PUBLIC LAW CHALLENGES TO PLANNING OBLIGATIONS

Guy Williams

Introduction

1. This seminar is deliberately limited in its scope to focus on the availability and scope of public law challenges to the enforcement of planning obligations after they have been entered. This issue has been brought into focus by two recent attempts by developers to challenge by judicial review a decision of a local planning authority to enforce/refuse to discharge a planning obligation.

2. Those decisions were **R (on the application of Renaissance Habitat Limited v West Berkshire DC**[1] and **R (on the application of Millgate Development Ltd) v Wokingham BC**[2] .

3. This seminar does not address challenges to the grant of planning permission where reliance has been placed on planning obligations in deciding to grant the permission and the provisions of the CIL Regulations or the decision of the Supreme Court in Sainsbury's Supermarkets Ltd v Wolverhampton CC.

Formal requirements

4. Thomas Jefferies addresses the particular means of enforcement of obligations in his related seminar. For the purposes of this seminar, it is important only that the relevant statutory formalities have been complied with so that the obligation is enforceable under the statute.

5. These formalities require:

[1] [2011] EWHC 242 (Admin)
[2] [2011] EWCA Civ 1062.

(a) entered into by person interested in the land;

(b) must be executed as a deed,

which must:

(i) state it is a s106 planning obligation (or a development consent obligation);

(ii) identify the land which the person entering the obligation is interested;

(iii) identify the person entering into the obligation and states what his interest is;

(iv) identify the LPA by whom it is enforceable.

6. If the formalities are not complied with then the purported obligation will not be a planning obligation under the terms of the statute and so the special provisions relating to planning obligations will not apply.

7. The remainder of this paper proceeds on the assumption that there is an enforceable planning obligation in place.

Public Law Challenges to Planning Obligations

8. It is typical now for planning obligations to be conditional on certain events, most usually the commencement of development of the scheme in relation to which the planning obligation is offered. Of course, when a particular obligation has to be met will turn on the particular provisions of the planning obligation, for example on occupation of the 'x'th dwelling.

9. Given that the obligation will have been entered into before or at the time of the grant of planning permission and the trigger will be some subsequent event, perhaps a substantial time later, it is likely that circumstances will have changed. It is also likely that if a new planning obligation were being entered

into at that later date different contributions may be required or not required, as the case may be.

10. When I refer to required contributions having changed I refer to changes in the factual matrix, for example, whether proposed infrastructure projects previously envisaged have been completed/abandoned/modified/re-costed, as well as changes to they way contributions are calculated, particularly through supplementary planning documents, which change on a regular basis. I do not see force in the argument I have seen raised, for example in **Millgate**, that by a later stage the occupiers of the development were known and this could be reflected in assessment of the impacts, for example because they did not have children of primary school age.

Ability to apply for discharge

11. There is no statutory right to apply for a discharge or modification of an extant planning obligation for five years from the date of the obligation (Charlie Banner addresses section 106A of the 1990 Act in his related seminar).

12. There is accordingly an unfortunate middle period when a developer may be waiting for the optimal time to implement a planning permission while realising that such a permission may in fact have been obtained more cheaply. Does the public law offer any remedy?

Principles

1 – Fundamental Principles

(1) The validity of a planning obligation requires only that the formalities are met, that it is for a planning purpose and it is not *Wednesbury* unreasonable (**Good v Epping Forest DC** [1994] 1 WLR 376).

(2) The enforceability of the undertaking turns solely on the terms of the obligation itself, and not on the degree of nexus with the development permitted (**Tesco Stores Limited v SSE)** [1995] 1 WLR 759, at 779 per Lord Hoffman.

Practicality:

(a) Vast majority of cases will sail through these requirements and will be enforceable;

(b) Although for many principle two is considered trite law, this principle is extremely important in ruling out a great many potential challenges. Both **Renaissance** and **Millgate** are in effect an application of this principle;

(c) Once the Court finds that the s106 was enforceable and validly entered, any challenge to its enforcement on public law grounds will be severely limited.

(d) The instinct of the Court is that the particular contributions payable, and the terms and conditions on which they are paid, are matters between the parties, with recourse to private law defences as appropriate.

2 – The decision under challenge

13. In order for any public law challenge to be raised there must be a justiciable decision. It is recognised that in deciding whether to accede to a request to modify or discharge an obligation, the planning authority is exercising public functions within its discretion (**The Queen on the Application of Batchelor Enterprises Limited v North Devon DC** [2003] EWHC 3006 Admin). Similarly, that a decision to take enforcement action may give rise to a public law challenge (**Renaissance)**. It should also be noted that in enforcing a unilateral obligation there is no question of a private contract being enforced: the authority may only enforce through section 106 in exercise of its planning functions.

