

Interpretation of planning permissions and the implication of conditions following *Lambeth* and *Trump* in the Supreme Court

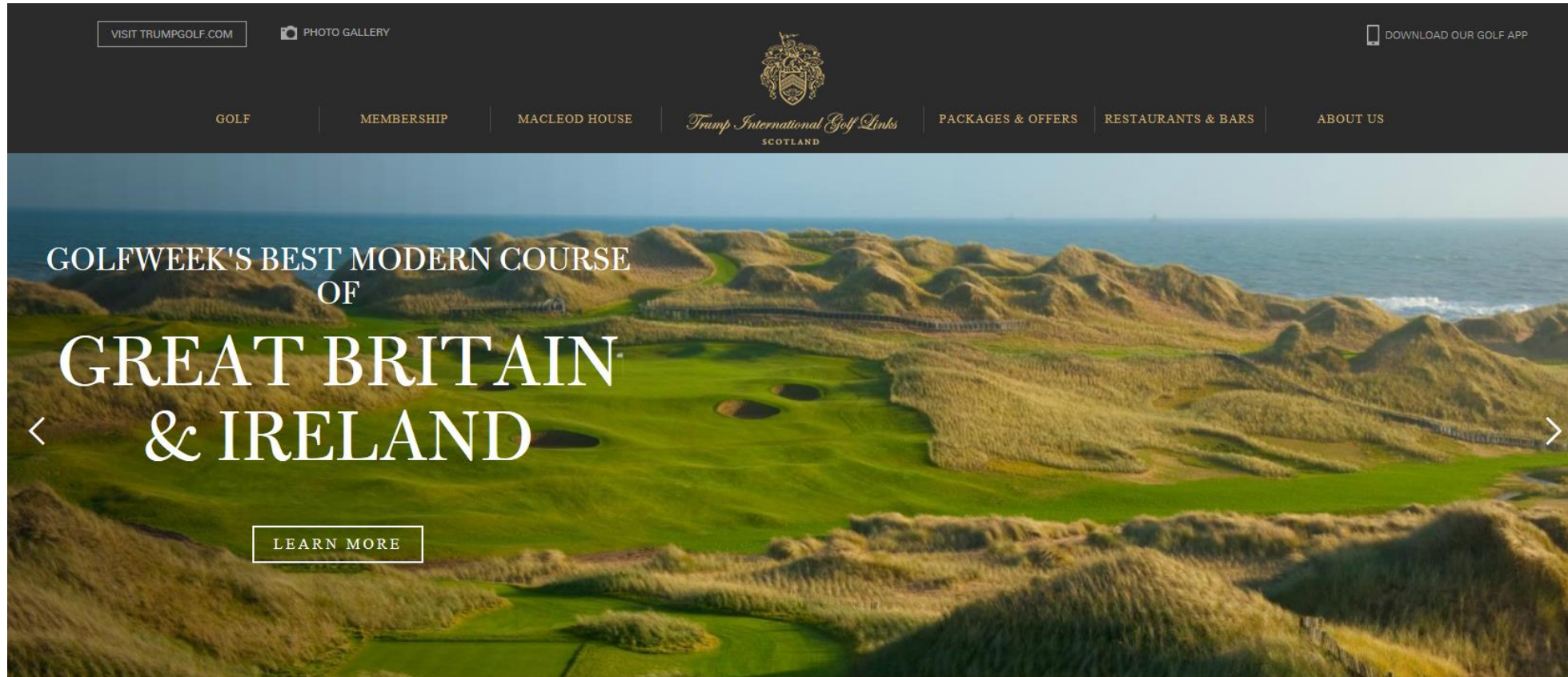
Sasha Blackmore

Overview

1. *Trump* and *Lambert*: a changing approach to interpretation and implication
2. The “Natural and Ordinary meaning”; keep it simple!
3. Section 73 TCPA 1990
4. Implication – where now?

