*337 Paul Butcher v Secretary of State for the Environment and Maidstone Borough Council

Queen's Bench Division

11 August 1995

(1996) 71 P. & C.R. 337

(Robin Purchas, Q.C., sitting as a Deputy Judge in the Queen's Bench Division)):

August 11, 1995

Town and Country Planning—Whether planning permission granted on earlier enforcement notice appeal had come into effect bringing to end by condition established use of land—Whether condition prevented established use—Inspector's reasons concerning implementation of permission and construction of condition inadequate

The subject land consisted of a transport yard, which had (at least prior to 1986) established use rights for haulage and storage purposes. In 1983 the Crystal Paper Company ("Crystal") took up occupation as licensees of part of the land for the stripping, cutting and packing of paper. In 1985 the second respondent issued an enforcement notice requiring that use to cease, and Crystal appealed. An Inspector appointed by the first respondent allowed the notice and granting planning permission subject to a condition: "that the premises shall be used for the stripping, cutting and packing of paper and for no other purpose" (the 1986 permission). Crystal occupied part of the land until October 1986; at the same time the land continued to be used for haulage and storage purposes by (*inter alia*) Paul Butcher (the appellant). In 1993 and 1994 the second respondent issued enforcement notices in respect of the land, against which the appellant appealed; an inquiry was held in 1994. The appellant challenged the Inspector's ensuing decision in the High Court on the grounds that (i) the Inspector erred in holding that the 1986 permission had come into effect, thereby bringing to an end by condition the established use of the land for haulage and storage (the implementation point); (ii) the Inspector erred in construing that condition as preventing use of the land for those purposes (the construction point); and (iii) in both respects the Inspector failed to give adequate reasons.

Held, remitting the decision to the first respondent for rehearing and determination, that a planning permission granted on an appeal against an enforcement notice under section 88B of the Town and Country Planning Act 1971 must be implemented before it comes into effect, as would any planning permission granted under Part III of the Act. Whether in any particular case a permission has been implemented is a matter of fact and degree. The mere continuance of a use is not necessarily conclusive. Once an enforcement notice has been issued the right of an occupier of the land to revert to its former lawful use under section 23(9) of the 1971 Act arises and subsists whether or not the enforcement notice is withdrawn or quashed; an occupier may choose to exercise this right of reverter in preference to implementing a permission granted under section 88B. The reasons given by the Inspector were so obscure that it was not possible safely to conclude that he approached this issue on a basis that was correct in law. On the construction point, if the 1986 permission was implemented the condition would have had the effect of requiring other uses of the land to cease. This was plainly the intention of the Inspector who had imposed that condition in 1986 and the 1994 Inspector's reasons in this respect were entirely adequate.

Cases referred to:

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(1) *Leighton and Newman Car Sales Limited v. Secretary of State for the Environment and Another (1976) 32 P. & C.R. 1; [1976] J.P.L. 369, C.A.* ***338**

(2) *Prosser v. Minister of Housing and Local Government (1968) 67 L.G.R. 109*.

(3) *Jennings Motors Ltd v. Secretary of State for the Environment (1982) 1 Q.B. 541; [1982] 2 W.L.R. 131; [1982] 1 All E.R. 471; [1982] 43 P. & C.R. 316; [1982] J.P.L. 181; (1982) 80 L.G.R. 226; (1982) 261 E.G. 994, C.A.*

(4) *Kerrier District Council v. Secretary of State for the Environment (1981) 41 P. & C.R. 284; [1981] J.P.L. 193, D.C.*

(5) *Save Britain's Heritage v. No. 1 Poultry Ltd (1991) 1 W.L.R. 153; [1992] 2 All E.R. 10; (1991) 62 P. & C.R. 105; 89 L.G.R. 809; [1991] 3 P.L.R. 17; (1991) 135 S.J. 312; (1991) 154 J.P.N. 429; [1991] E.G.C.S. 24; (1991) 3 Admin.L.R. 437; The Times, March 1, 1991; The Guardian, March 1, 1991; The Independent, March 1, 1991, H.L.*

(6) Bolton Metropolitan District Council v. Secretary of State for the Environment [Reference].

