17 December 2019

Kenneth Butcher on behalf of Keep Bures Beautiful v Babergh DC – Permission Hearing Notes

Judge: David Elvin QC

Counsel for Claimant: Leon Glenister

Counsel for Defendant: Richard Ground QC

Housekeeping

Bundle of authorities includes:

- Whitebook extracts
- Article 31 DMPO
- Mansell
- Jones v Mordue

Lawson Builders case handed up.

[Discussion about order of C's submissions]

Claimant's submissions

LG: Dealing with whether restriction in s73(5)..

J: In this case how is there a valid permission?

… S73A permission issued more than 3 years after.

J: If can't issue permission after expiry of original permission and your implementation was not compliant with grant of planning permission then *Whitley* principle suggests not lawful implementation and permission falls.

RG: Can I address?

J: I was worried about whether the Council had the power to grant permission at all.

RG: CB/223 – original permission granted in 2015. It was begun within 3 years.

J: Yes but *Whitley* says commencement in breach of planning control is not lawful. Requirement to implement in accordance with certain plans. How is development not carried out in accordance with plans an implementation of the permission?

RG: Condition precedent complied with and then commenced... Planning inquiry said was lawfully commenced…

J: Question is whether I accept it.

RG: Not a condition precedent here…

J: What rang alarm bells if you look at OR CB/281 although development carried out and substantially complete, the reason for s73A was not in accordance with permission.

RG: That didn't materialise until after commencement then breach later doesn't mean not lawful commencements. Line of authorities to decide what is or is not a condition precedent – this is important.

Principle in *Lawson Builders*, even if it cannot be a s73 application, authority says on s73 application LA can consider granting a retrospective permission under s73A.

J: Take me to principles.

RG: Para 29, s73A creates a general power…. [quote] had been a breach of pre-condition, the critical bit is para 38 [read out]. The point was there that there had been a breach and development contrary to a condition precedent (which this is not) and even where breach of condition precedent can determine s73 app under s73A. Even if this case was… s73 was inappropriate, we can treat permissions granted as ones for retrospective planning permission. No breach of condition precedent so s73 combined with powers in s73A is sufficient in this case.

J: Does Mr Glenister agree?

LG: Differ on factual position of whether breach of condition precedent but not sure it matters. Difficulty in reading something into s73A. s73(5) prevents changes to conditions about when development started, but if s73A application is successful, planning permission is granted from date building works first occurred. Can't directly apply as it doesn't affect 3 year time period as backdates it.

J: I apologise for setting hairs running. Would you like to tell me your case.

LG: Substantive permission then procedural. Para 4 of skele sets out grounds of challenge:

- Ground 1 failure to consider cumulative impact (notwithstanding scope of *North Wilts*).
- Ground 2 (failure to consider previous refusal)
- Ground 3 (failure to apply s72 LBCA act).

Timeline?

J: Don't need it. What is happening with 5 and 6?

LG: Currently unauthorised and appeal of s73 refusal has been adjourned. Appeal ongoing.

J: S73 related to everything?

LG: Yes. Today just 1-4. Appeals against enforcement notice as well.

J: You're trying to establish fallback was only original permission?

LG: Yes and also consideration of whole application not piecemeal.

<u>Ground 1</u>

LG: The true impact in relation to surrounding area and heritage are from overall development. Can't shut your eyes to other plots and 5 and 6. If go to OR (CB/278 – OR for 1 and 2).

J: I checked whether material difference.

LG: Yes doesn't appear to be.

J: So we only need to look at one.

LG: CB/278 – heritage comments those relate to plots 1 and 2 as that is the application in consideration. That trend continues in CB/283, end of 2nd para [read out] – explicit reference only to plots 1 and 2. Para 3.3 "overall scale, form … of *the building…".*Only looking at plots 1 and 2. Cut and paste of what was said by officers. Simply because IP salami sliced application doesn't stop or

absolve the Council of having to consider the overall scheme/impact of all the plots. The Council has ignored the buildings for which planning permission had been applied for and given no real consideration to status of plots 5 and 6 which is plainly relevant.

J: There is a slight curiosity, CB/280 "*refused for reason plots 5 and 6 have unacceptable affect*". Then CB/262 13.3 – although that assessment, when you come to reasons for refusal only refers to plots 5 and 6. What should I make of that?