Per Sullivan J. in **Batchelor**:

"*It is clear from the terms of section 106A(1)(a) that the local planning authority has a discretion to consider a request or an application that it should agree to a modification of an obligation notwithstanding that the five-year period has not elapsed. It is common ground that there is a distinction to be drawn between an application made within the five year period under sub-section 106A(1)(a) and an application made after the expiration of the five-year period under section 106A(3). In the latter case the local planning authority is bound to determine the application within a prescribed time, and if it fails to do so or if it refuses the application, an appeal may be made on the merits to the Secretary of State who may substitute his view for that of the local planning authority. In the former case, the local planning authority has a discretion."*

14. That said, it may well be possible for a developer to engineer a decision that may then be reviewed. Where a developer has concerns about an obligation it has entered the following sequence of options seem to me to arise:

(a) check all formalities;

(b) check whether obligation has taken effect, e.g. if permission implemented;

(c) if not, make new planning application for permission subject to lesser obligations;

(d) if in force, prepare explanation of criticisms of existing obligation, which should be substantiated, prepare full draft s106 obligation reflecting criticisms, and submit to authority with request for reasoned decision as to whether they are prepared in discretion to accept revised s106.

(e) Review response against traditional public law grounds of challenge.

(f) From authority's perspective such applications should be treated with caution, mindful that the more detailed response given the more detailed scrutiny. The particular response will be significantly influenced by the drafting of the enforceable obligation.

3 Scope of the Challenge

Principle 3

(3) Where the Council is exercising its discretion in advance of the expiration of the five year period the question for the authority is whether the obligation served a useful [planning] purpose. The question for the court is whether the council's answer to that question was a rational one (**The Queen on the Application of Batchelor Enterprises Limited v North Devon DC** [2003] EWHC 3006 Admin)

> *"29. It is accepted that the question to be considered by the local planning authority in each case is the same: Does the obligation still serve a useful planning purpose? Since the court in judicial review proceedings may not substitute its own answer to that question for that of the local planning authority, the question in relation to an application for judicial review in respect of a local authority's decision under section 106(A)(1)(a) is whether a reasonable local planning authority could have concluded that the obligation still served a useful planning purpose."*

Practicality

(a) A *Wednesbury* challenge to a decision of whether a planning obligation still serves a useful planning purpose is a difficult one. The obligation was no doubt entered into for a planning purpose, e.g. improving a highway, or providing affordable housing. If the obligation is the payment of money then hard to see how money paid to a planning department will not serve a planning purpose.

(b) That said, **Batchelor** itself was a case where the decision not to discharge was seen as *Wednesbury* unreasonable.

The Facts

i. On a related planning permission, a s106 safeguarded some land as open space;

ii. Due to a misunderstanding as to the extent of highway land available, the development could not be built out as envisaged. The developer made a new planning application which involved building over part of the safeguarded Open space;

iii. On appeal against the planning refusal a main issue was whether building on the Open space would cause any harm to character of the area. Inspector, and the Secretary of State, concluded firmly that it would not.

iv. The developer then applied (within 5 yrs) to discharge the s106 to the extent necessary to allow its new planning permission to be built out. The Council refused to do so, claiming that the Open Space served a useful purpose because it made a significant contribution to the character and appearance of the area.

v. Sullivan J held that this conclusion was irrational. It was the same question as had been squarely addressed by the Inspector and SoS and it was unreasonable of the Council simply to stick with its original view.

(c) Further, it seems to me that there is no reason not to apply the Tesco principle at this stage – so that the useful planning purpose should not be defined by reference to the nexus between the obligation and the development in relation to which it was originally entered. This issue has not been directly decided but there are a number of refinements to the basic Tesco principle that can be drawn out.

Principle 4

(4) It is not a precondition for the validity of a planning obligation that it should relate to any proposed development (**J A Pye (Oxford) Ltd v South Gloucestershire DC** [2001] 2 PLR 66.)

In the case C sought a declaration that the planning agreement was of no effect. The Council counterclaimed for payment of the money due. The Court only expressly considered the validity of the agreement, and it appears to have followed automatically that the sum could therefore be enforced.

Query: if the validity is not infected by the proposed development, then in assessing its continuing utility should be judged in same way?

15. There would be some support for this from **R (the Garden and Leisure Group) v North Somerset Council** [2003] EWHC 1605, where the Court considered the equivalent test for a modification in s106A(6)(c). Four essential questions fell to be considered (paragraph 28):

    (a) What is the current obligation?
    (b) What purpose does it fulfil?
    (c) Is it a useful purpose?
    (d) And if so would the obligation serve the purpose equally well if had effect subject to the modifications.

