

Case Name: *Lisle-Mainwaring, R (On the Application Of) v Royal Borough of Kensington and Chelsea* [2024] EWHC 440 (Admin) (29 February 2024)

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Commentary: This was an unsuccessful judicial review of a local planning authority's decision to approve details under a planning condition by an application submitted before the expiry of a planning permission but determined after expiry of the permission.

Planning permission was granted for demolition and replacement of a residential dwelling, subject to a pre-commencement condition ("Condition 3") requiring the submission and approval of a construction traffic management plan ("CTMP"). An initial application was made to discharge Condition 3 and refused. A further application to discharge Condition 3 was made (and works intended to comprise a "material operation" undertaken) on 9 May 2022, the day before the planning permission was due to expire.

The second application was heard at the Council's planning applications committee in July 2022. The officer's report ("OR") stated the "*decisive issue*" was the acceptability of the CTMP and recommended approval. The OR advised that works had commenced on site without discharge of the pre-commencement condition but, as the information to discharge Condition 3 was submitted prior to expiry of the permission, members could still determine the application.

That was on the basis of an established exception to the *Whitley*¹ principle (that operations carried out in contravention of conditions cannot be taken as lawfully commencing development), namely "*that if a condition requires an approval before a given date, but the developer has applied before that date for approval, and that approval is subsequently given so that no enforcement action can be taken, work done before the deadline and in accordance with the scheme ultimately approved can amount to a start to development. It does not matter if the subsequent approval was given after the deadline*". It was relevant that the operations carried out used hand tools only and did not require large vehicles to access the site. The OR considered those works "*would not render the development unlawful*". Members subsequently approved the CTMP.

Grounds

The claimant argued (on the basis of obiter dicta in *Whitley*) that the defendant had discretion to decline to determine the application as the developer had 'lost their

¹ *FG Whitley & Sons Co Ltd v Secretary of State for Wales* [1992] 64 P & CR 296

chance' following expiry of the permission. The claimant's single ground of challenge was that the defendant failed to take into account a material consideration, namely its ability (acting reasonably) to decline to determine the application to discharge Condition 3.

The claimant also argued that the defendant fell into legal error as advice given by officers (both in the OR and orally at committee) materially misled members by stating the only matter before them – the "*decisive issue*" – was the CTMP, thereby failing to mention the option of declining to determine the application.

Judgment

Neil Cameron KC, sitting as a Deputy High Court Judge, first considered whether the ground of challenge was made out on the assumption the defendant did have discretion to decline to determine the application.

The Judge found that even if members had a discretion to decline to determine the application, on a fair reading of the OR as a whole and treating the officer's advice (both written and oral) with reasonable benevolence, the reference to the acceptability of the CTMP as being the decisive issue or only "*thing*" before the committee did not mislead members. The advice had to be considered in its context. Members were being reminded of the application before them and not to consider other issues, such as whether a material operation comprised in the development had been carried out before expiry of the planning permission.

Insofar as the discretionary power to decline to determine the application was a material consideration, the Judge found it was not an obviously material consideration. No party had asked the defendant to exercise such discretion and the defendant was not obliged to "*cast around and find an alternative to refusing or approving the application which had been made to them*". For those reasons, the claim was dismissed.

Although not strictly necessary to make out the ground of challenge, the Judge went on to consider the obiter dicta remarks in *Whitley* and the question of whether a local planning authority has a discretion to decline to determine an application to discharge a planning condition when such application is made before expiry of a permission but determined after expiry.

The Judge found that the remarks in *Whitley* did not establish any such discretion. The general principle that a local planning authority has a continuing duty to determine valid planning applications and reserved matters applications (including after the time period for determination has expired) applies similarly to applications for approvals under a planning condition. The Judge did not consider *“the fact that such an application is made before the time limit on a planning permission has expired, and is determined after it is expired, is a good reason to disapply that principle”*.

Case summary prepared by Anna Sidebottom