Neutral Citation Number: [2020] EWCA Civ 1331

Case No: C1/2019/1730

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION
PLANNING COURT
MRS JUSTICE ANDREWS DBE
CO/5012/2018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16th October 2020

Before:

LORD JUSTICE LEWISON
LORD JUSTICE ARNOLD
and
LORD JUSTICE NUGEE

- -

Between :

DB SYMMETRY LIMITED	**Appellant**
- and -	
SWINDON BOROUGH COUNCIL	**First Respondent**
-and-	
SECRETARY OF STATE FOR HOUSING COMMUNITIES AND LOCAL GOVERNMENT	**Second Respondent**

- -
- -

MR RICHARD HUMPHREYS QC (instructed by **Jones Day**) for the **Appellant**
MR RICHARD HARWOOD QC (instructed by **Swindon Legal Department**) for the **First Respondent**
MR RICHARD HONEY & MR CHARLES STREETEN (instructed by the **Government Legal Department**) for the **Second Respondent**

Hearing dates : 7th and 8th October 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on Friday 16th October 2020

Lord Justice Lewison:

Introduction

1. The issue on this appeal is whether a condition attached to the grant of planning permission for employment development of various kinds lawfully required the public to have rights of passage over roads to be constructed as part of the development. A planning inspector said "no" but Andrews J said "yes". Her judgment is at [2019] EWHC 1677 (Admin). With my permission, the developer appeals.

The facts

2. The development site lies in the north-eastern outskirts of Swindon to the south of the A420. It is part of what the local development plan calls the New Eastern Villages ("the NEV") which are identified as a strategic allocation to deliver sustainable economic and housing growth, including the provision of about 8,000 homes, 40 hectares of employment land and associated retail, community, education and leisure uses. The application for planning permission on the development site was the first part of the NEV to be determined.

3. The application for planning permission was accompanied by an Illustrative Landscape Masterplan. That showed the application site lying to the immediate south of the A420. Within the western part of the site, a road ran southward from a new junction with the A420 and continued to the southern boundary. It was labelled "North-South access road". Halfway down that road a roundabout was shown, from which another road, described on the plan as the "East-West spine road", ran to the eastern boundary of the site. The portion of the North-South access road which ran from the A420 junction to the roundabout was described as a "dual carriageway" on the Masterplan. The southerly continuation of the North-South access road from the roundabout was labelled "North-South link to wider NEV" and described as a single carriageway. The annotations to each road were that they contained a "carriageway" and "footpaths/cycleways to both sides", giving the respective widths (between 59 and 61 metres).

4. Three development areas were indicated: area A on the eastern side of the North-South access road, and to the north of the East-West spine road; area B to the south of the East-West spine road; and area C, on the western side of the North-South access road, above the roundabout, and quite close to the A420. An addendum to the Design and Access Statement stated that it had been amended "to show highways extending to the site boundaries". The purpose of that amendment was to "show the connectivity of the site to surrounding land".

5. The application for outline planning permission was placed before Swindon's planning committee. We do not have a minute of the meeting; but we do have a copy of the officer's report that the committee considered. One of the points that the officer made in several paragraphs of the report was that the application site was part of a wider development proposal. It was to "integrate physically and functionally" with

adjoining development. The NEV was to come forward as "a series of new interconnected villages." Each scheme had to demonstrate how it fitted into the wider NEV. The proposal "must provide connections to future development within the [NEV] in the interests of enabling the comprehensive and sustainable development of the NEV as a whole".

6. One section of the report was headed "Infrastructure requirements". Paragraph 63 said that the site was "a key gateway" to the NEV; and paragraph 64 referred to the need for proposals to meet the infrastructure needs to mitigate the impact of the development. Paragraph 65 said that the transport requirements arising from the scheme included "a combination of direct provision of infrastructure and financial contributions towards mitigation of direct impact." But importantly, the legal context in which they were discussed in paragraph 64 was regulation 122 of the Community Infrastructure Levy Regulations 2010 dealing with planning obligations rather than conditions. It is also of note that the heading to what became condition 37 included a reference to a "section 38 agreement".

7. At the end of what was a very comprehensive report, the recommendation was to grant planning permission "subject to the satisfactory completion of a planning obligation".

8. On 3 June 2015 Swindon granted outline planning permission in respect of the site, subject to no less than 50 conditions. The development was described as:

> "Outline application for employment development including B1b (research and development/light industrial), B1c (light industrial), B2 (general industrial) and B8 (warehouse and distribution), new landscaping and junction to A420 (means of access not reserved)".

9. Condition 3 required the submission of reserved matters and the implementation of development to be in broad accordance with the Illustrative Landscape Masterplan. The internal points of access into development areas A and B (denoted on the plan) were to be subject to detailed assessment at the reserved matters stage. The reason for that condition was:

> "to ensure that the arrangement of employment uses on site is acceptable and allows for north/south and east/west highway linkages to site boundaries in the interests of the proper and comprehensive planning of the wider New Eastern Villages Development Area".

