CO/5427/2004

Neutral Citation Number: [2005] EWHC 840 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2

Tuesday, 26th April 2005

B E F O R E:

MR JUSTICE SULLIVAN

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THE QUEEN ON THE APPLICATION OF HART AGGREGATES LTD
(CLAIMANT)

-v-

HARTLEPOOL BOROUGH COUNCIL
(DEFENDANT)

- - - - - - -

Computer-Aided Transcript of the Stenograph Notes of
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MR M HUMPHRIES QC AND MR H PHILLPOT (instructed by Messrs Ward Hadaway) appeared on behalf of the CLAIMANT
MR A PORTEN QC AND MR J FINDLAY (instructed by Hartlepool Borough Council) appeared on behalf of the DEFENDANT

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J U D G M E N T

MR JUSTICE SULLIVAN: Introduction

1. This is an application for judicial review of a decision of the defendant on 8th September 2004, notified to the claimant in a decision notice dated 7th October 2004, declining to consider the claimant's application of 28th June 1999 for new conditions under section 96 of, and paragraph 9 of Schedule 13 to, the Environment Act 1995 ("the 1995 Act") in relation to a planning permission dated 28th April 1971 ("the 1971 permission), which was granted in respect of Hart Quarry, Hart Lane, Hartlepool. The reason for the defendant's decision was as follows:

> "In the opinion of the Local Planning Authority the 1971 permission to which this application relates has lapsed and the Local Planning Authority has no power to consider the application."

Facts

2. The claimant is a company primarily involved in quarrying. It has a lease of Hart Quarry and has been operating the quarry since planning permission was granted in 1971. On 28th April 1971 Durham County Council granted permission:

> "... for the extraction of limestone from land at Hart Farm, Hart village referred to in the application of Sherburn Stone Co Ltd per JJS Allison ... in accordance with plans submitted by him on 3rd July 1970 and numbered STNR:3778 as amended by letter and plan dated 18th January 1971 subject to the following conditions ..."

3. Twenty conditions were set out in an attached schedule. For present purposes, the following conditions are relevant:

> "1. That extraction of minerals shall be confined to the area edged red on the plan which accompanied the application.
>
> "3. All topsoil and vegetative overburden shall be removed and separately stored along the north eastern boundary of the site to the satisfaction of the Local Planning Authority.
>
> "4. That workings shall be phased in accordance with the plan submitted on the 18th January 971.
>
> "5. Extraction shall commence in that portion of the site marked Phase 1 on the submitted plan and that portion shall be worked out before extraction is commenced in Phase 2. Extraction in Phase 2 shall be completed before extraction is commenced in Phase 3.
>
> "6. That extraction shall, so far as is practicable, be phased in such a manner that no more land shall be taken out of agricultural use in any period of 12 months than can be worked in that period.

"10. The worked out areas shall be progressively back-filled and the areas restored to levels shown on the submitted plan or to a level to be agreed by the Local Planning Authority in accordance with a restoration scheme to be agreed by the Local Planning Authority before extraction is commenced.

"11. The materials to be used for the back-filling shall be agreed by the Local Planning Authority and no clay, shale, fly-ash, marl, household refuse, industrial and chemical wastes, or other impervious or obnoxious material shall be tipped into the worked out portions of the quarry.

"12. All stone and other deleterious material larger than 3 inches shall be buried to a depth of not less than 24 inches or such other depth as may be agreed with the Local Planning Authority.

"13. The final level of the worked out area shall be to the satisfaction of the Local Planning Authority and over which shall be respread the overburden and topsoil so as to achieve a reasonably level and evenly graded surface.

"14. That provision shall be made for the drainage of the restored site in accordance with a scheme to be approved by the Local Planning Authority.

"15. That work shall be carried out including cultivating, fertilising and seeding in a manner approved by the Local Planning Authority to provide for the proper establishment of a grass sward.

"17. That within 12 months after completion of workings all buildings, plant, machinery and other structures shall be removed from the site."

4. The reasons given for the imposition of those conditions were as follows:

"1 & 16. In order that the Local Planning Authority may retain effective control.

"3 & 10, 13, 14, 15 & 17. To ensure satisfactory restoration of the site.

"4 & 5. To ensure that excavation is carried out in an orderly manner.

"6 & 7. In order to minimise agricultural disturbance and loss.

"11... In order to safeguard underground water supplies."

5. It will be noted that no reason is given for the imposition of condition 12.

6. The letter dated 18th January 1971, referred to in the planning permission, was a reply to a number of questions that had been raised by the County Planning Officer in a letter dated 24th September 1970. Question 7 had asked for more information about the applicant's:

"Intentions regarding the restoration of the worked out quarry area."

7. Mr Allison's answer in the letter dated 18th January 1971 was:

> "We intend to backfill the worked out areas with suitable waste to the levels of the enclosed plan. Soil and subsoil will be stocked for subsequent respreading."

8. The plan submitted with the letter showed the order of working (in answer to another question raised by the County Planning Officer) and "sections shewing restoration levels." Within the application site it was proposed to work the quarry in three phases. A fourth phase, for future expansion to the south of the application site, was also indicated. The two sections (east to west and north to south) showed both the existing ground level and the proposed restoration level. The restored surface would have been mostly flat with a 1 in 40 slope, steepening to 1 in 8 towards the western boundary of the restored area.

9. After the grant of planning permission quarrying commenced and has continued up to the present day. It is common ground that no restoration scheme was ever submitted or agreed under condition 10. On 2nd November 1989 Cleveland County Council (which had become the Minerals Planning Authority on local government reorganisation) granted planning permission for:

> "Extension to existing quarry and reclamation of part of existing quarry to agricultural land, Hart Quarry, Hart."

10. In effect, planning permission was granted for the winning and working of limestone from the area shown as Phase 4 on the drawings submitted on 18th January 1971. The conditions imposed on the 1989 planning permission required progressive restoration back to agriculture of both the extension and the area permitted in 1971 ("the original quarry"). Quarrying of the extension began after the grant of planning permission in 1989 and has continued to the present day.

11. On 8th March 1996 Cleveland County Council granted planning permission on an application made under Section 73 of the Town and Country Planning Act 1990 ("the 1990 Act") for a "variation of condition 1" of the 1989 planning permission. In summary, the new planning permission permitted the extraction of clay from within the extension area and required progressive restoration of both that area and the original quarry. Clay has been extracted from the extended quarry pursuant to this planning permission, and this extraction has continued up until the present day.

12. On 22nd January 1996 Cleveland County Council notified the claimant that Hart Quarry was included in the "first list" of mineral sites in its area, pursuant to paragraphs 3 and 8 of Schedule 13 to the 1995 Act. Schedule 13 deals with the review of old mineral planning permissions (ROMP). The quarry was classified as an "active Phase II site".

13. On 28th June 1999 the claimant applied to the defendant (which had by then become a unitary authority responsible for minerals matters, following yet another local government reorganisation) for a determination of new conditions under paragraph 9 of

Schedule 13 ("the ROMP application") in respect of the 1971 permission. So far as relevant, paragraph 9(1) provides that:

> "Any person who is the owner of any land, or who is entitled to an interest in a mineral may, if that land or mineral forms part of ... an active ... Phase II site, apply to the Mineral Planning Authority to determine the conditions to which the relevant planning permissions relating to that site are to be subject."

