***'OVERCOMING IMPEDIMENTS'* - SIMON PICKLES**

1. The advantage of the title (not my own) to this brief paper is that it provides such a broad, blank canvas. I have chosen to address under it two 'current' topics of general application or significance. Those topics are:

    - The variation or amendment of planning permission; and
    - The discharge of planning conditions.

    The discussion that follows has provided recent support for 'stock in trade' Opinions on applications for variation or amendment and certificates of lawfulness.

The variation or amendment of planning permission

2. Section 96A was introduced into the TCPA 1990 to provide a mechanism for making non-material amendments to planning permissions.

3. The regime for *'minor material amendments'* – an altogether more potentially contentious area - was introduced alongside section 96A as, in effect, a half-way house between this new mechanism and the provisions for variation of conditions under TCPA section 73 of the Act. 'Greater Flexibility for Planning Permissions' (DCLG, November 2009) ('the DCLG guidance') provides guidance on this 'twilight' procedure.

The DCLG guidance

4. The gist of the minor material amendments regime is to facilitate the approval of amendments which, whilst material, do not constitute a substantially different development proposal from that already permitted. This summary of the purpose of the regime is sufficient to indicate that it bristles with problems of definition and application.

5. The DCLG guidance has this to say about the definition of *'minor material amendments'*:

    > *'We agree with the definition proposed by WYG: "A minor material amendment is one whose scale and nature results in a development which is not substantially different from the one which has been approved". This is not a statutory definition'* (emphasis added)

    This is clearly a high-level, generalised definition intended to operate across the entire spectrum of planning permissions and developments.

6. Whether proposed changes – assuming more than one - constitute, in any particular instance, *'minor material amendments'* or require a further planning permission should, as I see it, be decided by viewing the proposed changes holistically or as a whole, rather than individually or isolation from each other.

The WYG report

7. Further light is shed on the correct approach to the interpretation and application of DCLG's definition by the report of WYG relied upon ('Minor Material Changes to Planning Permissions: Options Study – WYG Report' (July 2009)). DCLG commissioned the WYG report to take forward the recommendations of the Killian Pretty Review final report (November 2008) relating, inter alia, to streamlining the planning process in respect of amendments which the Killian Pretty report had itself described as 'minor material amendments'. DCLG agreed WYG's recommended definition without express endorsement of the reasoning for it; but it did not, on the other hand, cast doubt on WYG's reasoning.

8. The WYG report advised DCLG as follows:

> *'4.2 … we have referred back to the criteria [relating to what is likely to be acceptable as a minor material change] suggested by Killian Pretty:*
>
> - *the degree or extent of the proposed alteration (absolute)*
> - *the scale of the change (relative)*
> - *the effect or impact of the change*
> - *conformity with planning policies*
>
> *In our view the first two bullet points encapsulate the criteria which should be used to determine whether an amendment constitutes a minor material change or not; the third and fourth criteria in our view are more applicable to the later stages of determining whether a minor material change, once validated, should be approved or not. Therefore guidance based around the first two criteria would be appropriate. The first bullet point addresses the issues of the absolute change i.e. the change between the original permission and the minor material change. The second bullet point deals with the relative change i.e. the scale of the change between the original permission and the minor material change. Therefore whilst a change may be across the whole site in terms of absolute change, the scale could be such that the relative change would only be the removal of chimneys from all plots. However, there needs to be an indication of the degree to which a scheme may be altered, beyond which it represents a significant change which merits a new planning application. To set such a limit we have referred back to case law: thus the limitation could be "a difference in substance", a "fundamental alteration" to the application. The essence of a minor material change is that it should be for substantially the same development, in terms of floorspace, size, design and range of uses, whilst affording applicants the ability to make appropriate moderate changes e.g.*

changes in house types/layouts, or the configuration of commercial developments.