(7) *Hope v. Secretary of State for the Environment (1975) 31 P.&C.R. 120; The Times, October 17, 1975*.

(8) *Kingston-upon-Thames Royal London Borough Council v. Secretary of State for the Environment (1973) 1 W.L.R. 1549; 117 S.J. 794; [1974] 1 All E.R. 193; (1973) 26 P. & C.R. 480; (1973) 72 L.G.R. 206, D.C.*

Legislation construed:

Town and Country Planning Act 1971, s.88B and s.23(9). These provisions are set out at p. 342 *post* .

Appeal by Paul Butcher, the appellant, under section 289 of the Town and Country Planning Act 1990 against a decision, dated December 7, 1994, of an inspector appointed by the first respondent, the Secretary of State for the Environment, which determined the appellant's appeal against enforcement notices issued by the Second Respondent, Maidstone Borough Council, in respect of land at Farleigh Lane, Maidstone. The facts are stated in the judgment of Robin Purchas, Q.C.

[Note: leave was refused for the introduction by the appellant of a new point that condition (1) on the 1986 permission was invalid and unenforceable.]

Representation

Meyric Lewis for the appellant.

David Holgate for the first respondent.

Peter Harrison for the second respondent.

Robin Purchas, Q.C.

In this appeal Paul Butcher appeals under section 289 of the Town and Country Planning Act 1990 against a decision of an inspector appointed by the first respondent to determine the appellant's appeal against enforcement notices issued by the second respondent in respect of land at Farleigh Lane, Maidstone. The decision letter is dated December 7, 1994.

Mr Meyric Lewis, who appears for the appellant, raises three points:

> (i) that the inspector erred in holding that a permission granted on an earlier enforcement appeal, in 1986, had come into effect, thereby bringing to an end by condition the lawful use of the land for haulage and storage purposes (the implementation point);
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> (ii) that the inspector erred in construing that condition as preventing use of the land for those purposes (the construction point); and
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> (iii) in both respects that the inspector failed to give adequate reasons as were required pursuant to Rule 18 of the Town and Country Planning (Determination by Inspectors) (Inquiry Procedure) Rules 1992.

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Background

The land, the subject of this appeal, consists of a transport yard. It is common ground that at least before 1986 it had established use rights for haulage and storage purposes. From the plan, at page 27 of the bundle, it can be seen that there were two main buildings or groups of buildings on the land marked A and B respectively and two Portakabins. On the facts found by the inspector in 1983 a company, the Crystal Paper Company (“Crystal”) took up occupation of a significant part of building B and one of the Portakabins for the stripping, cutting and packing of paper. They occupied as the licensees.

On April 11, 1985 the second respondent issued an enforcement notice in respect of the land requiring that use to cease. Crystal appealed. The appeal was conducted by written representations. In a decision letter dated February 21, 1986 an inspector appointed by the first respondent allowed the appeal, quashing the enforcement notice and granting planning permission under what was then section 88B of the Town and Country Planning Act 1971, for the continued use of the land for the stripping, cutting, packing and storage of paper. The permission was subject to conditions including:

> (1) That the premises shall be used for the stripping, cutting and packing of paper and for no other purpose.

It is accepted that that condition applied to the whole of the land.

In his decision letter at paragraph 7 the inspector recorded his acceptance of the established use right for uses including haulage and storage. At paragraph 9 he “emphatically endorsed” the council's view that the site was too restricted to accommodate all the uses because of the effect of traffic generation and on residential amenity.

At paragraph 10 he said:

> However, in view of the established and authorised uses of the site, I have regarded the deemed application as being for the continued use of the site exclusively for the stripping, cutting, packing and storage of paper. Considered in this way, it represents an alternative to the lawful development and not merely one element in a mixed use.

At paragraph 12, having referred back to his conclusion in paragraph 9 as to the unacceptability of the combination of uses on the land, he stated:

> However, when considered as an alternative to the lawful uses, it seems to me that the development enforced against would not only be acceptable but, if subject to conditions, would improve the environment for those living nearby.

