What are the limits of the power to impose conditions on the grant of planning permission following the decision of the Court of Appeal in DB Symmetry Ltd v Swindon Borough Council?

The Court of Appeal decision in this case was handed down on 16th October 2020.

I represented DB Symmetry Ltd, the successful appellant.

Swindon Borough Council was the respondent. The Secretary of State for Housing, Communities and Local Government also took part in the appeal. His Inspector's decision to grant a certificate of Lawfulness of Proposed Development under s.192 of the TCPA 1990 was the underlying basis of the court case.

I should say that the Court of Appeal subsequently refused Swindon's application for permission to appeal to the Supreme Court. Swindon then applied to the Supreme Court itself for permission; and a decision is currently awaited (as at 21st April 2021)

So, what was the case concerned with? Directly, as I have said, it was concerned with the decision of an Inspector to grant a Certificate of Lawfulness.

That decision turned entirely, though, on the proper interpretation and effect of a planning permission. That permission had been granted, subject to conditions, by Swindon Borough Council, in June 2015. The permission was for employment development, comprising research and development, light industrial, general industrial, warehouse and distribution buildings.

That permission represented the first part of a strategic allocation included in Swindon's local plan in respect of, what are referred to as, the New Eastern Villages. Those new villages are to be located on the north-eastern outskirts of Swindon, to the south of the A420. The allocation was for the development of some 8,000 homes, 40 hectares of employment land and associated retail, community, education and leisure uses.

As I have said, the 2015 permission was the first part of that allocation, in essence a logistics and business park. Access to that park was to be taken from a new junction on the A420.

A dispute arose as to whether the 2015 planning permission required the access roads to be dedicated as public highways; or whether it was lawful for the access roads to be used only with the permission of the estate owners and management company.

Unusually, dedication of the highways had not been the subject of a s.106 planning obligation or a s.38 Highways Act agreement.

The most relevant condition, condition 39, stated:

"The proposed access roads, including turning spaces and all other areas that serve a necessary highway purpose, shall be constructed in such a manner as to ensure that each

unit is served by fully functional highway, the hard surfaces of which are to be constructed to at least basecourse level prior to occupation and bringing into use."

The stated reason for the condition was: "to ensure that the development is served by an adequate means of access to the public highway in the interests of highway safety."

The Court of Appeal held that the condition was not to be interpreted as requiring the dedication of the access roads to the public.

The Court held that if the condition had required dedication of the roads as public highways it would have been unlawful.

The Court, in so holding, confirmed a clear line of authority dating back to a decision of the Court of Appeal in Hall & Co. Ltd v Shoreham-by-Sea Urban District Council in 1963.

The Court of Appeal also held that if there are two realistic interpretations that can be given to a planning condition, but one of those interpretations would mean that the condition was unlawful, the alternative interpretation should be given to the condition.

In Hall v Shoreham, the Court had held that it would be unreasonable (in the well-known 'Wednesbury' sense) for a council to impose a planning condition requiring, without compensation, a right of passage to be given to and from neighbouring land over a road required to be constructed across the frontage of the application site.

Swindon Borough Council argued that Hall turned on its own facts and did not establish any wider principle.

The Court of Appeal disagreed and held that Hall remains good law.

So, one answer to the question - what are the limits of the power to impose conditions on the grant of planning permission following the Court of Appeal's decision in DB Symmetry - is that the limits are just the same as they were before that case.

But what were, and what are, those limits? To understand this one needs to consider the legislation and the caselaw.

So first, the legislative provisions.

One starts with s.70, subsection (1) of the TCPA 1990. This permits a local planning authority to grant planning permission

"subject to such conditions as they think fit".

Note, that this wording is identical to the wording of section 14 of the original TCPA of 1947. This wording has been consistently used by Parliament for over 70 years, so it is the same wording that has been interpreted by the courts over that period.

As expressed, it appears to be a very broad power – "such conditions as they think fit".