14. It is unnecessary to set out the definitions of "Phase II site" and "relevant planning permission" for the purposes of Schedule 13, since it is common ground between the parties that (a) if it has not lapsed, the 1971 planning permission is a "relevant planning permission" relating to a "Phase II site", and (b) if the 1971 planning permission has lapsed, the defendant's decision on 8th September 2004 was lawful; see R v Oldham Metropolitan Borough Council and Pugmanor Properties Ltd, ex parte Foster [2000] JPL 711, per Keene J (as he then was) at pages 716 to 717, and R v Caerphilly County Borough Council ex parte Payne [2003] EWCA Civ 71, per Dyson LJ at paragraphs 27 to 30.

15. Following receipt of the claimant's ROMP application, the defendants sought advice from the Minerals Planning Group. Mr Porten QC, who appeared on behalf of the defendant, told me that the Minerals Planning Group had reported to the defendant on 2nd March 2001. The Minerals Planning Group said, in respect of the 1971 and 1989 planning permissions:

> "3. Both permissions contain conditions precedent. These conditions require that the written approval of the Local Planning Authority must be obtained for various matters before development can commence.
>
> "4. It is settled law that the development begun in breach of a condition precedent is unlawful.
>
> "5. Both permissions were subject to a deemed condition requiring development to start within 5 years of the date that the planning permissions were issued. This meant that development authorised by the 1971 permission had to start no later than 28th April 1976 and that development authorised by the 1989 permission had to start no later than 2nd November 1994.
>
> 6. The quarry operators failed to obtain the LPA's approval to all the matters covered by conditions precedent. This means that although the quarry has been worked extensively beyond the dates mentioned in paragraph 5, both permissions have in fact lapsed because of the failure to obtain approval to all the matters covered by conditions precedent within these time limits."

16. For some reason which is not explained in the evidence, the defendant did not communicate this view to the claimant until 24th January 2003. In a letter of that date the

defendant's principal planning officer told the claimant that the defendant had sought advice from counsel:

> "Counsel's Opinion is not categorical as to the position. However, it is sufficient to enable us to form a view on the current position and this letter is, therefore, based on the Opinion as being the best advice available.
>
> "It has been concluded that in all likelihood the permissions of 1971 and 1989 have lapsed in that conditions precedent (ie conditions that go to the heart of the permission and without whose discharge there could not be a lawful start on site) have not been discharged. With regard to the 1971 permission, condition 10 requires a restoration scheme before extraction is commenced. There is no record of the receipt of such a scheme."

17. This was the first occasion upon which the defendant had suggested to the claimant that the 1971 permission had lapsed. The letter also contended that the 1989 planning permission had lapsed, but that contention is no longer pursued by the defendant.

The Issue

18. The issue is, therefore, whether the 1971 planning permission has lapsed because condition 10 was not complied with, in that a restoration scheme was not agreed by the local planning authority before extraction commenced. This can be broken down into two questions:

19. (1) Does the fact that no restoration scheme was agreed mean that condition 10 was not complied with? The answer to this question depends upon the proper interpretation of condition 10.

20. (2) If condition 10 was not complied with, what is the effect of that non-compliance? Does it mean that the 1971 permission must be treated as not having been implemented, despite the fact that the original quarry has been worked for the last 34 years?

Question (1): The Interpretation of Condition 10

21. As set out in the schedule annexed to the 1971 permission, condition 10 is a single sentence devoid of internal punctuation. The parties' rival interpretations are best illustrated by the addition of punctuation as follows. The claimant contends that condition 10 should be read thus:

> "The worked out area shall be progressively back-filled and the areas restored
>
> (a) to levels shown on the submitted plan; or
>
> (b) to a level to be agreed by the Local Planning Authority in accordance with a restoration scheme to be agreed by the Local Planning Authority before extraction is commenced."

22. The defendant contends that condition 10 should be read thus:

> "The worked out areas shall be progressively back-filled and the areas restored
>
> (a) to levels shown on the submitted plan, or
>
> (b) to a level to be agreed by the Local Planning Authority;
>
> in accordance with a restoration scheme to be agreed by the Local Planning Authority before extraction is commenced."

23. If the claimant's interpretation is correct there was no breach of condition 10; a restoration scheme did not have to be agreed before extraction commenced if the back-filled areas were to be restored to the levels shown on the plans submitted on 18th January 1971.

24. If the defendant's interpretation is correct, a restoration scheme had to be agreed before extraction commenced, whether the back-filled areas were to be restored to the levels shown on the 1971 plan or to some other level to be agreed with the local planning authority.

25. In my judgment the claimant's interpretation of condition 10 is correct for two principal reasons. First, the condition must be interpreted as it appears in the schedule, without any internal punctuation or spacing to suggest that it imposes two separate and distinct obligations, firstly to progressively back-fill the excavated areas and restore them to certain levels and, secondly, to agree a restoration scheme before extraction commences. In the absence of any punctuation, the word "or" governs the whole of the remaining part of the sentence. There are no notional brackets around the words "or to a level to be agreed by the Local Planning Authority".

26. Second, condition 10 should not be interpreted in isolation. It must be construed in the context of the permission as a whole. If that is done, the defendant's interpretation of condition 10 would render conditions 3 and 11 to 15 superfluous and unnecessary, since any agreed restoration scheme would be able to make provision for all of the matters covered by those conditions. The reason given for the imposition of conditions 3 and 10, 13, 14 and 15 was "to ensure satisfactory restoration of the site". Whilst no reason was given for the imposition of condition 12, it would plainly facilitate the establishment of the grass sward required by condition 15. Even though condition 11 was imposed "in order to safeguard underground water supplies" a restoration scheme could have prescribed the materials to be used for back-filling.

27. Condition 10 should be interpreted in such a way as to give some purpose and effect to conditions 3 and 11 to 15, and not so as to render them otiose. The defendant submitted that the plan approved in 1971 merely showed restoration levels, and that there was nothing on the plan that could be regarded as a "restoration scheme" showing, for example:

> "... clarification of the correct sequencing, thickness and timing of material

replacement so as to protect soil structure, clarification of the methods of placement or routing of vehicles during soil placement or methods of relieving soil compaction) and no indication at all of the planting, landscaping or after-use intentions."

28. Thus, conditions 3 and 11 to 15 did not comprise all that would be needed to constitute a restoration scheme.

29. It may well be the case that a modern restoration scheme would make more detailed and extensive provision. The claimant has made it clear in its ROMP application that it would be prepared to accept the imposition of an up to date restoration scheme. However, I accept the submission of Mr Humphries QC on behalf of the claimant that one must not judge the conditions in the 1971 permission by the environmental standards of 2005. The purpose of Schedule 13 in the 1995 Act was to give mineral planning authorities an opportunity to bring the often inadequate conditions in old mineral planning permissions into line with modern requirements.

30. In practice, the restoration provisions in the 1971 planning permission have been overtaken by the more comprehensive proposals in the 1989 and 1996 permissions, but it is instructive to consider what the end result would have been if the worked out areas had been progressively back-filled and restored to the levels shown on the 1971 plan in accordance with condition 10, and the other conditions in the schedule to the 1971 permission had been complied with. The nature of the back-filling would have been agreed (condition 11); large stones et cetera would have been buried (condition 12); the stored topsoil and overburden (condition 3) would have been respread to satisfactory final levels so as to achieve a reasonably level and evenly graded surface (condition 13) which would have been drained in accordance with an agreed scheme (condition 14); and the restored area would then have been cultivated, fertilised and seeded so as to establish a grass sward (condition 15). Thus the combined effect of implementing these conditions would have been the restoration of the worked out areas to a largely level grass field. There is nothing to suggest that such a restoration would have been thought inappropriate in 1971, particularly given the evident desire in the 1971 permission to minimise the amount of land taken out of agricultural use at any one time (see condition 6).

