Michaelmas Term
[2022] UKSC 30
On appeal from: [2020] EWCA Civ 1440

JUDGMENT

Hillside Parks Ltd (Appellant) *v* Snowdonia National Park Authority (Respondent)

before

Lord Reed, President
Lord Briggs
Lord Sales
Lord Leggatt
Lady Rose

JUDGMENT GIVEN ON
2 November 2022

Heard on 4 July 2022

Appellant
Charles Banner KC
Robin Green
Matthew Finn
(Instructed by Aaron & Partners LLP (Chester))

Respondent
Gwion Lewis KC
(Instructed by Geldards LLP (Cardiff))

LORD SALES AND LORD LEGGATT (with whom Lord Reed, Lord Briggs, and Lady Rose agree):

1. This appeal raises issues of importance in planning law about the relationship between successive grants of planning permission for development on the same land and, in particular, about the effect of implementing one planning permission on another planning permission relating to the same site.

The factual background

2. The site to which the appeal relates is known as "Balkan Hill" and comprises around 29 acres of land near Aberdyfi in the Snowdonia National Park. In January 1967 the local planning authority granted full planning permission for the development of 401 dwellings on the Balkan Hill site in accordance with a detailed plan referred to as the "Master Plan". The Master Plan showed the proposed location of each house and the layout of a road system for the estate. It is the current status of this planning permission ("the 1967 permission") which is in dispute in this case.

3. The ownership of the Balkan Hill site has changed twice since the 1967 permission was granted. The current owner is the appellant, Hillside Parks Limited, which acquired the site in 1988. The identity of the local planning authority has also changed over the years. It is now Snowdonia National Park Authority, the respondent to this appeal. Nothing turns on these changes and we will refer without distinction to the appellant or whoever owned the site at any given time as "the Developer" and to the respondent or whichever body was the local planning authority at any given time as "the Authority".

4. The progress of development at the Balkan Hill site can best be described as glacial. In the period of more than half a century since the 1967 permission was granted, only 41 houses have been built. None of these houses has been built in accordance with the Master Plan. The Developer has applied for and been granted a series of additional planning permissions permitting development which has taken place on parts of the site. The question which now arises is whether the Developer is entitled to carry out further development at the Balkan Hill site pursuant to the 1967 permission; or whether, as the Authority contends, development carried out in accordance with other permissions has had the effect that the Developer cannot now rely on the 1967 permission.

5. The validity of the 1967 permission was previously the subject of litigation which was decided in favour of the Developer in 1987. The present proceedings are largely concerned with events since then, but it is necessary to say something by way of background about earlier events.

Development between 1967 and 1987

6. From the outset, the Developer ran into difficulties. Work was carried out to construct short sections of road to give access to the south of the site in accordance with the Master Plan. However, excavation to lay the foundations for the first two houses to be built revealed that they were sited on an old quarry which caused a problem with the ground level. Accordingly, the Developer applied for planning permission to build the houses in a slightly different position from that shown on the Master Plan and to alter their design in some respects. This permission was granted in April 1967.

7. Thereafter development proceeded very slowly indeed. By 1985 only 19 dwellings had been built, all on the very southernmost part of the site. None of these dwellings was built in accordance with the Master Plan and in some cases the departure from it was substantial. All the dwellings constructed were the subject of specific planning permissions granted by the Authority, of which there are said to have been eight in total.

Drake J's judgment

8. In 1985 a dispute arose about whether the 1967 permission remained valid. The permission had been granted subject to just one specified condition, namely, "agreement being reached on water supply before any work is carried out". The Authority contended that this condition had never been fulfilled, with the result that such development as was carried out was unlawful; and that, as no lawful development was begun within the statutory time limit, the 1967 permission had lapsed so that no development could now lawfully take place under it. The Developer disputed this and brought proceedings in the High Court to establish that the development permitted by the 1967 permission had been lawfully begun within the time limit and could lawfully be continued.

9. The action came to trial before Drake J. In his (unreported) judgment given on 9 July 1987, the judge found that the condition requiring agreement on the water supply had been fulfilled for such development as had already taken place on the

Balkan Hill site and was capable of being satisfied in relation to further development so long as the prior agreement of the responsible water supply authority was obtained. The judge also found that the development permitted by the 1967 permission had been begun by what he found to be the relevant deadline of 1 April 1974, since long before that date the Developer had constructed sections of road and a number of buildings. The judge considered that, although these buildings had been the subject of individual grants of planning permission, each such permission was "merely a variation" of the 1967 permission. He also expressed the view that "the Master Plan remains in force, and if the development is allowed to progress further it can be completed substantially in accordance with the Master Plan". The judge's decision was embodied in declarations, which included a declaration that the development permitted by the 1967 permission had been begun and "may lawfully be completed at any time in the future".

10. At the trial before Drake J, the Authority did not make any argument such as it makes in these proceedings that the 1967 permission had become incapable of implementation as a result of departures from the Master Plan. Nor does any consideration appear to have been given to how as a matter of legal analysis the variations of the 1967 permission had been achieved given that the planning legislation did not at that time give the local planning authority power to make any change to a planning permission previously granted. (Even now, as we discuss below, the power to amend a planning permission is very limited.)

Development after 1987

11. Since Drake J's judgment was given, the further development which has taken place on the Balkan Hill site has, as before, departed from the Master Plan. This further development has all been in the north-west part of the site. Not only do the positions, configurations and sizes of the houses built differ significantly from the Master Plan, but an estate road has been constructed which runs over land on which several houses are sited in the Master Plan; in addition, houses and some garages have been built on land across which one of the main internal estate roads shown in the Master Plan was to run. As previously, the Developer applied for a series of specific planning permissions for development which departed from the Master Plan. Some of the permissions granted describe the permission as a "variation" of the 1967 permission but some do not use that or any similar term. In total, eight such permissions have been granted by the Authority since 1987. It will be necessary to return to some of them in greater detail later in this judgment, but in summary (listed in the order in which the applications were made) they are as follows:

(i) Permission granted on 27 June 1996 for the erection of one dwellinghouse as a "variation" to the 1967 permission ("permission A").

(ii) Permission granted on 20 June 1997 for the erection of two terraces forming one attached dwelling, six apartment units and 8 garages with apartments over, as a "variation" to the 1967 permission ("permission B").

(iii) Permission granted on 18 September 2000 for the erection of a two storey detached dwellinghouse and garage on "Plot 5" of the site ("permission C"). This permission has not been implemented.

(iv) Permission granted on 4 March 2005 for the erection of a two storey dwelling and detached garage on "Plot 17" of the site ("permission D").

(v) Permission granted on 24 August 2004 for the erection of five detached houses and five garages as a "variation" to the 1967 permission ("permission E").

(vi) Permission granted on 25 August 2005 for the erection of a detached dwelling on "Plot 3 of Phase 1" of the site ("permission F"). This permission was not implemented and was superseded by permission H below.

(vii) Permission granted on 20 May 2009 for the construction of three pairs of dwellings ("permission G"). Although not apparent on the face of the permission, the proposed location of these dwellings was on part of the land which was the subject of permission E.

(viii) Permission granted on 5 January 2011 for the erection of one dwelling on "Plot 3" of the site ("permission H"). This permission superseded permission F.

12. With the exception of permissions C and F, we understand that all these planning permissions have been implemented.

The present proceedings

13. In May 2017 the Authority wrote to the Developer asserting that it was now impossible to implement the 1967 permission further and requiring the Developer immediately to stop all works at the Balkan Hill site until the planning situation had been regularised.