***Trump and Lambeth; a changing approach to
interpretation and implication***

Trump Int'l Golf Club Scotland Ltd v Scottish Ministers [2015] UKSC 7



WELCOME TO TRUMP INTERNATIONAL GOLF LINKS, SCOTLAND

Lambeth in the Supreme Court

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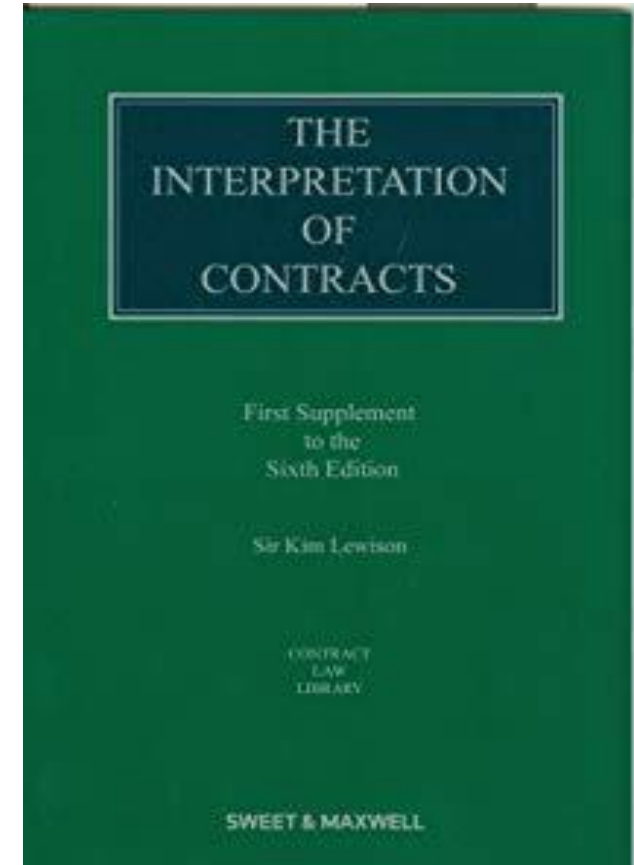


Supreme Court decisions

- ***Marks & Spencer plc v BNP Paribas Securities Services*** [2015] UKSC 72
- ***Arnold v Britton*** [2015] UKSC 36
- ***Impact Funding Solutions Ltd v Barrington Services Ltd*** [2017] AC 85
(October 2017, post-dates Trump)
- Older cases:
 - ***Attorney General of Belize v Belize Telecom Ltd*** [2008] UKPC 10 and
 - ***Geys v Societe Generale, London Branch*** [2013] 1 AC 523.
- Not only English cases: the Supreme Court also cite approvingly a decision of the Singapore Court of Appeal in ***Foo Jong Peng v Phua Kiah Mai*** [2012] 4 SLR 1267.
- And of course: ***Trump*** and ***Lambeth***

Interpretation and Implication

- **Consistency between classes of documents being interpreted** → desire to ensure that planning law is not “an island”
- **Different courts** → shift in focus of interpretation from restricted focus on meaning of words used to a more purposive approach
 - **Marks & Spencer Neuberger**, Clarke, Sumption, Carnwath, Hodge
 - **Trump**: Neuberger, Mance, Reed JSC, Carnwath, Hodge
 - **Lambeth**: Reed, Carnwath, Lloyd-Jones and Briggs and Black



Lambeth in the Supreme Court

- Reversed High Court and Court of Appeal decisions
- Held:

*“Whatever the **legal character** of a document”, the focus was “to find the ‘**natural and ordinary meaning**’ of the words used, viewed in their **particular context** (statutory or otherwise) and **in light of common sense**”*



Lambeth in the Supreme Court

- In addition, created other new areas of uncertainty:
 - Scope of s.73 on pre-existing conditions
 - Scope for an implied term – “difficult to envisage when...”



*The “Natural and Ordinary” meaning; keep it simple!
Lambeth and other examples*



Lambeth: Decision Notice (structure)

Determination of Application Under Section 73 —Town and Country Planning Act 1990

The London Borough of Lambeth hereby approves the following application for the variation of condition as set out below under the above mentioned Act ...

- Development At: Homebase Ltd, 100 Woodgate Drive, London SW16 5YP.
- For: Variation of condition 1 (Retail Use) of Planning Permission Ref: 10/01143/FUL (Variation of condition 6 (Permitted retail goods) of planning permission Ref 83/01916 ... granted on 30.06.2010.
- Original Wording:...
- Proposed Wording...
- Approved plans ...
- Summary of the reasons for granting planning permission: In deciding to grant planning permission, the council has had regard to the relevant policies of the development plan and all other relevant material considerations ... Having weighed the merits of the proposals in the context of these issues, it is considered that planning permission should be granted subject to the conditions listed below.
- Conditions...

