

Case Name: *Dennis, R (On the Application Of) v London Borough of Southwark* [2024] EWHC 57 (Admin) (17 January 2024)

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Commentary:

This was a successful claim by Aysen Dennis (“the Claimant”) against the decision by the London Borough of Southwark (“the Defendant”) to allow an application by Notting Hill Genesis (“the IP”) under s.96A of the Town and Country Planning Act, the effect of which was to insert the word “severable” into the description of development for an outline planning permission (“the s.96A Application”).

Background

The outline planning permission granted in 2015 (“the OPP”) was for a large scale mixed-use phased development at the Aylesbury Estate in Southwark, including dwellings, employment and retail space (“the Development”). In 2022, a new local plan was introduced with increased housing targets for the Development, which could not be achieved within the parameters set by the OPP. Therefore, the IP submitted an application for a new detailed planning permission (“the DPP”) for one of the phases of the Development (“Phase 2B”). This gave rise to an issue under the Pilkington principle, as applied in the Hillside case, namely if the DPP were to be implemented, the OPP could then no longer be built out due to physical incompatibility of Phase 2B. The Defendant and the IP agreed that, since the OPP was for a phased development, Phase 2B can be severed from the Development, allowing OPP and DPP to be built out together circumventing the Pilkington issue. In an attempt to “formalise” the severability of the OPP, the IP made the s.96A Application, which the Defendant approved.

Issue

The question for the Court was whether the introduction of the word “severable” into the description of the development of the OPP was a “material” amendment, such that the use of s.96A to effect the amendment was ultra vires. The Defendant and the IP argued that the OPP was always severable in principle since it was an outline permission for a phased development and the purpose of the S.96A Application was merely to formalise that severability, therefore, the amendment was “non-material”. All parties accepted that if, on a true construction, the OPP was in fact not severable prior to the S.96A Application, then the claim must succeed. Therefore, the key issue to be determined was whether the OPP was severable as granted.

Judgement

Mr Justice Holgate held that the OPP cannot be read as being severable prior to the S.96A Application because phasing of a development alone is not sufficient to amount to

a “clear contrary indication” (as noted in the case of Hillside) that a permission is severable. This is because to conclude so would mean that all planning permissions (outline or detailed) for phased development are severable, thus the Pilkington principle would never apply to such permissions. Although the Defendant and IP did not suggest that their submission was so far-reaching, Mr Justice Holgate held that this would be the natural corollary of their proposition if accepted. This conclusion would also give rise to unforeseen consequences such as uncertainty over statutory time limits for implementation if a phased permission was to be automatically deemed “severed” with separate freestanding permissions.

Further, Mr Justice Holgate noted that, although an outline permission does provide a “good deal of flexibility” such that details of a scheme can be determined at a later stage, it still sets the parameters and framework within which details can be approved. Such parameters and the framework are evident from the description of the development, the conditions imposed, and documents incorporated into the outline permission (e.g. design and access statements or planning statements). Therefore, the phased nature of a development alone will not be sufficient to conclude that a permission is severable and indeed, in this case, it was not. Mr Justice Holgate also doubted the legality of the introduction of the term “severable” on its own into the OPP, without clear limitations as to the manner of severability.

Thus, the Court held that the use of s.96A to introduce the word “severable” into the OPP was ultra vires since this would provide a new and much larger bundle of rights to the developer amounting to a “material” amendment.

For the above reasons, the claim succeeded.

Case summary prepared by Chatura Saravanan