14. After correspondence including an exchange of counsel's opinions had failed to resolve the issue, the Developer brought these proceedings seeking declarations that the Authority was bound by Drake J's judgment to treat the 1967 permission as valid as a matter of *res judicata*; and that in any event the 1967 permission remains valid and may be carried on to completion.

15. The trial took place before HHJ Keyser QC sitting as a judge of the High Court. He refused to grant the declarations sought and dismissed the Developer's claim: see [2019] EWHC 2587 (QB). The judge approached the issues by first considering whether Drake J was wrong in law to decide that the remainder of the development permitted by the 1967 permission could lawfully be completed at any time in the future. He concluded that Drake J had not been wrong in law to reach that conclusion on the basis that the additional planning permissions granted before 1987 were all variations of the 1967 permission. The judge considered that in these circumstances he did not need to decide whether the Authority is bound by Drake J's declarations as a matter of *res judicata*. He went on, however, to hold that, as a result of the physical alterations to the land which have taken place since 1987, it is now physically impossible to complete the development fully in accordance with the 1967 permission, and that this has the consequence that further development under that permission would be unlawful.

16. The Developer appealed. For reasons given by Singh LJ with whom David Richards and Nicola Davies LJJ agreed, the Court of Appeal dismissed the appeal: [2020] EWCA Civ 1440. In essence they did so on the basis that the judge was entitled to conclude that, in the light of factual developments since the judgment of Drake J in 1987, it is no longer possible to implement the 1967 permission. In those circumstances the *res judicata* issue did not arise.

This appeal

17. This court granted the Developer permission to appeal on the issue of whether any further development may lawfully be carried out under the 1967

permission, but not on the res judicata issue. The Authority does not now seek to argue that the 1967 permission became incapable of implementation as a result of anything that happened before Drake J's judgment in 1987. Nor does it seek to impeach anything that Drake J decided. We therefore proceed on the footing that the individual permissions granted before 1987 operated as what were, in their effect, variations of the 1967 permission, as Drake J held. On this appeal it is not necessary or relevant to consider whether Drake J's view of the effect of those permissions was correct. We are concerned only with the effect of the additional permissions granted after Drake J's judgment was given in 1987 and the further development which has taken place since then.

18. Judge Keyser accepted (at para 62 of his judgment) that much of the Balkan Hill site is unaffected by this further development, in the sense that it would still be physically possible to build houses and roads on much of the site which conform to the Master Plan. The Developer contends that, on a correct legal analysis, further development on these vacant parts of the site may still lawfully be carried out pursuant to the 1967 permission and that the courts below were wrong to hold otherwise. Before considering the Developer's arguments for this contention, we draw attention to some central features of the legal framework.

The planning legislation

19. Planning control is a creature of legislation. The main elements of the statutory scheme remain the same as they were when first introduced across England and Wales by the Town and Country Planning Act 1947. The principal Act is now the Town and Country Planning Act 1990 (the "1990 Act"). By section 57 of the 1990 Act, planning permission is required for the carrying out of any development of land. The term "development" is defined in section 55(1) to mean "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 other land". In this case we are concerned with the former type of development (operational development) and not with change in use.

20. A planning permission is simply a permission to develop land and does not itself impose any obligation to carry out development for which permission is given. Under section 70(1) of the 1990 Act a local planning authority may, however, grant planning permission subject to such conditions as they think fit (which may include entry into planning obligations enforceable under section 106 of the 1990 Act). There is a statutory condition that the development to which the permission relates must be begun within a specified period. Provided, however, that the development is

begun within this period, there is no time limit for completing it, unless a completion notice is served under section 94 of the 1990 Act.

21. A fundamental feature of planning permission is that it runs with the land. Section 75(1) of the 1990 Act states that "any grant of planning permission … to develop land shall (except in so far as the permission otherwise provides) enure for the benefit of the land and of all persons for the time being interested in it."

Powers to vary a planning permission

22. We have mentioned that under the planning legislation a local planning authority has only limited powers to vary a planning permission after it has been granted. The relevant statutory powers are as follows.

23. Section 73 of the 1990 Act gives the local planning authority a power to dispense with or vary conditions subject to which a planning permission was granted. However, this power cannot be used to change the description of the development: *Finney v Welsh Ministers* [2019] EWCA Civ 1868; [2020] PT&R 455.

24. Section 96A of the 1990 Act, added in 2009, provides that:

> "(1) A local planning authority may make a change to any planning permission … relating to land in their area if they are satisfied that the change is not material."

What qualifies as a non-material change is not defined but is left to the judgment of the local planning authority, subject only to a requirement in subsection (2) to "have regard to the effect of the change, together with any previous changes made under this section, on the planning permission … as originally granted." (We mention in passing that the Developer does not rely on section 96A or suggest that permission H - the only planning permission relating to the Balkan Hill site granted after section 96A came into force - was an exercise of this power.)

25. In addition, clause 98 of the Levelling-Up and Regeneration Bill currently before Parliament will, if enacted, insert a new section 73B into the 1990 Act giving the local planning authority power to grant a planning permission that varies an existing permission but only if the local planning authority is satisfied that "its effect will not be substantially different from that of the existing permission".

Interpreting a planning permission

26. The scope of a planning permission depends on the terms of the document recording the grant. As with any legal document, its interpretation is a matter of law for the court. Recent decisions of this court have made it clear that planning permissions are to be interpreted according to the same general principles that apply in English law to the interpretation of any other document that has legal effect. The exercise is an objective one, concerned not with what the maker of the document subjectively intended or wanted to convey but with what a reasonable reader would understand the words used, considered in their particular context, to mean: see *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2016] 1 WLR 85, paras 33-34 (Lord Hodge) and para 53 (Lord Carnwath); *Lambeth London Borough Council v Secretary of State for Housing, Communities and Local Government* [2019] 1 WLR 4317, paras 15-19.

27. Differences in the nature of legal documents do, however, affect the scope of the contextual material to which regard may be had in interpreting the text. Because a planning permission is not personal to the applicant and enures for the benefit of the land, it cannot be assumed that the holder of the permission will be aware of all the background facts known to the person who applied for it. Furthermore, a planning permission is a public document on which third parties are entitled to rely. These characteristics dictate that the meaning of the document should be ascertainable from the document itself, other public documents to which it refers such as the planning application and plans and drawings submitted with the application, and physical inspection of the land to which it relates. The reasonable reader of the permission cannot be expected to have regard to other material such as correspondence passing between the parties. See eg *Slough Estates v Slough Borough Council (No 2)* [1971] AC 959, 962 (Lord Reid); *Trump International Golf Club*, para 33 (Lord Hodge). In this case, we are concerned with grants of full planning permission, in relation to which it is to be expected that a reasonable reader would understand that the detailed plans submitted with the application have particular significance: *Barnett v Secretary of State for Communities and Local Government* [2008] EWHC 1601 (Admin), [2009] JPL 243, para 24 (Sullivan J); affirmed [2009] EWCA Civ 476, [2009] JPL 1597, paras 17-22 (Keene LJ); R Harwood, *Planning Permission* (2016), para 28.9.

Inconsistent planning permissions

28. As counsel for the Developer have emphasised in their submissions, the planning legislation is intended to operate as a comprehensive code. There is, however, no provision of the legislation which regulates the situation where two or

more planning permissions granted for development on the same site are, or are claimed to be, mutually inconsistent. The courts have therefore had to work out the principles to be applied.