31. While more might have been required in a restoration scheme in 1971, and most probably would be required in a restoration scheme in 2005, for example details of tree or hedge planting, the fact that more might have been sought does not mean that in order to make sense of the 1971 permission it is necessary to construe condition 10 so as to require the local planning authority's agreement to a restoration scheme before extraction commenced.

32. The defendant submitted that condition 10 must have intended to allow for revised levels to be agreed at any time before or after extraction commenced. If the change in levels alone triggered the need for agreement to a restoration scheme, it would be a nonsense to require that scheme to be agreed before commencement, rather than at the time of variation. If a change in restoration levels could be agreed at any time, that would certainly introduce an useful degree of flexibility into condition 10, but the lack of such flexibility does not render the condition, as interpreted by the claimant, unworkable.

Given the existence of the other conditions referred to above, there was no need for any restoration scheme to be agreed, much less for a restoration scheme to be agreed before extraction commenced, since restoration (to whatever final level was chosen) of an area within the quarry could not begin until it had been worked out and progressive back-filling had commenced.

33. Since extrinsic evidence is not admissible (see R v Ashford Borough Council ex parte Shepway District Council [1998] 2 PLCR 12, per Keene J (as he then was) at pages 19 to 20) one can only speculate as to the local planning authority's intentions when imposing condition 10. It may well have been content with the applicant's proposal for a basically level grass field, but wished to see more detail by way of a restoration scheme if a different topographical form was to be proposed. In any event the question is not what the local planning authority intended in 1971, but what it actually imposed by way of condition 10.

34. The proper interpretation of condition 10 is a matter of law for the court. For the reasons set out above, I am satisfied that the claimant's interpretation is correct. If the worked out areas were to be restored to the levels shown on the plans submitted on 18th January 1971, there was no need to obtain the local planning authority's agreement to a restoration scheme.

35. It follows that there has been no breach of condition 10, and the 1971 planning permission did not lapse on 28th April 1976. In reaching this conclusion, I am comforted by the knowledge that my understanding of condition 10 was shared by the claimant and three successive mineral planning authorities for a period of some 30 years until the Minerals Planning Group's advice was received by the defendant on 2nd March 2001. It follows that question (2) does not arise, but I will answer it on the basis that the defendant's interpretation of condition 10 is correct.

Question (2): What is the effect of non-compliance?

36. The defendant submits that condition 10 is a "condition precedent", because it required the approval of the local planning authority to be obtained for something (in this case a restoration scheme) before extraction commenced. Development in breach of a condition precedent being unlawful, the extraction which began in 1971 did not commence the development authorised by the 1971 permission, which therefore lapsed in 1976. The 1989 and 1996 permissions authorised extraction in the extension area and progressive restoration of both the original quarry and the extension: they do not authorise extraction in the original quarry.

37. If the defendant's approach to question (2) is correct, it follows that all of the extraction from the original quarry over the last 34 years has been unlawful. In the case of mineral operations "every shovelful is a mining operation" and "an enforcement notice can be served in respect of operations within the last four years" (see per Lord Denning MR in Thomas David (Porthcawl) Ltd v Penybont Rural District Council [1972] 1 WLR 1526 at page 1531). Thus the defendant would be able to issue an enforcement notice in respect of the last four years' extraction from the original quarry and, of greater importance to the defendant, would be in a position to prevent further extraction from the original quarry.

38. In support of these submissions, the defendant relied on the principle stated by Woolf LJ, as he then was, in FG Whitley & Sons Co Ltd v Secretary of State for Wales [1992] 3 PLR 72 at page 80:

> "As I understand the effect of the authorities to which I am about to refer, it is only necessary to ask the single question: are the operations (in other situations the question would refer to the development) permitted by the planning permission read together with its conditions? The permission is controlled by and subject to the conditions. If the operations contravene the conditions they cannot be properly described as commencing the development authorised by the permission. If they do not comply with the permission they constitute a breach of planning control and for planning purposes will be unauthorised and thus unlawful. This is the principle which has now been clearly established by the authorities. It is a principle which I would have thought made good sense since I cannot conceive that when section 41(1) of the 1971 Act made the planning permission deemed subject to a condition requiring the development to be begun by a specified date, it could have been referring to development other than that which is authorised by the permission. The position is the same so far as regulation 7 [of the Town and Country Planning (Minerals) Regulations 1971] and condition 11 are concerned. The mining operations to which the planning permission relates are those authorised by the planning permission, not those which are unauthorised, because they contravene conditions contained in the planning permission."

39. Woolf LJ then reviewed the authorities which established that principle:

> "The earliest authority establishing this principle is an authority which could have been, but was not, referred to Sir Frank Layfield, *Etheridge v Secretary of State for the Environment* (1983) 48 P&CR 35. In that case I was the first instance judge who determined an appeal to the High Court. In the course of giving judgment I stated the principle to which I have just been referring. However, my remarks in that case were *obiter* and, in any event, would not be binding on this court. However, in the recent case of *Oakimber Ltd v Elmbridge Borough Council* (1991) 62 P&CR 594 Purchas LJ (with whom Taylor LJ agreed), as one of the two grounds of his decision, 'unreservedly' agreed with my judgment and Beldam LJ indicated his views in this way at p616:
>
> 'On this reasoning it is unnecessary to consider the interesting argument addressed to the court that development carried out in breach of conditions can be regarded as development to which the permission related and whether for the purposes of planning permission conditions can properly be regarded as 'conditions precedent'. But if it had been necessary to do so, I would have expressed my agreement in principle with the view of Woolf J (as he then was) in *Etheridge v Secretary of State for the Environment* that development carried out without permission or commenced in contravention of conditions of a permission would not be development to

which the permission related because it was development carried out in breach of planning control and so not permitted. However the importance and nature of the condition and the extent of and reasons for breach may in some circumstances be relevant considerations and I would prefer to reserve an opinion on the question for a case in which it is necessary to decide it.'

"The next case which is relevant is the case of *R v Elmbridge Borough Council, ex parte Health Care Corporation Ltd* decided on May 23 1991 by Popplewell J. There is no report of that case available but we were provided with a transcript. That case was heard on an application for judicial review which challenged a decision of the local planning authority that an outline planning permission had not been validly implemented. The outline planning permission had been subject to a condition requiring development to be commenced within five years. Detailed approval was obtained within the five-year period but that detailed approval was subject to the applicants in that case 'prior to the commencement of the works' satisfying 'the District Planning Authority that the land required for the provision of sight lines at the access to Manor Road South is available for this purpose and that thereafter such land shall be kept free of all obstructions'. Within the five-year period the applicants had failed to comply with this condition. In the course of a detailed judgment Popplewell J considered a number of authorities and, at [1991] 3 PLR 63 at p79G, he said:

'Even if I were wrong about that, I entirely agree with the view expressed by Woolf J in *Etheridge* and by the Court of Appeal in *Oakimber*, namely that development carried out without permission or commencing in contravention of conditions of a permission is not development to which the permission related because it was development carried out in breach of planning control and so not permitted. I do not have to consider whether strictly I am bound by the Court of Appeal in *Oakimber* or whether what was there said was *obiter* because I am persuaded by the logic of the argument, even if I am not as a matter of jurisprudence required to follow it.'