But the courts have made it clear that the power is not uncontrolled, or in public law lawyers' language, unfettered.

This position dates back to 1958, and the case of Pyx Granite Co Ltd v Ministry of Housing and Local Government [1958] 1 Q.B. 554. That case concerned the validity of planning permissions which had been granted for mineral extraction in the Malvern Hills. Lord Denning stated that:

"Although the planning authorities are given very wide powers to impose 'such conditions as they think fit,'; nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their power for an ulterior object, however desirable that object may seem to them to be in the public interest. …"

This passage has been followed ever since and the tests have been synthesised as follows: the conditions

(i) must be imposed for planning reasons

(ii) they must fairly and reasonably relate to the development and

(iii) they should not be so unreasonable that no reasonable planning authority could have imposed them.

The tests subsequently became known as the 'Newbury' tests after the well-known decision of the House of Lords in Newbury DC v. SSE [1981] AC 578 in 1980. (That case is, of course, authority on numerous other planning law points too.)

In 2017 Lord Hodge in the Supreme Court decision in Aberdeen City and Shire Strategic Development Planning Authority v Elsick Development Company Ltd [2017] P.T.S.R. 1413 referred to the Newbury tests as "an established part of planning law".

They were reaffirmed by the Supreme Court in R (Wright) v Forest of Dean District Council [2019] UKSC 53, [2019] 1 WLR 6562.

As the Court of Appeal in DB Symmetry observed, the Supreme Court in the Wright case "declined the Secretary of State's invitation to 'update Newbury'."

The tests are therefore well-settled and regarded as up-to-date.

So test 1 is that conditions must be imposed for a planning reason, not for an ulterior object, however desirable that object may seem to them to be in the public interest.

A good example is the decision of the Divisional Court in R v Hillingdon LBC ex parte Royco Homes Ltd [1974] Q.B. 720. In that case planning permission for residential development (comprising 7 blocks of flats) had been granted subject to conditions. Those conditions required, in particular, that the flats should first be occupied by persons on the local authority's housing waiting list. Occupation was also limited, for ten years, to tenants having statutory security of tenure.

It was held that, however well-intentioned, the conditions were unlawful: they had been imposed for the purpose of relieving the authority of the burden of their statutory duty as housing authority, and not for planning purposes.

So the conditions must be imposed for planning reasons.

Test 2 is that a condition must fairly and reasonably relate to the development being permitted.

An example of this is the well-known Newbury case itself. That case concerned the grant of a temporary permission for the change of use of two existing aircraft hangars. A planning condition was imposed requiring the removal of the hangars upon the expiry of the permission. It was held that the condition was invalid. The condition was not imposed to meet a planning need arising out of the change of use, it wasn't related to the development being permitted, but for the extraneous purpose of restoring the area as a whole.

It is important to bear in mind too, as confirmed for example by R. (on the application of Evans) v Basingstoke and Deane BC [2013] EWHC 899 (Admin), that matters of weight and judgment as to whether or not a condition fairly and reasonably relates to a proposed development, are for the decision maker, not for the court (unless of course, unusually, the decision is irrational or perverse).

The final test, Test 3, is that the Conditions must not be manifestly unreasonable

In the Royco case in 1974 to which I referred earlier, Lord Widgery C.J. also considered that the conditions restricting, for example, the occupation of the flats to those on the housing waiting list - were manifestly unreasonable.

Lord Widgery referred to the Court of Appeal's decision in Hall v. Shoreham, noting its headnote summary that the requirement that the plaintiffs should in effect dedicate the road to the public without any right of compensation, was so unreasonable that the condition was ultra vires.

In the Aberdeen decision mentioned earlier Lord Hodge observed that other general principles of public law also apply to a decision to impose a condition – for example that all relevant considerations must be taken into account, and irrelevant considerations left out of account, and that the courts will not interfere with a decision unless Wednesbury unreasonable.