The *Pilkington* case

29. The leading case is the decision of a three judge Divisional Court in *Pilkington v Secretary of State for the Environment* [1973] 1 WLR 1527. The facts were that the owner of a plot of land was granted planning permission to build a bungalow on the plot. After the bungalow was built, he discovered an earlier planning permission granted to the previous owner to build a bungalow on a different part of the same plot of land. The description of the development in the earlier permission and the relevant plan showed that it was contemplated that the rest of the plot would be used as a smallholding. The question was whether the landowner could lawfully build another bungalow in the location specified in the earlier permission. The Divisional Court held that he could not.

30. Lord Widgery CJ (with whose judgment Bridge and May JJ agreed) pointed out that a landowner "is entitled to make any number of applications for planning permission which his fancy dictates," even though they may be mutually inconsistent with one another. The landowner may wish, for example, to "test the market" by putting in applications for alternative schemes before deciding which one to implement. In general, it is the duty of the local planning authority to regard each application as a proposal for a separate and independent development and to consider the application on its own merits. In saying this, Lord Widgery expressly set to one side cases "where one application deliberately and expressly refers to or incorporates another" (p 1531).

31. Where two separate applications are granted in respect of the same site, one of them is then implemented, and the question then arises - as it did in the *Pilkington* case - whether it is lawful to carry out the development contemplated by the other permission, Lord Widgery stated the test as being "whether it is possible to carry out the development proposed in that second permission, having regard to that which was done or authorised to be done under the permission which has been implemented" (p 1532B). Applying this test, the Divisional Court held that, having regard to what had been built pursuant to the later permission, the development contemplated by the earlier planning permission could not be carried out. This was because the development contemplated by that permission was not simply the building of a bungalow, but "the building of a bungalow in a particular site as ancillary to the smallholding which was to occupy the rest of the site" (p 1532D).

32. The *Pilkington* case has been approved and followed on numerous occasions, including in several decisions of the Court of Appeal: see eg *Hoveringham Gravels Ltd v Chiltern District Council* (1977) 35 P & CR 295; *Durham County Council v Secretary of State for the Environment* (1989) 60 P & CR 507; and *Staffordshire County Council v NGR Land Developments Ltd* [2002] EWCA Civ 856; [2003] JPL 56. The Authority contends, and the courts below held, that the present case is one where, on a straightforward application of the *Pilkington* test, development carried out under later permissions granted after 1987 has rendered the 1967 permission incapable of further implementation.

The Developer's case

33. On this appeal counsel for the Developer seek to distinguish the *Pilkington* case in three (alternative) ways. First, they submit that the principle for which the case is authority is, or is analogous to, a principle of abandonment whereby the right to develop land in accordance with a planning permission will be lost if a landowner acts in a way which would lead a reasonable person to conclude that the right has been abandoned. That test, they say, is not satisfied in the present case. Second, they submit that (unless it expressly says otherwise) a planning permission, such as the 1967 permission, for the construction of multiple buildings is properly interpreted as permitting the construction of any sub-set of these buildings, and there is no reason why the landowner cannot combine such development on parts of the site with development on other parts of the site authorised by other planning permissions. The third argument advanced is that, even if the 1967 permission is not severable in this way, each of the additional permissions implemented since 1987 is to be construed as, in substance, a variation of the 1967 permission, in the same way as Drake J found was the effect of the individual permissions granted before 1987. Hence the 1967 permission, as varied, remains valid and capable of further implementation.

No principle of abandonment

34. We consider first the Developer's argument that the decision in the *Pilkington* case should be analysed as resting on a principle of abandonment. Counsel for the Developer submit that the two planning permissions at issue in the *Pilkington* case were plainly irreconcilable so that Mr Pilkington had a choice between implementing one or the other. His conduct in building the first bungalow on the site would have led a reasonable person to assume that he had abandoned the right to implement the other planning permission. They submit that this analysis in terms of abandonment has the merit of keeping judicial gloss on the legislative code to a minimum. The second step in the argument is to contend that in this case the

conduct of the Developer in carrying out building operations authorised by the additional permissions granted after 1987 would not have led a reasonable person to conclude that the Developer had abandoned the 1967 permission.

35. We do not accept that the decision in the *Pilkington* case can be explained on the basis of a principle of abandonment, nor indeed that there is any principle in planning law whereby a planning permission can be abandoned.

36. In the first place, this explanation is directly contrary to the court's reasoning in the *Pilkington* case. Lord Widgery said in terms, at p 1532H:

> "My views on this matter are not based on any election on the part of Mr Pilkington; they are not based on any abandonment of an earlier permission … I base my decision on the physical impossibility of carrying out that which was authorised in [the earlier planning permission]."

37. More fundamentally, the suggested explanation is also inconsistent with the decision of the House of Lords in *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment* [1985] AC 132. In that case the House of Lords unanimously held that there is no principle, and no room for any principle, in planning law whereby a planning permission may be extinguished by abandonment. Lord Scarman, with whom the other members of the appellate committee agreed, gave two main reasons for this conclusion. The primary reason was that Parliament has provided a comprehensive code of planning control and the courts should not introduce into planning law principles or rules derived from private law unless expressly authorised by Parliament or necessary to give effect to the purpose of the legislation (pp 140H-141C). From what is now section 75(1) of the 1990 Act (quoted at para 21 above) Lord Scarman derived the "clear implication" that "only the statute or the terms of the planning permission itself can stop the permission enuring for the benefit of the land and of all persons for the time being interested therein" (p 141G-H). Introducing a doctrine of abandonment into planning law would be inconsistent with this, as it would allow the land to lose the benefit of a planning permission by a means not provided for either by the legislation or by the terms of the planning permission itself. It can therefore be seen that the Developer's assertion that recognising a principle of abandonment would avoid an impermissible judicial gloss on the legislative code is misplaced. It was precisely because it would involve such an impermissible gloss that the House of Lords decided that no such principle may properly be imported into planning law.

38. Secondly, Lord Scarman emphasised that the existence or otherwise of a valid planning permission should be capable of ascertainment by inspection of the planning register and of the land in question. That follows from the nature of planning permission as running with the land and as affecting third parties. Introducing a doctrine of abandonment, not provided for in the planning legislation, would be inconsistent with this requirement of public accessibility. As Lord Scarman observed, at p 139E, if such a doctrine were recognised:

> "The planning permission would be entered in a public register; but not so its abandonment. Nor would it be possible by inspection of the land to discover whether the permission had been abandoned, for the absence of implementation of a planning permission is no evidence that a valid permission does not exist."

39. Lord Scarman discussed the *Pilkington* case as one of a number of judicial decisions which, "upon first sight and before analysis, might seem to suggest that there is room in the planning law for a principle, or an exception, allowing the extinguishment of a planning permission by abandonment" (p 143A-B). Counsel for the Developers have sought to rely on this discussion as indicating that the *Pilkington* case may be regarded as establishing an exception to the general rule that a planning permission cannot be extinguished by abandonment. Lord Scarman went on, however, to explain why, on analysis, the *Pilkington* decision - which he described as "certainly a common sense decision, and, in my judgment, correct in law" - was <u>not</u> based on a concept of abandonment (see pp 144G-145C). Rather, its rationale was that the building of the first bungalow had "destroyed" the smallholding and made the development authorised by the earlier planning permission incapable of implementation. Lord Scarman was satisfied that there was, or need be, no uncertainty arising from the application of this principle:

> "Both planning permissions will be on a public register: examination of their terms combined with an inspection of the land will suffice to reveal whether development has been carried out which renders one or other of the planning permissions incapable of implementation."

40. Counsel for the Developer have not argued that this court should depart from the decision of the House of Lords in *Pioneer Aggregates* nor made any criticism of Lord Scarman's reasoning. We would endorse that reasoning, which also confirms that the correct explanation of the *Pilkington* case is, just as Lord Widgery stated,

that the development carried out in building a bungalow under the later permission had rendered the earlier planning permission incapable of implementation.