LG: Part of ground 2.

J: Potentially has implications for ground 1.

LG: 13.3 – this is not simply 5 and 6 as says other plots have material adverse impact.

J: Whilst in isolation might not be objectionable per se when taken together they do… it says the harm goes further than 5 and 6.

LG: It assists me in saying the cumulative harm, and change in position from previous OR compared to what is being said in s73 refusals.

ADJOURNMENT FOR LUNCH

Ground 2

LG: Starting point for ground 2 is *North Wilts*. Only point I would flag is OR is also basis for decision.

J: The principle is like cases should be decided alike and if not reasons should be given for doing so.

LG: Go to a few key passages, OR CB/255. Input from heritage team is "*scheme*", comments are generally in relation to scheme. Further clarification as to where….

J: Does say heritage team objects to height of plot 6.

LG: I say context of that must be taken into account in context of scheme as a whole. CB/255 para 4.1-4.3 are general in relation to the scheme and no particular reference to plots 5 and 6, it's a general concern. CB/257, para 5.10 "scheme thought to be over development of site". CB/259, halfway down para 5.17 [read out] that is all contributing to harm to conservation area. CB/262 which my Lord already raised. I say there is a finding in previous OR that the development as a whole and in particular plots 1-4 did contribute to harms identified. Council says plots 5 and 6 were basis for refusal of planning permission but I say contents of OR in context of decision which agreed with recommendation is still material. *Zurich Insurance*, Council taken to have accepted ….

J: Don't need to look at that as have Lindblom in *Mansell* case. … unless evidence to contrary usual position is members agreed with OR.

LG: … The OR still was a material consideration in the grant of the three applications and no accounting for that. You have already referenced plots 5 and 6 being sole basis for refusal.

Ground 3

LG: Simply follows on, the failure to take into account previous OR and look at scheme as a whole constituted failure to apply s72 and duty to pay special attention to conserving and enhancing conservation area.

Application

LG: Test is whether it is desirable (public and private law). In public law, I say JR claim where public wrong and KB was not claiming specific benefit for him but for the public, therefore claim should be allowed to continue. The Parish Council responded to every consultation, and taken..

J: Nothing radically new in the new grounds, you've whittled them down.

LG: Taking on board fact pleaded by a litigant in person, nothing new in them, they simply expand and it is helpful that many aren't pursued now. CB/4.

J: I read CB/4 as well as background at CB/7-9.

LG: Fifth ground on CB/10 again refers to statutory duty. To the extent it is relevant as well, there had been communication between Council and solicitors. KB put Council on notice and then communication between solicitors and Council but Council filed AoS…

J: Unfortunately the refusing Judge on papers didn't have the application before him.

LG: Aarhus point, KB ticked this was an Aarhus claim. PC witness statement sets out resources, surplus of about £3k and budgets have been set, PC only relying on fundraising. And so have asked for £5k cap to remain the same.

Defendant's Submissions

RG: Plan CB/292, Cuckoo Hill, 5 and 6 right by it.

J: I had noticed that but not making my own planning judgment.

RG: Ground 1…

J: You're essential point is each plot doesn't cause harm therefore no cumulative impact. How do you deal with 13.3?

RG: Correct way is to look at what is before them in 2019…

J: Applicant dividing up what was previously a single scheme into 3-4 chunks whilst still maintaining appeal for 5 and 6. Why isn't it relevant to have regard when development as a whole was advanced as a whole? Development was conceived of as a whole, assessed as a whole, appeal as a whole…

RG: Perfectly acceptable as factual background, 5 and 6 wasn't part of that application and so would be wholly wrong to say 5/6 might be harmful and so taken together is harm, would say wrong approach.

J: Mismatch between OR and reasons for refusal in s73.

RG: Ground 2 relevance… First point to notice, 2019 apps, CB/281 - officer was right to look back to 2018 and ask what is reason for refusal, may have been one stray comment, but looking at reason for refusal. *South Kesteven* case for application of *North Wilts* to local authority decisions, it is reasons for refusal that the judge goes to [Auth, Tab 7], Bartlett LJ, para 10, reasons for refusal were stated to be. 2019 decisions have all sorts of references to 2018. First place go is reasons for refusal.

