Neutral Citation Number: [2014] EWHC 1138 (Admin)

Case No: CO/11164/2012

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT IN BIRMINGHAM

Birmingham Civil Justice Centre
Priory Courts, 33 Bull Street
Birmingham

Date: Wednesday 9th April 2014

Before :

MR JUSTICE HICKINBOTTOM

- -

Between :

COTSWOLD GRANGE COUNTRY PARK LLP

Claimant

- and -

(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2) TEWKESBURY BOROUGH COUNCIL

Defendants

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Timothy Jones (instructed by **Marron Shakespeares**) for the **Claimant**
Suella Fernandes (instructed by **the Treasury Solicitor**) for the **First Defendant**
The Second Defendant was not represented and did not appear

Hearing date: 9 April 2014
Judgment
As Approved by the Court

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Mr Justice Hickinbottom :

1. This claim concerns land owned and occupied by the Claimant at Cotswold Grange Country Park, Meadow Lane, Twyning, Gloucestershire, which lies within an area for which the Second Defendant ("the Council") is the local planning authority.

2. In May 2005, the Council granted planning permission for the land for: "Change of use from agricultural land to extension to existing holiday caravan park (Stationing of 30 additional static caravans)" (Application No 05/1256/0215/FUL, "the 2005 Permission"). Permission was subject to a number of conditions, including:

> "2. The land shall not be used for more than 30 static holiday caravans.
>
> 3. Occupation of the holiday caravans on the land shall be restricted to a period between 15 March to 15 January the following year."

3. In May 2010, for the same land, the Council granted planning permission: "To erect static caravan site office and wardens use, replace and re site 40 static caravans and provide 14 additional static caravans (within original area) and ancillary works (partially retrospective) all for year round holiday use" (Application No 09/00388/FUL, "the 2010 Permission"). There was, with this grant of permission, an approved plan (No 5520 SL 02 K), which showed the site, and numbered pitches for 54 caravans and an additional caravan for the warden and office. In the centre of the site, there was a delineated ovoid space with "Amenity space" written in it. There were no caravan pitches in that area.

4. There were a number of conditions attached to the permission, including, as condition 3:

> "The re-sited 40 static caravans and additional 14 static caravans shall be occupied for holiday purposes only and shall not be occupied as a person's sole, or main place of residence. The owners/operators shall maintain an up-to-date register of the names of all owners/occupiers of individual caravans on the site, and of their main home addresses, and shall make this information available at all reasonable times to the local planning authority."

The reason for that condition was given as:

> "The site is unacceptable for general residential use by reason of its location in open countryside…";

and then it goes on to list the relevant policies from the development plan.

5. On 11 July 2012, the Claimant submitted an application under section 192(1)(a) of the Town and Country Planning Act 1990 ("the 1990 Act") for a Certificate of Lawfulness of Proposed Use or Development for "Siting of six additional caravans on the site for residential use". The application indicated that: "The proposal involves

the siting of six caravans in the position shown on the submitted plans for residential purposes". One of the two plans submitted showed the whole site, with the ovoid area. The second plan showed part of the site, including the ovoid area, with numbered pitches around it; and, in the ovoid area, six additional marked pitches. The application relied upon the fact that the permission granted in 2010 did not include a condition limiting the number of caravans on the site; and the proposition, derived from I'm Your Man Limited v Secretary of State for the Environment [1998] EWHC 866 (Admin), (1999) 77 P & CR 251 (which it cited), that a planning condition cannot be implied from a limitation in the description of the development.

6. On 3 December 2012, the Council refused the application.

7. On 18 January 2013, the Claimant appealed that refusal to the First Defendant Secretary of State under section 195 of the 1990 Act. The Secretary of State referred the matter to the Planning Inspectorate, and Mr A U Ghafoor BSc (Hons) MA MRTPI ("the Inspector") was duly appointed to report.

8. The Inspector dismissed the appeal in a decision letter dated 9 July 2013. Regarding the issue of the scope of the existing planning permission – and whether it was restricted to the use of 54 caravans for holiday use only – he concluded:

> "Taking the description of the development together with the wording of condition no. 3, I find that the 2010 permission defined the use of the application land and limited the number of static caravans to 54 plus a site office for a warden's use. The stationing of the proposed six caravans for residential occupation would be in conflict with the terms of the 2010 permission."

That was determinative of the appeal. In the circumstances, the Inspector considered that there was no need for him to address the question of whether an additional six caravans would amount to a material change of use, and he declined to do so.

9. In this application under section 288 of the 1990 Act, the Claimant seeks to quash that decision. At the hearing, Timothy Jones has appeared for the Claimant, and Miss Suella Fernandes for the Secretary of State; and I thank them both for their focused and helpful submissions.

