Landmark Chambers

Permitted development legal challenges

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Introduction

- ***Gluck v SSHCLG*** [2021] PTSR 1004:
  - When and how may time be extended for the consideration of prior approval applications?
- ***Smolas v Herefordshire Council*** [2021] EWHC 1663 (Admin):
  - When may prior approval applications be refused for failure to meet definitional requirements?
  - What information should an applicant provide in support of an application?
  - What is the scope of any appeal against refusal?
- ***Smolas*** involved a review of some other recent decisions: ***Keenan v Woking BC*** [2017] EWCA Civ 438; ***R (Marshall) v East Dorset DC*** [2018] EWHC 226 (Admin); and ***New World Payphones Ltd v Westminster CC*** [2019] EWCA Civ 2250

Gluck v SSHCLG

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- ***Gluck*** was concerned with Article 7 of the GPDO, in force to 1st August 2020

"*Where, in relation to development permitted by any Class in Schedule 2 which is expressed to be subject to prior approval, an application has been made to a local planning authority for such approval or a determination as to whether such approval is required, the decision in relation to the application must be made by the authority—*

(a) within the period specified in the relevant provision of Schedule 2,

(b) where no period is specified, within a period of 8 weeks beginning with the day immediately following that on which the application is received by the authority, or

(c) within such longer period as may be agreed by the applicant and the authority in writing."

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- After 1st August 2020, Article 7(c) amended to include the underlined text:

"(c) within such longer period than is referred to in paragraph (a) or (b) ***as may be agreed by the applicant and the authority in writing****."*

- The amendment resolved the first issue raised by ***Gluck***, namely whether sub-paragraph (c) applied to both sub-paragraphs (a) and (b). The Claimant's argument was that where a period was specified in Schedule 2, such that the default 8 week period in sub-paragraph (b) did not apply, then it was not possible to extend time
- Both the High Court (Holgate J) and the Court of Appeal rejected that argument

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- Court of Appeal said that there were both matters of textual interpretation and common sense which supported extensions of time being able to be agreed.
- Textual, because if sub-paragraph (c) applied only to sub-paragraph (b), these sub-paragraphs surely could and would have been combined
- Common sense, because otherwise an extension could not be agreed, even "*where both a developer and the local planning authority wanted to do so, for example to allow the developer to supply further information or to hold discussions with the local planning authority or consultees",* at [30]
- The second issue in ***Gluck*** was more difficult. That issue was what is necessary to show that a longer period is "*agreed by the applicant and the authority in writing*"

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- The Court of Appeal split on this issue. But first the facts:
  - 27th April 2018: the applicant and the authority agreed orally that time should be extended
  - The same day the applicant's planning consultant wrote to confirm the oral agreement. The authority did not expressly confirm that agreement in response
  - 7th May 2018 (after initial time for determination had expired): the applicant's solicitors wrote to the authority (opportunistically?) saying since there was no "*expression of agreement to an extension of time … [there] was therefore no written agreement to extend time*"

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- Newey LJ was in the minority. He held at [38] that there must be something in writing from both the applicant and the Council confirming the agreement, even if the agreement was made orally
- Hickinbottom LJ and Henderson LJ disagreed with Newey LJ. They were keen to avoid unnecessary complication, and to maintain planning as a flexible process, without excessive rigidity or formula. At [51]:

"… article 7(c) requires no more than for the agreement to be evidenced in writing, and I would not be minded to put a gloss on it … Consequently, if (for example) an applicant and an authority orally agree to an extension, and that agreement is acknowledged in writing by the applicant, the applicant could not then, in the absence of something in writing from the authority, say that deemed planning permission had been granted under the GPDO by the effluxion of the unextended period…"

Smolas v Herefordshire Council

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- Two principal issues:
  - Upon receipt of an application for determination of whether prior approval is required, is it lawful for a planning authority to determine whether the proposed development satisfies the definitional requirements of the permitted development class in issue, or is the local authority limited to considering the prior approval issues?
  - Did the Council's decision that the definitional requirements were not met amount to an impermissible reversal of the burden of proof and/or had the applicant provided sufficient information in any event?
- Part of the Council's response to the JR claim was that the claimant had an alternative remedy in the form of an appeal to the Secretary of State against the refusal of prior approval. PINS agreed, but the JR continued…

