Case Name: *Hillside Parks Ltd v Snowdonia National Park Authority* [2022] UKSC 30 (02 November 2022)

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Commentary: The Supreme Court has dismissed an appeal from the Appellant, Hillside Parks Ltd in a case concerning the relationship between successive grants of planning permission for development and the effect of implementing "overlapping" planning permissions on the same land.

The case relates to a site known as "Balkan Hill" and comprises around 29 acres of land near Aberdyfi in the Snowdonia National Park. A "Master Plan" full planning permission was granted in 1967 for the development of 401 dwellings on the site (initially in January 1967 and then a revised design in April 1967). The validity of the 1967 was previously subject of litigation which was decided in favour of the developer in 1987 – the judge at that time finding that the relevant pre-commencement conditions had been met and that the permission had been implemented (by virtue of the construction of buildings and roads). By 1987 there had already been substantial departures from the Master Plan with individual buildings being granted separate permissions which overlapped with the 1967 Master Plan permission, however at that time no arguments were made in respect of whether the 1967 Master Plan permission was still capable of implementation. Post-1987 further development was undertaken on the site with additional significant departures from the Master Plan, for example conflicting positioning, configuration and sizes of dwellings constructed and an estate road constructed over an area allocated for further dwellings under the Master Plan. While the departures from the Master Plan were clear, the departures did benefit from separately granted planning permissions, some but not all of which were expressly referred to as being "variations" to the 1967 Master Plan permission.

In May 2017 the Respondent and local planning authority (Snowdonia National Park Authority) wrote to the Appellant asserting that it was now impossible to implement the 1967 permission further and requiring the Appellant to cease all works on the site until the planning position had been regularised. Ultimately this resulted in this further litigation, with the High Court in the first instance dismissing the Appellant's claim, confirming that as a result of physical alterations to the land undertaken through subsequently granted planning permissions, it was now physically impossible to complete the development fully in accordance with the 1967 permission - and consequently any further development purported to be carried out pursuant to the 1967 Master Plan permission would be unlawful. The Appellant appealed to the Court of Appeal who dismissed the appeal on the basis that in light of factual developments since the 1987 litigation, it was no longer possible to implement the 1967 Master Plan permission.

Both the High Court and Court of Appeal applied the leading case in relation to

inconsistency between planning permissions, Pilkington v Secretary of State for the Environment [1973] 1 WLR 1527. In Pilkington it was found that as a consequence of implementation of a planning permission authorising the erection of a bungalow and particular part of a site, an earlier planning permission - which authorised the erection of another bungalow on a different part of the same site but importantly also including a smallholding on that part of the site occupied by the erected bungalow - was rendered unimplementable due to the fact that it would be physically impossible to implement the earlier planning permission in accordance with its terms (due to the presence of the bungalow on the land reserved for the smallholding under the earlier permission). The Appellant in the Supreme Court sought to distinguish the Pilkington case in three (alternative) ways –

1. Firstly, that the principle of abandonment was analogous to the circumstances of this case, and the 1967 planning permission could not be considered to have been abandoned in the circumstances of Hillside;
2. Secondly, that unless it is expressly stated otherwise, a planning permission, such as the 1967 Master Plan permission, for the construction of multiple buildings is properly interpreted as permitting the construction of any sub-set of these buildings, and there is no reason why the landowner cannot combine such development on parts of the site with development on other parts of the site authorised by other planning permissions; and
3. Thirdly, that even if the 1967 Master Plan permission is not severable in the manner set out under 2 above, that each additional permission since 1987 should be construed as a "variation" of the 1967 Master Plan permission in the same way the court found in the 1987 decision.

The Supreme Court rejected all three contentions.

In relation to the abandonment ground, the Supreme Court found that the Pilkington case cannot be explained the basis of a principle of abandonment, nor that there is any principle in planning law whereby a planning permission can be abandoned.

The Court went onto further endorse the principles of Pilkington noting that mere inconsistency between two permissions does not prevent the second permission from being implemented, and what must be shown is that development in fact carried out makes it impossible to implement the second permission in accordance with its terms.

The Appellant sought to rely on F Lucas & Sons Ltd v Dorking and Horley Rural DC (1964) 17 P & CR 116 which found that a multiple-unit housing scheme remained implementable notwithstanding subsequent permissions that had been granted and implemented for houses constructed in the same areas as dwellings authorised under the earlier permission, thus in theory rendering the earlier permission physically impossible to be fully implemented in accordance with its terms. The Supreme Court

found Lucas to have been wrongly decided concluding that a planning authority cannot be taken (absent some clear contrary indication) to have authorised the developer to combine building only part of the proposed development with building something different from and inconsistent with the approved scheme on another part of the site, and it was wrong to interpret a planning permission as severable in this way.

The Court did however confirm that it was wrong to interpret the case of Sage v Secretary of State for the Environment, Transport and the Regions [2003] UKHL 22 to conclude that partial works carried out in accordance with the terms of a planning permission but then ceased, with another planning permission being subsequently implemented on the remainder of the site, would render that built under the first permission unlawful because it was not carried out fully in accordance with its terms. The Court confirmed the approach set out in the Robert Hitchins case, namely that it could not be right that a developer building out 150 dwellings of a 200 dwelling development but then stopping would render those 150 dwellings built as unlawful. It did however note that in the absence of clear express provision making a planning permission severable, a planning permission is not to be construed as authorising further development if at any stage compliance with the permission becomes physically impossible.

Concluding in respect of the multi-unit development ground, the Supreme Court approved the Court of Appeal's judgment that where a planning permission is granted for the development of a site, such as a housing estate, comprising of multiple units, it is unlikely to be the correct interpretation of the permission that it is severable for the reasons set out above in respect of Lucas. It concluded that in this case the planning permissions implemented subsequent to the 1967 Master Plan permission constituted a material departure from that scheme and rendered the 1967 permission physically impossible to implement.

In relation to the final matter raised by the Appellant, which in summary claimed that because the subsequently granted permissions referred directly or by clear implication to the 1967 Master Plan permission they should be construed as implementable alongside the 1967 permission (or as "variations" as the Court termed them). Charles Banner KC for the Appellant noted the serious practical inconvenience if a developer, who when carrying out a large development, needs to depart from the approved scheme in one particular area of the site cannot obtain permission to do so without losing the benefit of the original permission and having to apply for a fresh planning permission for the remaining development on other parts of the site.

On this issue the Court held that this was a limitation of current planning legislation and if a developer requires to depart from a full planning permission in a material way it may apply for a further planning permission covering the whole site including the necessary modifications. The Court acknowledged that the requirements of any such

permission and any accompanying application documentation would depend upon the particular circumstances of the case.

The judgement has wide ranging implications. Town Legal has prepared an initial "house" view which provides further insight on the case - https://www.townlegal.com/wp-content/uploads/Hillside-%E2%80%93-Towns-house-view-Legal-update-from-Town-Legal-LLP.pdf

For further commentary on this case please also see Simon Rickett's blog post - https://simonicity.com/2022/11/02/running-down-that-hillside/

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