"The final case to which I should refer, so far as the principle is concerned, is the case of *Staffordshire Moorlands District Council v Cartwright*, May 24 1991 (unreported), of which we were also provided with a transcript. In that case Purchas LJ, with whose judgment the other members of the court agreed, applied what he had said in the earlier judgment in *Oakimber* and, at p 30C made a categoric statement that 'Works or changes of user in contravention of the permission concerned cannot be specified operations' and on this basis came to the conclusion that as a condition of the planning permission had not been complied with that a planning permission had not been implemented by the development which had taken place on the site."

40. This principle, commonly called the Whitley principle, was again applied by the Court of Appeal in a minerals case in Daniel Platt Ltd v Secretary of State for the Environment [1997] 1 PLR 73, see per Schiemann LJ at page 77C:

> "In the present case the authority had before them an application which specified a large area of land to which the permission allegedly related. If one looks at the permission to see what was authorised one sees that the carrying out of mining operations was not authorised on any part of the site pending the submission of satisfactory details. None were submitted and so the mining operations carried out before April 1 1979 were not authorised. Therefore none of the mining operations to which the planning permission related had begun to be carried out."

41. The principle has also been applied by the Court of Appeal and at first instance in a number of cases which were not concerned with minerals, to which I will refer in due course.

42. When applying the principle it is important to bear in mind that it is not a statutory provision but a judicial creation, devised to fill a gap where the otherwise comprehensive planning code was silent and so give effect to the underlying purpose of the legislation; see the speech of Lord Scarman at page 141A to C of Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment [1985] AC 132.

43. The court should be wary of applying the principle in an unduly rigid fashion and thereby pushing it to such an extreme that, far from giving effect to the underlying purpose of the legislation (in this case the provisions in the 1990 Act and the Town and Country Planning (Minerals) Regulations 1971 relating to the date when development authorised by planning permissions must begin if the permission is not to lapse), actually frustrates it by leading to absurd and wholly unforeseen results.

44. In Etheridge an outline planning permission had been granted subject to a condition that detailed plans showing siting, design, external appearance, means of access and "all other work" were to be submitted to and approved by the local planning authority before development commenced (page 37). Woolf J (as he then was) concluded that a grant of two full planning permissions had also amounted to an approval of the details that had been reserved in the outline planning permission. He rejected, obiter, the appellant's second contention that development begun without the approval of any details under an outlined planning permission would be sufficient to preserve the outline planning permission in existence. There can be no doubt that the application of the principle to such a case would produce a common sense result, which would indeed further the statutory purpose.

45. Similarly in Oakimber a planning permission was granted for an "application in principle for development of industrial site" subject to two conditions, the second of which was in these terms, at page 602:

> "2. This approval is given subject to detailed plans of the layout of buildings, open spaces and drainage and particulars of the types of

industries to be provided, being submitted to and approved by the Planning Authority before any development takes place."

46. The Court of Appeal concluded that no such detailed plans had been submitted to or approved by the local planning authority pursuant to condition 2, and therefore the permission granted "in principle" could not be relied upon. On its facts, the Court of Appeal's decision undoubtedly furthered the statutory purpose.

47. In Whitley the Court of Appeal said that four conditions were relevant:

> "2. No working shall take place except in accordance with a scheme to be agreed with the local planning authority or, failing agreement, as shall be determined by the Secretary of State and such scheme shall among other matters include provision for
>
> "(a) the order, direction depth and method of working ...
>
> "3. Progressive restoration of the site shall take place in accordance with a scheme to be agreed with the local planning authority or, in default of an agreement, to be determined by the Secretary of State, such scheme to be agreed or determined before working takes place, and the scheme shall, among other matters, include provision for~...
>
> "4. Landscaping of the site shall take place in accordance with a scheme to be agreed with the local planning authority or, in default of an agreement, to be determined by the Secretary of State, such scheme to be agreed or determined before working takes place.
>
> "11. The development hereby permitted shall be begun on or before 30th November 1978."

48. The appellants were relying on what were described as "limited operations", which began in November 1978 and which had ended on 8th December 1978, as having commenced minerals operations before 30th November 1978 in compliance with condition 11, thus keeping the planning permission alive.

49. Pausing there, it will be noted that the 1971 permission does not contain any condition which states in terms "no extraction shall take place except in accordance with a (restoration) scheme to be agreed with the local planning authority before extraction takes place", as was the case with condition 2 in the Whitley case. Nor, since an outline planning permission cannot be granted for mining operations, is there any condition in the 1971 permission which requires the approval of all reserved matters before any development may commence.

50. Mr Porten submitted that no distinction could properly be drawn between condition 10 in the 1971 permission and condition 2 in the Whitley case; it mattered not whether the words "no extraction shall take place before a restoration scheme has been agreed" were used, or whether the condition required a restoration scheme to be agreed "before extraction is commenced". The practical effect was the same in both cases: if no

restoration scheme was agreed, extraction was unlawful. He pointed out that the Court of Appeal had not drawn any distinction between condition 2 and conditions 3 and 4 in Whitley, and submitted that the latter conditions were similar in form to condition 10 in the 1971 permission. He submitted that failure to comply with any "condition precedent", such as condition 3 or 4 in the Whitley case or condition 10 in the 1971 permission, meant that the planning permission in question would not have been implemented.

51. This submission illustrates the dangers of taking judicial dicta out of the context of a particular case and applying them to very different circumstances. Given the clear terms of condition 2, "No working shall take place..." it was unnecessary for the Court of Appeal to consider what would have been the effect of a breach of either condition 3 or condition 4 alone in the Whitley case. Work had barely commenced at the Whitley site, so the Court of Appeal did not have to consider the question: what would have been the effect of non-compliance with either condition 3 or condition 4 if extraction had proceeded, in compliance with all of the other conditions in the 1973 permission, for over 30 years? If by some oversight a landscaping scheme had not been agreed before working commenced, would that have meant that there had been 30 years of unlawful mineral extraction?

52. If the object of judicial intervention is to give effect to the purpose of the legislation, the answer to that question must surely be no. Since conditions 3 and 4 in Whitley related specifically to restoration and to landscaping respectively, the legislative purpose would be better served by confining the extent of the unlawfulness to any restoration or landscaping works carried out in breach of those conditions, rather than by a conclusion that all of the quarrying operations over the last 30 years had been unlawful.

53. I say that the statutory purpose would be better served because it is important to remember that, if correct, the defendant's approach to "the Whitley principle" will apply equally to other forms of development: the carrying out of building or engineering operations, or the making of material changes of use. In the case of a mineral operation carried out without planning permission, the mineral planning authority will always be able to issue an enforcement notice to remedy any adverse effects of mineral operations that have been undertaken over the preceding four years, and will be in a position to prevent any further unlawful mineral operations; see the Thomas David (Porthcawl) case above. On the other hand, if planning permission is granted for building or engineering operations, and those operations are carried out, they will become immune from enforcement action and thus lawful four years after they have been completed. In the case of a change of use to a single dwelling house the period is also four years. For any other change of use the period is ten years; see sections 171(B) and 191(2) of the 1990 Act.

54. The defendant contends that any condition, such as condition 10, which requires some action to be taken (plans agreed or works done) before development is commenced is a "condition precedent", the breach of which will mean that the planning permission in question will not have been implemented.

