Case No: C1/2008/1550

Neutral Citation Number: [2009] EWCA Civ 333
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION, ADMIN COURT
(MR JUSTICE CRANSTON)
(LOWER COURT CITATION No C0/8261/2007)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday, 16th March 2009

Before:

THE MASTER OF THE ROLLS
(SIR ANTHONY CLARKE)
LORD JUSTICE TOULSON
and
LORD JUSTICE SULLIVAN

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Between:

SAMUEL SMITH OLD BREWERY (TADCASTER)	**Appellant**
- and -	
(1) THE SECRETARY OF STATE FOR COMMUNITIES & LOCAL GOVERNMENT	**Respondents**
(2) SELBY DISTRICT COUNCIL	
(3) UK COAL MINING LTD	

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Mr P Village QC & Mr A Tabachnik (instructed by Messrs Ward Hadaway) appeared on behalf of the **Appellant**.

Mr P Copal (instructed by Treasury Solicitors) appeared on behalf of the **First Respondent**.

Ms F Patterson QC (instructed by Selby District Council) appeared on behalf of the **Second Respondent**.

Mr J Hunter (instructed by Messrs Nabarro Nathanson) appeared on behalf of the **Third Respondent**.

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Judgment

(As approved by the Court)

Lord Justice Sullivan

1. This is an appeal against the order of Cranston J on 13 June 2008 dismissing the appellant's application under Section 288 of the Town and Country Planning Act 1990 ("the Act") to quash the first respondent's decision contained in a decision letter dated 13 August 2007 ("the decision letter"). In the decision letter the first respondent granted the third respondent, UK Coal Mining Limited ("UK Coal"), conditional planning permission for the:

> "…retention and reuse of suitable buildings, car parking and infrastructure, continued use of rail sidings, Gascoigne Wood Mine, Lennerton Lane, Sherburn in Elmet, Selby ("the site")."

2. The background to the grant of that planning permission is set out in some detail in the judgment of Cranston J, [2008] EWHC 1313 (Admin). In very brief summary, Gascoigne Wood Mine was developed as part of Selby coalfield in the 1980s. The planning permission for the erection of the mine buildings was granted on 31 March 1976 and was subject to a restoration condition:

> "On or before the expiration of a period of 12 months from the last date on which the Barnsley Seam is worked (pursuant to this permission) for the purposes of getting coal, all buildings, plant and machinery shall be removed from the Gascoigne Wood and Wistow sites unless otherwise agreed in writing by the County Planning Authority or, in default of agreement, determined by the Secretary of State; and those sites shall be restored to their former condition or otherwise treated in accordance with such scheme or schemes as may be agreed with the County Planning Authority or, in default of agreement, as shall be determined by the Secretary of State."

3. Production of coal from the Barnsley seam ceased in October 1984. Many, but not all, of the buildings on the site were demolished. On 25 May 2005, UK Coal applied to the second respondent for planning permission to retain some of the buildings and the associated rail infrastructure.

4. Under UK Coal's proposals, four significant buildings -- an amenity block, stores, workshops and a covered stock yard -- would be retained. These buildings have a total area of 23,673 square metres, and the covered stockyard alone was a very substantial building with an area of 19,510 square metres.

5. The Secretary of State called the application in for her own determination and appointed an inspector to hold an inquiry. The inquiry sat for six days between 5 and 12 March 2007, and in a lengthy report dated 8 May 2007 the

inspector recommended that planning permission should be granted subject to a number of conditions.

6. The conditions included: conditions that the workshop building, the stores building and the covered stockyard should be used only by occupiers using the existing rail facilities on site and their mainline connections. The railway sidings, which used to serve the mine, have connections to the Selby to Leeds railway line. The conditions recommended by the Inspector also included Condition 7:

> "In the event that any retained building is not used wholly or mainly for rail related uses by occupiers using the existing rail facilities on site and their main line connections within 5 years from the date of this permission, it shall be demolished and removed from site no later than 6 years from the date of this permission and the site shall be restored and landscaped in accordance with the scheme (which will include a timetable for implementation and management measures) first submitted to and approved in writing by the local planning authority."

The Secretary of State accepted the inspector's recommendation and granted planning permission accordingly.

7. The appellant appeared at the inquiry as an interested party and argued before the inspector that planning permission should not be granted for the retention of the buildings for a number of reasons. One of those reasons was that there was no evidence of any demand for any of the floor space of the site; there was no demand for the buildings in their current state; and, if they were refurbished, then the refurbishment would not be viable:

> "The only conclusion that can be drawn from these two indisputable facts is that there is no realistic prospect of their being implemented" [See paragraph 8.80 in the Inspector's Report. References in parenthesis are references to paragraphs' numbers in either the Inspector's Report or the decision letter as appropriate].

