Neutral Citation Number:2025] EWHC 657 (Admin)

Case No: AC-2024-MAN-000411

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT

The Civil Justice Centre, Manchester
Date:19th March 2025

Before :

HIS HONOUR JUDGE BIRD SITTING AS A JUDGE OF THIS COURT

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Between :

The King (on the application of Morris Homes (North) Limited)	**Claimant**
- and -	
BOLTON COUNCIL	**Defendant**
-and-	
WESTCHURCH Homes Limited and others	**Interested Parties**

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Vincent Fraser KC and Philip Robson (instructed by **FS Legal**) for the **Claimant**
Ruth Stockley KC (instructed by **Bolton Council Legal Services**) for the **Defendant**

Hearing date: 25th February 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 19th March 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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His Honour Judge Bird :

Introduction

1. On 3 October 2024, the Defendant local planning authority ("Bolton") granted planning permission for the erection of 133 affordable dwellings at land north of 659 Radcliffe Road in Bolton to Westchurch Homes Limited. Morris Homes Limited ("the Claimant") seeks permission (by way of oral renewal following a refusal on the papers by His Honour Judge Cawson KC on 27 January 2025) to judicially review that decision on the single ground that the grant was unlawful because a condition (the biodiversity gain planning condition or "BGPC") ought to have been imposed but was not.

2. Whether the failure to impose the BGPC was lawful or unlawful (and so the outcome of the application) depends on when the application for planning permission was made. If it was made before 12 February 2024, the Defendant was under no obligation to impose it and so the failure to do so would be lawful. Conversely, if it was made on or after that date, the failure to impose the condition is unlawful.

3. The Claimant submits that the application was made after 12 February 2024, so that an obligation to impose the BGPC arose. In order to grant permission, I need to be persuaded that the point has a realistic prospect of success (in other words it is "arguable", see *Sharma v Antoine* [2006] UKPC 57 and other cases cited at paragraph 21.2.8 of the Fordham's *Judicial Review Handbook* 7th edition. See also para.9.1.3 of the Administrative Court Guide). The Claimant relies on the fact that the Court of Appeal have determined the question "when is an application for planning permission made?" in different ways depending on context and suggests that there is therefore some uncertainty which can only be determined at a full hearing after permission has been granted.

The relevant statutory provision

4. The obligation to impose the BGPC arises from section 98 and schedule 14 of the Environment Act 2021. Those provisions were brought into force by the Environment Act 2021 (Commencement No.8 and Transitional Provisions) Regulations 2024 ("the Regulations"). Reg.3 of the Regulations sets out the following:

Transitional provision: planning permission applied for before 12 February 2024

The [obligation to impose the BGPC] does not apply in relation to a planning permission …. where the application for planning permission was made before 12 February 2024.

The Relevant Chronology

5. The relevant chronology can be stated shortly (but see paragraph 28 below). Westchurch's planning application was received by Bolton on 11 January 2024. On the same day the application fee was paid. Bolton identified a number of problems with the application and drew them to Westchurch's attention on 30 January 2024, at the same time explaining what Westchurch would need to submit. On 28 February 2024, the Claimant informed Bolton that reports submitted with the application could not be relied upon because they related to a different proposed development on the same site (a development proposed by the Claimant) and that the copyright in those reports was vested exclusively in the Claimant. There was a request that the reports be taken from the file. On 6 March 2024, by which time further issues with the application had been identified, Bolton informed Westchurch that its application was inadequate and could not be dealt with. Again, as it had on 30 January, Bolton set out what Westchurch needed to provide. Westchurch submitted a suite of new documents between 5 and 17 April 2024. The application was validated on 18 April 2024. Planning permission was granted on 3 October 2024.

6. It is accepted that if the application was examined on 11 February 2024 (the relevant date for the purpose of the Regulations) it would not have been a valid application in that it would not have complied with the relevant statutory and regulatory provisions, namely sections 58 and 62 of the Town and Country Planning Act 1990 ("the Act") and Arts.7 and 11 of the Town and Country Planning (Development Management Procedure) (England) Order 2015/595 ("the DMP").

7. Given the concession, I need not set out those provisions in the DMP or the Act which the application failed to meet. It is however important to note (as happened in the present case) that an application which initially fails to comply with (for example) Art.7 may be made compliant and lead to the grant of planning permission.