55. Take the case where planning permission has been granted for the construction of a large industrial building, subject to a number of conditions relating to such matters as, for example, hours of operation, maximum noise emissions, arrangements for car parking et cetera. The permission is also subject to a landscaping condition, which provides that a landscaping scheme must be submitted to and approved by the local planning authority before development commences. No such scheme is submitted and approved, but nevertheless the development commences and the industrial building is completed. After four years it will have become immune from enforcement action. Since the planning permission will not, on the defendant's submission, have been implemented it will lapse, and with it the obligation to comply with the conditions relating to, for example, hours of operation, maximum noise emissions, car parking et cetera.

56. To take another example, canvassed in submissions, where planning permission is granted for the erection of a large dwelling house. Detailed plans accompany the application. All of the details are satisfactory, but the local planning authority do not like the design of one of the dormer windows. A condition is therefore imposed upon the planning permission requiring revised details of the dormer window to be submitted to and approved by the local planning authority before development commences. The development commences. No revised plans of the dormer window are submitted and the omission is realised only when the house is complete. Has the entire house been constructed without planning permission, or has there simply been a breach of the condition in respect of the dormer window? Consistent with the defendant's approach to non-compliance with conditions precedent, Mr Porten submitted that the former answer was correct.

57. I do not accept that such an outcome would give effect to Parliament's intention in enacting the planning code insofar as it relates to the commencement of development authorised by planning permission. The 1990 Act draws a clear distinction between development without planning permission and development in breach of condition; see section 171(A)(1)(a) and (b). It is important that that distinction is not blurred by an indiscriminate use of the judge-made term "condition precedent".

58. Going back to first principles, the starting point should be the proposition that there is no scope for implied conditions in a planning permission. If a local planning authority wishes to impose any obligation upon an applicant by way of a requirement or prohibition, it should do so in express terms, because failure to comply with the condition may, ultimately, lead to prosecution for failure to comply with a breach of condition notice and/or an enforcement notice; see sections 179 and 187(A) of the 1990 Act. The need for a local planning authority to spell out any requirement or prohibition in clear terms applies with particular force where the condition is said to prevent not merely some detail of the development, but the commencement of any development pursuant to the planning permission.

59. If condition 10 is read in the context of the planning permission as a whole, it is simply concerned with the back-filling and restoration of the worked out areas. Other conditions govern the removal of topsoil and overburden and the extraction of the limestone. If Durham County Council had wished to prohibit any extraction before a restoration scheme for the worked out areas was agreed, it could have said so by imposing a

condition expressly to that effect, similar in form to condition 2 in Whitley, "No extraction shall take place except in accordance with a restoration scheme to be agreed ..."; or it could have imposed the standard form of conditions that are imposed on grants of outline planning permission: "details of [a restoration scheme] shall be submitted to and approved by the Local Planning Authority before any development takes place".

60. Such a prohibition should not be implied merely because a condition, which is apparently concerned not with extraction but with the back-filling and restoration of the worked out areas once extraction has been completed in those parts of the quarry, requires a restoration scheme to be agreed "before extraction is commenced".

61. Condition 10 is a "condition precedent" in the sense that it requires something to be done before extraction is commenced, but it is not a "condition precedent" in the sense that it goes to the heart of the planning permission, so that failure to comply with it will mean that the entire development, even if completed and in existence for many years, or in the case of a minerals extraction having continued for 30 years, must be regarded as unlawful.

62. In my judgment, the principle argued for by the defendant applies only where a condition expressly prohibits any development before a particular requirement, such as the approval of plans, has been met. Condition 10 is not such a condition. If it had been breached some 34 years ago, the effect of that breach would have been to render any restoration in breach of condition, and therefore unlawful. Other activities permitted by the 1971 permission, such as extraction, would not have been rendered unlawful.

63. This approach accords with the note of caution introduced by Beldam LJ in the concluding paragraph of his judgment in Oakimber, cited, with no indication of disagreement, by Woolf LJ on pages 80 to 81 of Whitley (see paragraph 40 above).

64. Although this passage in Beldam LJ's judgment was narrowly construed by Keene J (as he then was) in Leisure Great Britain Plc v Isle of Wight Council [1999] at pages 377 to 378, and questioned by Ouseley J in Hammerton v London Underground Ltd [2002] EWHC 2307 (Admin) 133, it reinforces my view that it is appropriate for the court without "taking on a role in assessing the planning significance of matters which are the exclusive purview of the planning authority" to pay close attention to the nature of any condition that is said to be a "condition precedent" in the sense in which those words are used in the defendant's letter dated 24th January 2003.

65. The defendant placed particular reliance upon the decision of the Court of Appeal in the Daniel Platt case. Mr Porten submitted that it could not be distinguished from the present case. That case was concerned with a planning permission granted in 1947 under a general Interim Development Order (IDO). It was common ground that the planning permission obtained in 1947:

> "... was akin to today's outline permission, namely a planning permission subject to a condition requiring the submission and approval of details of the proposed operations before any operations are begun. However, as is again now common ground, no such details were ever submitted to the

> planning authority. Yet mining continued and no enforcement action was ever taken until recently." Per Schiemann LJ at page 75B to C; see also the passage at page 77C to D cited above.

66. Again, the Court of Appeal did not have to, and therefore did not, address the question: what happens if there is not an outline but a detailed planning permission and if all the conditions of that detailed planning permission are complied with, save for one, which requires approval of some particular aspect of the development before any development commences? Is the resulting unlawfulness confined to that particular aspect of the development, or does it render the entire development unlawful?

67. For the reasons set out above, I believe that the statutory purpose is better served by drawing a distinction between those cases where there is only a permission in principle because no details whatsoever have been submitted, and those cases where the failure has been limited to a failure to obtain approval for one particular aspect of the development. In the former case, common sense suggests that the planning permission has not been implemented at all. In the latter case, common sense suggests that the planning permission has been implemented, but there has been a breach of condition which can be enforced against. I appreciate that these are two opposite ends of a spectrum. Each case will have to be considered upon its own particular facts, and the outcome may well depend upon the number and the significance of the conditions that have not been complied with. Provided that the Court applies Wednesbury principles when considering these issues, there is no reason why it should usurp the responsibilities of the local planning authority.

68. As mentioned above, the "condition precedent" principle has been applied in a number of non-minerals cases. In Leisure Great Britain, it was argued that very limited operations -- pegging out the site of a permitted road layout and construction to base level of part of a roadway in 1998 -- had been sufficient to keep alive a 1993 outline planning permission. The planning permission was subject to a number of conditions, of which conditions (8) and (12) were relevant. Condition (8) provided:

> "No works shall be commenced on site until chestnut pale fencing or other type of fencing approved by the local planning authority of a height of not less than 1.2 metres shall have been erected around each tree or tree group to be retained on site at a radius from the trunk of not less than 4.6 metres, or within the crown spread whichever is the lesser of the two. Such fencing shall be maintained to the satisfaction of the local planning authority during the course of the development operations."

69. Condition (12) read as follows:

> "The sequence of operations during the implementation of the permission hereby granted shall be as may be approved by the local planning authority and a programme of working shall be submitted to the local planning authority for approval before any operations are commenced on site."