8. The inspector accurately summarised the appellant's case on need, demand and viability in paragraphs 8.60 to 8.82 of the report. In support of its case, the appellant called evidence from Mr Turner, an associate of Donaldsons Llp. UK Coal called Mr Lloyd, a director of DTZ Debenham, and Mr Iggleden, an employee of Network Rail. In paragraph 6.93 of the report the inspector summarised UK Coal's response to the appellant on this issue:

> "In his evidence, Mr Turner further contended that it would not be economic to convert the buildings

> on site to their proposed end use. But here also the analysis related to standard B1, B2 and B8 uses. He accepted that his costings, even for those end uses, were at the top end of the range. Inevitably any development appraisal is sensitive to the inputs and the fact of the matter is that UK Coal have appraised the position and are happy to proceed. They are not going to sell the site on, but propose to convert the buildings themselves, set the site up, and manage it. That is their commercial decision, which it is their right to take. SSOB's [the appellant's] submissions on the relative merits of Mr Turner's and Mr Lloyd's viability appraisals are not relevant to the decision to be taken."

9. When dealing with the need for the imposition of Condition 7, the inspector summarised UK Coal's position as follows, in paragraph 6.111 of the report:

> "… [Condition 7] is necessary as it secures the removal of the buildings rather than letting them lie vacant in the event that they are not used for rail related purposes. It therefore secures the removal of what would then be unnecessary buildings in the countryside. Currently Mr Lloyd and Mr Iggleden agree that the buildings are likely to be used and taken up within a short time but should that professional view prove to be misplaced then there is a means to deal with that eventuality through the condition proposed…"

10. The inspector was therefore confronted with two rival contentions: that the buildings which it was proposed to retain would be "taken up within a short time" and, on the other hand, that there was "no realistic prospect" of that happening. In his conclusions under the subheading "Need and Demand" the inspector said, in paragraph 10.29, that he found UK Coal's case on this aspect of the appeal "less than convincing". He said in paragraph 10.30 that the letters that had been produced at the inquiry only showed a demand for the rail sidings rather than the buildings; and added in paragraph 10.31 that Mr Iggleden's evidence did not add to the case for the retention of the buildings.

    In paragraph 10.32 he said:

> "The position to some degree was further undermined by the evidence brought on the viability of the proposals. While I accept UK Coal's submission that viability is essentially a matter for them [6.93], there is no doubt in my mind that the works required to bring the covered stockyard

> building into beneficial use will be substantial and costly [8.70 et seq]"

In paragraph 10.33 the inspector said:

> "Notwithstanding this, the potential that the site affords for rail linked development has been widely recognised."

In the remainder of that paragraph he identified the documents where that potential had been recognised.

11. In paragraph 10.34 the inspector drew the threads together on this issue as follows:

> "Overall, however, I am still not convinced that, if planning permission for the proposal were granted, a user would be quickly found, as Mr Lloyd and Mr Iggleden suggested [6.33, 6.47], who would be able to book the rail infrastructure to beneficial use <u>together with</u> the buildings. At the same time I am far from convinced that no suitable user would be forthcoming. Rail linked sites of the quality of that Gascoigne Wood offers are undoubtedly rare and, whilst the market for them is limited, there is no doubt in my mind, that Gascoigne Wood site has significant potential to support rail linked manufacture and/or distribution. The buildings also have potential to be adapted to a variety of uses, albeit that the economics of so doing would need to be carefully considered having regard to the precise requirements of the respective user."

It is plain that the inspector recognised that there was uncertainty as to whether or not an occupier of the buildings would be forthcoming because he said, in paragraph 10.50.4, when dealing with the need for Condition 7:

> "It is necessary to prevent the buildings remaining on site as permanent structures in the event that they are not occupied by a rail user. This in turn is necessary having regard to the terms of the restoration condition and the uncertainty as to whether an occupier for the buildings will indeed be forthcoming (see paragraphs 10.29 to 10.34 above)".

12. When considering whether Condition 7 might be circumvented by short-term lets, the inspector said:

> "I tend to agree with UK Coal that such a device would not comply with the terms of the condition which require the buildings to be used *'wholly or mainly'* for rail related uses. In any event, given the expenditure that all are agreed would be required to bring the covered stockyard into beneficial use [8.70] the possibility of anyone making use of that building on a short term basis appears remote"

13. In his overall conclusions, the inspector concluded in paragraph 10.66 that the proposal conflicted with development plan and government policy "in that a new employment use would be created in the open countryside in a location that can effectively only be reached by the private car".

    In paragraph 10.67 he said:

> "Notwithstanding this, the existing railway infrastructure on the site is widely recognised as valuable and bringing the site back into use for industrial or distribution uses that make use of the rail connections would foster the movement of goods by more sustainable means, including rail."