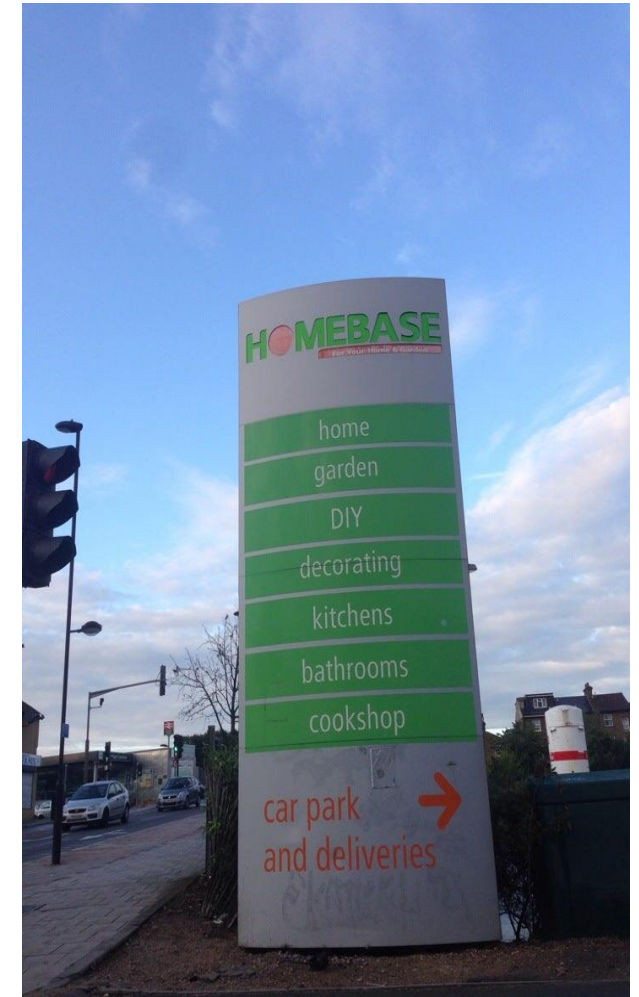
Lambeth: Decision Notice (3)

Original Wording:

The retail use hereby permitted shall be used for the retailing of DIY home and garden improvements and car maintenance, building materials and builders merchants goods, carpets and floor coverings, furniture, furnishings, electrical goods, automobile products, camping equipment, cycles, pet and pet products, office supplies and for no other purpose (including the retail sale of food and drink or any other purpose in Class A1 of the Schedule to the Town and Country Planning (Use Classes) Order 1987 [(SI 1987/764)] (as amended) or in any provision equivalent to that Class in any statutory instrument revoking and re-enacting that Order).

Proposed Wording:

The retail unit hereby permitted shall be used for the sale and display of non-food goods only and, notwithstanding the provisions of the Town and Country Planning (General Permitted Development) Order 1995 [(SI 1995/418)] (or any Order revoking and re-enacting that Order with or without modification), for no other goods.



Lambeth: Decision Notice (2) - Conditions

1. The development to which this permission relates must be begun not later than the expiration of three years beginning from the date of this decision notice. Reason: To comply with the provisions of section 91(1)(a) of the TCPA 1990...
2. Prior to the variation [hereby] approved being implemented a parking layout plan at scale of 1:50 indicating the location of the reserved staff car parking shall be submitted to and approved in writing by the local planning authority. The use shall thereafter be carried out solely in accordance with the approved staff car parking details. Reason: To ensure that the approved variation does not have a detrimental impact on the continuous safe [and] smooth operation of the adjacent highway ...
3. Within 12 months of implementation of the development hereby approved details of a traffic survey on the site and surrounding highway network shall be undertaken within one month of implementation of the approved development date and the results submitted to the local planning authority. If the traffic generation of the site, as measured by the survey, is higher than that predicted in the transport assessment submitted with the original planning application the applicant shall, within three months, submit revised traffic modelling of the Woodgate Drive/Streatham Vale/Greyhound Lane junction for analysis. If the junction modelling shows that junction capacity is worse than originally predicted within the transport assessment, appropriate mitigation measures shall be agreed with the council, if required, and implemented within three months of the date of agreement. Reason: to ensure that the proposed development does not lead to an unacceptable traffic impact on the adjoining highway network ..."

Keep it simple



Supreme Court: *Lambeth*

1. **Ordinary reading.** An “ordinary reading of the decision notice compels a different view. Taken at “face-value”, “the wording of the operative part of the grant seems to me to be clear and unambiguous”. The “suggested difficulties” of interpretation “do not arise from any ambiguity in the terms of the grant”
2. **Keep it simple.** It is “unnecessary to examine in detail the more ambitious alternatives proposed by Mr Reed”. Mr Reed’s submission “in the simple form” was “correct” and “It is not necessarily assisted by the varying formulations and citations discussed in his submissions to this court. There is a risk of over-complication”
3. **Reasonable reader.** Should look through the eyes of a “reasonable reader” but such a reader should “start by taking the document at face value”. Such a reader should not be “driven to the somewhat elaborate process of legal and contextual analysis hypothesised...” by the Court of Appeal
4. **Extraneous materials.** No issues with extraneous materials in this case
5. **Section 73.** The background to section 73 should have been considered, as “once it is understood that it has been normal and accepted usage” to describe section 73 as varying or amending a condition, “the reasonable reader would in my view be unlikely to see any difficulty” in understanding “its intended meaning and effect”.