10. Condition 4 required a phasing plan including "details of buildings, roads and footways" to be submitted and the development to be carried out in accordance with it. Conditions 9 and 10 required details of "the surface treatment of any roadways, footpaths, footways or parking areas" to be submitted within the strategic landscaping and each development phase respectively. Condition 16 required there to be acoustic fencing between the access road and Lock Keepers Cottage; and precluded any occupation of the development before the completion of the submitted landscape design.

11. Condition 34 required parking and turning areas to be constructed in accordance with Swindon's parking standards "in the interests of amenity and highway safety." A number of other conditions were imposed for reasons which were expressed to be in the interests of highway safety, for example, condition 40, which related to a minimum footway width for a proposed bus shelter; condition 42, which stipulated the minimum distance between entrance gates and the back edge of the highway; condition 43, relating to the gradient of private accesses within 10 metres from junctions with "the public highway"; condition 44, which required visibility splays for all private accesses to be provided before the development was brought into use; and condition 45, which required the submission of detailed junction analysis of "any junctions with the north south spine road to inform the design and ensure appropriate capacity".

12. Condition 37, under the heading "Local Highways Authority", provided as follows:

> "The proposed estate roads, footways, footpaths, verges, junctions, street lighting,… service routes…vehicle overhang margins,…accesses, carriageway gradients, driveway gradients, car parking and street furniture shall be constructed and laid out in accordance with details to be submitted and approved by the Local Planning Authority in writing before their construction begins. For this purpose, plans and sections, indicating as appropriate, the design, layout, levels, gradients, materials and method of construction shall be submitted to the Local Planning Authority.
>
> Reason: to ensure that the roads are laid out and constructed in a satisfactory manner."

13. Condition 38, entitled "Foot/Cycleways" states that:

> "The proposed footways/footpaths shall be constructed in such a manner as to ensure that each unit, before it is occupied or brought into use, shall be served by a properly consolidated and surfaced footway/footpath to at least wearing course level between the development and highway.
>
> Reason: to ensure that the development is served by an adequate means of access."

14. Condition 39 is the condition on which this appeal turns. It stated:

> "Roads
>
> 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 constructed to at least basecourse level prior to occupation and bringing into use.

> Reason: to ensure that the development is served by an adequate means of access to the public highway in the interests of highway safety."

15. The dispute between the parties is whether that condition required the developer to dedicate the roads as public highways (as Swindon contends) or whether it merely regulates the physical attributes of the roads (as the developer, supported by the Secretary of State) contends).

16. Condition 50 made it clear that the approval was in respect of the accompanying plans and documents, which are listed, and included the Illustrative Landscape Masterplan.

17. The day before the outline permission was granted, Swindon, as envisaged by the resolution to grant, entered into an agreement with the developer and the owners of the land under section 106 of the Town and Country Planning Act 1990, ("section 106 agreement") subject in the usual way to the grant of planning permission. There was no collateral agreement pursuant to section 38 of the Highways Act 1980.

18. The section 106 agreement specifically referred to the North-South link to wider NEV and the East-West spine road described in the Illustrative Landscape Masterplan. Schedule 2 paragraph 2 required the owners to transfer certain land, referred to as "the A420 Improvements Land", to Swindon for the purposes of carrying out improvements to the A420, and to grant them a licence to enter other land for the same purpose. In the event of a transfer of the A420 Improvements Land, it was either to be dedicated by Swindon as a highway maintainable at public expense, or to be used solely for undertaking the A420 improvements. The A420 Improvements Land was shown on a separate plan as lying to the west of the north-south access road and just below the A420. The land over which the licence was granted lies immediately beneath it and just above development area C.

19. Paragraph 3 of the same Schedule contains covenants by the owners with Swindon that within a year from the date of first occupation of area A they will construct the East-West Spine Road to base course level to the application site boundary in accordance with condition 39 of the planning permission, and that within a year from the date of first occupation of area B they will do likewise in respect of the North-South link. The final alignment of these roads would be as approved in reserved matters and under condition 37.

20. On 19 June 2017 the developer applied to Swindon for a certificate under section 192 of the Town and Country Planning Act 1990 that the formation and use of private access roads as private access roads would be lawful. Swindon refused the certificate; and the developer appealed. On 6 November 2018 Ms Wendy McKay LLB, an experienced planning inspector, allowed the appeal. She certified that the use of the access roads for private use only would be lawful.

21. Swindon succeeded before the judge on an application for a statutory review of that decision.

Highways

22. In ordinary legal usage a highway is a way over which the public have rights of passage. They may be rights on foot only (a footpath), on foot or with animals (a bridleway or driftway); or on foot, with animals and with vehicles (a carriageway). These definitions are replicated in section 329 (1) of the Highways Act 1980; and are applied to planning legislation (except in so far as the context otherwise requires) by section 336 (1) of the Town and Country Planning Act 1990.