On that basis he went on to grant permission subject to the conditions to which I have already referred.

The inspector in the 1994 decision letter with which this appeal is concerned found that Crystal continued to occupy part of the land until October 1986 (decision letter, paragraph 8). At the same time the land continued to be used in part and from October 1986 mainly for haulage and storage purposes (decision letter, paragraph 9).

In 1991 a vehicle repair and assembly use was introduced onto part of the land (decision letter, paragraph 9).

On March 31, 1993 the second respondent issued two enforcement notices, A and B, in respect of buildings A and B respectively. The breach ***340*** alleged under Notice A was the change of use of land to use for the manufacture and fitting of vehicle panels and vehicle bodies. The breach alleged under Notice B was the change in use from stripping, cutting, packing and storage of paper to a use for a furniture removal and storage business and ancillary vehicle workshop.

On July 18, 1994 a further notice, Notice C, was issued in respect of the whole of the land excluding building A. The breach alleged was the change of use to use as a storage and haulage contractors' business including ancillary repair workshop and office use.

The appellant appealed against these notices under section 174 of the 1990 Act, relying upon grounds (c), (d) and (a) of section 174(2), namely:

> (c) that the matters alleged did not constitute a breach of planning control;
>
> (d) that at the date the notice was issued no enforcement action could be taken in respect of the breach; and
>
> (a), that subject to (c) and (d), planning permission ought to be granted.

An inquiry was held on August 16 and October 20 to 21, 1994. The appellant accepted that grounds (c) and (d) of this appeal should only relate to the haulage and storage use (decision letter, paragraph 7).

The second respondent had withdrawn Notice B by September 30, 1994. The parties agreed that the land constituted a single planning unit. As a result it was accepted that the appeal should be considered on the basis that Notice C should be amended to apply to the whole of the land and to include the uses in Notice A and that Notice A should be quashed (decision letter, paragraph 6).

The inspector, at paragraph 24, duly quashed Notice A and amended Notice C to include the uses under that notice and to apply to the whole of the land. The Inspector considered grounds (c) and (d) together under paragraphs 7 to 15 of the decision letter. He concluded that both grounds failed because condition 1 of the 1986 permission brought to an end any right to use the site for haulage and storage.

The inspector considered ground (a) in paragraph 16 to 21. At paragraph 17 he concluded against the grant of permission in respect of the vehicle repair and assembly use.

He considered the storage and haulage use in paragraphs 18 to 21. In paragraph 21 he concluded that the appeal should be allowed by granting permission for that use subject to conditions.

He dealt with time for compliance with the notice in paragraph 23. His decision, in accordance with those conclusions, is set out in paragraph 24. At paragraph 1.1 of his skeleton Mr David Holgate, who appears for the first respondent, accepts that this decision should be remitted for

rehearing and determination on the ground that the Inspector failed to give adequate reasons for his conclusion that the planning permission granted on the 1986 appeal decision had been implemented.

Mr Peter Harrison, who appears for the second respondent, does not accept that there was any deficiency in reasons in that or any other respect, and accordingly Mr Lewis' grounds are all in issue.

During the course of argument, towards the end of his submissions, Mr Lewis submitted that if necessary it would be his submission that condition 1 on the 1986 permission was invalid and unenforceable. Mr Holgate and Mr Harrison both objected to the late introduction of that point. They ***341*** submitted that it was not in the Notice of Motion nor was it expressly raised in Mr Lewis' skeleton argument. They further submitted that it was far too late for a major new point to be taken of that nature which would require fresh instructions and almost certainly an adjournment.

Mr Lewis sought leave to rely upon the argument and, if necessary, to amend the Notice of Motion. He submitted that the point had been taken at the Inquiry, albeit not expressly reported in the inspector's decision letter. He further submitted that the issue of validity had been referred to by the deputy judge who granted leave (page 8 of the transcript) and that it could be inferred from the supporting material in the affidavit of Lynn Gladwell, a partner in the appellant's solicitors (see in particular paragraphs 5 and 6) and in his skeleton argument.