10. Mr Jones relies upon a single ground, namely that the Inspector, purportedly applying what he considered to be "common sense" but, in law, wrongly and contrary to the principles enunciated in I'm Your Man, treated the language used in the 2010 Permission relating to numbers of caravans as if it were a condition; whereas in fact there was no condition or enforceable limitation restricting the number of caravans on the site. The real – indeed, sole – issue for the Inspector was whether the number of additional caravans would or would not constitute a material change of use, a question with which the Inspector did not grapple yet alone answer.

11. I will return to I'm Your Man shortly; but the starting point is the statutory scheme, the pertinent parts of which are as follows.

12. By virtue of section 57(1) of the 1990 Act, planning permission is required for "the carrying out of any development". If it is not "development", then the scheme does not seek to restrict it and planning permission is not required. So far as relevant to this application, "development" is defined in section 55(1) as follows:

> "… the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or land".

There are, therefore, two limbs to this definition: (i) carrying out of various operations, and (ii) making a material change of use of the relevant land. The placing of caravans on land is not normally in itself a "building, engineering, mining or other operation…" (Borough of Restormel v Secretary of State for the Environment (1982) JPL 785); but, of course, it does comprise a change of use of that land, and, dependent upon the circumstances, it may amount to a material change in use, thereby falling within the definition of development.

13. The only other statutory provision of relevance is section 70(1) of the 1990 Act, which enables planning authorities to grant planning permission subject to "such conditions as they think fit".

14. In Forest of Dean District Council v Secretary of State for the Environment [1995] JPL 937, David Widdicombe QC, sitting as a Deputy High Court Judge, considered the difference between a planning limitation by way of a restriction inherent in the description of the development, and a limitation in the form of a condition. The case concerned an enforcement notice in respect of the change of use of land from use as a caravan park for holiday purposes to permanent residential use. The inspector quashed the notice. Having taken into account the contemporaneous documents, he found that permission was for the use of the land for the siting of caravans for the purposes of holidays. However, that was not the end of the matter. He said (the report using, of course, reported speech):

> "The Inspector had understood the matter correctly. Mr Fookes [Counsel for the appellant Council] was right that the 1984 permission in the case was limited to holiday caravans by the description of the development, but what the Inspector was referring to was the fact that it was not subject to any condition. There was a significant difference in terms of enforcement as between those two methods of restricting permission. In the case of a permission limited by the description of the development, the use of the land could be changed without any breach of planning control so long as the change was not material. But in the case of a permission subject to a condition, a change of use in breach of the condition could be a breach of planning control whether or not the change of use was material….
>
> Therefore, this case being one of limitation by description of the development, the Inspector was correct to consider whether there had been a material change of use, and correct in what he said… about the need for a condition…."

15. As Mr Jones put it, the grant identifies what can be done – what is permitted – so far as use of land is concerned; whereas conditions identify what cannot be done – what is forbidden. Simply because something is expressly permitted in the grant does not mean that everything else is prohibited. Unless what is proposed is a material change of use – for which planning permission is required, because such a change is caught in the definition of development – generally, the only things which are effectively prohibited by a grant of planning permission are those things that are the subject of a condition, a breach of condition being an enforceable breach of planning control.

16. I'm Your Man concerned land on an industrial estate in Weston-super-Mare, upon which stood two aircraft hangers and ancillary buildings. The applicant applied for planning permission to use those buildings for sales, exhibitions and leisure activities for a temporary period of seven years. The planning authority failed to determine the application, and so an appeal was made to the Secretary of State who appointed an inspector. He granted planning permission for "additional use of warehouse/factory for sales, exhibitions and leisure activities for a temporary period of seven years… in accordance with the terms of the application". No condition was imposed requiring cessation of that use at the end of seven years. Three years later the applicants applied for permanent use of the premises for the same purpose. That was refused by the planning authority. On appeal, the applicants contended that, because there was no condition restricting the period of use, the planning permission which had been granted was in law for permanent use. The inspector avoided that issue, by dismissing the appeal on other grounds; and the matter came to this court by way of a section 288 application.

17. Robin Purchas QC, sitting as a Deputy High Court Judge, allowed the application. He found that, when the statutory scheme was properly analysed and particularly given the definition of breach of planning control, there is no express or implied power for a local planning authority or the Secretary of State to impose legally enforceable limitations on a planning permission granted pursuant to an application. Such limitations are only available or enforceable under the planning Acts by way of Development Order, which are the subject of particular statutory provision. Limitations cannot be effected by mere restrictions in the description of the development in the grant, but only by the imposition of conditions. The Deputy Judge expressly rejected the argument that a condition restricting the period of the use in that case could be implied.