23. The way in which a highway comes into existence is through dedication and acceptance by the public. Dedication may be express, or may be inferred from public use. Both dedication and acceptance are necessary at common law, although there is a rebuttable statutory presumption of dedication after 20 years use as of right by the public. Before 1835 liability to repair highways was that of the inhabitants of the parish unless it could be shown that responsibility had attached to an individual or a corporate body by reason of tenure, inclosure or prescription. The imposition on the inhabitants of the parish of what could, potentially, be an onerous obligation led to the requirement of the common law that the existence of a highway could only be established by proving both dedication by the owner and acceptance by the public. Acceptance by the public demonstrated that there was a public benefit that justified the public assumption of liability to repair. Although the Highways Act 1835 abolished the universal rule that any highway was repairable at the public expense, it did not do away with the twin requirements of dedication and acceptance. It introduced a second stage, namely adoption, before a highway became maintainable at the public expense. Since the Highways Act 1959, as regards liability to repair, highways fall into three main classes:

    i) highways repairable at the public expense;

    ii) highways repairable by private individuals or corporate bodies; and

    iii) highways which no one is liable to repair.

24. Section 38 (3) of the Highways Act 1980 provides:

> "A local highway authority may agree with any person to undertake the maintenance of a way—
>
> (a) which that person is willing and has the necessary power to dedicate as a highway, or
>
> (b) which is to be constructed by that person, or by a highway authority on his behalf, and which he proposes to dedicate as a highway;
>
> and where an agreement is made under this subsection the way to which the agreement relates shall, on such date as may be specified in the agreement, become for the purposes of this Act a highway maintainable at the public expense."

25. Section 278 of that Act provides:

> "(1) A highway authority may, if they are satisfied it will be of benefit to the public, enter into an agreement with any person—
>
> (a) for the execution by the authority of any works which the authority are or may be authorised to execute, or
>
> (b) for the execution by the authority of such works incorporating particular modifications additions or features, or at a particular time or in a particular manner,
>
> on terms that that person pays the whole or such part of the cost of the works as may be specified in or determined in accordance with the agreement."

26. Under these provisions, then, a highway authority (which may or may not be the same as the local planning authority) may arrange for the construction of a road at a developer's expense, followed by the dedication of that road as a highway repairable at public expense. Alternatively, the carrying out of the works prior to adoption may be carried out by the developer; commonly under a section 106 agreement.

27. Section 263 of the Highways Act 1980 provides for the vesting of highways in the highway authority. But that section only applies to highways "maintainable at the public expense". If a highway is not maintainable at public expense, it remains vested in the owner of the soil, subject to public rights of passage.

Lawfulness of planning conditions

28. Section 70 of the Town and Country Planning Act 1990 enables a planning authority to grant planning permission either unconditionally or "subject to such conditions as they think fit". Despite the apparent width of these words, it is well-settled that there are legal constraints on a planning authority's ability to impose conditions on the grant of planning permission which I will come to in due course. Section 72 of the 1990 Act also deals with conditions. It provides, so far as material:

> "(1) Without prejudice to the generality of section 70(1), conditions may be imposed on the grant of planning permission under that section—
>
> (a) for regulating the development or use of any land under the control of the applicant (whether or not it is land in respect of which the application was made) or requiring the carrying out of works on any such land, so far as appears to the local planning authority to be expedient for the purposes of or in connection with the development authorised by the permission…".

29. Running alongside section 70 is section 106 of the 1990 Act. It provides, so far as relevant:

> "(1) Any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into an obligation (referred to in this section … as "a planning

> obligation"), enforceable to the extent mentioned in subsection (3)—
>
> (a) restricting the development or use of the land in any specified way;
>
> (b) requiring specified operations or activities to be carried out in, on, under or over the land;
>
> (c) requiring the land to be used in any specified way; or
>
> (d) requiring a sum or sums to be paid to the authority … on a specified date or dates or periodically."

30. Mr Harwood QC, for Swindon, argues that it is lawful for a planning condition (as opposed to a planning obligation) to require a developer to dedicate land as a highway. If and in so far as that allows a local authority to have the benefit of a highway without the payment of any compensation, he relies on the proposition that a public authority may lawfully use powers which do not involve the payment of compensation in preference to powers that do. That proposition is well supported by authority: *Westminster Bank Ltd v Minister of Housing and Local Government* [1971] AC 508; *Cusack v Harrow LBC* [2013] UKSC 40, [2013] 1 WLR 2022. It is to be noted, however, that *Westminster Bank* involved no more than a refusal of planning permission for development to protect future road widening; while *Cusack* involved a choice between two express statutory powers. In addition, Mr Harwood's proposition simply begs the question: is it lawful for a condition attached to a planning permission to require the developer to dedicate part of his land as a highway without compensation?

31. Whether a planning condition is lawful depends on satisfying the so-called *Newbury* criteria (see *Newbury District Council v Secretary of State for the Environment* [1981] AC 578); namely:

> "the conditions imposed must be for a planning purpose and not for any ulterior one, and … they must fairly and reasonably relate to the development permitted. Also they must not be so unreasonable that no reasonable planning authority could have imposed them."

