What Do We See From Hillside?

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We now have the judgment of the Supreme Court in *Hillside Parks Limited v Snowdonia National Park Authority* (2 November 2022).

The case concerns the relationship between successive grants of planning permission for development on the same land and, in particular, about the effect of implementing one planning permission on another planning permission relating to the same site.

Full planning permission was granted for the development of 401 dwellings at Balkan Hill, near Aberdyfi in the Snowdonia National Park, granted in 1967. Development was to be in accordance with a detailed "master plan" showing the proposed location of each house and the layout of a road system for the estate.

Only 41 of the dwellings have been built to date, none in accordance with the masterplan. The developer has been granted a series of additional planning permissions permitting development which has taken place on parts of the site.

The Supreme Court has followed the Court of Appeal and High Court in concluding that development pursuant to the 1967 permission cannot lawfully be continued.

Whilst the specific facts of the case are unusual (including uncertainty as to the intended procedural status and effect of the subsequent planning permissions, several of which on their face are described as "variations" of the 1967 permission) the Supreme Court sets down some general principles in relation to overlapping permissions and clarifies some ambiguities arising from the earlier Court of Appeal judgment, although ambiguities remain, such as the extent of its application to outline permissions and the extent to which "drop-in" applications may still be appropriate.

The judgment sets out following principles:

The Pilkington principle

"… the principle illustrated by the Pilkington case [[1973] 1 WLR 1527, Divisional Court] is that a planning permission does not authorise development if and when, as a result of physical alteration of the land to which the permission relates, it becomes physically impossible to carry out the development for which the permission was granted (without a further grant of planning permission)." (paragraph 45)

Under the Pilkington principle, departures must be material

"The Pilkington principle should not be pressed too far. Rightly in our view, the Authority has not argued … that the continuing authority of a planning permission is dependent on exact compliance with the permission such that any departure from the permitted scheme, however minor, has the result that no further development is authorised unless and until exact compliance is achieved or the permission is varied. That would be an unduly rigid and unrealistic approach to adopt and, for that reason, would generally be an unreasonable construction to put on the document recording the grant of planning permission – all the more so where the permission is for a large multi-unit development. The ordinary presumption must be that a departure will have this effect only if it is material in the context of the scheme as a whole … What is or is not material is plainly a matter of fact and degree" (paragraph 69)

Interpretation of planning permissions for multi-unit developments

In the absence of clear express provision to the contrary, a planning permission for a multi-unit development is unlikely properly to be interpreted as severable into a set of discrete permissions to construct each individual element of the scheme.

I suspect that the "severable" nature of many large multi-phased planning permissions is already clear on their face and this will be a useful discipline for the future.

The whole development is not unlawful if a proposed development cannot be completed fully in accordance with the planning permission

The Supreme Court doubted that "in carrying out a building operation, any deviation from the planning permission automatically renders everything built unlawful, even in relation to a single building" and considered that it was certainly not the case that failure to complete a building operation for which planning permission has been granted renders the whole operation including any development carried out unlawful, disagreeing with Lord Hobhouse's remarks in *Sage v Secretary of State for the Environment, Transport and the Regions* [2003] UKHL 22).

No principle of abandonment of planning permissions

The Supreme Court states that there is no principle in planning law whereby a planning permission can be abandoned.

How to vary a planning permission

Aside from utilising section 73, section 96A or in due course the additional procedure proposed in the Levelling-up and Regeneration Bill, what else can a developer do where it wishes to depart from a planning permission?

The Court suggests that "there is no reason why an approved development scheme cannot be modified by an appropriately framed additional planning permission which covers the whole site and includes the necessary modifications. The position then would be that the developer has two permissions in relation to the whole site, with different terms, and is entitled to proceed under the second." (paragraph 74).

This suggestion (potentially cumbersome in relation to large development sites) surely relates to situations where the Pilkington principle would otherwise bite i.e. where, although development will be unchanged pursuant to part of the permission:

(1) that part can't be shown to be clearly severable from the remainder (or presumably amended via sections 96A or 73 to be clearly severable); and

(2) it would now be physically impossible to complete development pursuant to the planning permission in accordance with its terms (its original terms or presumably as amended via sections 96A or 73) if a separate permission were to be implemented in relation to part of the development area covered by the permission.

In my view, "drop-in" applications, carefully framed, will otherwise still be appropriate.

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