*Keep it simple...
even when it's even more complicated*



UBB Waste Essex Ltd v Essex County Council

- Illustrates the difficulty of “*natural and ordinary meaning*”
- Judgment of Lieven J, 18 July 2019 (rolled up hearing ordered by Holgate J)
- About the lawfulness of a CLOPUD
- Lieven J had to consider (1) the terms of the CLOPUD (2) the terms of the original grant of consent (3) the construction of 3 complex conditions (2, 3, and 31) and which (4) had the effect of incorporating the Planning Statement, the Environmental Statement, and the Environmental Non-Technical Statement

UBB Waste Essex Ltd v Essex County Council

- The CLOPUD permitted “the importation and treatment... of up to 3,000 tonnes per annum of source-segregated green garden waste....”
- The SSGGW came from Household Waste Recycling Centres (HWRC)
- The issue was whether SSGGW from HWRC was excluded by the terms of the permission
- That depended on whether SSGGW from HWRC was “residual” waste...

UBB Waste Essex Ltd v Essex County Council

"Enclosed facility for the Mechanical and Biological Treatment (MBT) of municipal solid waste and commercial and industrial waste, including waste water treatment infrastructure; biofilter and air filtration infrastructure; a visitor, education and office facility; parking area; surface water management system; hardstanding's; internal roads; new access and junction arrangements onto Courtauld Road; earthworks; landscaping, fencing and gates; weighbridge complex; lighting and ancillary development."

10. Condition 2 of the Planning Permission states:

"2. The development hereby permitted shall be carried out in accordance with the details of the application dated 23 March 2012 and covering letter dated 23 March 2012, together with:

- ...*
- Environmental Statement dated March 2012 and appendices 1.1-1.9, 5.2, 5.2, 6.1, 7.1, 9.1 and 9.2,*
- Environmental Statement Non-Technical Summary dated March 2012,*
- Environmental Statement Errata dated April 2012,*
- letter from Alistair Hoyle dated 10 May 2012 and enclosed Environmental Statement Addendum to Flood Risk Statement dated May 2012 and drawing number 5093106/C/P/200,*
- Planning Statement and appendices 1-8,*
- ...¹*

And in accordance with the contents of the Design and Access Statement dated March 2012.

14. The PS at section 1.2 [1/13/493] under the heading "The proposal" states that the

"proposal... will satisfy the residual municipal waste management needs of Essex County Council and Southend on Sea Borough Council ... The Facility is capable of treating up to 416,955 tonnes per annum (tpa) of residual waste, but with a smaller proportion of locally derived commercial and industrial (C&I) (third party) waste ... The technology consists of: Pre-processing – sorting raw residual waste and extracting recyclables such as plastic and metals for beneficial use ..."
[emphasis added]

Condition 21 of the Planning Permission states:

"21. No waste other than 416,955t tpa of those waste materials defined in the application details shall enter the site. Records of waste type and tonnage shall be kept by the operator and made available to the Waste Planning Authority upon written request.

Reason: waste material outside of the aforementioned would raise additional environmental concerns, which would need to be considered afresh and to comply with East of England Policy WM1, Basildon District Plan Policy C15 and Waste Local Plan Policies W3A, W3C, W8A and W10E" [emphasis added]

- (a) Residual household waste - 78%
- (b) Street sweepings - 2%
- (c) Bulky waste - 0.5%
- (d) Trade waste - 5.5%
- (e) Household Waste Recycling Centre ("HWRC") Residual Waste - 14%

UBB Waste Essex Ltd v Essex County Council

MRS JUSTICE LIEVEN DBE
Approved Judgment

Double-click to enter the short title

Term	Definition
"1990 Act"	Town and Country Planning Act 1990
"AD"	Anaerobic Digestion
"Biowaste"	Types of food and green waste, including SSG waste
"C&I Waste"	Commercial and Industrial Waste
"CLEUD"	Certificate of Lawful Existing Use and Development (see s.191 of the 1990 Act)
"CLOPUD"	Certificate of lawfulness for a proposed use or development (see s.192 of the 1990 Act)
"EA"	Environmental Agency
"EIA"	Environmental impact assessment carried out under, at the time of the application for the Planning Permission, the Town and Country Planning (Environmental Impact Assessment) Regulations 2011. .
"EIA Directive"	European Directive 2011/92/EU on Environmental Impact Assessment
"ES"	Environmental Statement
"Essex JMWMS"	Essex Joint Municipal Waste Management Strategy 2008-2032

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"EWP"	Essex Waste Partnership
"The Facility"	The MBT Facility at Courtauld Lane, Essex
"HWRC"	Household waste recycling centre
"MBT"	A residual waste treatment process that involves both mechanical and biological treatment processes
"MSW" (Residual Municipal Solid Waste)	means waste that is household or household like - it comprises household waste collected by local authorities as well as some commercial and industrial waste (e.g. from offices, schools and shops) that may be collected by the local authority or a commercial company.
"NTS"	The Non Technical Summary of the ES
"QSRF"	'Quick Solid Recovered Fuel', which consists of waste processed through the QSRF Line
"QSRF Line"	a number of modifications to the Facility implemented by UBB in 2015 whereby certain waste is shredded, passed under a magnet to remove ferrous metals, diverted away from the biohalls and the Refining Hall, and then transported to the Treatment Output Loading Area.