16. Richards J. commented as follows on the first and second questions, paragraph 46:

    "*Strictly, as it seems to me, section 106A(6) does not require that the obligation continues to serve is <u>original purpose</u>. What matters is whether the obligation continues to serve a <u>useful purpose</u>".*

Principle 5

(5) Applying **Pye**, there is no scope for construing a planning obligation so as to require the contribution to be connected to any particular effect of the related development: **R (on the application of Renaissance Habitat Limited v West Berkshire DC** [2011] EWHC 242 (Admin).

Facts

(a) Planning permission was granted for residential development and a section 106 agreement entered into to mitigate impacts;

(b) The contributions were calculated by reference to a Supplementary Planning Guidance document.

(c) Subsequently, there were changes to the Supplementary Planning Guidance so that the sums changed (overall amounting to a reduction).

(d) The Council sought to enforce the section 106 agreement to recover the sums originally offered. The Claimant argued the Council could not lawfully demand the full amount (paragraph 20).

(e) The Council had not offered to return the surplus, but to spend it on certain projects in its area.

(f) The Council commenced proceedings for the sums owed under the obligation. The Claimant challenged by judicial review the decision to bring the proceedings and so enforce the planning obligation.

Judgment

1. Council simply seeking to enforce an agreement that was lawful when entered. C had not contested merits at application stage, or prior to decision to enforce. The parties could have stipulated for the changes which occurred. “It would be very strange if enforcing the agreement were unlawful in those circumstances”.

2. Lawfulness of enforcement does not depend on the lawfulness of the calculations or methodology – the agreement simply contains the sum. The sums are lawfully demanded because C agreed to pay them.
3. The fact that SPG changed due to erroneous calculations does not mean that the contributions agreed as a result were unlawful.
4. If the 106 properly construed requires (educational) contributions to be paid in changed circumstances where the impact no longer exists the developer is simply being held to his agreement.
5. The facts are just because the developer could now win an appeal against planning refusal does not mean it would even now be unlawful to enter and enforce exactly the same agreement: "*The SPG changes and the changes in circumstance simply do not and would not make that agreement unlawful under s106, or its enforcement*".

Turning to the argument that the enforcement is unlawful because the 'surplus' is going to other purposes:

(1) the useful planning purpose does not have to be related to the development in connection with which the s106 agreement was entered into (**Pye).** As a result, no such connection with the development should be implied into the useful purpose test in considering discharge or modification:
"*There is nothing in the Act which requires variation or discharge for want of useful planning purpose to be judged by reference to the development to which the agreement was related. There is nothing unlawful about enforcing an agreement in circumstances which would not warrant its variation or discharge*". (32)

(2) There is no reason why the useful planning purpose still being served should not be a different one from that which led to the agreement in the first place (33). There is nothing to stop the parties agreeing to provisions which cover changes in circumstances if they wish.

(3) Since there is no requirement that the useful planning purpose relate to the development itself, there can be no requirement either that it relate to an impact of the development at all, or to the same impact for which it was originally sought.

(4) In fact, there was a direct connection to the development in that the occupiers of the development would benefit from the monies being spent in their area.

Principle 6

(6) There is no obligation on the Council to re-visit the planning merits or the policy tests of 05/05 or the development plan in deciding whether to enforce/discharge (and presumably modify?) a planning obligation, and an inspector's views on those tests will not be determinative, subject to rationality challenge (**R (on the application of Millgate Development Ltd) v Wokingham BC** [2011] EWCA Civ 1062).

Facts:

(a) Council refused C's planning application on design grounds with a holding reason for lack of s106 for infrastructure contributions;

(b) C appealed. C submitted planning obligations which met all the contributions sought. The Inspector granted planning permission, and in doing so commented that the Council had produced no evidence to show that the contributions are necessary: "*I therefore conclude that contributions to the provision of infrastructure are unnecessary and afford the unilateral undertaking little weight"*.

(c) C subsequently asked the Council to discharge the Undertakings as a result. Council refused. It conducted an internal consultation exercise as to whether the contributions remained necessary and all departments confirmed they did. However, due to changes in

circumstances and SPG the Council was prepared to accept a reduced sum (approx £140,000 not approx £170,000).

(d) The particular obligations required the sum to be paid "provided the Council shall apply them towards the provision of [school facilities] where reasonably required by the Council in the light of the likely or actual impact upon such facilities in the Borough arising from the Development".

(e) As a result in re-justifying the contributions the Council took into account new SPG guidance, hence the reduced amount.

(f) C argued it was unlawful to enforce the obligations where the Council could not justify the full sum, and that the Council was required to reconsider the impacts of the development – so that, for example, it was unreasonable to require contributions where they may be no impact (e.g. because primary school had capacity).