The Claimant's Arguments

8. The Claimant's main argument (advanced by Mr Fraser KC and Mr Robson) is, in summary, that on a proper construction of Reg.3, 12 February 2024 is a hard deadline in that it marks a point in time when the validity of the application is to be determined. If on that date, there was no valid application (that is an application that met the requirements of the DMP set out above) then there was no application made before 12 February 2024.

9. Mr Fraser KC relies principally on the Court of Appeal decision in *Geall v Secretary of State for the Environment* (1999) 78 P&CR 264. The case concerned (the now repealed) Reg.10(5) of the Town and Country Planning (Fees for Applications and Deemed Applications) Regulations 1989/193 ("the Fees Regulations").

Geall

10. Mr Geall carried out some development without permission. After the work was completed, he applied for retrospective planning permission. He paid the requisite fee but failed to supply any plans. The application was therefore invalid (because it was incomplete) and the authority did not process it. The fee ought to have been returned but the authority retained it. Subsequently the authority served an enforcement notice. Mr Geall appealed. One of his grounds was that planning permission ought to be granted. He was therefore deemed to have made an application for planning permission. By operation of section 177(5A) of the Act, he was required to pay the required fee in respect of the deemed application. Failure to do so meant that ground of the appeal could not be pursued. The fee was not paid and so the Inspector refused to consider that ground. Mr Geall appealed that determination and argued that a fee was not required. The High Court refused his appeal, and the matter came before the Court of Appeal. He relied on Reg.10(5) which provided that no fee would be due if the applicant had:

> *"Before the date when the notice was issued, made an application to the local planning authority for planning permission for the development to which the relevant enforcement notice relates (and had paid to the authority the fee payable in respect of that application) …. and at the date when the relevant enforcement notice was issued,*

that application…. had not been determined."

11. Schiemann LJ identified 2 questions "at the centre of" the appeal:

> *In what circumstances is a request for planning permission not to be treated as an application for planning permission and who is the person who is to decide whether a request constitutes an application*

12. He noted that these questions may arise in "*various different contexts and at different stages in the planning process*" and went on to consider a number of those contexts. First, he considered the position where an application is made, considered by the authority to be valid, processed and a decision made to grant permission. In that case he said (see page 271 point 1 under the heading "cases other than EN cases"):

> "*The [authority] has to decide whether or not to process the application. At that point the Secretary of State is not involved. If the [authority] grants planning permission, then subject to judicial review that is an end to the matter*"

13. It is clear from the report that Mr Geall invited the Court of Appeal to treat the application as valid because the authority had failed to return the application fee (see p.271 under the heading "The relevance of the payment of a fee in 1993 and the failure of the authority to return it" and p.273 dealing at the top of that page with the submissions of Mr Katkowski). The argument was rejected, not least because on appeal the Secretary of State was under a duty to consider if the appropriate fee had been paid.

14. Simon Brown LJ concluded that an application that was incomplete (or invalid in that it failed to comply with the DMP) when the enforcement notice was served was not to be treated as an application for the purposes of Reg.10(5) and the issue of completeness (or validity) was for the Secretary of State on the appeal against the enforcement notice. He put it in this way:

> "*The critical question arising under regulation 10(5) of the Fees Regulations was whether, before the enforcement notice was issued, the applicant had made an application to the local planning authority for planning permission and that application had not been determined. It seems to me necessarily implicit in the regulation that the application must be a valid one: it would not otherwise fall for*

> *determination. That question was in my judgment one for determination by the Secretary of State*."

15. It is clear that Simon Brown LJ was dealing with the correct interpretation of Reg.10(5) and not the general (and wider question) of when a planning application should be taken to have been made. The application, when examined at the relevant time (before the notice was served) had to be capable of determination, otherwise the words "*that application…. had not been determined*" would add nothing.

Bath

16. I was also referred to the Court of Appeal decision in *R v Secretary of State ex parte Bath and North East Somerset District Council* [1999] 1 WLR 1759. That case is authority for the proposition that a determination of invalidity by the planning authority does not exclude the right of appeal to the Secretary of State on the question of validity (see page 1768C-E). The decision relates to the meaning of "application" in sect.78 of the Act.

