RTPI
Royal Town Planning Institute

2024 Planning Enforcement Conference

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Too much change? – from *Hillside* to *Southwood*

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The cases being discussed today

- *Pilkington v Secretary of State for the Environment* [1973] 1 W.L.R. 1527
- *Hillside Parks Limited v Snowdonia National Park Authority* [2022] UKSC 30
- *Dennis v LB Southwark* [2024] EWHC 57 (Admin)
- *Southwood v Buckinghamshire Council* [2024] EWHC 71 (Admin)

Pilkington v Secretary of State for the Environment [1973] 1 W.L.R. 1527

Let's take things all the way back – *Pilkington*

***Pilkington v Secretary of State for the Environment* [1973] 1 W.L.R. 1527**

- Landowner had the benefit of two separate planning permissions for a plot of land, and claimed the right to build out both permissions
- Each granted permission for one dwelling (on different parts of the plot), with the rest of the plot required to be unbuilt on / remaining as a smallholding
- Court held that a landowner is permitted to make an unlimited number of planning applications on a site, which may result in numerous inconsistent planning permissions
- ***Pilkington*** principle - where the same area of land has the benefit of two or more planning permissions and development has been carried out under one of those permissions, if that development has made it physically impossible to carry out development approved by another consent then that consent may no longer be relied upon.

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What about more recently? – *Hillside*

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***Hillside Parks Limited v Snowdonia National Park Authority* [2022] UKSC 30**

- Original planning permission was for 401 dwellings with masterplan showing location of each dwelling and road within the estate
- Over years, a number of other permissions ("drop-ins") has been granted and built out for individual dwellings which departed from the master plan in the original permission
- Supreme Court approved the ***Pilkington*** principle, finding that it was now physically impossible to build out the development approved by the original permission and so it could no longer be relied upon

Hillside (Cont'd)

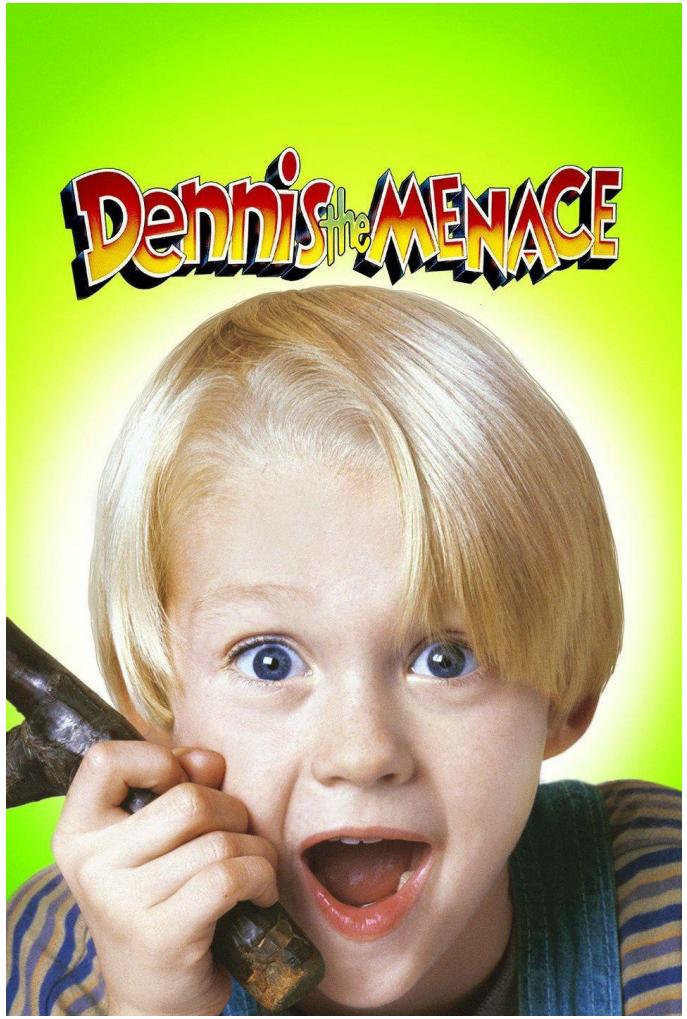
- Court not persuaded by argument that the original permission was 'severable' so ability to carry any such element did not depend upon whether it was still physically possible to develop all other parts of the site in accordance with the original permission
- Save where there is some 'clear contrary intention' within the permission, it will be assumed that a permission for a multi-unit development is granted for an integral whole
- ***Why*** = when granting permission, LPA will have considered a range of factors relevant to the development as a whole (number of buildings, overall layout, public benefits of the scheme as a whole)
- LPA has not authorised the developer to combine building only part of the proposed development with building something different from and inconsistent with the approved scheme on another part of the site

Where did *Hillside* leave us?