32. These principles were recently reaffirmed by the Supreme Court in *R (Wright) v Forest of Dean District Council* [2019] UKSC 53, [2019] 1 WLR 6562, in which that court declined the Secretary of State's invitation to "update *Newbury*".

33. The question whether a planning condition can lawfully require the developer to dedicate land for public purposes has been considered by the courts on a number of occasions. In *Hall & Co Ltd v Shoreham by Sea Urban DC* [1964] 1 WLR 240 sand and gravel importers and the owners and occupiers of land in an area scheduled for industrial development, applied for planning permission to develop part of their land for industrial purposes. The land adjoined a busy main road which was already overloaded. The highway authority intended to widen it at a future date and to acquire for that purpose a strip forming part of the developer's land. The planning authority

granted planning permission subject to a condition requiring the developer to "construct an ancillary road over the entire frontage of the site at their own expense, as and when required by the local planning authority and shall give right of passage over it to and from such ancillary roads as may be constructed on the adjoining land." It is to be noted that the condition did not require the transfer of the land itself.

34. This court held that the imposition of that condition was unlawful. At 247 Willmer LJ summarised the developer's argument as follows:

> "It is contended that the effect of these conditions is to require the plaintiffs not only to build the ancillary road on their own land, but to give right of passage over it to other persons to an extent that will virtually amount to dedicating it to the public, and all this without acquiring any right to recover any compensation whatsoever. This is said to amount to a violation of the plaintiffs' fundamental rights of ownership which goes far beyond anything authorised by the statute."

35. It is important to note first that at 244 he regarded the planning authority's objective of avoiding further congestion as "admirable" from a planning point of view; second that at 248 he accepted that the condition related to the proposed development; and third that at 249 he accepted that the local planning authority's objective was "a perfectly reasonable one". But nevertheless, he held it was unlawful. The essence of his reasoning is, I think, encapsulated by the following passage in his judgment at 250:

> "The defendants would thus obtain the benefit of having the road constructed for them at the plaintiffs' expense, on the plaintiffs' land, and without the necessity for paying any compensation in respect thereof.
>
> Bearing in mind that another and more regular course is open to the defendants, it seems to me that this result would be utterly unreasonable and such as Parliament cannot possibly have intended."

36. Harman LJ said at 256:

> "It is not in my judgment within the authority's powers to oblige the planner to dedicate part of his land as a highway open to the public at large without compensation, and this is the other possible interpretation of the condition. As was pointed out to us in argument, the Highways Acts provide the local authority with the means of acquiring lands for the purpose of highways, but that involves compensation of the person whose land is taken, and also the consent of the Minister."

37. Pearson LJ said at 261:

> "I agree with Willmer LJ that condition 3 is ultra vires because it is "unreasonable" in the sense which has been explained in

> *Kruse v Johnson* and other cases. I should, however, be inclined to say that the element of ultra vires is to be found in the conflict with the general law relating to highways. The general words of section 14 (1) of the Town and Country Planning Act, 1947, should not be interpreted as authorising a radical departure from the general law relating to highways."

38. Mr Harwood submitted that *Hall* was a decision that turned on its own facts; and did not establish any wider principle. I disagree.

39. Both Willmer LJ and Harman LJ placed considerable reliance on the existence of "another and more regular course" as demonstrating the unreasonableness of the condition. That other course would have been by the exercise of powers of compulsory purchase under the Highways Act 1959. This was certainly how the decision was interpreted by Lord Wilberforce in *Hartnell v Minister of Housing and Local Government* [1965] AC 1134 (referring to it as a "well-established principle of law"); and by Diplock LJ in *Westminster Bank Ltd v Beverley BC* [1968] 1 QB 499 ("it is a misuse of a power granted by statute for one object to use it in order to achieve a different object for which Parliament did not intend it to be used"). In *Leeds CC v Spencer* [2000] LGR 68 Brooke LJ quoted the same extracts from the judgments of Willmer and Pearson LJJ which he said set out "the governing principle". It is also how the editors of the Encyclopedia of Planning Law and Practice interpret the decision, which is cited in support of the proposition that:

> "A condition will be invalid if its effect is to destroy private proprietary rights, such as to require the construction of an ancillary road on the application site and to make it available for use by owners of adjoining properties, effectively requiring its dedication as a highway without compensation …"

40. *Hall* has never been overruled or disapproved for what it actually decided. On the contrary, it has been followed and applied in a number of cases. In *City of Bradford Metropolitan Council v Secretary of State for the Environment* (1987) 53 P & CR 55 the planning authority granted permission for the building of 200 houses subject to a condition requiring the widening of a roadway as shown in the amended plans. Once widened, the roadway was to form part of the highway. This court upheld the decision of the Secretary of State discharging the condition on the ground that it was manifestly unreasonable. *Hall* was directly applied and found to be indistinguishable.

