UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – PLANNING PERMISSION – preliminary issue – whether permission deemed to be granted – resolution to grant planning permission – whether a planning decision granting planning permission for the purpose of ss.23-25, Land Compensation Act 1961 – reference dismissed

A NOTICE OF REFERENCE UNDER THE LAND COMPENSATION ACT 1961

BETWEEN:

R. GARDNER & COMPANY (LANCASTER) LIMITED

Claimant

and

LANCASTER CITY COUNCIL

Respondent

Re: St Georges Works,
St George's Quay,
Lancaster

Determination on written representations

The following cases are referred to in this decision:

R. (Burkett) v Hammersmith and Fulham LBC (No 1) [2002] UKHL 23, [2002] 1 WLR 1593

Slough Estates Ltd v Slough Borough Council (No.2) [1969] 2 Ch 305

Slough Estates Ltd v Slough Borough Council (No.2) [1971] AC 958

Thomas Newall Ltd v Lancaster City Council [2010] UKUT 2 (LC)

Thomas Newall Ltd v Lancaster City Council [2011] UKUT 437 (LC)

Thomas Newall Ltd v Lancaster City Council [2016] EWCA Civ 31

Introduction

1. In this reference, which was submitted to the Tribunal on 19 November 2019, the claimant, R. Gardner & Co (Lancaster) Ltd, claims compensation of approximately £8 million under the Land Compensation Act 1961 as a result of the compulsory acquisition of the St George's Works, St George's Quay, Lancaster from its subsidiary company, Thomas Newall Ltd ("TNL"), by Lancaster City Council on 10 November 2006.

2. TNL's own entitlement to compensation for the compulsory acquisition of the St George's Works has already been the subject of a reference to the Tribunal by TNL itself (see *Thomas Newall Ltd v Lancaster City Council* [2010] UKUT 2 (LC) (preliminary issues) and [2011] UKUT 437 (LC) (determination of compensation)). The Tribunal found that TNL was entitled to compensation of a little over £2 million but, by a margin of only £10,000, that sum was not enough to match a previous offer of compensation made by the Council. Having failed to recover more than it had already been offered, TNL was ordered to pay the greater part of the costs of the original reference.

3. After the conclusion of the reference TNL, by its director Mr Stephen Loxam, embarked on what was later described by Briggs LJ in the Court of Appeal as "a vigorous campaign designed to have the proceedings entirely reheard". Those efforts, which were ultimately unsuccessful, are described in *Thomas Newall Ltd v Lancaster City Council* [2016] EWCA Civ 31, in which Briggs LJ refused TNL permission to appeal to the Court of Appeal against the refusal of the Tribunal to reopen the original reference and to admit new evidence of suggested wrongdoing on the part of the Council and its expert witness, Mr Massie. It is sufficient for the purpose of this reference to note that the basis of the unsuccessful applications to reopen the reference was the contention that Mr Massie had been dishonest in the evidence that he gave about the value of the land, that the Council and its solicitors had known the truth throughout, and that therefore all the decisions made by the Tribunal in the reference should be set aside, and the matter reheard.

4. As a result of the order for costs made against it in the reference, TNL went into administration on 15 November 2016.

5. The claimant made this reference after purchasing the right to bring any remaining claims arising from the acquisition of the St George's Works from the administrators of TNL (the Council has reserved its position on the precise scope of the claimant's agreement with the administrators which has not been the subject of consideration by the Tribunal).

6. The reference is brought under section 23, Land Compensation Act 1961. This entitles a person whose land has been compulsorily acquired and who has already been paid compensation to claim additional compensation if:

> "before the end of the period of ten years beginning with the date of completion, a planning decision is made granting planning permission for the carrying out of additional development of any of the land."

By section 25, 1961 Act, the circumstances which trigger this right are enlarged to include a variety of different cases in which planning permission is granted or "deemed to be granted" other than on an application to which section 23 would apply.

7. On 24th January 2017, following the completion of a section 106 agreement, planning permission was granted for a development of land including the St George's Works for student housing. That planning permission was granted outside the ten-year period beginning with the date of completion of the compulsory acquisition which began on 10th November 2006 and expired on 10th November 2016.