- Where there is a ‘clear contrary intention,’ left possibility for ‘severable’ consents, however, rationale suggests surely difficult to do this retrospectively
- That takes us to ***Dennis*** – to come
- Confirmed that everything built out before a physically incompatible 'drop in' permission is implemented remains lawful.
- ***Pilkington*** principle does not kill it all. It is only if the departure from the permitted scheme is material in the context of the scheme as a whole, that the original permission cannot be relied upon.
- Key suggestion - large schemes could be varied by making a new replacement application covering the whole site, setting out the modifications sought (but CIL, EIA etc...)

Practice Point: ***Fiske v Test Valley BC*** [2023] - no legal duty on LPA to consider the inconsistency or effect of a 'drop-in' application on existing permission

Where are we now? - *Dennis*



Where are we now? - *Dennis*

***Dennis v LB Southwark* [2024] EWHC 57 (Admin)**

- Outline planning permission dated 2015 for a large, phased outline regeneration scheme
- Developer sought to 'drop -in' a higher density phase- including a taller tower
- Key concern – risk of encountering ***Pilkington*/ *Hillside*** issues later
- In December 2022, the developer submitted a s.96A application, proposing to add the word "severable" so that the description of the development in the OPP would read "...a severable phased development...".
- Council accepted this as a non -material amendment application, arguing that this was confirmatory only- phasing and outline nature enough to demonstrate severability, hence change was non-material

Dennis (Cont'd)

- The claimant submitted that the OPP was not severable, therefore the amendment could not be treated as non-material.
- The purpose and effect of the amendment was to change the bundle of rights granted by the OPP, so as to disapply the Pilkington principle.
- Materiality usually a matter for the Council- but harder to make this argument when the change is a legal one to which there is only one right answer
- Court accepted that planning permission consists of a bundle of rights. Changing a non-severable permission to one that is severable expands that bundle of rights – allows for mixing and matching without fear of later incompatibility arguments e.g. ***Pilkington***
- Where did that leave things – question of interpretation – if OPP was never severable to begin with, challenge would succeed.

Dennis – So how to interpret this OPP?

- Principles for interpreting permissions well-established: e.g. ***Lambeth London Borough Council v Secretary of State for Housing, Communities and Local Government*** **[2019] 1 WLR 4317**
- Extraneous docs e.g. planning statement, DAS etc can form part of the permission by incorporation: e.g. "granted in accordance with...": ***R v Ashford Borough Council ex parte Shepway District Council*** **[1999] PLCR 12**
- This is a case in which large number of planning documents incorporated by the grant – most of these documents suggested permission intended to operate as a coherent whole within particular parameters
- No evidence of contra-indication that permission intended to be severable e.g. mixed and matched. Not changed by phasing which is about order of build-out rather than how it is eventually intended to operate
- OPP not severable to begin with thus s.96A amendment unlawful

Materiality of Change - *Southwood*

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***Southwood v Buckinghamshire Council* [2024] EWHC 71 (Admin)**

- Developer owned the adjoining site and had a number of unsuccessful planning permissions applications for residential development on it
- In 2010, granted PP for a detached single-storey building for general storage and vintage farm machinery storage
- Implementation within 3 years and compliance with plans were conditioned, as was a pre-commencement requirement to submit details of materials and landscaping. Use was restricted to storage by condition.
- Developer did not discharge pre-commencement conditions but dug and concreted foundations by 2012.
- Foundation works were commenced in 2012, but no further work was done until around 2018, at which point developer had still not obtained the approvals required by the conditions.

Southwood Facts *(Cont'd)*

- The building was completed in 2020 and used for storage.
- Developer applied for permission to change its use to residential, stating that the building had become redundant. A planning officer prepared a report in favour of granting permission, and the local authority granted it.
- A neighbour sought judicial review and the council agreed by consent to quash the permission and reconsider the decision.
- On reconsideration, Council again accepted developer's evidence that building was now an existing building, which had become redundant. Supported its use in accordance with relevant local policy.
- Council granted PP for dwelling and neighbour sought judicial review again of the change of use decision and the conclusion as to whether the as-built building was lawful, despite fact it did not comply fully with approved plans

Southwood – What did the Court say?

- Julian Knowles J refused the application for JR
- **Lawful implementation** - Implementation of an operational development permission takes place when a development is commenced. It is commenced when a material operation comprised in the development begins to be carried out (s56 TCPA 1990). Very little is required for a “material operation”. But the material operation has to be “comprised in the development”.
- **Effect of conditions** - The officer had been entitled to find, as a matter of planning judgment, that the conditions regarding external materials and soft landscaping did not go to the heart of the planning permission.
- **Materiality** - The question of materiality is a matter of fact and degree for the council/inspector. The court will therefore only interfere when there has been an unreasonable decision, not simply because the court disagrees with the conclusion.

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Q&A

Thank you

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