Smolas v Herefordshire Council

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- What is meant by definitional requirements? ***Smolas*** was concerned with an application whether prior approval was required for a proposed agricultural building, under Schedule 2, Part 6 of the GPDO
- Class A of Part 6 permits the erection of buildings "*which are reasonably necessary for the purposes of agriculture within that unit*"
- Paragraph A.2 provides for the conditions applicable to this class, and includes that before beginning development an application must be made to the local authority for a determination as to whether prior approval will be required for the "*siting, design and external appearance of the building*"
- The Council refused the application not for an prior approval reasons (i.e. siting, design, external appearance), but instead because it was not satisfied that the particular building proposed was "*reasonably necessary for the purposes of agriculture within that unit*"

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- The Claimant's argument, quite simply, was that refusing prior approval on the basis that definitional requirements were not satisfied was outside the Council's powers. If it thought that the definitional requirements were not met, then it could express a view to that effect, but it could not refuse the prior approval application on that basis.
- If the Council expressed such a view, the applicant could seek a lawful development certificate to resolve the issue, and if it did not do that but instead relied on the prior approval and proceeded with development, then the Council could take enforcement action.
- Reliance was placed on the High Court's decision in ***Marshall***, which sought to apply the Court of Appeal's decision in ***Keenan***

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- ***Keenan*** was also about Part 6, but about a hard core track. The local authority failed to make a determination in response to the prior notification application, meaning that prior approval was deemed to be granted
- The argument made by the Claimant was that meant he was authorised to build the hard core track. The Court of Appeal rejected that argument. It held at [36] that the GPDO does not "*confer upon the authority a power to grant planning permission for development outside the defined class of permitted development*"
- Part of the Court's reasoning was that the provisions in the GPDO relating to prior approval (i.e. those in paragraph A.2 Conditions) "*do not expressly, or implicitly, engage any other question, such as whether the development is "reasonably necessary", respectively, for the purposes of agriculture within the agricultural unit*"

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- ***Marshall*** considered and applied ***Keenan***. The Court accepted the local authority's argument that the effect of ***Keenan*** was that "*a local planning authority does not have power under the prior approval provisions of the GPDO, or indeed any other provision of the GPDO, to determine whether or not the proposed development comes within the description of the relevant class in the GPDO*": at [44].
- What if a local authority thought the definitional requirements were not met? The applicant could apply for a lawful development certificate, and if the applicant did not do so, the local authority could take enforcement action.
- Compared to simply refusing the prior approval application, these approaches involve extra costs and resources and involve greater risk of unauthorised development taking place

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- ***New World Payphones*** is the next in time judgment. It did not consider ***Marshall***, but it did consider and apply ***Keenan***
- In substance, ***Payphones*** confirmed that the statements in ***Keenan*** about the prior approval provisions not expressly or implicitly engaging any other question were confined to the stage when an authority is actually considering the prior approval questions, for example, of siting, design and external appearance
- Remember that ***Keenan*** was a non-determination and so deemed approval case
- ***Keenan*** did not purport to decide whether the definitional requirements could never be considered when an application is made to a local authority for determination as to whether prior approval is required

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- *Per* Hickinbottom LJ, at [49]:

"… In Keenan (at [36]), Lindblom LJ said that an application to a local planning authority for a determination as to whether its "prior approval" would be required does not impose on the authority a duty to decide whether the proposed development is in fact permitted development under the GPDO. But the thrust of that paragraph of Lindblom LJ's judgment was that, by requiring a developer to seek prior approval limited to restricted planning issues, that did not confer upon the authority a power to grant planning permission for development outside the defined class of permitted development. On an application to an authority for a determination as to whether its "prior approval" is required, then the authority is bound to consider and determine whether the development otherwise falls within the definitional scope of the particular class of permitted development."

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- ***Smolas*** – judgment handed down 21st June 2021; also judgment of Lang J (who was the judge in ***Marshall***)
- On issue 1, the Claimant relied upon (a) the statement in ***Keenan*** that considering prior approval did not engage any other issues, (b) the judgment in ***Marshall*** and (c) that ***New World Payphones*** could be distinguished since it was concerned with a different part of the GPDO
- All arguments were rejected and the Court applied ***New World Payphones***. A local authority is required to consider definitional requirements. Much like in ***Gluck***, the common sense of this outcome won through

Smolas v Herefordshire Council

- Issue 2 turned on the particular facts. There are two matters of note: (1) the application form used by the Council was the standard form from the Planning Portal, which sought information about whether the building was reasonably necessary (i.e. the definitional requirement), and (2) PINS had confirmed that the whole dispute could have been resolved on an appeal, so the JR was unnecessary
- The final word? The Court of Appeal has refused permission to appeal. Coulson LJ held the Court was bound by ***New World Payphones***. But anyway that the Claimant's arguments were contrary to common sense: there "*would be no purpose in requiring a local planning authority to grant prior approval … when that proposed development did not meet definitional requirements*"

Thank you for listening

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