70. Neither of those conditions was complied with before the limited operations relied upon by applicants were carried out. Keene J concluded on page 381:

> "Those two conditions were not complied with. It follows that the roadworks which were carried out were not authorised by the planning permission, but were in breach of planning control. I can see no basis for departing from the well-established normal principle that unauthorised works do not constitute 'material operation comprised in the development'. That being so, development to which the 1993 permission related did not begin within the period set out in condition 2 of that permission."

71. That conclusion is not in the least surprising on the facts of that case. The court did not have to consider what the position would have been if condition (8) had been breached but no harm had come to the trees on the site, and the 60 holiday lodges and leisure club had been completed and occupied. If the development had been completed less than four years previously, would the local planning authority have been entitled to issue an enforcement notice on the basis that the 1993 planning permission had not been implemented? Alternatively, if more than four years had elapsed, would the landowner have been entitled to argue, in response to enforcement proceedings for breach of any of the other conditions on the planning permission (for example, as to holiday occupancy, if such a condition had not been omitted in error; see page 372), that since condition (8) had been breached the planning permission had not been implemented and it had therefore lapsed together with all of its conditions?

72. A not dissimilar problem arose in Henry Boot Homes Ltd v Bassettlaw District Council [2002] EWCA Civ 983, [2003] 1 P&CR 23. An outline planning permission, which envisaged the construction of some 315 dwellings, had been granted. It contained, in addition to the usual condition requiring submission of reserved matters for approval, condition (8), which required:

> "No development of the site shall begin until such time as full details of the manner in which foul sewage and surface water are to be disposed of from the site have been submitted to and agreed in writing by the District Planning Authority."

73. Reserved matters were approved, and the approval was itself subject to a number of conditions, including:

> "2. No dwelling shall be commenced until the extension of Heathfield Gardens has been constructed, and surfaced to at least base course level, from the existing end of Heathfield Gardens to the point where it meets the southern boundary of the site...
>
> "5. Before development commences precise details of the finished floor level of each dwelling, road and footpaths, garden areas and open spaces shall be submitted to and agreed in writing with the District Planning Authority...

"6. The facing and roofing materials to be used in the development hereby permitted shall be only as may be agreed in writing by the District Planning Authority before development commences.

"7. A scheme for tree planting on and landscaping treatment of the site, including the area indicated as Public Open Space, shall be submitted to and agreed in writing by the District Planning Authority before development commences...

"8. The form of surfacing used for all outdoor hard surfaces on the site shall be only as may be agreed in writing by the District Planning Authority before development commences.

"9. Precise details of the landscaped strip adjacent to the River Idle shall be submitted to and agreed in writing by the District Planning Authority before development commences...

"10. No development of the site shall begin until such time as full details of the manner in which foul sewage and surface water are to be disposed of from the site have been submitted to and agreed in writing by the District Planning Authority.

"12. Precise details of the landscaping, surfacing treatment and footpath provision for the strip of land containing the gas main shall be submitted to and agreed in writing with the District Planning Authority before development commences..."

74. Limited works were carried out, sufficient in physical terms to amount to material operations for the purpose of commencing development, but such works commenced without compliance with all of those conditions; see per Keene LJ at pages 376 to 377. Although the appellants could have regularised the position by submitting the required details for approval before the deadline for commencing development expired, they failed to do so, despite warnings from the respondent's solicitor.

75. Against this factual background, it is hardly surprising that leading counsel for the appellant accepted that:

> "In general, operations carried out in breach of a condition cannot be relied upon as material operations capable of commencing the development within the meaning of section 56(2) [of the 1998 Act]." See per Keene LJ at page 385.

76. The "Whitley principle" was not in dispute. The appellants argued that they had a legitimate expectation as a result of the respondent's conduct that the development would be treated as having been validly commenced; see page 386. That argument was rejected.

77. Again, the Court of Appeal did not have to consider whether it would have been appropriate to apply the full rigour of the Whitley principle in circumstances where, for

example, 315 dwellings had been erected and had been occupied for three years, but it had then been belatedly realised that precise details of the finished floor levels et cetera had not been submitted before the development commenced in accordance with condition 5. On the defendant's approach the 315 dwellings would have been erected without planning permission.

78. Such an over-literal application of the Whitley principle would produce absurd and wholly unforeseen consequences. I do not accept the proposition that the court would be usurping the role of the local planning authority if it concluded that such an approach could not possibly serve any useful planning purpose, given the local planning authority's power to enforce against any breach of a planning condition if thought appropriate.

79. The difficulties presented by an over-rigid application of the Whitley principle, and the court's ingenuity in circumventing those difficulties, is illustrated by the decision of Ouseley J in Hammerton, a case concerned with the East London line extension. Having reviewed the relevant authorities, Ouseley J said this in paragraph 123:

> "The starting point is clear: development in breach of planning control is normally ineffective to commence development because it is unlawful. But there are exceptions as the Whitley case shows. Whitley has not been disapproved in the House of Lords. They cover the situations first, where before the deadline has passed the necessary consents have been obtained even though development commenced before they were obtained, and secondly, where the necessary consents were sought before the expiry of the deadline and obtained after it but before any enforcement action had been taken. The approach of the Court of Appeal was seen as a sensible and practical approach which allowed for the realities of any authority rationally taking enforcement proceedings in such a situation. The Court did not contemplate one way or another the making of further exceptions and it did not address the position where the developer has failed to do required works as opposed to a failure to obtain approvals for details."

80. In paragraphs 126 and 127, Ouseley J said:

> "126. However, neither the House of Lords in Reprotech nor the Court of Appeal in Powergen overruled or expressly confined to its particular facts, respectively, the decision in Whitley. The decision in Whitley does not fall foul of those subsequent decisions. Whitley dealt with circumstances where the necessary approvals of details were sought and did go through all the relevant statutory procedures. It would have been irrational for the Council thereafter to have thought it expedient to take enforcement proceedings. But Woolf LJ also referred to other circumstances in which the effectiveness of development to commence a planning permission should be judged in the light of the expediency of enforcement proceedings: where the work relied on was started in breach of condition, but within the five year period the approvals were obtained, enforcement proceedings would be too technical; where works contravened a blanket prohibition but were not themselves something to which the missing

approvals could relate, or where the works in breach were of no planning significance, the position had to be judged in the light of enforcement proceedings. I do not say that Woolf LJ was saying that those latter two circumstances were ones in which development in breach of condition would always be effective, (though he was for the first). Nor was he saying that in no other circumstances could such development be effective. Nor was he making an unprincipled ad hoc non-statutory exception to a statutory code or one which was confined to cases where the breach arose from a failure to secure approvals of details, which is not a distinction drawn by the Act for these purposes. It cannot be seen as a hard case making bad law. And it is inherent in Whitley, that it may not be possible to tell whether the development has been effectively commenced immediately upon the expiry of the five year period because the exception in Whitley depends upon whether the previously sought approvals are in fact granted before enforcement proceedings are initiated. It would not be unlawful to commence such proceedings before the approvals were granted, although there would be no point in continuing with them thereafter.

"127. I consider that the principle discernible in Woolf LJ's reasoning is that where it would be unlawful, in accordance with public law principles, notably irrationality or abuse of power, for a local planning authority to take enforcement action to prevent development proceeding, the development albeit in breach of planning control is nevertheless effective to commence development. Three of the passages from his judgment, to which I have referred in paragraph 104, related his approach to the rational availability of enforcement proceedings. Enforcement action may still be taken to remedy the breach by requiring compliance with the condition. But the development cannot be stopped from proceeding."