In my judgment the invalidity of the condition had not previously been expressly raised as part of the appellant's case in the Notice of Motion, the supporting affidavit or, indeed, Mr Lewis' skeleton argument.

While I was reluctant to exclude any point on procedural grounds, the rules of this court, in this context, are of importance to ensure the efficient, effective and fair disposal of actions. That is of particular importance in the context of public administration.

In my judgment it would not have been a proper exercise of my discretion to allow an amendment of the Notice of Motion to introduce, at that very late stage, a point of this significance. I accordingly refused leave and ruled that argument on the condition would be restricted to the grounds set out in the Notice of Motion.

I would add that by virtue of section 242(1) of the 1971 Act

> (e) any such action on the part of the Secretary of State as is mentioned in subsection (3) of this section, shall not be questioned in any legal proceedings whatsoever.

Subsection (3)(f) includes any decision of the Secretary of State to grant planning permission under paragraph (a) of section 88B(1) of this Act. That would have included the grant of planning permission for the continuance of the Crystal use in this case.

1. Implementation

This issue can be conveniently considered under two heads: (a) the point of principle whether a permission under section 88B of the 1971 Act must be implemented before it comes into effect and, (b) if that is correct in law, the application of the principle in the present case.

The principle

Mr Lewis submits that as a matter of law a permission granted under section 88B of the Town and Country Planning Act 1971 did not come into effect until it was implemented. Mr Holgate supported that submission and developed the point as part of his argument. By section 88(11) of and schedule 9, paragraph 2(2) to the 1971 Act an Inspector appointed to determine an appeal had the benefit of the powers of the Secretary of State including those under section 88B.

By subsection (3) of section 88B, so far as is relevant:

> When an appeal against an enforcement notice is brought under section 88 of the Act the appellant shall be deemed to have made an application ***342*** for planning

> permission for the development to which the notice relates …

The subsection goes on to deal with the finality of the Secretary of State's decision and its registration under section 34 of the Act.

Section 88B(1) provides:

> On the determination of an appeal under section 88 of the Act the Secretary of State may
>
> (a) grant planning permission for the development to which the enforcement notice relates or for part of that development …
>
> (2) in considering whether to grant planning permission under subsection 1 of this section, the Secretary of State shall have regard to the provisions of the development plan so far as material to the subject matter of the enforcement notice and to any other material consideration, and any planning permission may
>
> (a) include permission to retain or complete any buildings or works on the land or to do so without complying with some condition attached to a previous planning permission;
>
> (b) be granted subject to such conditions as the Secretary of State thinks fit.

Reference was also made to sections 32, 41 and 92 of the Act but I do not consider that they are necessary for the determination of the point of principle with which I am concerned.

Mr Holgate submits that the power to grant permission under section 88B is a stand alone power granted in the context of enforcement proceedings. However, he submits that the permission that is granted on the deemed application is like any other permission granted under Part III of the Act. It only becomes effective if and when it is acted upon or implemented. The occupier of the land, as recipient of the permission, can choose whether:

> (1) to implement the permission;
>
> (2) to discontinue the use;
>
> (3) to revert to the former lawful use of the land under section 23(9) of the Act; or
>
> (4) conceivably to continue to use the site without implementing the permission albeit subject to the risk of further enforcement action.

Mr Holgate draws attention to section 23(9) of the 1971 Act to which he refers under his third course of action. That provides, so far as relevant:

> Where an enforcement notice has been served in respect of any development of land, planning permission is not required for the use of that land for the purpose for which … it could lawfully have been used if that development had not been carried out.

Mr Holgate submits that that provision is clear and unambiguous. If enforcement action is taken it permits reverter to the former lawful use. That right of reverter, he says, subsists whether or not the enforcement notice is subsequently withdrawn or quashed. It was for that reason that the Inspector in 1986 included condition 1 to ensure that if the permission he then granted under section 88B was taken up there should be no reverter to the former uses by virtue of section 23(9).