18. The Deputy Judge therefore found that the grant permitted a change of use of the relevant buildings to sales etc, and did not impose any limit on the period for that use that could be subject to the enforcement regime of the 1990 Act. The planning permission granted was therefore permanent. He considered that the real issue in the case to be the materiality of the change of use; but found that the difference in character of use in that case between a seven year use and a permanent use was insufficient to amount to a material change of use.

19. The correctness of I'm Your Man has been questioned, in this court in argument, as recently as R (Altunkaynak) v Northamptonshire Magistrates' Court [2012] EWHC 174 (Admin). The Deputy Judge certainly adopted a narrow approach to the delineation of the scope of grants of planning permission. However, before me, Mr Jones positively relies upon I'm Your Man; and Miss Fernandes does not seek to argue that it is wrong. She is right to make that concession. As Richards LJ said in

Altunkaynak, there is no obvious flaw in the reasoning of the Deputy Judge – indeed, his legal analysis is tight, and in my view unimpeachable – and the decision has stood for over ten years without adverse comment in case law or commentary. Those involved in planning – including, vitally, local planning authorities – are (or should be) aware of its effect. The Divisional Court in Altunkaynak took the view that, in all the circumstances, they should follow it. I am bound to follow in their steps.

20. The limitation in I'm Your Man was temporal; but the principle equally applies to substantive limitations. Altunkaynak was, in form, an application to stay planning enforcement proceedings in the magistrates' court following a failure of the applicant to comply with enforcement notices; but in circumstances in which the principles of I'm Your Man arguably came into play. The applicant leased 15 Silver Street, Kettering, from which, with appropriate planning permission, he carried on a restaurant and food takeaway business. He acquired the leasehold of separate premises, No 15B, linked to No 15 by a passage. In respect of No 15B, he obtained planning permission for: "Conversion of shop to restaurant kitchen and hot food takeaway as an extension to the present premises at number 15". He then lost the lease of No 15. He nevertheless continued to carry on his business from No 15B alone. Matters then proceeded thus. Enforcement notices were issued by the local authority. The applicant continued his business from those premises. Informations were issued alleging breaches of the enforcement notices. The applicant contended that the proceedings were an abuse of process. The magistrates rejected that submission. The applicant pleaded guilty, and was fined. And the applicant then appealed to the Divisional Court by way of case stated.

21. The local authority argued that the case was distinguishable from I'm Your Man. The court did not agree. Richards LJ said this:

> "… I can see no basis for distinguishing I'm Your Man Limited, as Mr Butler [Counsel for the local authority] appeared to seek to do in the course of submissions. True it is that the case was concerned with an apparent *temporal* limitation on the permission granted, whereas in this case the words 'as an extension to the present premises at number 15' are relied on as imposing a *substantive* limitation on the permission granted. But the reasoning in I'm Your Man Limited contains nothing to justify confining its application to temporal limitations. The relevant principle, drawn from the wording of the statute, is a general one: if a limitation is to be imposed on a permission granted pursuant to an application, it has to be done by condition.'" (emphases in the original)

The last part of that quotation – "If a limitation is to be imposed on a permission granted pursuant to an application, it has to be done by condition" – succinctly and perfectly encapsulates the principle derived from I'm Your Man. Therefore, in that case, the words of description of the development restricting the use of No 15B to use only as an extension to No 15 were not effective in law to impose a limitation on the permission granted.

22. A similar approach was taken by this court in Winchester City Council v Secretary of State for Communities and Local Government [2013] EWHC 101 (Admin). Planning

permission was granted for "Change of use of agricultural land to travelling showpeoples' site". Various conditions were imposed, but none expressly restricted the occupation of the site to travelling showpeople. Enforcement notices were issued because it was thought that the site was being occupied by gypsies and travellers, who are not travelling showpeople. On appeal, the inspector, considering himself bound by I'm Your Man, concluded that the permission was for the use of the land as a residential caravan site with no restrictions on who may occupy the site. He quashed the notices, and allowed the planning application.

23. The applicants appealed against the quashing of the notices, and the decision on the planning appeal. Philip Mott QC, sitting as a Deputy High Court Judge, considered I'm Your Man and Altunkaynak, before continuing:

> "25. Clearly the I'm Your Man principle means that when permission is granted for a certain use, any limitation on the way in which that use is exercised must be imposed by condition. It does not matter whether the limitation is by way of a time limit (as in I'm Your Man), or by linking to the use or occupation of other premises (as in Altunkaynak). Nor is the principle limited to those two examples.
>
> 26. The underlying principle, as explained in I'm Your Man, is that 'limitation' is a technical term used in the statute only when imposed by Development Order. Any restriction seeking to have effect of a limitation, but imposed by a local planning authority, can only be effective if included in a condition.
>
> 27. That leaves the question of what use is permitted by a grant of permission, as opposed to any restriction or limitation on that use…".