J: Doesn't stop you looking at substance of decision as well as the reasons.

RG: CB/267

J: Don't think Mr Glenister takes issue with the reasons for refusal only relating to plots 5 and 6.

RG: Council finds current application unacceptable… absolutely clear reasons for refusal for Council are related to plots 5 and 6. Spelt out in CB/268 – clear in relation to conservation area it is 5 and 6 causing harm. Harm to setting of listed White Horse House, "*the unacceptable harm identified above is contrary to paras 192 and 196".*

CB/259, para 5.17 plot which has most significant views is plot 6. Consistent with reasons for refusal, thing that causes harm is 5 and 6 which is why drafts reasons for refusal. Then one stray sentence in conclusion but is read 13.3. What is material adverse is 5 and 6 plus the other things, not saying how much impact the other things are causing. Unattributable amount of harm is lumped in together with 5 and 6 which are really causing harm.

J: Well, the same changes together with other changes. It says what it says.

RG: 1-4 add, in context of reasons for refusal and knowing what we know about heritage team not attributing any harm of any nature if read together not suggesting Council should…

J: Should I have regard to para 13.5 "decision in the round"? [read out quote] "…*With that national guidance in mind it will be open to the applicant to seek to put forward a revised proposal or proposals which might allow for distinct consideration of the various elements on their own merits."*

RG: In terms of *North Wilts* point, if take to para 33 D skele, here it is distinguishable as 1 and 2 were not the same.

J: You're point is material differences, this proceeds on basis of the individual applications, in light of fact reasons for refusal was plots 5 and 6 that takes you back to earlier point at 13.5 wasn't acceptable to split at that point…

RG: Taking same view in relation to harm to conservation area… Not the case the second decision disagrees, it agrees as both 1 and 2 do not cause harm to conservation area. Officer at CB/281 seek to regularise some parts of development that do not form reasons for refusal. The two are completely..

J: Don't think Gd 3 is in itself self-standing. If LG gets home.

…

J: Complaint not about listed building. Ground 3 doesn't add to Grounds 1 an 2, reinforces them if good, if it doesn't it falls away.

J: How about application to substitute? Cutting down more sprawling grounds.

RG: If analyse, grounds are different from CB/7-10, don't really mention a failure to cite s72.

J: Cumulative point is there?

RG: Is it my lord? Not on CB/8-10 is it?

J: Certainly number of grounds not pursued now. Does say about harm to conservation area in CB/10 last para and also in para 9.

RG: Don't want to spend a lot of time on that.

J: Council was alerted in Oct? That's 4 Nov, CB/337.

RG: AoS went in after summary grounds, 8 Nov. No explanation why PC didn't challenge it and seek legal advice within time limited period, grounds of KB already determined by Knowles J. Not appropriate for PC to pursue new grounds. Don't stress too much on that.

J: You were going to assist me about Aarhus.

RG: Witness Statement of Jennifer Wright, not sure in the bundle. PC income made up of £24k precept. If PC wanted to pursue this litigation they could increase their precept rather than look to put all that burden on Babergh which is also a public body. Also raising money at para 4, therefore correct order should be £10k rather than £5k. Tax raising powers and not same burden as the District Council.

J: Financial year for the percept? April to April?

LG: Yes I am getting a nod.

Claimant's Reply

LG: Doesn't follow on arguability basis… have to look at real life development. I say you must look at 3 and 4 not just 5 and 6. If position taken 5 and 6 were problem, why not one application for 1-4, why was it split further?

J: Just speculation Mr Glenister.

LG: Yes but would have at least resulted in decision which would have considered those put forward. I say not a complete answer, your para you went to [13.5] certainly not on arguability level. In relation to Ground 2 and previous decision and OR, RG referred to para 13.3 "stray conclusion", I say that was the conclusion that other plots at least had an impact which should have been considered in these applications.

Those are my submissions.

On Aarhus, the assertion is the precept could be increased, I do not know the legality about how precept is come to but I say it is unrealistic and as April to April if permission is granted could be determined by April anyway.

J: Retention buffer is advised but not mandatory is it.