Mr Holgate submits that it is accordingly fundamental that a permission granted under section 88B is not *ipso facto* binding without steps being taken ****343*** to implement or take up that permission. If it was not the case, an owner or occupier of the land could find himself involuntarily subject to a condition which, as indeed is suggested in the present case, divested him of his right to revert to a former lawful use or was otherwise contrary to his interest.

Mr Holgate submits that there is no basis in the Act for treating a section 88B permission differently from any other permission and good reason not to do so in view of those potentially draconian consequences. He further submits that whether or not there has been implementation of a permission in any particular case is a matter of fact and degree for the decision maker in the light of all the circumstances. Naturally, those circumstances may include whether, for example, the use in fact continued. But equally it may include the basis on which a use was continued, whether it was intended to implement the permission that had been granted and other relevant circumstances.

Mr Holgate referred me to the decision of the *Court of Appeal in Leighton and Newman Car Sales Limited v. The Secretary of State for the Environment*.[1]

That case concerned a condition imposed on a planning permission for the rebuilding of a garage and petrol filling station. The condition required that no vehicles should be sold or displayed for sale on the forecourt, which the appellants claimed was an established use.

Browne L.J. gave the judgment of the Court. At page 10 he referred to the *Divisional Court's decision in Prosser v. Minister of Housing and Local Government*[2] and continued:

> … in our opinion there is nothing to throw any doubt on the actual decision in that case, which was that where (as in the present case) there has been an application for a new planning permission and a grant of permission subject to an express condition prohibiting a previous established use, and the new permission has been acted on, the previous use is extinguished.

Mr Holgate draws attention to the words: "… and the new permission has been acted on." *Prosser v. Minister of Housing and Local Government*[3] concerned a permission for a new building on part of a garage site subject to a condition that no retail sales were to take place in the new building. The owner of the site claimed existing use rights for selling motor cars.

Lord Parker C.J. said at page 113:

> … by adopting the permission granted in April, 1964, the appellant's predecessor, as it seems to me, gave up any possible existing use rights in that regard which he may have had. The planning history of this site, as it were, seems to me to begin afresh on April 4, 1964, with the grant of this permission, a permission which was taken up and used, …

I was also referred to the dictum of Lord Denning M.R., in *Jennings Motors Ltd v. Secretary of State for the Environment and Another*[4] where the Master of the Rolls refers to obtaining planning permission and acting upon ***344*** it in the context of losing existing use rights, albeit in a rather different context.

Mr Harrison submits that implementation is not required for a permission under section 88B to become effective. He starts from the premise that it is a power that is separate from other powers to grant planning permission under the Act. He rejects the notion that the right of reverter under section 23(9) can continue after an enforcement notice is quashed or withdrawn. It is, he says, wholly parasitic on the enforcement notice. Once the notice is gone, so is the right.

He goes on to submit that in this case as in most change of use cases the former use rights would already have been lost through the material change of use of the land to the use enforced against. If, accordingly, an inspector or the Secretary of State determines to allow the appeal by quashing the notice and granting planning permission, there can be no other existing use right that is capable of being lost. Any other conditions would in any event have to be lawful and would simply be those that were considered appropriate to impose as the basis for allowing the appeal and granting planning permission.

Accordingly he submits that not only is there no unfairness in imposing the permission granted and any conditions to which it is subject irrespective of implementation or adoption but it would be a nonsense to take a contrary view bearing in mind that the change of use would already have taken place.

Alternatively, Mr Harrison submits that the continuance of the use itself is conclusive that the permission has been implemented.

In my judgment a planning permission granted by the Secretary of State under section 88B is, in this respect, no different in character or effect from a planning permission granted under Part III of the 1971 Act.

The power to grant planning permission under section 88B has all the hallmarks of the power to grant planning permission under Part III of the Act.

It is deemed to be on an application. It is required to be registered under section 34. The Secretary of State is required to have regard to the development plan and material considerations. He can give permission subject to conditions and otherwise on a similar basis to that provided under section 29 and 32 of the Act. The permission granted would run with the land (1971 section 33(1)).