He then went on to consider that question.

24. Those are the relevant legal principles. How do they apply to this case?

25. In terms of the approach adopted by the Inspector, he found that the description of the development in the planning permission was unambiguously restricted to 54 caravans. In any event, on the basis of cases such as R v Ashbridge Borough Council ex parte Shepway District Council [1999] PLCR 12 and Barnett v Secretary of State for Communities and Local Government [2009] EWCA Civ 476 (both of which he cited), documents other than the document granting planning permission itself can, in certain circumstances, be used to construe the scope of the permission. If and insofar as the description of the development was ambiguous, the extrinsic evidence such as the approved site plan resolved the matter in favour of that limitation. Further, he considered condition 3 "unambiguously applies the restriction on holiday use only to a total of 54 static caravans" (paragraph 16). To that extent, he considered the condition "reflects the description given in the grant of planning permission" (again, paragraph 16). He concluded, as I have already noted:

> "Taking the description of the development together with the wording of condition no. 3, I find that the 2010 permission

> defined the use of the application land and limited the use of static caravans to 54 plus a site office for a warden's use. The station of the proposed six caravans for residential occupation would be in conflict with the terms of the 2010 permission. "

26. That was the Inspector's essential reasoning for concluding that the Council's decision to refuse the LCD was correct. Miss Fernandes submits that that analysis was correct. In support, she relies upon the reasoning of another inspector in respect of another site in the area which, she submits, is essentially the same as the Inspector's analysis in this case.

27. I agree that the description of the development is clear from the face of the permission, in this case: as the Inspector found, the Council conceded (see paragraph 5.4 of its statement to the Inspector) and Miss Fernandes submitted with compelling force, it is clear that the permission granted is described in terms of only 54 caravans plus an additional caravan for the warden and office. Extrinsic evidence is therefore not required; but, in fact, the approved drawing attached to the permission confirms that there are to be 54 caravans, and 54 only, and where the 54 individual pitches are to be. The Inspector concentrated on this aspect of the matter, and concluded, rightly, that the description of the development was so.

28. However, that is not the determinative issue, which is not whether the limitation is imposed merely in terms of a restricted description of the permission granted, but whether it is in the form of a condition. That is the I'm Your Man principle.

29. The only possible contender is condition 3, which is quoted above (see paragraph 4). Miss Fernandes, boldly, submitted that this "unambiguously restricts the planning permission to 54 caravans for holiday purposes only" and was consequently sufficient to impose a condition as to number of caravans. The Inspector himself was more circumspect: as I have indicated, he merely said that that condition – which is clearly aimed restricting the use of the caravans to holiday use (as the reasons for the condition make clear: see paragraph 4 above) – reflected the description given in the grant of permission, which it does. But that is a different thing from a condition restricting the numbers of caravans on the site: it is simply an acknowledgment in the conditions of a limitation in the description of the development in the grant. Contrary to Miss Fernandes' strong assertion, there is simply no condition restricting the number of caravans. Any limitation found merely in the description of the development is insufficient to amount to a limitation in law, for the reasons I have given. I do not find the other inspector's decision to which Miss Fernandes referred is of any assistance in this context.

30. Therefore, whilst I accept that the Inspector acknowledged the principle derived from I'm Your Man, I have come to the firm conclusion that he failed properly to apply it. He failed to respect the difference between a limitation of numbers of caravans in the description in the grant (present in this case), and a limitation of such numbers in the form of a condition (not present in this case). In that failure, unfortunately, the Inspector (and the Council before him) materially erred in law, because only the latter was capable of imposing a limitation at law.

31. My conclusion is based upon the application of now well-recognised principles of law. However, it would be of some concern if the practical results made drafting

grants of planning permission very difficult if not impossible for planning authorities, as Miss Fernandes submitted. She said that Mr Jones's interpretation would mean that every grant would have to set out every limitation the planning authority wished to impose on the use of the relevant land. However, that is not so. If a material change of use is proposed, then planning permission will be required. If a change is not material, then it is open to an authority to restrict the use within the prescribed development as described in the grant; but, following I'm Your Man, only by way of condition. In this case, it would not have been onerous to have restricted the numbers of caravans that could be pitched on the site by an appropriate condition, as the 2005 Permission had done (see paragraph 2 above).

32. For those reasons, I allow the application, and quash the decision of the Inspector. I shall refer the matter back to the Secretary of State to enable him, with the benefit of this judgment, to consider whether the proposal would be a material change of use. As I have indicated (paragraph 10 above), that was an issue with which the Inspector declined to deal, because he considered that his findings on the other issues before him were determinative. However, on the basis of this judgment, it is an issue that now requires consideration and determination.