41. *MJ Shanley Ltd v Secretary of State for Environment* [1982] JPL 380 concerned a condition requiring a developer to provide 40 acres of land for public use. Woolf J held:

> "That condition, as specified by the Secretary of State in his decision letter, is, in my view, undoubtedly one which is invalid and unenforceable. It was requiring as a condition of planning permission the providing to the public of 40 acres of land. It falls, in my view, four square within the situation considered in *Hall & Co Ltd v Shoreham-By-Sea Urban District Council*."

42. In our case the judge noted at [39] that *Hall* has not been overruled, although she did seem to consider that some doubt had been cast on the decision by the speech of Lord Hoffmann in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759. That is not my reading of Lord Hoffmann's speech. As the judge correctly said, Lord Hoffmann's speech was not the leading speech; and none of the other Law Lords expressly agreed with it.

43. Lord Hoffmann referred to *Hall* as a "landmark case". As he noted, one result of *Hall* was that planning authorities used different methods to achieve the result that the imposition of conditions could not achieve. Foremost among these was the use of planning agreements (now planning obligations). Lord Hoffmann commented on the use of such agreements, and their relationship with planning conditions. At 775 he referred to Circular 16/91 which dealt with the content of planning obligations under section 106. That circular took the view that a developer could reasonably be expected to "pay for or contribute to the costs of infrastructure" which would not have been necessary but for his development. Lord Hoffmann went on to say at 776:

> "… the Circular sanctions the use of *planning obligations* to require developers to cede land, make payments or undertake other obligations which are bona fide for the purpose of meeting or contributing to the external costs of the development. In other words, it authorises the use of planning obligations in a way which the court in *Hall & Co Ltd v Shoreham-by-Sea Urban District Council* … would have regarded as Wednesbury unreasonable in a condition." (Emphasis added).

44. That observation is clearly directed to planning obligations and not to conditions.

45. He then said at 776:

> "Parliament has therefore encouraged local planning authorities to enter into agreements by which developers will pay for infrastructure and other facilities which would otherwise have to be provided at the public expense. These policies reflect a shift in Government attitudes to the respective responsibilities of the public and private sectors. While *rejecting the politics of using planning control to extract benefits for the community at large*, the Government has accepted the view that market forces are distorted if commercial developments are not required to bear their own external costs." (Emphasis added).

46. He returned to the point later in his speech at 779:

> "It does not follow that because a condition imposing a certain obligation (such as to cede land or pay money) would be regarded as *Wednesbury* unreasonable, the same would be true of a refusal of planning permission on the ground that the developer was unwilling to undertake a similar obligation under section 106. I say this because the test of *Wednesbury* unreasonableness applied in *Hall & Co Ltd v Shoreham-by-Sea*

> *Urban District Council* to conditions is quite inconsistent with the modern practice in relation to planning obligations which has been encouraged by the Secretary of State in Circular 16/91 and by Parliament in the new section 106 of the Town and Country Planning Act 1990 and the new section 278 of the Highways Act 1980 and approved by the Court of Appeal in *Reg v South Northamptonshire District Council, Ex parte Crest Homes Plc*."

47. These passages clearly recognise a difference between what can be achieved by conditions on the one hand; and what can be achieved by planning agreements (or planning obligations) on the other. I cannot regard this as casting any doubt on the correctness of *Hall* for what it decided. On the contrary, 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 1991, for instance, section 106 of the Town and Country Planning Act 1990 was substituted by a new section which expressly empowered a planning obligation to provide for the payment of money to the planning authority. *Hall* was also cited approvingly by Brooke LJ in *Leeds CC v Spencer* [2000] LGR 68 (albeit in a different context) and by Lord Collins in *R (Sainsbury's Supermarkets Ltd) v Wolverhampton CC* [2010] UKSC 20, [2011] 1 AC 437 at [46].

48. In addition, in *Aberdeen City and Shire Strategic Development Planning Authority v Elsick Development Company Ltd* [2017] UKSC 66, [2017] PTSR 1413 Lord Hodge said that planning obligations enable a planning authority to control matters which it might otherwise have no power to control by the imposition of planning conditions. It is clear, then, that the power to impose conditions on the grant of planning permission is narrower than the power to enter into planning agreements or to accept planning obligations.

49. The judge commented on *Tesco* at [39]. She said:

> "However it is quite clear from the tenor of Lord Hoffmann's speech that he did not subscribe to the view that in principle it would be *Wednesbury* unreasonable in the modern era for a local authority to require the developer to bear some of the external costs of the development, whether by way of condition or by imposing a planning obligation under s.106."

50. What this statement fails to recognise is that, at least in 1995 when *Tesco* was decided, there was a difference between the scope of what could lawfully be achieved by the imposition of a condition attached to the grant of planning permission, and the content of a planning obligation. In addition, contrary to what the judge said in the last sentence of the quoted extract, a planning obligation cannot be *imposed* by a local planning authority. It can result only from an agreement, or from a unilateral undertaking offered by the developer. If no satisfactory agreement is made or undertaking offered, the local planning authority may refuse permission.