8. The claimant's case is that a previous resolution by the Council to grant planning permission for the student housing scheme, subject to a section 106 agreement, is sufficient for the purpose of section 23. The resolution was approved on 19 September 2016, which was within the relevant period of ten years. The claimant also suggests that planning permission for an alternative development may be deemed to have been granted at a much earlier date, so as to give rise to a claim for additional compensation under the wider provisions of section 25.

9. The Council considers that the reference is misconceived and applied at an early stage for the determination of a preliminary issue. After consultation with the parties, the Tribunal has directed the determination of two preliminary issues. The parties have requested that these should be determined on the basis of written representations which they have exchanged.

The preliminary issues

10. The two issues which the parties have agreed should be determined as preliminary issues are these:

    1. Whether, assuming the facts pleaded in the claimant's statement of case, it is arguable that planning permission may be deemed to have been granted within the period of ten years beginning on 10th November 2006.

    2. Whether the decision of the Council on 19th September 2016 that planning permission be granted subject to completion of an agreement under section 106 of the Town and Country Planning Act 1990 was a planning decision granting planning permission subject to conditions within the meaning of section 23(1)(a) and 29(2)(a) of the Land Compensation Act 1961.

The relevant facts

11. The Tribunal directed that the issues would be determined on the basis of the facts pleaded in the claimant's statement of case, together with any additional facts which the parties might agree.

12. The claimant's statement of case is a lengthy document prepared by Mr Loxam, its director. I approach the preliminary issues on the basis that all of the facts stated in it are true. It is not necessary for me to repeat all of those facts, because some are not relevant to the resolution of the issues with which I am concerned.

13. I have already alluded to the three most important facts, which are all agreed. First, the acquisition of the freehold interest in the St George's Works pursuant to the Lancaster City Council (Luneside East Lancaster) Compulsory Purchase Order 2005 ("the CPO") was completed by the vesting of that interest in the Council on 10 November 2006. Secondly, the Council resolved to grant planning permission for a student housing development on 19 September 2016. And thirdly, planning permission for that development was granted on 24 January 2017, subject to conditions and a section 106 agreement.

14. The additional facts relied on by Mr Loxam in his statement of case and in his submissions on the preliminary issues dealt extensively with TNL's own development proposals for the St George's Works, the larger "urban village" scheme which the CPO was intended to facilitate, the viability of that scheme, and the conduct of the Council, its advisers, and its expert witness in the original Tribunal proceedings.

15. For the purpose of the claimant's argument on the preliminary issues the key factual assertions are: that the only obstacle to a grant of planning permission for TNL's scheme for the development of its own land was that it interfered with the CPO urban village scheme; that the CPO scheme had never been financially viable and that the Council knew this, or ought to have known it, by the time it presented its evidence to the Tribunal in the first reference; that in the "no scheme" world it is reasonably to be expected that planning permission would have been granted for the TNL scheme by 2008; and that the student housing scheme for which planning permission was eventually granted was not part of the purpose of the CPO. I make no findings whether those facts are true or not, but I will determine the preliminary issues on the assumption that all of the claimant's factual assertions would be proved at a full hearing of the reference.

The relevant statutory provisions

16. Sections 23 to 29, Land Compensation Act 1961 are no longer in force in relation to compulsory purchase orders made on or after 22 September 2017, having been repealed by the Neighbourhood Planning Act 2017, but they continue to provide an additional right to compensation in relation to compulsory purchase orders made before that date. The CPO was confirmed by the Secretary of State on 20 June 2006 and the repealed provisions apply to it.