MRS JUSTICE LIEVEN DBE
Approved Judgment

Double-click to enter the short title

"PAF"	Planning Application Form
"PS"	Planning Statement
"Planning Permission"	The planning permission dated 6 December 2012 allocated reference number ESS/22/12/BAS granted by Essex County Council for the Facility
"Residual Waste"	Waste that is not sent for reuse, recycling or composting and therefore excludes SSG Waste
"Residual Waste Contract"	The contract dated 31 March 2012 between UBB and the Defendant in its capacity as WDA for the County of Essex
"Ricardo"	Ricardo Energy & Environment
"SOM"	Stabilised Output Material a bulk output that is suitable for landfilling produced by the MBT plant.
"SRF"	Solid Recovery Fuel – a fuel that is capable of incineration produced by the MBT plant.
"SSG Waste" (SSGGW)	Source segregated green garden waste
"SSO Waste"	Source segregated organic waste. SSG Waste is a type of SSO Waste.
"TPA"	Tonnes per annum

UBB Waste Essex Ltd v Essex County Council

- Lieven J found that the “natural and ordinary meaning” was such that essentially green waste was excluded
- Four principles set out in her judgment (but in fact 6):
 1. **“Permissions should be interpreted as by a reasonable reader with some knowledge of planning law and the matter in question”**
 - This does not mean that they are the “informed reader” of a decision letter;
 - but the reasonable reader will understand the role of the permission, conditions, and any incorporated documents
 - *“Mr Sharland points out with some justification that reasonable people may differ on what amounts to common sense”*;
 - References to common sense really point to the “*planning purpose*” of the permission or condition

UBB Waste Essex Ltd v Essex County Council

2. Planning “purpose” to be considered

- *“where this is reflected in the reasons for the conditions and/or the documents incorporated”*
- This “*planning purpose*” is not a “*private intention*”, but the “*planning purpose which lies behind the condition*”

3. Holistic view taken of incorporated documents

- It may be the case that documents are not wholly consistent
- There may be some ambiguity with parts of them
- Try to understand the nature of the development and planning purpose to be achieved
- Not appropriate to focus on one sentence without seeing its context – *“unless that sentence is so unequivocal as to give a clear-cut answer”*

UBB Waste Essex Ltd v Essex County Council

4. Extrinsic documents

- Only if ambiguity - “*save perhaps for exceptional circumstances*”
- Difference between documents in the public domain “*and easily accessible*” (e.g. Planning Officer’s report) and private documents