51. It is possible that the permissible content of a planning obligation may have been altered by regulation 122 of the Community Infrastructure Levy Regulations 2010 which imported the *Newbury* criteria into such obligations where those obligations

"constitute a reason for granting planning permission". But whether that is or is not the case, that regulation undoubtedly does not expand the permissible scope of lawful conditions attached to planning permissions.

52. I consider that, at least at this level in the judicial hierarchy, a condition that requires a developer to dedicate land which he owns as a public highway without compensation would be an unlawful condition. Whether the unlawfulness is characterised as the condition being outside the scope of the power because it requires the grant of rights over land rather than merely regulating the use of land; or whether it is a misuse of a power to achieve an objective that the power was not designed to secure; whether it is irrational in the public law sense, or whether it is disproportionate does not seem to me to matter. In my judgment *Hall* establishes a recognised principle which is binding on this court.

53. If (as is likely to be the case in this appeal) the condition cannot be severed from the grant of planning permission the consequence would be, as in *Hall* itself, that the planning permission cannot stand either.

Government policy

54. We were shown extracts from a number of policy statements issued by central government over the years. The earliest we were shown dates from 1951. Paragraph 13 of that statement said:

> "Conditions requiring for example, the cession of land for road improvement or for open space should not therefore be attached to planning permissions."

55. The latest, from 2019 states:

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

56. Intermediate statements of government policy all say the same thing.

57. At [37] of her judgment the judge commented on Lord Hoffmann's speech in *Tesco* once again. She said:

> "In his speech, Lord Hoffmann described *Hall v Shoreham* as having exercised a decisive influence upon the development of British planning law and practice. He referred to the circulars issued by the Ministry of Housing and Local Government for the guidance of local planning authorities in the wake of that decision, quoting from what was then the most recent. I note in passing that that circular included the statement that "conditions may in some cases reasonably be imposed to oblige developers to carry out works, e.g. provision of an access road, which are directly designed to facilitate the development". Thus, *Hall v Shoreham* was (rightly) not regarded as giving rise to an absolute ban on imposing such obligations. The question whether a condition which is imposed for a planning purpose

> and relates to the development is *Wednesbury* unreasonable is fact specific."

58. If the judge interpreted that circular as authorising the imposition of conditions which not only required a developer to provide an access road, but also to dedicate it to public use as a highway, I consider that she was wrong. Such an interpretation would be flatly contrary to consistent government policy for nearly 70 years. In my judgment *Hall does* impose an absolute ban on requiring dedication of land as a public highway without compensation as a condition of the grant of planning permission. I also consider, contrary to Mr Harwood's submission, that there is no difference for this purpose between dedicating a road as a highway and transferring the land itself for highway use. As I have said, the condition in *Hall* did not require the land itself to be transferred, yet it was still held to be unlawful.

The interpretation of a planning permission

59. There was little dispute about the principles applicable to the interpretation of a planning permission; not surprisingly since they have recently been stated at the highest level: *Lambeth LBC v Secretary of State for Housing Communities and Local Government* [2019] UKSC 33; [2019] 1 W.L.R. 4317. In that case the Supreme Court applied the principles that had already been articulated in *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2015] UKSC 74, [2016] 1 WLR 85.

60. 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.

61. In carrying out that exercise, there is no absolute bar on the implication of words, although the court will be cautious in doing so.

62. There is no special set of rules applying to planning conditions, as compared to other legal documents.

63. Like any other document, a planning permission must be interpreted in context. The context includes the legal framework within which planning permissions are granted.

64. Since the context includes the legal framework, the reasonable reader must be equipped with some knowledge of planning law and practice: *Lambeth LBC v Secretary of State for Housing Communities and Local Government* [2018] EWCA Civ 844, [2019] PTSR 143. (Although the decision in the case was reversed by the Supreme Court, it was common ground that this principle remained unaffected).

65. As Lord Carnwath summarised the position in *Lambeth* at [19]:

> "In summary, whatever the legal character of the document in question, the starting point—and usually the end point—is to find "the natural and ordinary meaning" of the words there

> used, viewed in their particular context (statutory or otherwise) and in the light of common sense."

66. Planning permission is granted under a statutory framework. If Parliament defines its terms in an Act (whether by enlarging or by restricting the ordinary meaning of a word or expression), it must intend that, in the absence of a clear indication to the contrary, those terms as defined will govern what is proposed, authorised or done under or by reference to that Act: *Wyre Forest DC v Secretary of State for the Environment* [1990] 2 AC 357.

67. Where it is said that a condition attached to a planning permission excludes a land owner's existing rights, the words used in the relevant condition, taken in their full context, must clearly evince an intention on the part of the local planning authority to make such an exclusion: *Dunnett Investments Ltd v Secretary of State for Communities and Local Government* [2017] EWCA Civ 192, [2017] JPL 848.