17. Section 23 provides as follows:

> (1) Where –
>
> (a) any interest in land is compulsorily acquired or is sold to an authority possessing compulsory purchase powers and, before the end of the period of ten years beginning with the date of completion, a planning decision is made granting planning permission for the carrying out of additional development of any of the land; and
>
> (b) the principal amount of the compensation which was payable in respect of the compulsory acquisition or, in the case of a sale by agreement, the amount of the purchase price, was less than the amount specified in subsection (2) of this section,
>
> then, subject to the following provisions of this section, the person to whom the compensation or purchase price was payable shall be entitled, on a claim duly made by him, to compensation from the acquiring authority of an amount equal to the difference.
>
> (2) The amount referred to in subsection (1)(b) of this section is the principal amount of compensation which would have been payable in respect of a compulsory acquisition of the interest by the acquiring authority, in pursuance of a notice to treat served on the relevant date if –
>
> (a) the planning decision mentioned in subsection (1)(a) of this section had been made before that date; and
>
> (b) the permission granted by it had been in force on that date.

18. It can be seen that subsection 23(1)(a) makes it a condition of a claim for further compensation that there should have been "a planning decision" granting "planning permission" for "additional development", and that the decision must have been made within ten years beginning with the "date of completion".

19. The various components of the condition are defined in sections 29 and 39, 1961 Act. By section 39(1) a "planning decision" is defined as "a decision made on an application under Part III of the Town and Country Planning Act 1990", and a "planning permission" is "permission under Part III of the Town and Country Planning Act 1990". Section 29(2) provides that this includes outline planning permission, permission granted unconditionally or subject to conditions, and permission granted in respect of the land taken by itself or in respect of an area including the land taken.

20. Where, as in this reference, land has been acquired for the purposes of any of the functions of a local authority, the term "additional development" is defined in section 29(1), 1961 Act as meaning any development of the land other than development for the purposes of the functions for which the local authority acquired it. Although the Council has challenged the claimant's assertion that the development of the St George's Works site for student housing is "additional development", for the purpose of the preliminary issues I will assume that it is.

21. The "date of completion" is defined in section 29(1) as "the date on which the acquisition or sale is completed by the vesting of that interest in the acquiring authority".

22. If the condition in subsection 23(1)(a) is satisfied, and if the value of the land would have been greater if the planning permission had been in force on the date of service of the notice to treat or vesting declaration which led to its acquisition, the person to whom compensation was originally payable is entitled to additional compensation equal to the amount by which the value of the land would have been increased at that date by the planning permission.

23. Not all planning permissions are granted following an application under Part III of the Town and Country Planning Act 1990. If section 23(1) stood alone, the effect of the definition of "planning decision" as "a decision made on an application …", would be to exclude land which had been increased in value by planning permissions granted by other means. Section 25 avoids any such exclusion.

24. Section 25(1) provides as follows:

> The provisions of sections 23 and 24(1) of this Act shall have effect in relation to any planning permission falling within column 1 of the following table for any development as if a planning decision granting permission had been made on the date shown in column 2.

Planning permission	**Date of decision**
Permission granted by a development order	When the development is initiated
Permission granted by the adoption or approval of a simplified planning zone scheme	When the scheme is approved or adopted
Permission granted by an order designating an enterprise zone	When the designation takes effect
Permission deemed to be granted by a direction under section 90 of the Town and Country Planning Act 1990	When the direction is given
Permission deemed to be granted by a local authority	The occurrence of the event in consequence of which the permission is deemed to be granted

25. The purpose of section 25 is to extend the ambit of section 23 to enable a person to whom compensation was payable to make a claim not only where there has been an

actual grant of permission in response to an actual application, but also where planning permission for development derives from any of the circumstances identified in column 1 of the table. It achieves this by treating such a planning permission as if a planning decision granting the planning permission had been made on the date in column 2.

26. Column 1 of the table is headed "planning permission" and identifies five different types of planning permission each of which is granted or deemed to be granted other than as the result of a decision made following an application under Part III of the 1990 Act. The first category is where planning permission is granted by a development order. Mr Guy Roots QC, who provided the Council's written submissions, gave as examples of this type of permission the numerous forms of development listed in the schedule to the Town and Country Planning (General Permitted Development Order). Article 3 of the Order expressly grants planning permission for those forms of development, but section 25 treats that planning permission as if it had been the result of a planning decision.

27. The second category relates to simplified planning zones. Under section 82, Town and Country Planning Act 1990, local planning authorities may create simplified planning zones where planning permission is granted for defined categories of development without the need for an application.