In my judgment there is a weakness in Mr Harrison's argument where he relies upon the facts of the present case to sustain his submission on the point of principle. It may not be the case that a use enforced against, for which permission is granted, is continuing or is continued after the grant of permission under section 88B. It is not merely the loss of existing use rights that may be of concern but the whole spectrum of obligations that may lawfully be imposed by condition. Moreover, so far as use rights are concerned, I have no hesitation in accepting the submissions of Mr Holgate that once an enforcement notice is issued the right of reverter under section 23(9) arose and subsisted whether or not the notice was subsequently withdrawn or quashed. It does not seem to me that section 23(9) is reasonably capable of any other construction. On the point of principle I accordingly accept the submissions of Mr Lewis and Mr Holgate that a planning permission under section 88B of the 1971 Act must be implemented before it comes into effect, just as would be the case with any other planning permission granted under Part III of that Act (see *per* ****345*** Browne L.J. in Leighton and Newman Car Sales Ltd v. Secretary of State for the Environment and Another.[5]

Whether in any particular case a permission has been implemented is in every case a matter of fact and degree upon the evidence for the decision maker (see, *e.g. Kerrier District Council v. the Secretary of State for the Environment*.[6]

In this respect I accept the submission of Mr Holgate as to what is capable of being material to a decision whether or not a permission has been implemented. It is axiomatic that planning permission is concerned with the development of land either through operational development or by making a material change of use. Accordingly what occurs on the land in respect of building or other activity or in its use will be likely to be of particular weight. In that respect a particular problem arises when the development subject to the enforcement notice is the making of a material change of use. The effect of a planning permission under section 88B would be to legitimise that development and permit its continuance on the land. In my judgment, however, there remains the requirement for implementation of the permission for the reasons I have already given. In such a case the continuance of the use, at least for a material period of time, would generally be sufficient to justify the conclusion that the permission had been implemented and that any condition on the permission had accordingly become binding. However, there are other factors which may be material to that consideration, depending upon the circumstances of the particular case. That the use was by a licensee in the process of being evicted by the owners of the land in order to bring the use to an end might well be material. The more so if it was in breach of the term of the licence. Equally the relationship between the continued use and the use permitted may be material. If the permission is for the exclusive use of a site for use A while the use continued is for a mixed use comprising uses A and B, that would be a factor that was material in the consideration of implementation.

Accordingly I do not accept the submission of Mr Harrison that the continuance of a use, the subject of a permission under section 88B, is necessarily conclusive that the permission has been implemented.

Application of the principle

I turn to consider the submissions made as to the application of the principle to the decision letter with which I am concerned. Mr Lewis contends that it is plain that the 1994 Inspector approached

the 1986 permission on the basis that it became effective and bound the land irrespective of implementation. Alternatively he says that, if I am not persuaded that far, the reasons given were so obscure that there must be substantial doubt whether the Inspector did approach this issue on the correct basis or, indeed, what were his findings on implementation.

In his skeleton at paragraph 1.2 Mr Holgate accepts that on a fair interpretation the decision letter reads as if the inspector made the assumption or inferred that the 1986 planning permission was implemented merely on or from the fact that it had been granted. However, as I have ***346*** already mentioned, he makes the concession that the decision should be remitted on the lack of adequate reasons for the conclusion of the inspector that permission had been implemented.

Mr Harrison submits that the inspector in fact found on the evidence that the 1986 planning permission was implemented and that its reasons were adequate in that respect. These submissions turn on an examination of the relevant part of the decision letter. I remind myself that the decision letter should be read as a whole, as if by an informed readership and not in an excessively legalistic manner as a deed or statute. I also remind myself of the well-established principles as to the adequacy of reasons in the speech of Lord Bridge in *Save Britain's Heritage v. No. 1 Poultry Ltd*[7] and in the speech of Lord Lloyd in *Bolton Metropolitan District Council v. The Secretary of State delivered on May 24, 1995*. In particular the decision must "be in sufficient detail to enable him to know what conclusions the inspector has reached on the principal important controversial issues" (per Phillips J. in *Hope v. Secretary of State for the Environment*. [8]