68. As noted, the Supreme Court held that the same principles apply to the interpretation of a planning permission as apply to other documents. One principle that applies (both to contracts and to other instruments) is that the court will prefer an interpretation which results in the clause or contract being valid as opposed to void. It is known as the validity or validation principle: see, most recently, *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38. This approach is triggered where the court is faced with a choice between two realistic interpretations: *Tillman v Egon Zehnder Ltd* [2019] UKSC 32, [2020] AC 154. In that case Lord Wilson described the principle at [38]:

> "… the validity principle proceeds on the premise that the parties to a contract or other instrument will have intended it to be valid. It therefore provides that, in circumstances in which a clause in their contract is (at this stage to use a word intended only in a general sense) capable of having two meanings, one which would result in its being void and the other which would result in its being valid, the latter should be preferred."

69. He went on to consider a number of cases on the appropriate trigger for the application of the principle. At [42] he said:

> "To require a measure of equal plausibility of the rival meanings is to make unnecessary demands on the court and to set access to the principle too narrowly; but, on the other hand, to apply it whenever an element of ambiguity exists is to countenance too great a departure from the otherwise probable meaning."

70. He went on to say:

> "In *Great Estates Group Ltd v Digby* … Toulson LJ explained that, if the contract was "capable" of being read in two ways, the meaning which would result in validity might be upheld "even if it is the less natural construction". And in Tindall *Cobham 1 Ltd v Adda Hotels* … Patten LJ, with whom the

> other members of the court agreed, observed at para 32 that the search was for a "realistic" alternative construction which might engage the principle. In my view Megarry J, Toulson LJ and Patten LJ were identifying the point at which the principle is engaged in much the same place. Let us work with Patten LJ's adjective: let us require the alternative construction to be realistic."

71. I see no reason why this approach should be excluded in the interpretation of a planning permission. Indeed, it was applied to a condition in a planning permission by Harman and Pearson LJJ in *Hall*.

Is there a realistic interpretation of condition 39 which does not result in unlawfulness?

72. I do not think that the judge really appreciated the consequences of her decision. In my judgment, if the judge was right in her interpretation of the condition, the condition (and probably the whole planning permission) is invalid. In those circumstances, the validation principle comes into play. The question, then, is whether the inspector's interpretation of condition 39 was realistic (even if not the most obvious or natural one).

73. In answering this question, I do not derive much help from the planning officer's report, on which Mr Harwood strongly relied. As I have said, the recommendation to grant was subject to completion of a satisfactory planning obligation (i.e. a section 106 agreement) and the transport infrastructure requirements were all discussed in the report within the legal framework of regulation 122 (which applies only to section 106 agreements). Nor do I find persuasive the argument that the test of lawfulness is necessarily the same for the imposition of a condition and the contents of a section 106 agreement. In the way that the law has developed, they are subject to different constraints and achieve different purposes. Moreover, planning obligations under section 106 can only arise with the developer's consent. They cannot be imposed by the local planning authority.

74. In her decision letter, the inspector expressed her conclusion at [20] as follows:

> "Whilst the term "*highway*" usually means a road over which the general public have the right to pass and repass, the phrase "*fully functional highway*" cannot be divorced from the beginning of the sub-clause which states "*shall be constructed in such a manner as to ensure*…". In my view, Condition 39 simply imposes a requirement concerning the manner of construction of the access roads and requires them to be capable of functioning as a highway along which traffic could pass whether private or public. It does not require the constructed access roads to be made available for use by the general public. I believe that a reasonable reader would adopt the Appellant's understanding of the term "*highway*" as used in the context of the condition with the clear reference to the construction of the roads as opposed to their use or legal status. The distinct inclusion of the term "*public highway*" in the

> reason for imposing Condition 39 reinforces my view on that point."

75. Moreover, the inspector stated at [23] that the construction of condition 39 was "neither difficult nor unclear".

76. At [63] the judge acknowledged that the interpretation adopted by the Secretary of State was a possible one. She said:

> "Looked at in isolation, it is possible to construe condition 39 in the manner for which [the Secretary of State] contends. It is headed "roads" and it appears in juxtaposition to a condition headed "foot/cycleways", thus it is possible to infer that it is dealing with the matters that are not covered by that previous condition, i.e. vehicular access to and within the site. Conditions in a planning permission are not interpreted like statutes, so, whilst it would be slightly odd, it is not impossible for the words "road" and "highway" to be used to mean the same thing in the same condition. However, condition 39 cannot be read in isolation, and when looked at in context of the overall permission, that is not how the reasonable informed reader would construe it."

77. The first point to make is that condition 39 does not expressly require dedication which is a necessary prerequisite of the creation of a highway. Nor (unlike the condition in *Hall*) does it expressly refer to the grant of rights of passage. Dedication could not be inferred from public use, for the simple reason that until the roadways have been constructed at which point (on the judge's interpretation) they become highways, there will have been no public use. Although he disclaimed any intention of implying terms into condition 39, Mr Harwood argues that the only way to give effect to the repeated use of the word "highway" in that condition ("highway purposes" and "fully functional highway") is by requiring dedication of the roads as highways. In other words it is implicit in the use of the word "highway" that the roads have been dedicated to public use. In my judgment, that is implication, because it extrapolates a legal meaning which is not apparent in the words of the condition.