28. The third category relates to enterprise zones which are similar to simplified planning zones in that planning permission is granted for defined categories of development without the need for an application. An order designating an enterprise zone under Schedule 32, Local Government, Planning and Land Act 1980 has effect from the date on which the order designating the zone takes effect to grant planning permission for development or class of development specified in the scheme.

29. The fourth category relates to permissions deemed to be granted under section 90, Town and Country Planning Act 1990. Section 90 applies to a variety of circumstances in which the authorisation of a government department is required by virtue of an enactment in respect of development to be carried out by a local authority, National Park authority, or by statutory undertakers. For example, under the Electricity Act 1989, consent may be granted for the construction of a generating station or an electric line. Where such consent is granted, the Secretary of State may direct that planning permission is deemed to be granted.

30. The fifth category of planning permission listed in the table in section 25 does not refer to any specific statutory procedure. It refers instead in column 1 to permission "deemed to be granted by a local authority" and in column 2 to "the occurrence of the event in consequence of which the permission is deemed to be granted". It is the meaning and effect of this fifth category of planning permission which is the subject of the first preliminary issue.

Issue 1: Assuming the facts pleaded in the claimant's statement of case, is it arguable that planning permission may be deemed to have been granted within the period of ten years beginning on 10th November 2006?

31. It is the claimant's case that because of the history of the Council's involvement with the site of the St George's Works a planning permission "should reasonably be deemed to be granted … in the "no scheme world" in accordance with section 25" (see the conclusion of the claimant's statement of case, at paragraph 77).

32. The claimant proposes that the deemed planning permission should be for one or other of two different forms of development. The first is the development of the site for two buildings containing 247 units of student accommodation, which should be deemed to have been granted on the date when it became clear to the Council that the "urban village" scheme which justified the use of its CPO powers was not viable and could not be completed without significant changes and additional public funding. The claimant considers, and for the purpose of the preliminary issue I assume, that the Council was aware the CPO scheme was not viable by the time it submitted its evidence to the Tribunal in 2009. Alternatively, the deemed planning permission should be for the development which formed the basis of the TNL's claim for compensation which was for 150 flats including 20% affordable homes. That planning permission should be deemed to have been granted five years after the valuation date, on 19th November 2011. The claimant selects that date because, it submits, that is the date by which, in the absence of the "urban village" scheme, the Tribunal considered that TNL would have been likely to have achieved planning permission for its own alternative comprehensive scheme of development (in support of its submission the claimant refers to *Thomas Newall Ltd v Lancaster City Council* [2010] UKUT 2 (LC) at [71]).

33. Two themes recur in the claimant's submissions. The first is that sections 23 and 25, 1961 Act should be treated either as a remedy for the wrongdoing of the Council and its expert witness, or as an opportunity for the person whose land has been acquired to obtain additional compensation should there be any changes to the scheme which justified the use of the acquiring authority's CPO powers. The second theme is that the statutory provisions should be applied to identify the planning permission which would have been granted in the hypothetical "no scheme world" if the facts which are now to be assumed concerning the viability of the CPO scheme are taken into account. It is necessary to interpret the provisions in that way, the claimant submits, because a failure to provide fair compensation would be a breach of the Human Rights Act.

34. The claimant's submissions contend in a number of places that "planning permission could reasonably be deemed to be granted on the dates of the occurrence of events" which would have made it obvious to the Council that the CPO scheme was not viable. The claimant sees the statutory provisions as providing a remedial response to the sequence of events recounted in detail in Mr Loxam's submissions and summarised, in part, in the decision of Briggs LJ in the Court of Appeal. It sees them also as requiring a further assessment of the planning status of the St George's Works on the "no-scheme" hypothesis, but this time taking into account the additional factual material which TNL was unable to deploy in the original reference.

35. I do not accept this interpretation of section 23 to 25. On behalf of the claimant Mr Loxam has focussed on the fifth category of planning permission identified in the table in section 25(1), but he supplements the statutory language, which refers to "permission deemed to be granted by a local authority", by inserting the additional word "reasonably". But subsection 25(1) does not refer to planning permission "reasonably

deemed" to have been granted, and does not invite an inquiry into what might have happened in different circumstances.