In the DB Symmetry case Lewison L.J. observed that it did not matter whether the unlawfulness of a condition was characterised as being beyond the scope of the power under s.70(1); or as a misuse of a power or as 'Wednesbury' unreasonable/irrational in the public law sense; or as disproportionate. However characterised, if a condition required a road to be dedicated to the public use without compensation, it would be unlawful.

The Court of Appeal held that Hall establishes a recognised principle which was binding on it.

Planning officers and consultants, as well as planning lawyers, may also be interested to note that Hall is consistent with government policy of the last 70 years - from Circular 58 of 1951 (58/51) to present-day National Planning Policy Guidance.

Paragraph 13 of the memorandum to Ministry of Housing and Local Government Circular 58/51 stated that:

> "It is a general principle that no payment or other consideration can be required when granting a statutory consent except where there is a specific authority. Conditions requiring, for example, the cession of land for road improvements or for open space should not therefore be attached to planning permissions".

That policy preceded the decision of Hall v Shoreham by some 12 years and was no doubt based on the Ministry's interpretation and understanding of the law generally and the T&CP Act 1947 in particular. Hall v Shoreham in effect confirmed the Ministry's interpretation.

There is similar wording in the subsequent MHLG Circular 5/68, DOE Circular 1/85, DOE Circular 11/95, right up to the current NPPG section 21a-005 (last updated 23rd July 2019):

> "Conditions cannot require that land is formally given up (or ceded) to other parties, such as the local highway authority."

So the wording has not changed significantly in 70 years.

Having considered section 70 (1) of the TCPA 1990 and the caselaw concerning it, how do the provisions relating to section 106 obligations differ from planning conditions?

The scope of a Section 106 obligation is different for a number of reasons; in particular the statutory requirements for a section 106 are different. The essence of a s.106 planning obligation is that it results either from an agreement or is unilaterally offered and entered into - i.e. a voluntary act of the landowner. Unlike a planning condition, it is not imposed by the decision-maker.

In terms of wording, it is noticeable that Section 106 (1)(d) specifically and expressly authorises an obligation to require a sum or sums to be paid to the local planning authority. By contrast, there is no such statutory provision set out in section 70 in respect of planning conditions.

So the differences between s.106 obligations and s.70 planning conditions stem from the different concepts and wording in the sections.

An important case concerning the relevance of planning obligations to a decision whether to grant planning permission for many years was the House of Lords' decision in Tesco Stores Ltd v. SSE [1995] 1 WLR 759 in 1995. That case established (until changes to the law were introduced in 2010) that in law if the obligation has some connection with the proposed development which is not 'de minimis' (i.e. trivial), then regard may, indeed must, be had to it.

In the High Court in DB Symmetry the judge had thought that the speech of Lord Hoffmann in the Tesco case had cast doubt on the decision in Hall.

The Court of Appeal comprehensively rejected that interpretation and drew attention to the fact that the focus of the Tesco case was on the scope to take into account planning obligations, rather than planning conditions, when determining a planning application or

appeal. Further, that certain passages in Lord Hoffmann's speech had simply recognised the difference between what could be achieved by conditions on the one hand; and planning agreements on the other. The Court of Appeal held that these passages could not be regarded as casting any doubt on the correctness of Hall for what it decided.

"On the contrary", the Court of Appeal noted, "the direction of travel in the planning legislation has been to encourage a wider use of planning agreements and obligations, while leaving the scope of the power to impose conditions untouched."

In a number of respects the legal and policy tests for section 106 obligations have, moreover, moved over time closer to those applicable to conditions.

The 3 Newbury tests for the imposition of conditions

- (i) that they must be imposed for planning reasons (ii) that they must fairly and reasonably relate to the development and (iii) that they should not be so unreasonable that no reasonable planning authority could have imposed them -

are to be compared now with the legal requirements imposed by Regulation 122 of the Community Infrastructure Levy Regulations in respect of planning obligations. This regulation changed the law from that set out in the Tesco decision.