    The inspector returned to the question of need in paragraph 10.70 of the report, saying:

> "As to need, there is evidence of significant interest in using the railway sidings, but evidence of need for the buildings is only weak. To my mind, there is a real possibility that a user would not be found who would be prepared to undertake the refurbishment and other works that would be required to bring the buildings back into use. In the event that my concerns in this regard were to be realised, however, the harm caused by leaving unoccupied buildings in the open countryside would be limited by the agreed condition which would require their removal in the event that they are not brought into use in accordance with the terms of the application within five years of granting planning permission."

14. The Secretary of State's approach in the decision letter was essentially similar to that of her inspector. Under the heading "Need and Demand" the Secretary of State said in paragraph 18 of the decision letter:

> "For the reasons set out in IR10.29 to IR10.33, the Secretary of State agrees with the Inspector that the evidence of need for the buildings on the site is weak but, notwithstanding this, the potential that the

> site affords for rail linked development has been widely recognised (IR 10.33). The Secretary of State agrees with the Inspector in IR 10.34 that rail linked sites of the quality that Gascoigne Wood offers are rare and whilst the market for them is limited, the Gascoigne Wood site has significant potential to support rail linked manufacture and/or distribution. Overall, the Secretary of State agrees with the Inspector that although a user who would be able to put the rail infrastructure to beneficial use together with the buildings may not be found quickly, she is not convinced that no suitable user would be forthcoming, and agrees with the inspector that the buildings also have the potential to be adapted to a variety of uses. (IR10.34)"

15. Under the heading "Conditions" the Secretary of State said in paragraph 23 of the decision letter, in part:

> "…she has paid particular attention to suggested condition 7 which seeks to ensure that the buildings are brought into use within a defined period. The Secretary of State agrees with the Inspector that this condition is reasonable and necessary and accords with the advice in the Circular. She is satisfied that it will achieve the stated aim"

16. The Secretary of State agreed with the inspector that, overall, the proposal would conflict with the development plan and government policy relating to the location of employment uses and accessibility. She therefore considered other material considerations (see paragraph 24 of the decision letter). The principal consideration was that there were:

> "…significant benefits in bringing the site back into use for industrial or distribution uses that can make use of the rail connections and therefore foster the movement of goods by more sustainable means [paragraph 25 of the decision letter]"

In paragraph 26 the Secretary of State said:

> "The Secretary of State concludes, for the reasons given above, that the risk of harm caused by leaving unoccupied buildings in the open countryside would be sufficiently mitigated by the imposition of the agreed condition (number 7) requiring the removal of these buildings in the event that they are not brought into use in accordance with the terms of the application within five years of the date of granting

> planning permission. She has taken into account that the proposal would make use of the existing bunds which are recognised as a valuable feature in the landscape."

In paragraph 27 the Secretary of State drew the threads together, saying:

> "Having carefully considered the arguments for and against the proposal, the Secretary of State concludes that the benefits she has identified outweigh the conflict of the development plan and national policy in this particular case and accordingly planning permission should be granted."

17. On behalf of the appellant, Mr Village QC advances two grounds of appeal. Firstly he says that, as part of the appellant's case at the inquiry, Mr Turner produced a development appraisal which demonstrated that the refurbishment of the existing buildings would not be economically viable. He submits that the inspector and the Secretary of State failed to grapple with this point, which was a separate point, that the costs of refurbishment would exceed the revenue from the refurbished buildings, and that they did so because the inspector, in paragraph 10.32 of the report, had said that viability was irrelevant because it was a matter for UK Coal.

18. The second ground is linked with the first. Mr Village submitted that the Secretary of State's decision was based on mere speculation, or a "theoretical" as opposed to a "real" possibility that an occupier who wished to use the retained buildings with the rail facilities would be found within the period of five years.

19. In support of this second ground of appeal, Mr Village referred to the decision of Brentwood BC v Secretary of State for the Environment [1995] 72 P&CR 61. In that case the question was whether, in deciding to grant planning permission for the retention of an outbuilding in the greenbelt, the inspector had considered whether there was "a real prospect" that, if planning permission was not granted, then Mr and Mrs Grey would simply demolish the existing building and rebuild it five (rather than two) metres away from their house, in which case the rebuilt outhouse would be permitted development.

20. Mr Christopher Lockhart Mummery QC sitting as the Deputy High Court judge concluded that the inspector had failed to make any finding "as to the real prospect or likelihood of Mr and Mrs Grey actually demolishing the building in whole or in part and re-erecting it" (see page 66). It is important to note that in this context a real prospect is used as the antithesis of "a merely theoretical" prospect (see page 65 of the judgment and the cases therein cited).