36. Each of the five categories identified in column 1 of the table describes a situation in which a real planning permission exists, or is "deemed" to exist. In ordinary usage "to deem" often means to reach a conclusion about something or to judge or assess it. That is the sense in which, in his submissions, Mr Loxam has understood it to have been used in section 25(1). He has interpreted the fifth category in column 1 of the table as allowing a planning permission to be assumed where it would be reasonable in all the circumstances to treat it as having been granted, or where it is likely to have been granted if the compulsory acquisition had not occurred. But in statutes the word "deemed" is often used in slightly different senses. It can be used to create a presumption (for example by section 7, Interpretation Act 1978, service is "deemed to be effected by properly addressing, pre-paying and posting a letter containing the document") or to create a "statutory fiction" by which one subject is treated as if it were another for the purpose of the application of a statutory provision. In *Barclays Bank v IRC* [1961] AC 509, 523 Viscount Simonds said: "I … regard its primary function as to bring in something which would otherwise be excluded". When used in that sense "to deem" does not involve any independent judgment or speculation; it is a statutory instruction that A is to be treated as B.

37. Mr Roots gave a number of examples of circumstances in which, despite there being no grant of planning permission, planning permission is nevertheless deemed to have been granted by a local authority. Each of his examples under different statutes would be covered by the fifth category in column 1.

38. Where express advertisement consent is granted by a local planning authority under regulation 14 of the Town and Country Planning (Control of Advertisements) Regulations 2007, section 222 of the Town and Country Planning Act 1990 provides a deemed planning permission for any development involved in displaying the advertisement. Section 222 provides:

> Where the display of advertisements in accordance with regulations made under section 220 involves development of land—
>
> (a) planning permission for that development shall be deemed to be granted by virtue of this section, and
>
> (b) no application shall be necessary for that development under Part III.

39. To similar effect, section 173(11) of the 1990 Act applies where a local planning authority serves an enforcement notice which does not require any buildings or works to be removed or any activity to cease, and provides that "planning permission shall be treated as having been granted" once the requirements of the enforcement notice have been complied with.

40. As Mr Roots pointed out, the first four categories of planning permission in column 1 all relate to circumstances in which, either by primary or secondary legislation, the law expressly provides that it may be assumed ("deemed") that planning permission has been granted. As a matter of statutory interpretation, one would expect the fifth category also to relate to (and be confined to) circumstances in which the law expressly provides that it may be assumed that planning permission has been granted. There are many such circumstances and the fifth category is intended to cover all the circumstances in which the law provides that planning permission may be deemed to have been granted by a local authority.

41. I accept Mr Roots' submission that section 25 does not enable a claimant to speculate, that, in the absence of the compulsory purchase, an actual planning permission for some form of development might have been granted at some date. The fifth category in column 1 is restricted to circumstances in which primary or secondary legislation requires it to be assumed that planning permission has been granted for a form of development which is defined in the legislation, despite such planning permission never in reality having been granted.

42. The claimant's statement of case does not identify any statutory provision under which planning permission could be deemed to have been granted for the St George's Works site in the sense intended by section 25(1), 1961 Act. Nor does it include any facts which would enable it to be argued that a planning permission is to be deemed to have been granted. On that basis the first issue must be answered in the negative.

43. The claimant's submissions refer to the resolution to grant permission subject to conditions on 19 September 2016 and assert that it was a planning permission which was deemed to have been granted within the meaning of section 25(1). The status of the resolution is the subject of the second issue, but there is no basis on which it can be treated as a "deemed" planning permission.

Issue 2: Was the decision of the Council on 19th September 2016 that planning permission be granted subject to completion of an agreement under section 106 of the Town and Country Planning Act 1990 a "planning decision" granting planning permission subject to conditions within the meaning of section 23(1)(a) and 29(2)(a) of the Land Compensation Act 1961?