Rather than an obligation being relevant to a decision if it had only some connection to the proposed development, Regulation 122 now provides that:

"A planning obligation may only constitute a reason for granting planning permission for the development if the obligation is—

(a) necessary to make the development acceptable in planning terms;

(b) directly related to the development; and

(c) fairly and reasonably related in scale and kind to the development."

These tests come much closer to the Newbury tests for the imposition of valid conditions.

NPPG Section 21a paragraph 3 sets out policy requirements for the imposition of conditions. They must be

1. necessary;

2. relevant to planning;

3. relevant to the development to be permitted;

4. enforceable;

5. precise; and

6. reasonable in all other respects

So it is clear that there is considerable legal and policy overlap between planning conditions and planning obligations, except for example in respect of the payment of money or other consideration.

I should say something about the way in which conditions have been drafted to compensate for the inability positively to require by planning condition the payment of money.

So-called 'Grampian' conditions are frequently used. That name derives from the HL case – Grampian Regional Council v City of Aberdeen [1984] J.P.L. 590. The House of Lords there held that a planning condition was not invalid where it prevented development from proceeding until, in that case, a road closure had occurred.

Grampian conditions can be used to avoid a planning condition positively requiring the payment of a sum of money. A Grampian-style condition is phrased negatively: no development or, as appropriate, further development or no occupation or further occupation of a development is permitted until a specified action has occurred.

There is no positive requirement in the condition to carry out the specified action – to provide, for example, a facility the need for and to which the development gives rise – so no positive requirement is imposed to provide the facility but further development or occupation cannot occur until the facility has been provided.

The Secretary of State's policy advice used to be that Grampian conditions could only be imposed when there were

> "*at least reasonable prospects* of the action in question being performed within the time-limit imposed by the condition"
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> (DOE Circular 11/95, WO 35/95, The Use of Conditions in Planning Permissions, Annex, para.40).

The current PPG now states, however, that:

> "Such conditions should not be used where there are *no prospects at all* of the action in question being performed within the time-limit imposed by the permission."

So there is more scope from a policy perspective to impose Grampian conditions today.

Indeed, as held by HL in British Railways Board v Secretary of State for the Environment [1994] J.P.L. 32 as a matter of strict law, a Grampian condition can be imposed even if there are insuperable obstacles to the condition being fulfilled.

NPPG section 21a refers to Grampian conditions relating to specified actions such as, for example, "the provision of supporting infrastructure" (paragraph 9); or the entering into of a planning obligation requiring the payment of a financial contribution towards the provision of the supporting infrastructure (paragraph 5).

I have referred to the statutory provisions and policy tests relevant to planning conditions and planning obligations.

I should mention that statute of course provides for appeals against conditions if they are considered not to be policy compliant.

In the same way, since amendments to section 106 obligations were introduced by the Planning and Compensation Act 1991, it is generally easier now to seek to modify or discharge obligations, certainly easier than used to be the case when it was necessary to seek an order from the then Lands Tribunal pursuant to, and subject to the restrictions of, section 84 of the Law of Property Act 1925. Nevertheless, even now, the landowner must wait 5 years after the obligation has been entered into before being able to apply to the LPA for the modification or discharge, unless the LPA consents to an earlier modification or discharge.

It is important finally to say something about the courts' approach to the interpretation of a condition. This also was considered in the DB Symmetry case.

The issue was considered generally by the Supreme Court in Trump International Golf Club Scotland Ltd v Scottish Ministers [2015] UKSC 74; [2016] 1 W.L.R. 85, in the context of the interpretation of a consent under section 36 of the Electricity Act 1989 which had been given to a company to construct and operate an offshore windfarm;

The issue was then considered by the Supreme Court in a specific planning context in:

London Borough of Lambeth v Secretary of State [2019] UKSC 33; [2019] 1 W.L.R. 4317. That case concerned a permission granted pursuant to section 73 of the TCPA 1990 for the retail development of land without complying with conditions subject to which a previous planning permission had been granted.