81. Having considered a number of authorities, including Leisure Great Britain, Ouseley J said in paragraphs 130 and 131:

"130. However, if after the expiry of the five year period, it is possible to conclude that enforcement action is not lawfully possible, I see no reason why the development which cannot be enforced against should not be regarded as effective to commence development. The role of enforcement, and the statutory flexibility which it brings, cannot be left wholly out of the picture when reaching a conclusion on a matter about which the Act is not explicit -- can development in breach of planning control ever be effective to commence a planning permission? This is itself a judicial interpolation into the statutory code. It too arises from the application of public law principles as to the legal consequences of unlawful though not criminal acts. No sound distinction can be drawn for these purposes between development which cannot be enforced against because there has been no breach of planning control and development which cannot be enforced against because such action would itself be unlawful. If, in language which the post Carnwath Report enforcement regime has made redundant,

development in breach of planning control is immune from enforcement control, it should be regarded as effective to commence development. Such an approach flows from my analysis of the Whitley line of cases.

"131. On that analysis, it would be insufficient to show that the authorities were indifferent to the breach, or unlikely to take enforcement action or indeed that they had decided not to (although no concluded view is required). It is necessary to conclude that they could not do so."

82. Mr Humphries relied upon these dicta of Ouseley J and submitted that, after some 34 years, it would now be irrational and/or an abuse of power for the defendant to commence enforcement proceedings for breach of condition 10, since the restoration of the original quarry area is now governed by the restoration conditions contained in the 1989 and 1996 planning permissions and, if and insofar as those conditions are felt to be inadequate, more appropriate conditions can be imposed by the defendant in response to the claimant's ROMP application. It is clear that the defendant's underlying purpose in commencing enforcement proceedings would not be to secure the submission of a restoration scheme for approval, but to prevent or control further extraction in the area covered by the 1971 permission.

83. Mr Porten submitted that Hammerton had no application to the facts of the present case, which could not be distinguished from those in the Daniel Platt case. In that case the Court of Appeal had concluded that section 191(3) of the 1990 Act, under which the mining operations which had been carried out were lawful because they were immune from enforcement action, was irrelevant to the question whether the mining operations were "authorised" by the IDO permission; see per Schiemann LJ at page 82.

84. The IDO permission in Daniel Platt was an "old mining permission"; see section 22 of the Planning and Compensation Act 1991 ("the 1991 Act"). Paragraph 1(4) of schedule 2 to the 1991 Act provides that:

"(4) On an application under this paragraph, the mineral planning authority must --

"(a) if they are satisfied that ... the permission authorises development consisting of the winning and working of minerals ... ascertain --

"(i) the area of land to which the permission relates, and

"(ii) the conditions (if any) to which the permission is subject

"and grant the application, and

"(b) in any other case, refuse the application."

85. Mr Humphries submitted that a distinction should be drawn between these provisions in the 1991 Act and the relevant provisions in Schedule 13 to the 1995 Act, paragraph 9(1) of which is set out above (see paragraph 14). Paragraph 9(6) provides that, where the

mineral planning authority receive an application under paragraph 9 in relation to, inter alia, an active Phase II site:

> "... they shall determine the conditions to which each relevant planning permission relating to the site is to be subject ..."

86. There is no equivalent of the "authorises" provision in schedule 2 of the 1991 Act. Mr Porten submitted that there was no material difference between the approach which the mineral planning authority was required to take under the 1991 and 1995 Acts, since in the Oldham and Caerphilly cases (see above) it had been concluded that a relevant "planning permission" had to be an extant permission.

87. I accept that the approach of the Court of Appeal in Daniel Platt is difficult to reconcile with the approach of Ouseley J in Hammerton. It is clear, however, that Ouseley J was referred to the Daniel Platt case by leading counsel for the defendant; see paragraph 110 of his judgment. I am, of course, bound by the Court of Appeal, but the Court of Appeal itself had to consider the Whitley principle in another appeal concerning the East London line extension, R (Prokopp) v London Underground Ltd [2003] EWCA Civ 961, [2004] 1 P&CR 31. In paragraphs 83 to 85, Buxton LJ said this:

> "83. The "Whitley principle" is that development in breach of a condition is not development relevant to the planning permission, and thus must be ignored for the purposes of deciding whether that permission has been implemented. Woolf LJ however recognised an exception to that principle, in cases where enforcement action in respect of the breach of condition would not be possible: that is, would constitute a breach of the authority's public law obligations. Mr Clayton argued strongly that that exception must be strictly limited, relying on the judgments in this court in the subsequent case of Henry Boot Homes v Bassettlaw DC [2003] 1 P&CR 372. There the developer relied on what he alleged was a legitimate expectation that the condition would not be enforced. Keene LJ, at §§ 55 and 56 of the leading judgment, emphasised that such claims, while not necessarily to be excluded, must be treated with great caution. The public nature of the planning process was inconsistent with giving effect to private understandings between the developer and the planning authority.
>
> "84. I would venture the following comments. First, there is nothing in Boot to suggest that Woolf LJ's recognition of the possibility that public law rules might inhibit enforcement was limited to cases where, as alleged in Whitley, it would be unfair to enforce because, as in that case, a consent lacking at the date of development had been obtained by the time that enforcement was contemplated. Indeed, at p86B of the report in Whitley Woolf LJ treated that as only a particular example of matters to be reviewed at the enforcement stage. Second, while I respectfully give great force to the observations in Boot referred to in §83 above, the claim made by LUL does not seek private exemption from the planning process but rather, in however unusual and accidental a form, relies on the binding nature in rem of the public documents produced by that process.

> "85. I would therefore respectfully agree with the view of Ouseley J in Hammerton that irrationality of enforcement action falls within the public law exception to the Whitley principle; and with the submission of LUL that this case falls within that rubric. Enforcement action is therefore not available in any event against the continued development of the ELLX."

88. Schiemann LJ delivered a separate judgment, containing different reasoning, but said in paragraph 51 that he had read the judgment of Buxton LJ in draft and was "in substantial agreement" with it. Kennedy LJ agreed with both Buxton LJ and Schiemann LJ.

89. Given the Court of Appeal's endorsement of the approach of Ouseley J in Hammerton, my agreement with that approach is superfluous. However, I too wish to express my agreement with Ouseley J's approach in Hammerton, since it gives practical effect to those parts of the statutory code which deal with enforcement, and ensures that a judge-made principle is not applied so inflexibly as to produce results which defy common sense and serve no useful planning purpose.

90. Applying the Hammerton approach, if I had concluded that condition 10 of the 1971 permission was a "condition precedent" of a kind to which "the Whitley principle" applied, I would have concluded that there had nevertheless been an effective implementation of the 1971 permission. I would have reached that conclusion on the basis that, limestone having been extracted from the original quarry for some 34 years and the restoration scheme mentioned in condition 10 having been overtaken by the restoration provisions in the 1989 and 1996 permissions, it would be both irrational and an abuse of power for the defendant now to commence enforcement action for the purpose of preventing or controlling extraction in the original quarry under the guise of a complaint that the claimants had, many years ago, failed to comply with condition 10, not least because if what is wanted is an up-to-date restoration scheme, that can be obtained by the defendant in its response to the claimant's ROMP application.