44. The claimant argues that the Council's resolution on 19 September 2016 to grant planning permission for the demolition of the St George's Works and the erection of four buildings for use as student accommodation was a planning decision granting planning permission for the carrying out of additional development within the meaning of section 23(1)(a). If it was, there is no dispute that it was within the ten year period referred to in section 23(1)(a) which commenced on 10th November 2006 and expired in 10th November 2016.

45. Mr Loxam's submissions on this issue were mainly directed to the question whether the student accommodation scheme is "additional development". I have already indicated that I will assume for the purpose of the preliminary issue that it is. Mr Loxam did not make detailed submissions on the real issue, which is whether the resolution to grant planning permission was a "planning decision granting planning permission" within the meaning of section 39(1). That was the question addressed by Mr Roots' submissions on behalf of the Council.

46. The term "planning decision" is defined in section 39(1), 1961 Act as "a decision made on an application under Part III of the Town and Country Planning Act 1990". However, the 1990 Act does not define what action by the local planning authority constitutes "a decision" for this purpose. Mr Roots submitted that that question has been settled by the Courts which have consistently held, including at the highest level, that a resolution by a local planning authority to grant planning permission does not constitute the grant of planning permission. It must follow, Mr Roots argued, that a resolution to grant planning permission does not constitute a planning decision granting planning permission as defined in section 39(1).

47. In *Slough Estates Ltd v Slough Borough Council (No.2)* [1969] 2 Ch 305, Lord Denning MR was required to interpret a planning permission; at p. 315 he said:

> "The permission must be construed together with the plan which was submitted and incorporated into it: *Wilson v West Sussex County Council* [1963] 2 QB 764. I confine myself to the plan. I do not think it is permissible to look at the resolution of the county council or the correspondence, for neither of them was incorporated into the permission……. The grant is not made when the county council resolve to give permission. It is only made when their clerk, on their authority issues the permission to the applicant."

Although the decision of the Court of Appeal was the subject of an appeal to the House of Lords the question whether the resolution was the grant of permission did not arise: *Slough Estates Ltd v Slough Borough Council (No.2)* [1971] AC 958.

48. Mr Roots referred to a number of later authorities which either decided or included dicta to the effect that it is the notification to the applicant which constitutes the grant of planning permission, not the prior resolution to grant. I mention only the most recent of these, *R. (Burkett) v Hammersmith and Fulham LBC (No 1)* [2002] UKHL 23, which concerned an application for judicial review of a grant of planning permission where the question was whether the application had been made within time. This depended on whether the time limit for making an application for judicial review ran from the date of the resolution to grant or from the date of grant itself, following the completion of a section 106 agreement. The House of Lords (Lord Steyn, with whom the other law lords agreed) held that, whilst a resolution to grant was capable of being challenged by judicial review, "until the actual grant of planning permission the resolution has no

legal effect" (at [39]) and also held that "in law the resolution is not a juristic act giving rise to rights and obligations. It is not inevitable that it will ripen into an actual grant of planning permission" (at [42]). It was therefore held that the time to apply for judicial review ran from the grant of planning permission itself.

49. These authorities do not directly determine that a resolution to grant planning permission is not a planning decision granting planning permission for the purpose of section 23(1) and 39(1), 1961 Act. But they do establish that a resolution to grant is not a planning permission and need not inevitably ripen into a planning permission. I agree with Mr Roots that it follows that the resolution to grant is not a planning decision granting planning permission.

Disposal

50. The answer to preliminary issue 1 is that, on the basis of the facts pleaded in the statement of case, it is not arguable that planning permission for development of the St George's Works site may be deemed to have been granted within the period of ten years beginning with 10th November 2006.

51. The answer to preliminary issue 2 is that the decision of the Council on 19th September 2016 that planning permission be granted subject to completion of an agreement under section 106 of the Town and Country Planning Act 1990 was not a "planning decision" granting planning permission subject to conditions within the meaning of section 23(1)(a) and 29(2)(a) of the Land Compensation Act 1961.

52. It follows that the claimant is not entitled to bring a claim under sections 23 to 25 and I therefore dismiss the reference.

Martin Rodger QC,

Deputy Chamber President

23 November 2020