Thus the definition we propose is: "A minor material change is one whose scale and nature results in a development which is not substantially different from that which has been approved." Inevitably there will be differences in interpretation by different LPAs, but we believe that this definition gives LPAs and developers the clearest guidance that they have flexibility to amend schemes, but not to substantially change them or scale them up into something which was never envisaged.' (underlining added)

Commentary

9. This passage from the WYG report is helpful in three respects:

- it reflects an essentially two-dimensional appraisal insofar as the consideration of the 'scale' and 'nature' of change are concerned (helpfully for lawyers);

- it reinforces the point that a conclusion that a proposed material change does not cease to be minor unless the proposed development is no longer substantially the same as that permitted (a quite demanding threshold of significance); and

- it confirms the immateriality of the effect or impact of the changes or their planning policy implications (was this ever in doubt?) .

Assuming, therefore a holistic approach to multiple changes reference to the WYG report provides the basis for a more systematic and persuasive submission that material changes remain minor or systematic and justified conclusion that they do not.

<u>The discharge of planning conditions</u>

10. I draw attention under this topic to the recent decision of the Court of Appeal in *Greyfort Properties Ltd v. Secretary of State for Communities and Local Government* [2001] EWCA Civ 908 (Stephen Richards LJ, with whom Maurice Kay LJ and Leveson LJ agreed) (on appeal from Mitting J [2010] EWHC 3455 (Admin)).

11. The central significance of *Greyfort* is that it provided the Court of Appeal with its first opportunity to consider the observations of Sullivan J (as then) in *R (Hart Aggregates Ltd) v Hartlepool Borough Council* [2005] on the *Whiteley* principle (bearing in mind also that those observations were *obiter*, in light of his conclusion that there had been no breach of condition in that case). Mitting J had described the relevant law as '*still in a state of flux'* and Sullivan LJ himself endorsed that view in granting permission to

appeal. He said that the question whether *Hart Aggregates* was correctly decided and/or correctly applied by the judge was of some wider importance. Before the CA, however, it was common ground between highly experienced planning counsel that *Hart Aggregates* was correctly decided and the argument proceeded within the framework established by the observations of Sullivan LJ.

12. The facts in *Greycourt* were more 'mainstream' than those in *Hart Aggregates* – the CA referred to the facts in these cases as representing 'opposite ends of the spectrum'. The detailed planning permission, whose lawful implementation was in issue, was for the erection of 19 flats subject to four conditions:

> *'(1) That the development hereby permitted shall be begun not later than the expiration of the period of five years commencing on 25 March 1974.*
> *(2) Trees and shrubs shall be planted in accordance with the scheme to be submitted to and approved by the Local Planning Authority before any part of the development is commenced ….*
> *(3) Before any work is commenced on the flats hereby permitted the access including visibility displays shall be formed and laid out to the satisfaction of the Local Planning Authority.*
> *(4) Before any work is commenced on the site the ground floor levels of the building hereby permitted shall be agreed with the Local Planning Authority in writing.'*

13. There was no dispute as to the inspector's finding, in favour of *Greyfort*, that access work carried out in January 1978 was sufficient to amount to a commencement of development and the live issue was whether there was compliance with the pre-conditions of the permission, and condition 4 in particular.

14. The CA filled in the case-law background by reference to (i) *Whitley & Sons v. Secretary of State for Wales* (1992) 64 P&CR 296, (ii) *Leisure GB plc v. Isle of Wight Council* (1999) 80 P&CR 370 (referring also to *Agecrest* [1998] JPL 325 and *Flints CC* [1998] P&CR 336), (iii) *R (Hammerton) London Underground Ltd* [2002] EWHC 2307 (Admin) (and *R Prokopp) London Underground Ltd* [2003] EWCA Civ 961) and – at greater length – (iv) *Hart Aggregates* itself. It then set out the key passages from the Inspector's decision letter.