In Trump – it was said that the court:

> "…asks itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense."

The Supreme Court in Trump rejected a submission that there was no room for implying words into a condition when interpreting a planning permission.

So, for example, if a condition requires the submission of a landscaping scheme and its approval before development commences but does not specifically require the approved landscaping scheme to be carried out thereafter – whereas in the past the LPA would have been unable in such circumstances to require the approved scheme to be carried out, the Supreme Court held that it is possible in appropriate cases to imply words e.g. that the approved landscaping scheme must be carried out.

Lord Hodge stated that:

> “37… While the court will, understandably, exercise great restraint in implying terms into public documents which have criminal sanctions, I see no principled reason for excluding implication altogether."

In Lambeth, the Supreme Court directly applied the comments in Trump to a planning permission.

The Supreme Court in Trump accepted the summary in R v Ashford BC ex p. Shepway DC [1999] that the court will, when interpreting the permission look at the permission itself, including its conditions and the stated reasons for their imposition, and also at documents which are expressly incorporated by the permission – so if the permission is expressed to be granted "in accordance with the application and/or plans" submitted, the court will have regard to them.

In the same way, sometimes a condition will refer, for example, to the submitted Design and Access Statement. That Statement can be looked at, if and insofar as it is relevant to the particular issue of interpretation.

If the permission is a full, as opposed to an outline, permission for building works, the Court of Appeal in Barnett v. SSE [2009] EWCA Civ 476 upheld the decision of Sullivan J. (as he then was) in the High Court that the approved plans can still be considered, even if they are not expressly incorporated by the permission itself, because by the very nature of a full permission, the detailed plans are an integral part of the permission.

Where there is still ambiguity, the court may decide to look, albeit with some caution, at documents not incorporated by the permission - for example the planning officer’s report to committee.

Lord Carnwath in Lambeth also referred to the possibility of reading words into planning conditions but observed that it was difficult to envisage circumstances in which it would be appropriate to use implication for the purpose of supplying a wholly new condition, as opposed to implying words into an existing condition.

So, to go back to my earlier example, if there is a planning condition that a landscaping scheme be submitted and approved before development is commenced, but the condition does not require the approved scheme to be implemented thereafter, a court is likely to imply that wording. If, however, a wholly new condition would, for some reason, be required, the court is unlikely to imply such a condition into the permission.

So, I have referred to the facts and findings in the DB Symmetry case, shown how that case reflects the provisions of section 70 (1) and case law as to its interpretation. I have looked at some of the differences between planning conditions and planning obligations as well as the legal and policy overlaps now in place. I have discussed the Tesco case concerning s.106 obligations and noted the changes introduced by the CIL Regs in 2010. I have also drawn attention to the use of ‘Grampian’-style conditions and also considered some of the case law as to how planning permissions and their conditions will be interpreted by the courts.

By way of conclusion, in my view the Court of Appeal in DB Symmetry did not alter the limits of the power to impose conditions on the grant of planning permission.

• The court reaffirmed the principle established by Hall that conditions cannot require the dedication of public rights over land without compensation.

• The court held that if there are 2 possible interpretations of a condition but one of those interpretations would mean that the condition would have been unlawfully imposed, then the other interpretation of the condition should be supported.

• In reaching their conclusions the court followed the well-known Newbury tests, the case law since Hall, the different provisions of section 70 relating to conditions on the one hand and those of section 106 relating to planning agreements and voluntary unilateral obligations on the other hand; and noted the consistent statements of policy by respective governments since 1951 (70 years ago) regarding the imposition of conditions for the dedication of rights over land.

• The moral for LPAs on the facts of DB Symmetry is to enter a legal agreement if it wishes to secure dedication of public rights of way – whether a s.106 obligation and/or a s.38 agreement under the Highways Act 1980, as indeed has always been the usual practice.

21st April 2021 **Richard Humphreys QC**