Court of Appeal:

(1) The obligation became enforceable on its own terms on implementation of planning permission;

(2) The Inspector's approach does not cast doubt on the lawfulness of the s106 and did not mean that it was not entered into or a legitimate planning purpose (which it plainly was);

(3) The Council was entitled to enforce without analysis by them at the enforcement stage. This was a decision to enforce a contractual undertaking.

(4) The enforceability of the undertaking cannot now be challenged on the basis that when made it lacked sufficient nexus with the proposed development.

(5) The validity of the obligation is not affected by the Council's decision not to enforce the whole sum;

(6) The conclusion that the obligation still served a useful planning purpose was reasonable.

(7) There is no requirement to apply section 38(6) of the 2004 Act to the decision to enforce and there is no need to revisit development plan policies;

(8) An undertaking in accordance with the development plan when made does not cease to be in accordance with it by a concession that the full amount undertaken to be paid is no longer appropriate.

(9) A relevant planning purpose is served and is not defeated by concessions or detailed arguments about quantum.

(10) The Council has power to may a repayment of surplus sums, if appropriate.

(11) Further:

> *"Another factor to be considered in my judgment is whether a remedy by way of judicial review is appropriate in a case such as this. The undertaking was lawful when given. It would be enforced by a private law action contract. If and when a sum is claimed by the respondents in an action based on the undertaking, it will be open to the appellants in question whether the sums claimed under each head comes within the terms of the undertaking. Reference to those terms…reveal an area of argument that would be available to the appellants. Concessions have been made by the Respondents. The points which in substance the appellants claim to make by way of judicial review can be employed as a defence to a private law claim. In this context a private law shield rather than a private law action is available but an alternative remedy is available."*

Note: This comment is obiter and appears to have been made very much on the facts of the case. Certainly, in other situations a private shield may not be

available, depending upon the nature of the obligation and the chosen means of enforcement.

Lessons - overview

17. Once the planning obligation becomes legally enforceable then the statutory limits on its enforcement are very low: essentially - is a decision that it serves a useful planning purpose (which need not relate to the impacts of the development to which it originally related) irrational.

18. Therefore, the parties (really the developer) should make good any argument it wishes to raise as to the justification for the obligation prior to the grant of planning permission. Where appropriate, this may include arguing the toss on appeal and submitting an obligation conditional on a finding by the inspector that the contribution is necessary. Failing this, a new planning application should be submitted pre-implementation.

19. Where the obligation is enforceable, and if the time limit of 5 years in section 106A has passed then the developer should exhaust this avenue first.

20. Where this is not available, then the developer may still request that the obligation be modified or discharged but the test is a low one. If seeking a variation such a request should be supported by justification for new contributions and a draft 106.

Lessons – Developer – Policy

21. As **Millgate** and **Renaissance** make clear, it is very difficult to raise a public law challenge on the grounds that the purpose of enforcement does not relate to the development or its impacts.

22. But clearly, planning policy in Circular 05/05, and often in development plan policies, requires (especially in relation to pooled contributions) there to be a clear audit trail between the contribution made and the infrastructure provided (B21), and that standard charges and formulae applied to each development must reflect the actual impacts of the development (B35) – Circular 05/05. More generally that the obligation is relevant, necessary, directly related to the proposed development, and fairly and reasonably related in scale and kind to the proposed development, and reasonable in all other respects (B5).

23. There is therefore justification and benefit for ensuring that the planning obligation itself sets out specifically the projects to which the contribution will be put and a longstop period if the project has not come forward in that time.

24. The drafting may allow for the accounting for the sums paid and their progress towards the specified works, and may allow for repayment of whole or part if circumstances change, or if the impact is reassessed at a specific time.

25. There will then be an opportunity to raise a defence in the county court if the sums are not paid and the developer considers they cannot bring the sum claimed within the terms of the obligation (as discussed by Ton Jefferies).

26. Of course, there will be occasions when the developer is happy to pay a set sum unconditionally for simplicity and ease of advancing its planning application.

27. If there is within the obligation in question a period before the sums become payable then applications to vary should be made in this period if at all possible. If a variation is requested a draft s106 to this effect should be submitted to Council.

Lessons – Council – less is more?

28. Of course, at the planning permission stage, the contributions must be clearly justified by reference to the particular development (Circ 05/05);

29. Do not sit back if point being taken on appeal against the need/scale of the required s106 (especially on written reps);

30. Try and avoid accepting contributions that place too heavy a burden administratively on the Council, e.g. having to account for sums;

31. Address the proper question at each time. In deciding to enforce it is not necessary to re-visit the merits of the development in question – although regard must be had to the particular terms of the s106. Do not be drawn into conducting a wider exercise than required.

32. In drafting the obligation the less said as to purpose and relationship the better. An ideal covenant for a Council would be simply to pay money on commencement for, e.g., highway purposes.