LG: Claimant's legal team also on a 50/50 CFA and so what asking for is no more than what legal team would take as a hit…

Judgment of David Elvin QC

This is a renewed application to bring permission for JR of a decision by Babergh DC to grant planning permission retrospectively under s73A in respect of 3 applications, one concerning plots 1 and 2 of The Slaughterhouse… and the other two pplications in respect individually of plots 3 and 4 at the same general address. Permission was refused on the papers by Knowles J on 19.11.19, when he ordered Kenneth Butcher should be included as a named claimant as Keep Bures Beautiful is an unincorporated association. An application has also been made by Bures St Mary Parish Council on the basis it has a direct interest in these proceedings as has made many representations…

The permissions under s73 under which the complaint is made, were granted by the Council on 29.8.19 and they followed a comprehensive refusal of not only plots [xx] but plots 1-6 inclusive. Essentially planning permission was originally granted for plots 1-6 on 13.2.15 – commenced within

3 years + carried out in accordance with plans in condition 2. Development was commenced, but various plots to greater and lesser extent have not been built in accordance. There are plans in Tab 4 of the bundle which cite the differences detailed, plots 5 and 6 are immediately adjacent to a listed building and all properties form part of the conservation area and there were concerns in that respect.

It is helpful if refer to terms of original s73 determination last year. In the Officer's Report, which is assumed to be adopted by Members as it was refused on the grounds recommended, reference is made to the advice of the heritage team. I would ask on the transcript there is set out completely paras 5.7-5.11 of the 2018 OR (CB/256-257), which deals with impact on the conservation area. It should be typed into the transcript if required, paras 5.16-5.18. Those paras refer to the development as a whole although plot 6 is singled out by the heritage team and Officer's Report as well as plot 5, see para 5.17. Having considered more of the details, the planning balance is set out in section 13 of the OR (typed in to transcript paras 13.3-13.6 in full). It would be seen from para 13.3 that it appears officers concluded that although the primary impact was from plots 5 and 6, nonetheless there is reference also to other changes in other plots albeit changes to a lesser degree,, which together give rise to an adverse material impact. The overall conclusion is a high level of less than substantial harm, however, although that paragraph appears to suggest contributions to material impact, it is noted at para 13.5 that there was no possibility of splitting away elements that were acceptable and unacceptable. But it did note further down para 13.5 that it would be open to the applicant to apply for individual applications... It is in that context that the officer recommended refusal, (I note recommendation for delegated authority) relating to the conservation area and the reasons for refusal related to the conservation area should be read into the transcript and fully included if transcript sought. It will be seen from these reasons that they focused on plots 5 and 6 and did not refer to plots 1-4. The focus is on plots 5 and 6. That refusal I am told is under appeal and the inquiry is listed for hearing in the first quarter of 2020.

Following that refusal, the applicant made 3 further applications, for 1 and 2, 3, and 4, all seeking retrospective planning permission under s73A. I only need to refer to the application on plots 1 and 2 as the parties did before me as they are more or less in identical format. The assessment of the applications in the later reports refer to the fact that the earlier application was refused by the Council for reasons that plots 5 and 6 have an unacceptable effect on the conservation area. The report then goes on to say following report of DC/18…. [read out quote].

The reason for refusal reference given was that of s73 app mentioned earlier. The next heading noted nature of application "*officers and members visited site on number of occasions…. appropriate to consider app under s73A….".* Members are then warned about need for consistency in decision making. The report then notes the principle of development was established by permission in 2015 and Members not asked to consider that permission… The report deals specifically with the implications and impacts of plot 1 to 2 only. Para 3.3 deals simply with this development application and "*the building*". More significantly under section 3.4 Heritage Assets, the report deals simply with development before Members of this application [quote read out] "*as described at 3.3. above ,part of dev… officers endorse this view*".

Permission was then granted and similar decisions reached for plots 3 and 4. Each plot were each considered on their own without reference to each other or each noted applications proceeding concurrently.

Mr Glenister appears on behalf of the Claimant, and makes 3 points in the amended grounds. His points are 1) the report failed to consider the impact of plots 1 to 4 "in the real world" by reference

to each other and the cumulative effect considering only each application site in isolation. Drew attention to fact the 2018 application was all 6 plots at same time and para 13.3 notes impact not just of 5 an 6 but also adverse effect by plots 1-4. Under Ground 2, Mr Glenister argues breach of principle of consistency and fair decision-making in *North Wilts* case as reports did not properly consider 2018 report and failed to give reasons why did not deal with cumulative effects in para 13.3 of earlier report, and related to that is Ground 3 and the failure to apply Planning (LBCA) Act (statutory duty to preserve and enhance the conservation area).