The *Pilkington* principle

41. The principle underlying the *Pilkington* case can be analysed further. In the passage of his judgment quoted at para 36 above Lord Widgery said that his decision was based on the "physical impossibility" of carrying out what was authorised by the unimplemented planning permission; and elsewhere in his judgment he used the phrase "practical possibility" (see p 1532C). Two points arise from this. First, it is important to recognise that the test of physical impossibility applies to the whole site covered by the unimplemented planning permission, and not just the part of the site on which the landowner now wishes to build. Thus, in the *Pilkington* case, as pointed out in later cases, it remained perfectly possible to build a bungalow in the position authorised by the earlier, unimplemented planning permission, as that part of the site remained vacant. The reason why it was not physically possible to carry out the development authorised by the earlier permission was that the proposal for which permission was granted involved using the rest of the land as a smallholding and this could not be achieved when part of that land was occupied by the first bungalow: see *R v Arfon Borough Council C Ex p Walton Commercial Group Ltd* [1997] JPL 237; *Staffordshire County Council v NGR Land Developments Ltd* [2002] EWCA Civ 856; [2003] JPL 56, para 56; and *R (on the application of Robert Hitchins Ltd) v Worcestershire County Council* [2015] EWCA Civ 1060; [2016] JPL 373, para 42.

42. A second point to note concerns Lord Widgery's formulation of the relevant test (in the passage quoted at para 31 above) as "whether it is possible to carry out the development proposed in that second permission, having regard to that which was done *or authorised to be done* under the permission which has been implemented" (emphasis added). The words "or authorised to be done" ought, we think, to have been omitted as they are not consistent with the ratio of the decision.

43. On the facts of the *Pilkington* case the planning permission which had already been implemented included a condition that the bungalow built in accordance with that permission should be "the only dwelling to be erected" on the plot. Lord Widgery, however, specifically stated that his decision did not in any way depend on the fact that building the second bungalow would be a breach of this condition (see p 1532H). What mattered, as he made clear, was whether it was physically possible to carry out the development authorised by the terms of the unimplemented permission. That depends upon (a) the terms of the unimplemented permission and (b) what works have actually been done. It would not make sense to have regard to the terms of the permission under which development has already taken place, as a

central theme of the judgment is that mere inconsistency between the two permissions does not prevent the second permission from being implemented. What must be shown is that development in fact carried out makes it impossible to implement the second permission in accordance with its terms.

44. This point is illustrated by *Prestige Homes (Southern) Ltd v Secretary of State for the Environment and Shepway DC* (1992) 64 PCR 502, where a house had been built pursuant to a planning permission which was subject to a condition that the existing trees on the site should be retained. The question then arose whether a separate planning permission to build a house on part of the site (which did not include the land on which a house had already been built but did include some of the trees) was capable of being implemented. The local planning authority argued that it could not be implemented because the house contemplated by the second permission could not be built without felling some of the trees on the site, which would be contrary to the terms of the first permission. Mr Malcolm Spence QC, sitting as a Deputy Judge, held that this objection was misplaced. Applying the reasoning in the *Pilkington* case, all that mattered was that there was no physical impossibility in carrying out the development authorised by the second permission, which there was not. The *Pilkington* case did not decide that mere incompatibility with the terms of another permission already implemented has the consequence that a permission which is capable of being implemented is of no effect. This decision was approved and similar reasoning applied by the Court of Appeal in *Staffordshire County Council v NGR Land Developments Ltd* [2002] EWCA Civ 856; [2003] JPL 56.

45. In essence, the principle illustrated by the *Pilkington* case is that a planning permission does not authorise development if and when, as a result of physical alteration of the land to which the permission relates, it becomes physically impossible to carry out the development for which the permission was granted (without a further grant of planning permission). Unlike a doctrine of abandonment, this principle is consistent with the legislative code. Indeed, as Lord Scarman observed in *Pioneer Aggregates* at p 145C, it serves to "strengthen and support the planning control imposed by the legislation". Where the test of physical impossibility is met, the reason why further development carried out in reliance on the permission is unlawful is simply that the development is not authorised by the terms of the permission, with the result that it does not comply with section 57(1).

Multi-unit developments

46. In the *Pilkington* case the planning permission which Mr Pilkington wanted to implement was for the construction of only a single dwelling. By contrast, in the present case the 1967 permission authorised the construction of 401 dwellings along

with an internal road network on a large site covering some 29 acres of land. Where a planning permission is granted for the development of a site, such as a housing estate, comprising multiple units, it is a question of interpretation whether the permission authorises a number of independent acts of development, each of which is separately permitted by it, or whether it is to be construed as a permission for a single scheme which cannot be disaggregated in this way. Counsel for the Developer submit that (in the absence of some clear contrary indication) the former interpretation is to be preferred, as it gives developers a necessary degree of flexibility about which parts of the approved scheme they build and when. They contend that the 1967 permission ought to be interpreted in this way as giving a freestanding permission to construct each element of the Master Plan. If this interpretation is correct, the ability to carry out any particular element of the Master Plan does not depend on whether it is still physically possible to develop other parts of the site in the manner authorised by the 1967 permission. The development that has taken place since 1987 would therefore not preclude further reliance on the 1967 permission in relation to parts of the Balkan Hill site which have not yet been developed.

The *Lucas* case

47. In support of their contention that a planning permission for a multi-unit development is properly interpreted as severable into a set of discrete permissions to construct each individual element of the scheme (however exactly these elements are individuated), counsel for the Developer rely on the decision and reasoning of Winn J in *F Lucas & Sons Ltd v Dorking and Horley Rural District Council* (1964) 17 P & CR 116. The facts of that case were that a developer was granted planning permission in 1952 to develop a plot of land by building a cul-de-sac off a lane, with seven pairs of semi-detached houses on each side of the cul-de-sac. No construction work was at that stage carried out. In 1957 the developer was granted planning permission to develop the same plot by building six detached houses facing the lane with long, narrow curtilages at their backs. Two of these detached houses were built, making it physically impossible to build one of the two rows of houses contemplated by the 1952 planning permission. The developer nevertheless decided to build the cul-de-sac and the 14 houses on the other side of it, relying on that permission. Winn J granted a declaration that this development was lawful.

48. In his judgment Winn J recognised that the local planning authority, in granting the 1952 planning permission, may have wanted to achieve “a well-laid-out, symmetrical, balanced housing estate” (p 116). However, he treated this as a matter of motivation only, and not as affecting the correct interpretation of the permission. He accepted the developer’s argument that the 1952 permission was properly to be

regarded as comprising separate permissions to erect each of the houses shown on a plan which had accompanied the application. That meant that it authorised the developer to build the 14 houses that it wished to build even though it was now physically impossible to achieve the overall layout contemplated by the 1952 permission.

49. That was on its face an improbable meaning to give to the 1952 planning permission. Winn J did not refer to any term of that permission which required it to be interpreted in such a way. In the absence of such a term, we cannot see how the planning authority, by granting the 1952 planning permission, could reasonably be taken to have authorised the developer to mix and match building whichever of the 28 houses it chose with other buildings constructed on the site as part of an entirely different and inconsistent scheme of development. Yet this was treated as being the effect of the 1952 planning permission. Nothing mentioned in the judgment justifies such a conclusion and we think it clear that the case was wrongly decided.

