to hold otherwise would be to undermine a foundational rule of the planning system on which people have relied for decades and create uncertainty where there should be certainty.

(7) The interpretation of condition 39

66 In Trump International Golf Club Scotland Ltd v Scottish Ministers [2016] 1 WLR 85 and Lambeth London Borough Council v Secretary of State for Housing, Communities and Local Government [2019] 1 WLR 4317 this court has given guidance on the interpretation of planning conditions. In summary, there are no special rules for the interpretation of planning conditions. They are to be interpreted in a manner similar to the interpretation of other public documents. The court 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. This court has rejected assertions that there can never be a term impliedcol cae a planninacan

the hard surfaces of which are constructed to at least basecourse level prior to occupation and bringing into use.

Reason: to ensure that the development is served by an adequate means of access to the public highway in the interests of highway safety.

68 In my view the condition does not purport to require the dedication of the access roads as a public highway. Instead, it addresses the quality and timing of the construction of those roads and other access facilities. While the Court of Appeal in this case relied on the validation principle in support of that interpretation (viz para 23 above), I am persuaded that there is no need to rely on that principle as, in agreement with the inspector and Arnold LJ, I consider that the meaning of the condition is clear. I have reached this view for the following six reasons.

69 First, the condition makes no mention of any requirement to dedicate the access roads as public highways and does not otherwise require the landowner to grant any public rights of way over those roads. The phrases that the facilities serve a necessary highway purpose and that each unit is served by fully functional highway are insu–cient to support a construction of the condition as a dedication of the access roads and other facilities. Not only, as discussed in the courts belowc.3(asent)-6hes the cow-253.1(dy561.

means of a section 106 agreement would strongly suggest to the reader that Swindon BC did not seek to impose a requirement of the dedication of the access roads etc as public highways in this condition which, as I have said, makes no mention of such dedication.

75 Condition 39 is therefore a valid planning condition which does not purport to require the dedication of the access roads etc as a public highway.

(*8*) Conclusion

76 There is no doubt that in this case Swindon BC would have been wholly justi ed in terms of planning policy in requiring the owner of the site to dedicate the access roads within the site as a highway extending to the boundaries of the site to enable the public to have rights of access to and from the other proposed development sites in the NEV south of the A420. It could have done so by means of a section 106 agreement, but for reasons unknown it did not do so. Its attempt after the event to rely on condition 39 fails for