78. Second, it was by no means clear to me which parts of the development were to be dedicated as highways. Take the "turning spaces" for example. Mr Harwood suggested that these might be lay-bys on the north-south link and the east-west spine roads. But, even if the expression "turning spaces" could be stretched to include a lay-by, given the width of those roads as shown on the Illustrative Landscape Masterplan, it is impossible to see where lay-bys or turning areas might be required. In addition, the condition requires only that each unit is served by a fully functional highway. As Nugee LJ pointed out in argument, it is perfectly possible to satisfy this requirement without dedicating both the whole of the north-south link road and the whole of the east-west spine road.

79. Third, the condition itself refers to "areas that serve a necessary highway purpose" whereas the reason given for imposing the condition refers to "access to the public highway". The drafter of the condition thus appears to distinguish between a

"highway" and a "*public* highway". The same distinction between the "highway" and the "public highway" also appears in condition 43.

80. Fourth, as the inspector noted, the obligation imposed by the condition is one which at least on its face relates to the *construction* of the roads, which are themselves described as "access roads", rather than as highways.

81. Fifth, the reason for imposing the condition states that it is imposed to ensure that "the development" (rather than individual units or other areas within the development) has "adequate means of access to the public highway". Individual units or areas within the development are to have access to the public highway by means of the "proposed access roads".

82. Sixth, condition 38 (although headed "Foot/cycleways") deals only with footways and footpaths. The condition says that they must be constructed to wearing course level "*between* the development and highway". That suggests, at the very least, that the highway does not form part of the development. Mr Harwood said that this condition also required dedication of the footways and footpaths as public footways and footpaths. That submission depended entirely on the statutory definition of "footway" and "footpath" in the Highways Act 1980. But to my mind, that is a very oblique way of requiring a developer to dedicate land for perpetual public use.

83. Seventh, the power to impose conditions on the grant of planning permission should not be interpreted as derogating from the rights of the owner to exercise his property rights, in the absence of clear words. The right in issue in this case is the right to forbid access to the land to anyone who enters it without the owner's permission. This is not a right which is dependent on the construction of roads. It is a right inherent in the ownership (or perhaps more accurately the possession) of land. If condition 39 means what Swindon says it means, the land owner will have lost that right so far as it extends to the access roads. Swindon argue that the right in issue is the right to charge for granting a licence to use the roads. That is, no doubt, part of the right (and the immediate occasion for the dispute). But whether or not any adjoining owner agrees to contribute to the repair of the roads, on Swindon's interpretation any member of the public (whether a licensee or not) may use the roads; and the land owner is powerless to prevent them.

84. Eighth, the planning permission as granted says nothing about repair of the roadways once constructed. Although it is legally possible to create a newly constructed highway which no one is liable to repair, in modern times that is unusual.

85. Ninth, the reasonable reader would be disposed to understand that in imposing conditions on the grant of planning permission, the local planning authority had complied with long-standing government policy. *Hall*, or at least the rule which it embodies, was a landmark in planning law, and also forms part of the relevant legal context. The reasonable reader could not suppose that the local authority intended to grant a planning permission subject to an invalid condition, let alone to grant an invalid planning permission.

86. Tenth, there is a readily available statutory mechanism for securing the adoption of a way as a highway; namely by agreement under section 38 of the Highways Act 1980. A section 106 agreement could have required the carrying out of works to bring the

roads to adoption standards. Neither of these familiar mechanisms were used. They, too, are part of the statutory context in which the planning permission must be interpreted.

87. Finally, the courts should give some weight to the expertise of an experienced and specialist planning inspector. Their position is in some ways analogous to that of expert tribunals, in respect of which the courts have cautioned against undue intervention by the courts in policy judgments within their areas of specialist competence: *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] UKSC 37, [2017] 1 WLR 1865. Although this was said in the context of the interpretation and application of national policy it also applies (though perhaps to a lesser extent) to the interpretation of a planning permission.

88. In my judgment, the interpretation adopted by the inspector is, to put it no higher, a realistic one even if it is not the most natural. The validation principle therefore applies; and condition 39 should be given the meaning that she ascribed to it.

Result

89. I would allow the appeal.

Lord Justice Arnold:

90. I agree that this appeal should be allowed. For the reasons given by Lewison LJ at [77]-[86], I consider that the inspector's interpretation of condition 39 was the correct one. If I was in doubt as to the correct construction, then I would agree with Lewison LJ that the validation principle confirmed the inspector's interpretation. I would only add that it is clearly established that the validation principle applies to documents other than contracts. Thus it also applies to patents, which are public documents: see Terrell on the Law of Patents (19th ed) at paras 9-71 to 9-78. The validation principle is not the same as the formerly recognised rule of benevolent construction: see Terrell at paras 9-80 to 9-85.

Lord Justice Nugee:

91. I also agree.