50. The aspect of the case which Winn J left out of account in his analysis is that planning permission for a multi-unit development is applied for and is granted for that development as an integrated whole. In deciding whether to grant the permission, the local planning authority will generally have had to consider, and may be taken to have considered, a range of factors relevant to the proposed development taken as a whole, including matters such as the total number of buildings proposed to be constructed, the overall layout and physical appearance of the proposed development, the infrastructure required, its sustainability in planning terms and whether the public benefits of the proposed development as a whole outweigh any planning objections. In granting permission for such a scheme, the planning authority cannot be taken (absent some clear contrary indication) to have authorised the developer to combine building only part of the proposed development with building something different from and inconsistent with the approved scheme on another part of the site. Therefore, it is not correct to interpret such a planning permission as severable, as Winn J did.

51. It appears that Winn J was led to a wrong conclusion from the way the case was argued. The alternative interpretation to the one he accepted was presented as being that the 1952 planning permission was conditional upon completion of the whole scheme of development covered by the permission. Winn J understandably rejected that suggestion, observing (at p 117) that:

> "[it] cannot have [been] intended to leave individual owners of separate plots comprised in the contemplated total housing scheme dependent upon completion of the

> whole of the scheme by the original developer, or by some purchaser from him, so that they would be vulnerable, were the whole scheme not completed, separately to enforcement procedure which might deprive them of their houses and of the money which they would have invested in those houses …"

Later in his judgment (at pp 117-118) the judge further emphasised the practical difficulties that would arise if the validity of the planning permission depended "as a condition precedent or subsequent on the completion of the whole project in contemplation of which the permission was granted".

52. The reasons for rejecting such an interpretation are compelling. Section 57(1) requires that planning permission is required for the carrying out of any development of land, so a grant of planning permission has to be effective from the time when the development commences. When permission is granted for a multi-unit development, the permission authorises each stage of that development for so long as it remains practically feasible for the whole development to be implemented. The statute itself imposes no condition precedent or subsequent that the authorisation granted be implemented in full. Where the earlier stages of the development are carried out in accordance with the planning permission which has been granted, the development so carried out complies with the requirement in section 57(1) and hence is lawful. In the context of this statutory regime, it would make no sense to grant planning permission for the construction of a multi-unit development conditional upon completion of the whole scheme, whether as a condition precedent or subsequent.

53. If completion of the whole scheme was a condition precedent to the permission, it would never be permissible to begin development. Treating completion of the whole as a condition subsequent, such that failure to complete the whole scheme would retrospectively remove permission for what had been built, would be almost equally unworkable. It would create intolerable uncertainty and potential unfairness, not least for parties who purchased completed units. Unless the condition subsequent was precisely defined, it would also be unclear when or whether it would apply in a situation where, for example, the developer ran out of money or simply decided to stop construction work but it remained physically possible to complete the development. Parliament cannot have intended accrued property rights to be made vulnerable to enforcement action taken under the Planning Acts in such circumstances, and the terms in which section 57(1) is cast do not lend any support to such an interpretation.

54. The reasons given by Winn J were good reasons to conclude that, if the developer had constructed the cul-de-sac and the 14 houses on one side of it while the rest of the site remained vacant, such development would have been permitted by the 1952 planning permission whether or not the other 14 houses were subsequently built. It did not follow, however, that the local planning authority had authorised the developer to construct the cul-de-sac and the 14 houses in a situation where two detached houses had already been built on part of the site in accordance with a mutually inconsistent scheme.

55. The analytical error made in the *Lucas* case was to fail to distinguish between two significantly different propositions. The first is that, from a spatial point of view, a planning permission to develop a plot of land is not severable into separate permissions applicable to discrete parts of the site. The second is that, from a temporal point of view, development authorised by a planning permission is only authorised if the whole of the development is carried out. The rejection of the second proposition does not undermine the first.

The *Sage* case

56. An argument made on behalf of the Authority in the courts below involved a similar error to that made in the *Lucas* case, albeit that the Authority sought to draw the opposite conclusion from that drawn by Winn J. The Authority argued that if a proposed development is not or cannot be completed fully in accordance with any planning permission under which it is carried out, the whole development will be unlawful. This is a version of the condition subsequent analysis which Winn J rightly rejected.

57. In support of this argument, counsel for the Authority relied on *Sage v Secretary of State for the Environment, Transport and the Regions* [2003] UKHL 22; [2003] 1 WLR 983, a decision of the House of Lords, and the reference made to that case in *Singh v Secretary of State for Communities & Local Government* [2010] EWHC 1621 (Admin).

58. Section 171B(1) of the 1990 Act imposes a time limit of four years for taking enforcement action where building operations have been carried out without planning permission. Time runs from the date when "the operations were substantially completed". In *Sage* an enforcement notice was served in relation to a building which had been partly constructed and for which no planning permission had been granted. No building work had been carried out during the previous four years. The developer argued that the relevant question was when those operations

which amounted to a breach of planning control had been "substantially completed" and that, as the building operations that remained to be done were not operations which, by themselves, required planning permission, they should be left out of account. It followed that all the relevant operations had been completed more than four years previously so that the planning authority was out of time in serving the enforcement notice.

59. The House of Lords rejected this argument. They held that, in applying section 171B(1), regard should be had to the totality of the operations which the developer originally contemplated and intended to carry out: the relevant question was whether these had been substantially completed. Viewed in this way, on the findings made by the planning inspector in that case, the operations had not been substantially completed and the time limit for taking enforcement action had therefore not expired.

60. In the course of his speech (with which the other law lords agreed) Lord Hobhouse referred to what he called the "holistic approach" of planning law and said, at para 23:

> "As counsel for Mr Sage accepted, if a building operation is not carried out … fully in accordance with the permission, the *whole* operation is unlawful. She contrasted that with a case where the building has been completed but is then altered or improved …" (emphasis in original)

In *Singh*, para 20, Hickinbottom J took this to mean that:

> "reflecting the holistic structure of the planning regime, for a development to be lawful it must be carried out fully in accordance with any *final* permission under which it is done, failing which the whole development is unlawful …" (emphasis in original)

It followed, he thought, that where some parts of a development are physically incapable of being implemented, or completed, then the whole development becomes unlawful (para 25).

61. Counsel for the Authority submitted to the Court of Appeal that this "holistic approach" entails that if development for which planning permission has been

granted cannot be completed because of the impact of operations carried out under another permission, then it is not only subsequent development but all development carried out in reliance on the original permission that is unlawful, including any such development that has already taken place. The Court of Appeal noted, at para 68, that, if correct, this "would have the consequence that there could be enforcement action, and potentially criminal liability, in relation to the development that has already taken place, even though it was at the time apparently in accordance with a valid planning permission." That would indeed be a most unreasonable result, but the Court of Appeal preferred to express no view on whether the analysis is correct, saying that the question did not need to be decided.

62. It is important to recognise that in the *Sage* case no planning permission had been granted for any of the building operations carried out. The remarks of Lord Hobhouse about carrying out an operation fully in accordance with a planning permission were therefore obiter. The ratio of the decision is that, for the purpose of section 171B(1) of the 1990 Act, building operations carried out without planning permission are not substantially completed until construction of the whole building contemplated by the landowner is substantially completed. It was the requirement to have regard for this purpose to the whole of the development contemplated by the landowner which was characterised as a "holistic approach".