Ground 1

15. *Greycourt* pursued two grounds of appeal. The first was, in substance, a point of construction having regard to what Sullivan J had had to say about requirement that conditions precedent should be imposed in express and clear terms. Greycourt submitted that *'work'* was apt to refer to work on the building but did not equate with *'development'* (cf conditions 1 & 2) and therefore cover the access works relied upon as evidence of implementation; and it submitted that condition was not, in that light, a clear and express prohibition on development. The CA upheld the Inspector's conclusions. The relevant question was whether the prohibition in condition 4 applied

to the access works; and it plainly did. *'The site'* had a broad meaning and included the access road (through the parties had agreed otherwise) - and the width of condition 4 was confirmed by comparison with condition 3:

> *'In substance, therefore, the prohibition in condition 4 on the commencement of "any work … on the site" was at the very least equivalent to a prohibition on the commencement of "development". The inspector commented (again at [93] of the decision letter) that "any work … on the site" in condition 4 was arguably more extensive in its reach than the expression "any part of the development" in condition 2; but it is unnecessary to go that far.'*

16. Greycourt's second submission was (more boldly) that only conditions in the form *'no development shall take place …'* are sufficiently express to constitute a condition precedent for this purpose. The CA rejected this also, agreeing with Mitting J that: (i) condition 4 was in substance exactly that which Sullivan J gave in *Hart Aggregates* as an example of an express prohibition; and (ii) that there is in any event no material difference between the effect of a condition which expressly prohibits development before a particular matter is approved and one which requires a particular matter to be approved before development commences.

Ground 2

17. The second ground went to the Inspector's view that condition 4 was a condition precedent going to the heart of the permission. Greycourt sought to draw a distinction between cases where there is only outline permission (all matters reserved) and others where the failure is limited to failure to obtain approval for one particular aspect of the development. It was submitted that the Inspector had failed to engage with the approved plans, which indicated that these was, in fact, very limited room for manoeuvre remaining in respect of ground levels. It was also submitted that it was perverse to conclude that condition 4 went to the heart of the permission in light of the fact that the non-compliance related to a matter, ie the building of the facts, that was to occur later in time than provision of the access works relied upon. The CA rejected these submissions.

18. The approved drawings did not, on the facts, define ground floor levels with sufficient certainty to make good Greycourt's case. Of more general relevance:

> *'… the local planning authority had possession of the plans (and approved them by the grant of the planning permission), yet must be taken to have regarded the setting and agreement of ground floor levels as a matter of considerable importance. The very fact that condition 4 was included at all in this short planning permission indicates the importance attached to it. … Everything points to condition 4 as having been included, with good reason, as more than a mere formality or simply as a way of ensuring that the building was built in accordance with the plans already approved.'*

19. The local planning authority was reasonably entitled to treat the ground floor levels of the building as a matter of sufficient importance to justify the inclusion of a condition prohibiting the commencement of *any* work on the site, including access work, before the levels were agreed. By condition 4 it chose wording plainly intended to achieve that result and there existed no good reason for declining to respect its judgment on that point.

Commentary

20. Although none of the Appellant's arguments *'came near'* to persuading the CA that the Inspector had fallen into error (their force was compromised by the fact that several of them had not been raised below), *Greycourt* is helpful, first, in providing authoritative confirmation of the *obiter* analysis in *Hart Aggregates* of the basis of the *Whitley* principle and how it is to be applied – notwithstanding that there was no 'higher order' dispute of legal principle before the CA.

21. It assists also to confirm that it will not assist, when construing conditions and deciding whether pre-conditions are conditions precedent, to adopt an unduly formulaic approach. What matters, first and foremost, are the words used and their natural and ordinary meaning. I say first and foremost, not exclusively, because the CA did support its conclusions on the wording and status of condition 4 by reference to the Inspector's findings as to its purpose.

22. It is, finally, very doubtful that it will assist the applicant for a certificate to question the necessity for the condition because the fact of its imposition is likely to prove to be the overriding point so far as this is concerned.

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27 October 2011

Landmark Chambers