Mr Ground QC in response makes the simple submission that these issues simply don't arise as plots 5 and 6 which were contentious in 2018 and although some references in para 13.3 to other impacts, nonetheless the refusal in 2018 was on the basis of the adverse effect of plots 5 and 6 and para 13.5 made clear that certain elements might be acceptable but couldn't be split away in that application. Also draws attention to the fact in 2019 report there were discussions between officer and developer which led to regularisation and the current applications. In respect of the failure to consider consistency and reasoning, he simply says no inconsistency because read properly as a whole, the impact of plots 5 and 6 was the reason for refusal. It was sufficiently clear they were being brought forward individually. He says that s72 Planning (LBCA) Act simply doesn't arise in the context.

Whilst, I was initially troubled by the assessment in 2018 of para 13.3 which appeared to indicate material impacts arising, it is, applying the approach of the Court of Appeal required be taken in officer reports, that it is sufficiently clear reading the report as a whole although may have contributed in some degree, it was plots 5 and 6 which were considered to be unacceptable. That is the only conclusion which could be drawn. The reasons for refusal taken together with para 13.5. I refer to the judgment of Lindblom in *Mansell* in para 42 (OR not to be read too rigidly…). It seems to me that when read properly, the 2018 report on s73 app did not ultimately lead to the conclusion that the development should be refused because of plots 1-4, the reasons for refusal make sufficiently clear that the plots 1-4 impacts…. The cumulative impact point therefore falls away.

Firstly, the 2019 reports are drafted in the context of the application brought forward, made clear in the passages I quoted. Secondly, the heritage team said impacts were negligible and in that context there is nothing to accumulate since plots 1 and 2 and 3 and 4… Not inconsistent with 2018 decision. I do not think the reasons for refusal are themselves determinative of the issue of consistency but reading the report as a whole it does seem that is the correct conclusion. Therefore it means not an arguable Ground 1 as the issue of cumulative impact doesn't arise, similarly the issue of consistency doesn't arise. In any event these were retrospective proposals… The fact those matters remain in issue at appeal, doesn't affect that the applicant was entitled to bring forward other applications. I reject grounds 1 and 2 as unarguable and ground 3 falls as it is parasitic on grounds 1 and 2. I would have been minded to substitute the Parish Council if I had granted permission.

I refuse permission.

Costs submissions

RG: Grounds not covered in AoS and we needed to be here today.

J: £6.5k being claimed by D. I haven't added the Parish Council so the original cap stands doesn't it? Current schedule is £3,300. *Mount Cook* suggests entitled to costs of AoS.

RG: The rest is attributable to today.

J: I wouldn't have varied the cap in any event if I had substituted the Council. Mr Glenister is right that D entitled to costs of AoS but not costs of attendance.

RG: That is the general principle but where a party put in amended SFGs and put forward very different case… Here the ASFGs were very different and wouldn't have been helpful..

J: Did you put in revised summary grounds?

RG: No but put in skeleton argument. We didn't know whether ASFGs would be allowed.

J: No need to produce…

RG: I seek an order for it to be amended to £5k.

J: I'm inclined to think Mr Glenister's attendance rather cut time down spent today. Is this schedule additional to £3k?

RG: Yes, subsequent to that.

LG: Would you like submissions from me?

J: No.

J: Kenneth Butcher remains the claimant and as an individual litigant normally subject to cap of £5k. Mr Ground QC submits that he should have the full £5k as in addition to £3,300 AoS costs awarded, a further [xxxx?] has been incurred. Mr Ground QC refers to revised SFGs. Bearing *Mount Cook* in mind and doing matters in rough and ready fashion it seems I shouldn't vary the Knowles J order. It seems to me the reformulation of the grounds meant matters far quicker to deal with and taking that into account I should stick with normal *Mount Cook* presumption of AoS costs. Affirm £3,300 available.

RG: Just to clarify…

J: Permission refused, costs order of £3,300 affirmed.

RG: No substitution of party?

J: As application dismissed it doesn't arise…

END OF HEARING