63. It is unclear exactly what counsel for Mr Sage accepted, as recorded by Lord Hobhouse in the passage quoted at para 60 above. If the concession was that, in carrying out a building operation, any deviation from the planning permission automatically renders everything built unlawful, we doubt that this can be correct, even in relation to a single building. A case comment in the Journal of Planning Law on the later case of *R (on the application of Robert Hitchins Ltd) v Worcestershire County Council* [2016] JPL 373, 387, refers to authorities where failure to conform exactly to a planning permission has been held not to prevent some development having taken place under the permission. If, alternatively, the concession was that failure to complete a building operation for which planning permission has been granted renders the whole operation including any development carried out unlawful, then this certainly cannot be supported. Even in relation to a single building, if construction stops when the building has been only partly built, the remedy of the local planning authority, as mentioned earlier, is to serve a completion notice under section 94 of the 1990 Act. Moreover, even when such a notice is served, failure to complete the development within the required period only invalidates the planning permission going forward: see *Cardiff City Council v National Assembly for Wales and Malik* [2006] EWHC 1412 (Admin); [2007] 1 P & CR 9. Section 95(5) specifically provides that, although the planning permission becomes invalid at the expiration of the period specified in the notice, this "shall not affect any permission so far as development carried out under it before the end of [that period]

is concerned." This provision presupposes that the planning permission authorises each step of development taken in the course of its implementation.

64. The reference made in *Singh* to the remarks of Lord Hobhouse was, in our view, misplaced but was also unnecessary and irrelevant to the result. *Singh* involved a straightforward application of the *Pilkington* principle. Construction of an extension at the back of the claimant's house for which planning permission had been granted had been commenced within the statutory time limit. But a planning inspector found that it had since become physically impossible to complete the development in accordance with the permission because of the impact of work done under another permission to construct a new house alongside the existing house. Seeking to complete the development relying on the earlier permission would therefore be unlawful. Hickinbottom J refused an application to quash the inspector's decision, holding that the inspector had correctly interpreted and applied the law on "impossibility". Although the judge referred in the passages mentioned at para 60 above to the "whole development" becoming unlawful, it seems clear from paras 19 and 20 of his judgment that he had in mind only "subsequent development" and was not intending to suggest that the development initially carried out under the permission had been rendered retrospectively unlawful. He would have been wrong to do so.

65. In any event, neither of these cases was concerned with a multi-unit development. An attempt to read across the remarks of Lord Hobhouse to such a context was made in the *Robert Hitchins* case, where two successive planning permissions had been granted in almost identical terms to develop a site with up to 200 dwellings. The only difference was that the first permission was subject to a planning obligation to make a financial contribution towards transport services whereas the second permission, granted at a later date, was not. The developer had begun the development under the first permission and had paid the first instalment of the transport contribution which had fallen due before the second permission was granted. The developer then claimed to have switched horses and completed the development under the second permission. The judge found that the developer was entitled to act and had acted in this way, with the result that no further instalments of the transport contribution were payable. An appeal against that decision was dismissed.

66. One of the grounds of appeal was that the judge ought to have concluded, applying what Lord Hobhouse said in *Sage*, that because the building operations had been partly carried out under the first permission, they could not be carried out fully in accordance with the second permission, with the consequence that any operations carried out under that permission were unlawful. The Court of Appeal rejected that

argument. Amongst other reasons for doing so, Richards LJ pointed out, at para 49, that, if the argument were correct:

> "it would mean … that if planning permission was granted for 200 houses of which 150 were progressively built out in accordance with the plans and were occupied, all the dwellings so built and occupied would be unlawful unless and until the remaining 50 dwellings were built, even if the 150 were all individually in accordance with the plans and there was no breach of any condition of the permission. That proposition is unsupported by authority and cannot in my view be right."

We agree.

67. On proper analysis, the developer was able to proceed to implement the second permission, since the partial development carried out pursuant to the first permission was compatible with doing so. No difficulty arose from the *Pilkington* principle. The decision and analysis in the *Robert Hitchins* case reflect the established position that any number of planning permissions can be granted in respect of the same land and a developer is free to choose which one it implements, so long as it can do so and does so in accordance with its terms.

68. In summary, failure or inability to complete a project for which planning permission has been granted does not make development carried out pursuant to the permission unlawful. But (in the absence of clear express provision making it severable) a planning permission is not to be construed as authorising further development if at any stage compliance with the permission becomes physically impossible.

Departures must be material

69. The *Pilkington* principle should not be pressed too far. Rightly in our view, the Authority has not argued on this appeal that the continuing authority of a planning permission is dependent on exact compliance with the permission such that any departure from the permitted scheme, however minor, has the result that no further development is authorised unless and until exact compliance is achieved or the permission is varied. That would be an unduly rigid and unrealistic approach to adopt and, for that reason, would generally be an unreasonable construction to put on the

document recording the grant of planning permission – all the more so where the permission is for a large multi-unit development. The ordinary presumption must be that a departure will have this effect only if it is material in the context of the scheme as a whole: see *Lever Finance Ltd v Westminster (City) London Borough Council* [1971] 1 QB 222, 230. What is or is not material is plainly a matter of fact and degree.

70. There is no inconsistency here with section 96A of the 1990 Act (referred to at para 24 above). If the planning authority makes a change to a planning permission under section 96A because satisfied that the change is not material, this will have the benefit for the landowner that it can be certain that the altered pattern of development is indeed within the scope of the permission. It could not afterwards be said that there has been any departure at all from the scheme for which permission has been granted. If, on the other hand, the landowner alters the pattern of development in an immaterial way without first obtaining a variation under section 96A, it does not follow that the development must be treated as unauthorised by the original, unvaried permission. In such a case the landowner will simply be more exposed to possible arguments in later enforcement proceedings that the change was in fact material, which would then have to be decided by a planning inspector or a court. That has always been the position under the planning legislation, including before section 96A was added to give the facility to amend a permission.

Conclusion on multi-unit developments

71. We agree with the view expressed by the Court of Appeal in this case that where, as here, a planning permission is granted for the development of a site, such as a housing estate, comprising multiple units, it is unlikely to be the correct interpretation of the permission that it is severable: see [2020] EWCA Civ 1440, para 90. That is for the reasons given in para 50 above.

72. The scheme for development of the Balkan Hill site on the Master Plan which was the subject of the 1967 permission seems to us to be a paradigm instance of such an integrated scheme which cannot be severed into component parts. It follows that carrying out under an independent planning permission on any part of the Balkan Hill site development which departed in a material way from that scheme would make it physically impossible and hence unlawful to carry out any further development under the 1967 permission.

The "variation" argument

73. The Developer's third argument, on which the appellant's leading counsel, Charles Banner KC, put most emphasis in his oral submissions, seeks to avoid this conclusion by asserting that the development on the Balkan Hill site since 1987 has been carried out under planning permissions which were not independent of the 1967 permission. Rather, he submitted, these permissions were intended to operate along with the 1967 permission by authorising what were, in effect, local variations of the original development scheme on particular parts of the site while leaving the 1967 permission otherwise unaffected. Mr Banner pointed out that in the *Pilkington* case Lord Widgery excluded from the scope of the court's decision cases where one planning application expressly refers to or incorporates another (see para 30 above). He submitted that the post-1987 permissions are all of this kind as they refer either specifically or by clear implication to the 1967 permission and must therefore be read with it. Mr Banner also submitted that it would cause serious practical inconvenience if a developer who, when carrying out a large development, encounters a local difficulty or wishes for other reasons to depart from the approved scheme in one particular area of the site cannot obtain permission to do so without losing the benefit of the original permission and having to apply for a fresh planning permission for the remaining development on other parts of the site.