The question to be asked is whether the interests of the party have been substantially prejudiced by a deficiency of the reasons given in that they are so inadequately or obscurely expressed as to give rise to a substantial doubt whether the decision was taken within the powers of the Act (see *per* Lord Bridge in *Save*).[9]

In paragraph 8 of the decision letter, having dealt with the earlier use of the land as a transport depot and for storage, the inspector continued:

> Although some permissions were given in the intervening years the next material event was the arrival of Crystal Paper Company in 1983. They occupied B1, slightly over half of B2 and part of one of the Portakabins. At that time Bosman Transport's repair workshop was in Buildings A and B3 and they stored types in the remainder of B2. The yard was shared for parking, access and deliveries; Crystal also stored some paper in the yard. Crystal were engaged in the stripping, cutting and packing of paper.

He then refers to the issue of the enforcement notice on the 1986 decision. He continues "The meaning and effect of that decision lie at the heart of the ground (c) dispute in this appeal." He concludes in that paragraph "Crystal remained on the site until October 1986." He continued at paragraph 9:

> During 1985 Bosman Transport, who still own the freehold, were running down their presence on the site and by early 1986 were only using the workshop facilities. Mr Bosman gave evidence that he was not aware of the Crystal appeal and had never seen the appeal decision letter until this inquiry; your client also said that he was not aware of the Crystal appeal until recently. In any event during January 1986 Mr Bosman and Mr Butcher were negotiating for the latter to occupy the site. It was agreed that payment would start on an interim basis on 1 March 1986 until your client took over the whole premises when Crystal were moved out. The impression is that both your client and Mr Bosman were anxious to achieve this. Although the formal occupation by your client appears to have been on 1 March the evidence points to ***347*** him at least getting the site ready during February and it may be that the use by him started during February. When Crystal left your client started to use the areas they had occupied as well as the rest of the site which he had occupied in the interim. That remained the case until Farleigh Fabrications moved onto the site in 1991. I accept that throughout the time when your client was negotiating for the site it was his and Mr Bosman's intention that the then lawful haulage use would not be abandoned or relinquished in any way.

In this respect I interpolate that Mr Holgate submits, and I accept, that the fact that the site was

already being put to the alternative lawful use with the intention of removing the Crystal uses and that there was no relevant intention, to that extent, of abandoning the rights or implementing any permission for Crystal's use even if the appellant had been aware of that permission. That was capable of being a factor to be taken into account in determining whether the 1986 permission was, in fact implemented.

The inspector continues at paragraph 10 and deals with the implementation point:

> It is your client's case that it was not the intention of the inspector in 1986 to take away any lawful or existing use rights but that he was offering an alternative—the new permission could be taken up or the existing lawful use could be continued. By ejecting Crystal and maintaining the continuity of haulage operations you say the lawful use was maintained. With the perspective of time, including the information that the owner was not aware of the appeal, his intentions and the occupation of the site by your client, it may seem odd that the outcome of the appeal was the removal of previous existing use rights. However, I consider that was the effect and that it was the effect the inspector intended for the reasons I set out below.

At paragraph 11 the inspector refers to passages in the 1986 appeal decision and continues:

> Indeed, these references and the letter as a whole have a simple logic which leads me to conclude that the inspector intended that the future of the site would be with a Crystal use and not the previous lawful use. In short, he saw the permission he granted as the means to remove the lawful use in favour of the Crystal use. Now, it may be that the written representations did not provide a clear, or indeed any insight into the wider considerations of the owner's longer term aspirations for the land but that does not invalidate the decision and I can find no clear indication that the inspector believed that the permission he was giving could be taken up or discarded as a matter of choice. It would be odd if he did have that view since the use had commenced and the permission which related to the deemed application was in effect implemented the moment it was given; there could be no going back.

He then deals with the scope of the condition and continues:

> That the other conditions requiring schemes to be submitted were never complied with does not undermine my conclusion since the use continued as an authorised use, but in breach of the conditions.