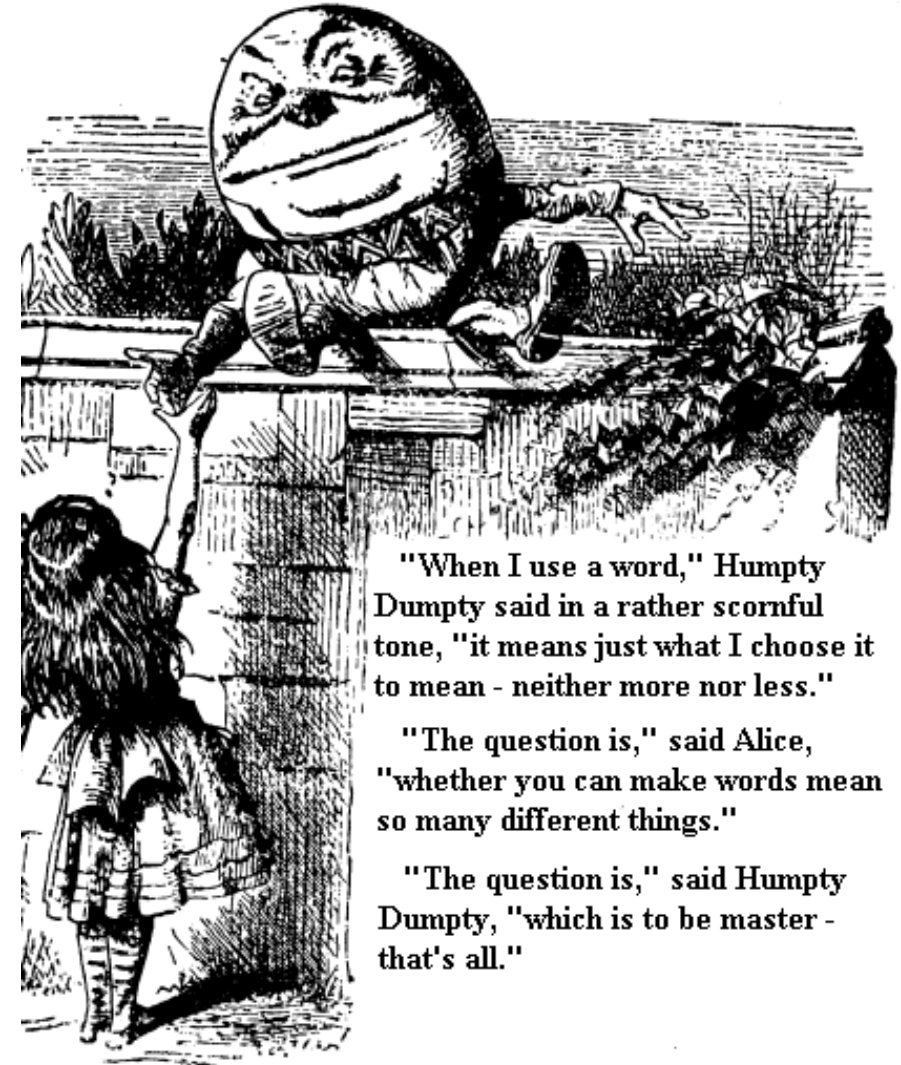
“The Court should be extremely slow to consider the intention alleged to be behind the condition from documents which are not incorporated and particularly if they are not in the public domain. This is for three reasons. The determination of planning applications is a public process which is required to be transparent. Any reliance on documents passing between the developer and the LPA, even if they ultimately end up on the planning register, is contrary to that principle of transparency. Planning permissions impact on third party rights in a number of different ways. It is therefore essential that those third parties can rely on the face of the permission and the documents expressly referred to. Finally, breach of planning permission and their conditions, can lead to criminal sanctions”

5. Starting point is the words of the permission itself

6. Whether one interpretation leads to an odd result

Interpretation of conditions Lambeth

'Curiouser and curiouser!' cried Alice
(she was so much surprised, that for the moment
she quite forgot how to speak good English).



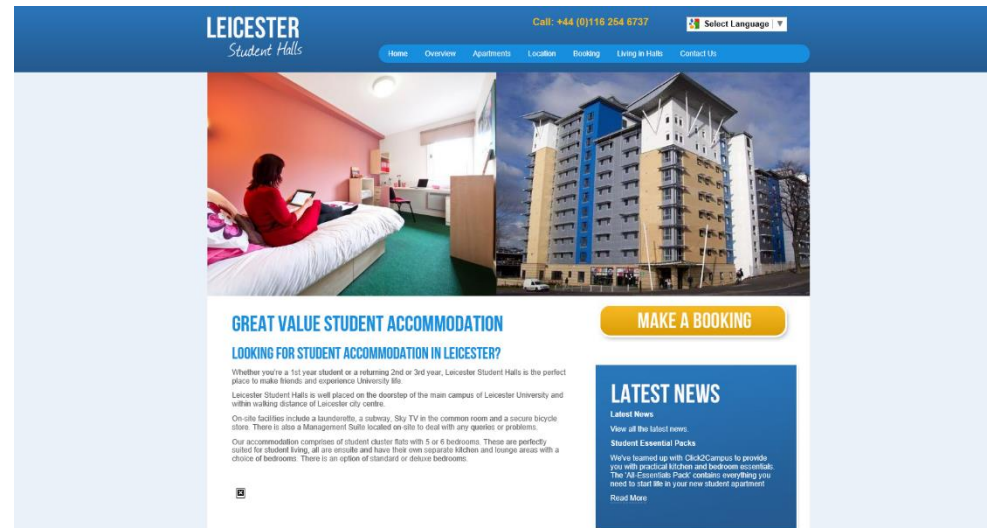
"When I use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean - neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master - that's all."

NB Extrinsic evidence Univ of Leicester

- Facts: whether an ambiguously worded consent permitted a University's halls of residence to also be used lawfully for conference guests.
- Extrinsic material beyond application (planning officer's report, minutes of committee meetings, correspondence, travel plan) made clear this was intention; could this be considered?



Interpretation of conditions Univ of Leicester (3)

- Court rejected argument both on the facts (holding it was necessary to go further than the application form in this case in any event) and on law:

*“I am not in fact persuaded that the authorities, in particular **Trump** and **Wood**... support his formulation of the second stage of the test. The authorities suggest that when there is an ambiguity, it is permissible to look at the extrinsic evidence, including but not limited to the application form, and indeed including but not limited to documentary evidence. All relevant extrinsic material may be referred to, depending on the circumstances of the individual case”*

Section 73 TCPA 1990

Scope of s.73

Section 73 provides:

Determination of applications to develop land without compliance with conditions previously attached.