74. In our view, that is indeed the legal position where, as here, a developer has been granted a full planning permission for one entire scheme and wishes to depart from it in a material way. It is a consequence of the very limited powers that a local planning authority currently has to make changes to an existing planning permission. But although this feature of the planning legislation means that developers may face practical hurdles, the problems should not be exaggerated. Despite the limited power to amend an existing planning permission, there is no reason why an approved development scheme cannot be modified by an appropriately framed additional planning permission which covers the whole site and includes the necessary modifications. The position then would be that the developer has two permissions in relation to the whole site, with different terms, and is entitled to proceed under the second.

75. The Authority has argued that, because the planning legislation does not confer any power on a local planning authority to make a material change to an existing planning permission, a later planning permission cannot have the effect of modifying in any material way the development scheme authorised by an earlier permission.

76. The trial judge, HHJ Keyser QC, did not find this argument persuasive and nor do we. We agree with him that, although there cannot strictly be a variation of a planning permission (save as mentioned in paras 24 above), there is "no reason why a grant of permission might not, on its true construction, authorise development in accordance with an earlier permission (eg the Master Plan) but with specified modifications": para 48. That seems to us to be how, at least prima facie, a planning permission described as a "variation" of an earlier planning permission would reasonably be understood. The legal analysis which best gives effect to the expressed intention is to construe the permission described as a "variation" as a permission to carry out the development described in the original permission as modified to accommodate the development specifically authorised by the new permission (and as modified by any previous such "variations"). However, if an application for a permission described as a "variation" is properly to be analysed in this way, ordinarily it would have to be accompanied by a plan which showed how the proposed new permission incorporated the changes indicated into a coherent design for the whole site. Mere use of the "variation" label by itself is not sufficient to show how the new permission ought properly to be interpreted, when read as a whole and having regard to the relevant context.

77. Where an application for a variation of a previous permission is properly to be regarded as an application for a fresh permission for the whole site, this may of course mean that the application is required to be accompanied by certain documentation relevant to the whole site, such as an environmental impact assessment. Where the variation is comparatively minor and circumstances have not changed, it may be possible to re-use or update such documentation submitted in support of the application for the previous permission. Whether this is possible or not will depend upon the particular circumstances.

The effect of the post-1987 permissions

78. Each of the additional planning permissions granted after 1987 (listed at para 11 above) states that the Authority hereby permits the development briefly described in the permission notice "in accordance with the plans and application submitted to the Authority". To ascertain the effect and precise scope of the permission, it would therefore be relevant to examine the plans and application submitted to the Authority by the Developer. However, the Developer did not put in evidence in these proceedings any of the relevant plans and applications. The court was provided only with the permission notices themselves, the Master Plan, plans showing the development built on the Balkan Hill site as at July 1987 and when these proceedings were begun in 2019, and selected correspondence between the parties.

79. The absence of the planning applications and accompanying plans is explained by the fact that in the courts below the Developer's case was presented at a high level of generality. The Developer argued that there were no material differences between the pre-1987 additional permissions (some of which were expressed to be "variations" of the 1967 permission and some of which were not) and the post-1987 additional permissions; and that, as Drake J decided that the pre-1987 additional permissions were variations of the 1967 permission, the same must be true of the later permissions. So far as appears from the skeleton arguments and judgments in the courts below, no attempt was made to examine and construe the post-1987 permissions individually.

80. The attempt to extrapolate from Drake J's acceptance that the pre-1987 additional permissions were in some way lawful variations the conclusion that the post-1987 additional permissions must be regarded as variations (in the sense of new permissions granted for development of the whole site with relevant changes) is, however, untenable. The fact that Drake J's judgment is to be taken as conclusive in relation to matters as they stood in 1987 cannot prevent the Authority from disputing, as it does, the meaning and effect of permissions which did not yet exist when that judgment was given. It is for the Developer to make good the contention that the additional planning permissions granted after 1987 are properly to be construed as modifying the original development scheme rather than as independent permissions. In his oral argument in this court Mr Banner KC sought to do this by addressing each of the individual post-1987 permissions.

The permissions described as "variations"

81. Of the six post-1987 planning permissions listed at para 11 above which have been implemented, three (permissions A, B and E) are expressed on their face to be "variations" of the original 1967 permission. However, the development which took place under each of them is substantially at variance from what was shown in the Master Plan. Without sight of the applications or evidence that they were accompanied by plans of the kind referred to in para 76 above, it cannot be said that these permissions authorised a new development scheme for the whole site. A reasonable reader would have understood them to relate only to specific sites within the Balkan Hill area.

82. The position is clearer still in relation to the other three permissions (D, G and H) since they were not stated to be "variations" of the 1967 permission.

The permissions referring to plot numbers

83. In each of permissions D and H the brief description of the development in the permission notice referred to a specified plot number in "Hillside Park". It is an agreed fact that these references were to plot numbers used in the original Master Plan to which the 1967 permission related. The Developer contends that this would convey to the reasonable reader that the permission was intended to authorise a localised modification of the Master Plan so as to permit the development described in the permission on the particular plot referred to while leaving the 1967 permission otherwise intact.

84. We cannot accept this submission. Although the copies of the original Master Plan provided to the court do not contain plot numbers, we accept based on the parties' agreement that the locations of the plots of land to which permissions D and H relate were identified by reference to the original Master Plan. That only shows, however, that the Master Plan was used for the purpose of geographical reference: in effect as a map. It does not mean that either of permissions D or H was intended to modify the scheme shown in the Master Plan rather than to permit a discrete development on the specified part of the site. That might have been a proper inference to draw if the application had been accompanied by a plan, which the Authority approved, showing how the proposed development on the plot concerned would fit with the scheme shown on the Master Plan, as a coherent integrated whole. However, the Developer has not put in evidence any such plan nor suggested that any such plan exists. All the indications are that the plans submitted when applying for permissions D, G and H showed only the proposed development on the land in question and did not attempt to integrate the proposed development with the development shown in the Master Plan. So, for example, no attempt appears to have been made to indicate how the roads shown on the plans for these additional permissions would be linked to the road network shown on the Master Plan.

85. Mr Banner KC submitted that a reasonable reader, aware of the planning history of the Balkan Hill site, would not understand permissions D and H to build a few houses on particular plots to be intended to operate at the expense of the original permission granted for a major scheme to construct 401 dwellings which was being rolled out across the Balkan Hill site. He suggested that to interpret permissions D and H as having that effect would be unreal.

86. We are not persuaded by this submission for two reasons. First, it is wrong to assume that the previous planning history of the site is relevant to the interpretation of these permissions. As explained in the *Pilkington* case (see para 30 above), it is the duty of the local planning authority to regard every application for planning

permission, unless it refers to an earlier permission, as a proposal for a separate and independent development and to consider the application on its own merits. The reader of a planning permission should accordingly assume that the application has been dealt with in this way. Hence a planning permission should be regarded as a self-contained permission for an independent development unless it says otherwise.

87. Second, even if regard is had to the previous planning history of the Balkan Hill site, it does not support the suggestion that the Developer was rolling out across the site the scheme for a development of 401 dwellings authorised by the 1967 permission. As noted at the beginning of this judgment, none of the houses built on the site has been built in accordance with the Master Plan and some of the departures from it have been substantial. An objective observer who looked at the planning history in 2005 when permission D was granted, or in 2011 when permission H was granted, would therefore see a pattern of development significantly different from that authorised by the 1967 permission and would see that every house built in the 40 years since it was granted had been built in accordance with a subsequent specific planning permission. There was nothing in this history which showed that the Developer still intended to carry out any development in accordance with the 1967 permission. Moreover, it would have been clear that the development carried out pursuant to the additional permissions granted since 1987 meant that the Master Plan for the 1967 permission could not be implemented according to its terms and no alternative updated version of it had been filed in support of the applications for those permissions. Nor was there any evidence that any of the additional documents to be expected in relation to a fresh application for permission for a development of the whole site (see para 77 above) had been filed.