At paragraph 12 the inspector deals with the validity of a condition which ****348*** requires existing use rights to cease. The principle of that is not in issue in this appeal.

At paragraph 13 he deals with an alternative submission made by Mr Harrison, relying upon the loss of existing use rights through the change of use to mixed use. He concludes:

> Its lawfulness was, however, broken by the terms of the 1986 permission. Certainly once the 1985 enforcement notice was issued there was a right to revert to a single haulage use but that was lost when the 1986 permission was granted. Again, I return to the view that it is the effect of the 1986 permission which is fundamental.

At paragraph 14 the inspector deals with a submission of Mr Lewis regarding the break in the planning history of the site. He then concludes:

> In my view none of these considerations displace my conclusion that the 1986 planning permission which by definition was implemented and related to the whole of the site, precluded by its terms any other use but a Crystal type of use thereafter.

At paragraph 15 he went on to conclude that the appeal under ground (c) should fail. For my part

I am left in substantial doubt as to how the inspector approached the 1986 appeal permission. Did he consider that with a permission for the continuance of a use there was “by definition” automatic implementation and no choice whether or not to take up the permission?

If he did that it was, in my judgment, a misdirection. Did he take the view that the mere continuance of the use, in whatever circumstances, was conclusive of implementation? If he did, in my judgment, he would have failed to have regard to material considerations including those he refers to in paragraphs 9 and 10. If he did approach the question on the basis of implementation, I do not know how he resolved the factual issue he had to address in respect of the continuing Crystal use and the other factors to which I have referred.

In my judgment the reasons given by the inspector are so obscure that it is not possible, on a fair reading of the relevant part of the decision letter as a whole, safety to conclude that he approached this issue on a basis that was correct in law. There is, in my judgment, a substantial doubt whether he did in fact do so.

In the circumstances, Mr Lewis's appeal should succeed on Ground 3 of this Notice of Motion in respect of the lack of adequate reasons as to the approach to implementation.

2. The construction point

Mr Lewis submitted that Condition 1 of the 1986 permission should be construed so that it did not require the cessation of the existing use rights. He submits that that must follow because there is no break in the planning history, given the history of continued mixed use and the limited occupation by Crystal. He says there was no evidence to support a different approach in the 1986 decision letter. I can deal with this submission shortly.

Condition 1 was, in my judgment, clear. Mr Lewis accepts that the condition applies to the whole land. It required that the land should be used for stripping, cutting and packing of paper and for no other purpose. In my ***349** judgment, so far as it is relevant, the 1986 Inspector intended that if the permission was taken up it should be exclusive of other uses on the site (see 1986 decision letter, paragraphs 9, 10 and 12.)

The condition closely followed the form of condition that was considered and upheld by the *Divisional Court in Kingston-upon-Thames Royal London Borough Council v. Secretary of State for the Environment*.[10] In my judgment if this permission was implemented Condition 1 would have had the effect of requiring other uses of the site to cease. I consider that the 1994 inspector's reasons in this respect are entirely adequate. In the circumstances this decision will be remitted to the first respondent for rehearing and determination with the opinion of this Court expressed in this judgment.

Representation

Solicitors—Argles & Court, Maidstone, Kent; Treasury Solicitor; Borough Solicitors, Maidstone.

Reporter —Alison Henry.

Decision remitted to the first respondent. Partial award of costs in favour of the appellant (against the first respondent) and the first respondent (against the second respondent) respectively.

***350**

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1. *(1976) 32 P. & C.R. 1.*

2. *(1968) 67 L.G.R. 109.*

3. *ibid.*

4. *(1982) 1 Q.B. 541*.

5. (1976) 32 P. &C.R. 10.

6. *(1981) 41 P.&.C.R. 284 per* Lord Lane C.J. at 288 to 289.

7. *(1991) 1 W.L.R. 153*.

8. *(1976) 31 P.&C.R. 120* at 123.

9. *(1991) 1 W.L.R. 153* at 167E to F.

10. *(1973) 1 W.L.R. 1549*.

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