- (1) This section applies, subject to subsection (4), to applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted.
- (2) On such an application the local planning authority shall consider only the question of the conditions subject to which planning permission should be granted, and—
 - (a) if they decide that planning permission should be granted subject to conditions differing from those subject to which the previous permission was granted, or that it should be granted unconditionally, they shall grant planning permission accordingly, and
 - (b) if they decide that planning permission should be granted subject to the same conditions as those subject to which the previous permission was granted, they shall refuse the application.

Scope of s.73

Lambeth creates challenges when considering a s.73 consent and its relationship with the previous consent – and interpretation:

“Although we have not heard full argument, my provisional view is that Mr Reed’s current submission is correct. It will always be a matter of construction whether a later permission on the same piece of land is compatible with the continued effect of the earlier permissions... In this case, following implementation of the 2010 permission, the conditions would in principle remain binding unless and until discharged by performance or further grant. Conditions 2 and 3 were expressed to remain operative during continuation of the use so permitted. The 2014 permission did not in terms authorise non-compliance with those conditions, nor, it seems, did it contain anything inconsistent with their continued operation. Accordingly, they would remain valid and binding – not because they were incorporated by implication in the new permission, but because there was nothing in the new permission to affect their continued operation...”



Scope of s.73

- The earlier arguments had been to incorporate into the new consent Conditions 2 and 3 by various innovative arguments – for example an expansive reading of the car parking condition
- The judgment makes clear that it is a “*provisional*” view
- The problem is that its extent and scope is not discussed
- In many cases there is a real risk that
 - a condition not re-imposed is closely linked to the application made
 - Or that it has not been re-imposed because of error

Scope of s.73

- The High Court, Court of Appeal and Supreme Court all refer to the Government's advice that to "*assist with clarity*" decision notices should "*repeat relevant conditions*" unless already discharged.... but what if they don't?

42. Sullivan J added the following comment [2002] EWHC 2174 at [59]:

"I accept unreservedly that the drafting of the 2002 planning permission could have been much clearer. The inspector's observations as to good practice should be heeded by all local planning authorities. When issuing a fresh planning permission under [section 73](#), it is highly desirable that all the conditions to which the new planning permission will be subject should be restated in the new permission and not left to a process of cross-referencing. Good practice was not followed in the present case."

The present case illustrates the wisdom of that advice, which is also reflected in the PPG. Nothing in the present judgment is intended to detract from that advice, nor from the importance of ensuring that applications and grants under [section 73](#) are couched in terms which properly reflect the nature of the statutory power.

Scope of s.73: Basic problem

- Reg 5 of SI 2920/2012
 - “*Where application is made pursuant to section 73 of the 1990 Act (determination of applications to develop land without compliance with conditions previously attached) the fee payable in respect of the application shall be £234*”
- S.73 applications are not properly resourced for the time they can take
- This results in busy planning officers having to consider applications without being adequately resourced to do so

Certainty?