88. On the material available we are therefore unable to construe permissions D and H as modifying the development scheme authorised by the 1967 permission. A reasonable reader of those permissions would understand that they related solely to the specific limited areas of land to which they applied. It follows that the development carried out under these permissions, by departing in material ways from the Master Plan, made it impossible for the Developer thereafter to carry out development in accordance with the 1967 permission.

Permission G

89. The last of the additional permissions granted after 1987 which has been implemented is permission G. This was not expressed to be a variation of the 1967 permission nor did the permission notice even refer to a plot number on the Master Plan. The development for which the permission was granted is described in the

permission notice as: “Full application for construction of 3 pairs of dwellings, Land at Hillside Park, Aberdyfi.” Again, there is no evidence that the application for this permission was accompanied by a revised version of the Master Plan showing how the development would form part of an integrated development of the whole site.

90. No reasonable person would, in our view, interpret this permission as intended to authorise a local variation of the scheme authorised by the 1967 permission on the basis set out above rather than as an independent permission applicable only to the specific site to which it relates. The proposed development is mutually inconsistent with the 1967 scheme. The easternmost pair of dwellings constructed pursuant to permission G is sited across an estate road which in the Master Plan served as an access route to the entire northern part of the site. Instead of that access road, a road has been built which is designed to serve only as a communal private road giving access to the eight dwellings authorised by permissions E and G. For good measure, this local road cuts across the site of a building shown on the Master Plan.

91. Again, we have not seen the plans and application submitted to the Authority but there is no evidence that any plan was submitted which sought to integrate the proposed development with the development shown on the Master Plan. Nor is there any evidence that the application was accompanied by the additional documents to be expected if it had been intended to be for a fresh permission relating to the whole site. It follows that carrying out the development authorised by permission G has made it physically impossible to carry out the development authorised by the 1967 permission.

92. The Developer sought to avoid this conclusion by relying on a letter from the Authority to the Developer dated 10 October 2008. The first paragraph of this letter indicates that it was written in response to a request for the Authority to approve a plan to construct two pairs of attached houses on part of the site covered by permission E as “minor amendments” to the 1967 permission. The letter then states:

> “The situation is that [permission E] for 5 detached dwellings and 5 garages supersedes the 1967 permission. As [permission E] has been commenced, that is not the extant permission on this part of Hillside Park. Therefore, I cannot treat the submission for the two pairs of attached houses as an amendment to the 1967 permission.

> For your information, I agree with you that the 1967 permission has been proven to be 'A full permission which could be implemented in its entirety without the need to obtain any further planning permission or planning approval of details'. This means that it is only that exact permission as approved that can be implemented without the submission of further applications. … For the avoidance of doubt, once a variation to the 1967 permission is approved and commenced, then the 1967 permission on that part of the site ceases to be valid."

93. Permission G does not refer to this letter. Indeed, the letter - which was written several months before the application was submitted on 7 April 2009 - appears to relate to an earlier proposal for development which was not the proposal for which permission was ultimately sought and granted. Thus, the letter refers to "two pairs of attached houses" rather than the "construction of 3 pairs of dwellings" described in permission G. For the reasons given in para 27 above, we see no justification for treating this letter as part of the context to which a reasonable reader would have regard in interpreting permission G.

94. For good measure we would add that, even if regard is had to the letter, it does not assist the Developer. It specifically rejects a request to treat the proposed development as an amendment to the 1967 permission and expresses the view that permission E had superseded the 1967 permission and was the extant permission on that part of the Balkan Hill site. The letter gave no assurance that carrying out the proposed development would be compatible with further implementation of the 1967 permission on other parts of the site. Even if such an opinion had been expressed by the Authority, we do not see how it could as a matter of law affect the correct interpretation of permission G - all the more so in view of the fact that the location of the easternmost pair of houses built under permission G (which may not even have been one of the two pairs of houses referred to in the letter) directly conflicts with Master Plan.

95. The difficulties for the Developer's case do not end there. The plan produced by the Authority for the purpose of these proceedings showing the buildings constructed on the Balkan Hill site as at 2019 depicts, immediately to the east of the houses authorised by permission B, a terrace of six houses and a block of garages built on land not covered by any of the additional permissions. These buildings do not accord with the Master Plan. The houses encroach on the site of one the main estate roads shown on the Master Plan and the garages have been built directly across the site of that road. There is no suggestion on the plan that this development

was authorised by any additional permission, let alone one that could be said to operate as a "variation" of the 1967 permission. At the end of the hearing we accordingly asked the parties to provide clarification of the status of these buildings.

96. Documents subsequently provided to the court include a drawing number 97/3/A1/1 dated February 1997 (the "1997 drawing"), submitted with the planning application for permission B. This shows the two terraces of houses which were the subject of permission B but not the further terrace of six houses and garages which have been built on land to the east of that plot. The first reference in the documents provided to us to those further buildings is in a letter from the Developer's architect to a development control officer at the Authority dated 23 May 2004, some seven years later. This letter states that the "approved Phase 1 lay out, as you know, provides for six attached houses linked together. Units 18 to 23." The "approved Phase 1" layout referred to in this letter, which now includes the six attached houses numbered 18 to 23, is shown in an amended version of the 1997 drawing which indicates that it was "Amended Jan 2000".

97. The letter dated 23 May 2004 went on to say that, in order to improve this lay-out, it had been revised to provide for three separate pairs of attached houses providing landscaped spaces between each pair of houses instead of six attached houses, and also to make provision for garages. It appears from some further correspondence that the proposed revised layout was not approved by the development officer. The Developer then went ahead and built a terrace of six attached houses ("units 18-23") as shown on the 1997 drawing as amended in January 2000.

98. The Developer submits that it is to be inferred from this correspondence that the Authority had approved the construction of the terrace of six houses labelled units 18-23 in accordance with the amended drawing, presumably in January 2006. No evidence has been provided, however, that planning permission was ever granted for this development, let alone for the block of garages which have also been constructed on this part of the site. The most that the references to the "approved" layout can be taken to signify is that the development control officer had indicated that he was content with the proposed layout. But that did not dispense with the requirement to obtain a grant of planning permission. A fortiori there is no evidence to suggest that permission was given to treat the development as a variation of the Master Plan.

99. As the Authority accepts, because this further development was completed more than four years ago, it is now immune from planning control in accordance

with section 171B of the 1990 Act. But its effect is, again, to make it physically impossible to carry out the development authorised by the 1967 permission.

Conclusion

100. The courts below were right to hold that the 1967 permission was a permission to carry out a single scheme of development on the Balkan Hill site and cannot be construed as separately permitting particular parts of the scheme to be built alongside development on the site authorised by independent permissions. It is possible in principle for a local planning authority to grant a planning permission which approves a modification of such an entire scheme rather than constituting a separate permission referable just to part of the scheme. The Developer has failed to show, however, that the additional planning permissions under which development has been carried out on the Balkan Hill site since 1987 should be construed in this way. Therefore, that development is inconsistent with the 1967 permission and has had the effect that it is physically impossible to develop the Balkan Hill site in accordance with the Master Plan approved by the 1967 permission (as subsequently modified down to 1987). Furthermore, other development has been carried out for which the Developer has failed to show that any planning permission was obtained. This development also makes it physically impossible to develop the site in accordance with the Master Plan approved by the 1967 permission (as subsequently modified). The courts below were therefore right to dismiss the Developer's claim and this appeal must also be dismissed.