Camden

17. The final case I was referred to is the decision of the Court of Appeal in *Camden London Borough Council v ADC Estates Limited* (1991) 61P&CR 48. In certain circumstances (set out at sect.169 of the Town and Country Planning Act 1971), compensation would be paid to an applicant if planning permission was refused. An exception to that right (set out at sect.169(6A) of the 1971 Act) was introduced by the Town and Country Planning (Compensation) Act 1985. By sect.3(3) of the 1985 Act the exception would only apply:

> "*In relation to the refusal or conditional grant of planning permission on any application made after 23rd January 1985*."

18. If ADC's application was made after 23 January 1985, it would not be entitled to the compensation (because it would fall into the exception). The case concerned timing, more particularly when was ADC's application "made"? The argument below was that there were 3 options: When it is posted to the authority (on 22 January), when it is received by the authority (25 January) or when the application is complete (in that case when an accurate certificate of ownership was provided on 8 March). The third option was not pursued at the

appeal. It was held that the application was made when it was received.

19. Glidewell LJ (with whom Nourse and Purchas LLJ agreed) held that:

> "*The date on which an application is made is the date of the earliest moment when the application is received by its intended recipient. So, I would hold that an application for planning permission is not made until it has been communicated to or received by the local planning authority to whom it is to be made*."

20. Sect.3(3) of the 1985 Act requires the decision maker to start with the relevant decision (the refusal or grant of conditional permission) and determine when the application that led to the decision was made. At the time the application for planning permission was received (that is, when it was "made") it was not valid (in the sense that it was not complete) because it lacked the certificate of ownership. It follows, at least for the purposes of Reg.3, an application need not be complete at the date it is "made".

The Defendant's arguments

21. On behalf of Bolton, Miss Stockley KC reminds me that the making of an application and the process of validation are different, and separate, steps. If an application is not valid when made, "*the effect is merely that, as in this instance, the applicant is given time to supplement it with further supporting documents to enable its validation. In such circumstances the application remains the same application already made*…" (para.15 of Bolton's skeleton argument).

22. Bolton invite me to distinguish *Geall* and apply *Camden*.

Resolution

23. In my judgment it is clear from the authorities that the answer to the question: when is an application "made"? is wholly dependent on context and in particular wholly dependent on the construction of the relevant regulatory or statutory provision in respect of which the question arises. Whether or not this application for Judicial Review is arguable depends entirely on the correct construction of Reg.3 of the Regulations. It is important that the

authorities are considered in that light.

24. Reg.3 only falls to be considered when planning permission has been granted on a given application. Sect.3(3) of the 1985 Act (see *Camden*) only falls to be considered when planning permission is refused or when conditional permission is granted. In each case the relevant authority must have reached a decision on the application and determined it. It follows in each case there must necessarily have been a valid, complete application.

25. Reg.10(5) of the Fees Regulations (see *Geall*) on the other hand, only applies where there has been no determination. It follows, in such a case that the application might, at the relevant time, be invalid.

26. Mr Fraser KC's argument, that the guidance in *Geall* applies and must be followed has, in my judgment, no realistic prospect of success. In fact, I can go further, I am satisfied that an application is made for the purposes of Reg.3 of the Regulations when it is received (see *Camden*) by the authority. I reach that view for the following main reasons:

    a. In my view the decision in *Camden* is binding on me. There is no material difference between sect.3(3) of the 1985 Act and Reg.3.
    b. Even absent *Camden* I would have come to the same conclusion.
    c. *Geall* relates to a different provision and provides no guidance on the correct interpretation of Reg.3 of the Regulations.

27. Mr Fraser KC invited me to conclude that, because there is not a single answer to the question "when is an application made" and that the Court of Appeal have come to different conclusions in different cases, there was plainly an argument with a realistic prospect of success. For the reasons I have given I do not accept that submission.

28. I was invited to consider the chronology (see paragraph 5 above) in more detail, and in particular to consider in some detail the extent to which the application was flawed when made. In my judgment such an exercise is unnecessary. It seems to me that any application, no matter how flawed, is capable of being saved by the provision of correct documentation. Once the correct documents are provided, and the application is valid, the application is treated as valid from the point it was made. As Schiemann LJ put it in *Geall*, once permission

is granted, subject to judicial review "*that is an end to the matter*".

29. For all of those reasons I refuse permission. Whilst I have not set out his reasons, I find myself in entire agreement with the reasons for refusal advanced by His Honour Judge Cawson KC.