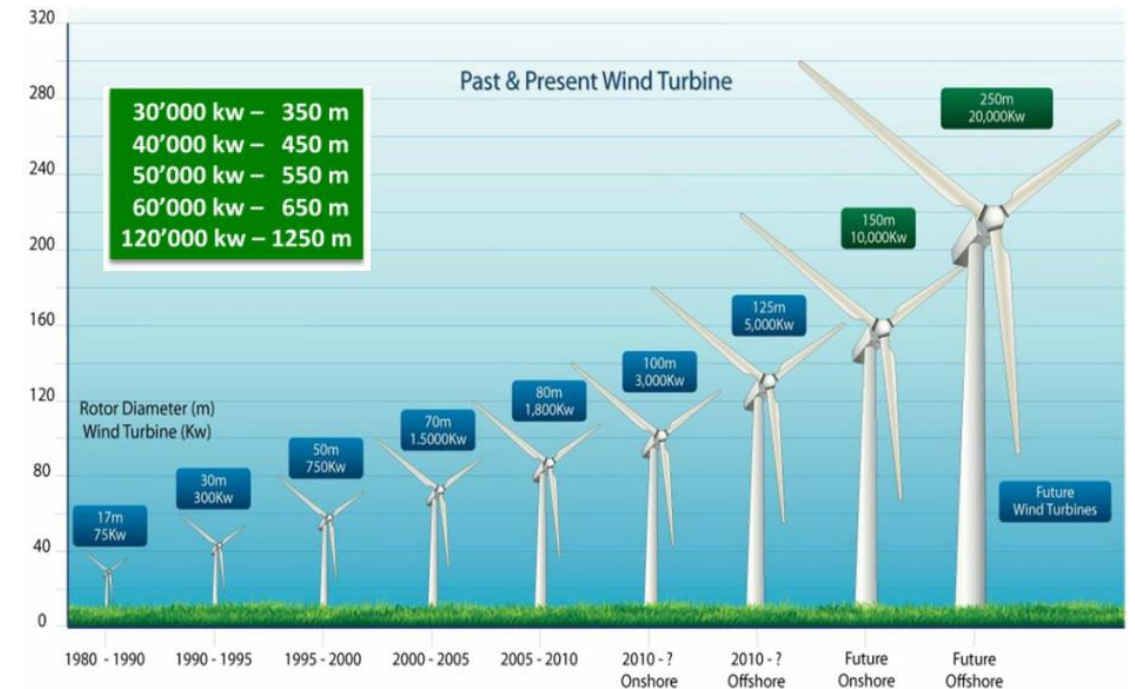


Further issues with scope of s.73: Finney v Welsh Ministers

- LPA never argued that the application to change the condition was a fundamental alteration to the original grant
- Local residents raised it in written submissions - unclear whether raised orally
- Inspector did not address in terms whether or not the 125m increase was a “*fundamental alteration*” to the original consent
 - **Arrowcroft** : can only impose new conditions if they are conditions which could have been lawfully imposed on the original permission “*in the sense that they do not amount to a fundamental alteration of the proposal put forward in the original application*”
- Court considered the Inspector did consider it and “read as a whole” it could be inferred that the Inspector’s view was that it was not a fundamental alteration
- Court considered that if this was wrong, s.31(2A) would be engaged

Scope of s.73

- **Lambeth** creates challenges as to interpretation when considering a s.73 consent:
- **Finney v Welsh Ministers**
 - **High Court:** [2018] EWHC 3077,
 - **Court of Appeal:** oral hearing 27/10/2019
- **Construction of Condition 2**
- “Figure 3.1” → wind turbine 100m
- Substitute “3.1a” → wind turbine 125m



Scope of s.73: *Finney v Welsh Ministers*

Comment. At the time of writing, there is an appeal outstanding to the Court of Appeal. It would seem prudent to withhold a detailed commentary until the outcome of that appeal is known, especially as this case has received a fair amount of interest among planning lawyers. It is also to be noted that Holgate J granted permission to bring this statutory challenge. In my experience, at the permission stage, Holgate J get to grips with the issues very quickly and incisively so that the mere fact that he has granted permission is, of itself, a sign that there is an important legal issue to be debated (or put another way, he does not give permission lightly). It is no surprise therefore that the judge (Sir Wyn Williams) detected a degree of uncertainty arising out of the three main first instance decisions regarding the scope of s.73 applications given that the appealed application sought to vary the height of the two turbines in question from 100m to 125m, which some might consider amounted to a fundamental alteration of the permitted scheme. An appeal decision may therefore provide welcome clarity to this important area of the statutory code.

Implication – where now?

Implication: Reminder from Trump

1. *“the court will, understandably, exercise great restraint in implying terms into public documents which have criminal sanctions, I see no principled reason for excluding implication altogether”* (Lord Hodge [34]).
2. while planning cases not “directly applicable” Lord Hodge considers Sevenoaks and says “In agreement with Lord Carnwath JSC, I am not persuaded that there is a complete bar on implying terms into the conditions in planning permissions ...” ([32]).
3. *“There is no reason in my view to exclude implication as a technique of interpretation, where justified in accordance with the familiar, albeit restrictive, principles applied to other legal documents. In this respect planning permissions are not in a special category”* (Lord Carnwath, para 64) who called for a “relatively cautious” approach (para 66).

Implication: Lambeth

- The parties' cases were
 - **Claimant:** there should be an implied term in this case
 - **Defendant SoS:** following *Trump*, there could be scope for an implied term as a matter of principle in the right case - but not in this case
 - **IP** (landowner): there was no scope for an implied term in a planning condition as a matter of the statutory scheme
- Lord Carnwarth:

*“...I observe in passing (in agreement with Mr Lockhart-Mummery’s submission as to the limited scope of the judgments in the **Trump** case...) that it is difficult to envisage circumstances in which it would be appropriate to use implication for the purpose of supplying a whole new condition, as opposed to interpretation of an existing condition....”*

Scope for an implied term

- But the IP's case was that there was no scope for an implied term
- Lord Carnwarth was referencing the IP's argument, which was that in the cases considered in Trump, these cases were about "*incomplete conditions*"
- So → an "*incomplete condition*" can be completed – Trump was about the lack of an implementation clause
- When is a condition "*incomplete*" ?
- We all know how key words can be omitted from conditions which can entirely change the meaning of the condition
- What can be considered to reach that point?

Thank you for listening

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