Conclusions

91. For these reasons, I conclude that (a) condition 10 was complied with; (b) if condition 10 was not complied with, it is not a condition precedent to which the Whitley principle applies; and (c) if the Whitley principle should be applied to condition 10, the 1971 permission was implemented because the extraction of limestone from the original quarry is immune from enforcement action (provided the claimant continues to comply with the remaining conditions of the 1971 permission and with any relevant conditions in the 1989 and 1996 permissions). It follows that the application succeeds and I grant the claimant the following relief:

92. 1. A quashing order in respect of the defendant's decision on 8th September 2004 as notified in the decision notice dated 7th October 2004; and

93. 2. A declaration that the 1971 permission has not lapsed and is still a valid permission.

94. It only remains for me to thank counsel for their very helpful submissions.

95. MR PHILLPOT: I am grateful, my Lord. In the light of your Lordship's judgment, we do ask for an order that the defendant pay the claimant's costs. I am afraid that the amount of the costs is not agreed. We have put schedules in, but unfortunately there are issues arising from them which we are not able to deal with today, so we would ask them to be assessed if not agreed.

96. My Lord, I am also asked to seek an order that £10,000 of the claimant's costs should be paid on account within 21 days of today.

97. MR JUSTICE SULLIVAN: I do not want to look at the detailed figures if I can possibly avoid it. What is the total figure for the claim now?

98. MR PHILLPOT: The total figure for the claim, my Lord -- there has been a supplementary schedule submitted, an extra £1,200.

99. MR JUSTICE SULLIVAN: For turning up today, yes.

100. MR PHILLPOT: It is in the region of £50,000.

101. MR JUSTICE SULLIVAN: That is close enough. I do not think that I need to know any more than that. Can I just find out from Mr Findlay, first of all, whether there is any objection to the principle that the defendant ought to pay the claimant's costs to be assessed?

102. MR FINDLAY: In the light of your Lordship's judgment, no. My Lord, there is --

103. MR JUSTICE SULLIVAN: What about the payment on account?

104. MR FINDLAY: My Lord, it would be unusual, but I apprehend that at least £10,000 will need to be paid. My Lord, the only issue is as to the question of time, and that relates to another application I wish to make in a moment. My Lord, I would suggest 28 days.

105. My Lord, I have two applications to make. One relates to the time, so if I could deal with that first. It is to ask your Lordship to extend the time to make any application for permission to appeal, partly because your Lordship's judgment, albeit on the second and third issues, raises matters of considerable importance, but also because the council is undergoing both mayoral elections at the moment and the officers involved are also involved in the general election. So, my Lord, I would ask your Lordship to extend that to 28 days.

106. MR JUSTICE SULLIVAN: The legal department of the council's services will be heavily involved as returning officers and so forth.

107. MR FINDLAY: Absolutely. My Lord, I do have another application and that is for leave to appeal. Clearly the second and third parts of your Lordship's judgment raise issues of considerable importance. I realise that the first part of your Lordship's judgment is a much narrower issue, but it still raises an issue.

108. MR JUSTICE SULLIVAN: Well, it is a point of interpretation, and the thing about that is that it can strike you one way or it can strike you another, that is the trouble.

109. MR FINDLAY: I am grateful to your Lordship for that indication.

110. MR JUSTICE SULLIVAN: I will hear what Mr Phillpot says about it, but I am not unsympathetic to either of those applications at the moment. Let us see if Mr Phillpot can make me less sympathetic.

111. MR PHILLPOT: My Lord, on the first matter I am not going to resist the first application for the extension of time to 28 days, for the reasons given. On the second matter, the first point is a narrow point and a decisive point which would render the second and third points academic. That is my first submission.

112. The second submission is this: we say that your Lordship has found in the same way that the condition, when read as it appears on the face of the permission, is clear in its effects. We do not consider that there is a real prospect of success in the light of that. Now, my Lord, without trawling over all the submissions that have been made, and which your Lordship has summarised this morning, I am not sure I can take it much further. We say that the permission is absolutely clear.

113. MR JUSTICE SULLIVAN: The difficulty with interpretation and clarity is -- well, we are all familiar with the story about the two-judge Court of Appeal where they each looked at each other and each said, it is perfectly clear, is it not, and they said, yes, and they then proceeded to give two completely diametrically opposed interpretations, each of which they were convinced was entirely clear. But I have your submission, Mr Phillpot, thank you very much.

114. Right, let us go through these. I am minded to grant your applications, Mr Findlay. First of all, claim allowed; relief in the terms I have just mentioned in the judgment; defendant to pay the claimant's costs; those costs to be subject to a detailed assessment if not agreed; the sum of £10,000 to be paid by the defendant on account of those costs within 28 days; the defendant to have permission to appeal. I indicate why -- well, the first issue is a narrow point of interpretation and there is almost always scope for argument about interpretation, and the second and third points are matters of considerable importance to developers and local planning authorities alike.

115. As far as the time within which the council may appeal, they have put in their notice and I extend that to -- you have asked for 28 days. I am just wondering -- it does not seem to me to be sensible to try to require you to put in grounds -- it is quite a lengthy judgment --

116. MR FINDLAY: Absolutely, my Lord.

117. MR JUSTICE SULLIVAN: -- and I am just wondering whether it is actually more sensible to give you a time after receipt of the transcript to put the notice in. You have been taking careful notes and so forth, but it must be sensible to cross-refer.

118. MR FINDLAY: I appreciate that.

119. MR JUSTICE SULLIVAN: I was thinking of 28 days after receipt of the transcript, because the local authority obviously will want to consider carefully whether it appeals and, if so, on what basis. That will inevitably take time. Mr Phillpot, I think this has been going on for a very long time. Your clients, as far as I know, are still extracting from the quarry. I know they would like their conditions approved, but I do not think the extra few days will make much odds.

120. MR PHILLPOT: My Lord, may I make two points. First of all, I think it is entirely sensible that the time should be extended to after receipt of the transcript. I do not think I can resist that. But the first point I would make about that is it would be helpful if the transcript could be expedited in those circumstances. As to the question of my client's interest, and of course my clients are very keen to know their position as they have economic interests in it, as long as the first point is met, then I cannot resist the application.

121. MR JUSTICE SULLIVAN: I will find out about expedition because in practice I usually get the transcripts within a relatively short time. (Pause). They generally come back within about a working week, or seven days, so expedition simply messes up the schedule for everything else as well, so I am not going to do that. What I am going to do is to extend time for the filing and serving of the notice of appeal to 28 days from receipt of the transcript. Mr Phillpot, I have not ordered the transcript to be expedited, but I am satisfied that it will come reasonably quickly anyway, within a week or so, and I turn them around very quickly once I get them.

122. MR PHILLPOT: My Lord, I am extremely grateful for that. Would your Lordship make the same timing provision for the orders of costs, because I would wish that they mirrored one and the other for obvious reasons. If there is to be an appeal, then we would have to take a view as to whether we wanted a stay on thE order as to costs or not.

123. MR JUSTICE SULLIVAN: Yes, it only makes about five days' difference. Associate, if you would tie the costs order in with the timescale for the transcript, as well, to 28 days from receipt of the transcript. So they have to appeal and pay £10,000, or make some sort of application in respect of it. Right?

124. MR FINDLAY: I am grateful, my Lord.

125. MR JUSTICE SULLIVAN: Anything else?

126. MR PHILLPOT: No, my Lord.

127. MR JUSTICE SULLIVAN: I would be grateful if you would express my thanks again to Mr Humphries and Mr Porten. They were very interesting submissions and it was a very interesting case. It was a nice trip down memory lane.