21. In order for a prospect to be a real prospect, it does not have to be probable or likely: a possibility will suffice. It is important to bear in mind that "fall back"

cases tend to be very fact-specific. One might envisage a case where it was thought by the inspector or the Secretary of State that the fall back position -- for example, an old planning permission which was still capable of implementation -- would be very damaging indeed if it was to be implanted. The point did not arise in Brentwood, where it was being argued that the impact of that which was permitted development would be much the same as the impact of the development for which planning permission was being sought. However, in a case where the adverse consequences of implementing the fall back position would be very significant, Mr Village accepted that there would be no reason why the Secretary of State could not conclude, as a matter of planning judgment, that even if the risk of implementing the fall back position was very slight indeed -- an outside chance perhaps -- the seriousness of the harm that would be done, if planning permission was not granted and the fall back position was implemented, was such that the risk was not acceptable so that planning permission should be granted.

22. It is important, in my judgment, not to constrain what is, or should be, in each case the exercise of a broad planning discretion, based on the individual circumstances of that case, by seeking to constrain appeal decisions within judicial formulations that are not enactments of general application but are themselves simply the judge's response to the facts of the case before the court. By the same token, if the Secretary of State concludes, as a matter of planning judgment in any particular case, that there would be significant planning advantages if certain buildings were to be reused in the manner contemplated in an application for permission for their retention, then there is no reason why the Secretary of State should not be entitled to say that there may well be only an outside chance of these buildings being reused, but it is well worth keeping that option open at least for a period of five years.

23. In the present case, both the inspector and the Secretary of State recognised that it was uncertain whether or not any user would be found for the retained buildings in association with the railway infrastructure (see the passages from the inspector's report and the decision letter set out above). But they plainly both thought that there was *a* possibility that they might be ("not convinced no use would be forthcoming"), and that the significant benefits, if they were to be so used, justified the risk that unoccupied buildings would be left in the countryside, bearing in mind Condition 7 which "sufficiently mitigated" that risk.

24. Those conclusions were a matter of planning judgment for the inspector and Secretary of State respectively. Mr Village submitted that the only conclusion that the inspector and Secretary of State could properly have reached in the light of the appellant's viability evidence was that there was no chance whatsoever of the buildings being occupied in that manner. That brings me back to the appellant's ground 1. I do not accept the submission that viability was raised as a wholly freestanding issue. It was part and parcel of the appellant's case, which was accurately summarised by the inspector, which led to the submission that "there is no realistic prospect of this development being implemented" (see paragraph 8.80 of the report).

25. As the inspector said when summarising the appellant's case as to the relevance of the viability assessment in paragraph 8.73:

> "The purpose of Mr Turner's viability assessment was to demonstrate that there is no likelihood of the application being implemented from a commercial point of view"

26. The inspector clearly recognised that this was the appellant's case. His summary of the appellant's case in the report is not criticised. Equally, he recognised that UK Coal was contending to the contrary, namely that a user for the buildings would be quickly found (see the references above).

27. In paragraph 10.34 of the report, with which the Secretary of State agreed, the inspector accepted neither of these somewhat extreme propositions. On the one hand he was not convinced that, if planning permission for the proposal was to be granted, a user would be quickly found; and on the other he was "far from convinced that no suitable user would be forthcoming". Mr Village submitted that in so concluding the inspector had simply had regard to the evidence as to need and demand and had not grappled with the viability evidence; but that submission is unrealistic for two reasons, one general and one specific. The general reason is this: that need, demand and viability were all interlinked; for example, the demand assessment would inevitably feed into the rental figures which would be included in a development appraisal. The particular reason is the final sentence of paragraph 10.34, which makes it plain that the inspector clearly had in mind the characteristics of Mr Turner's appraisal and UK Coal's response to it. It will be recalled that UK Coal had submitted to the inspector that Mr Turner's analysis related to standard B1, B2 and B8 uses. UK Coal had said to the inspector that they were not going to sell the site to a developer but proposed to convert the buildings themselves, set the site up and manage it; hence the inspector's observation that the economics of adapting the buildings would need to be "carefully considered, having regard to the precise requirements of the prospective user".

28. The fact that UK Coal was not proposing to sell the site on also explains the submission which the inspector recorded in paragraph 6.93 of the report that UK Coal were "happy to proceed", and that in these circumstances it was "their commercial decision"; and the further submission that the rival submissions about the development appraisals were irrelevant.

29. As I read paragraph 6.93 of the inspector's report, UK Coal was not submitting, nor was the inspector at 10.32 of the report accepting, that the question of viability was irrelevant. UK Coal said that a development appraisal -- carried out using generic values for B1, B2 and B8 uses, on the basis that the site would be sold for £8 million to a developer -- was irrelevant when it was proposing to carry out the development itself. That was why the inspector said in paragraph 10.32 that he accepted UK Coal's submission that viability was "essentially", not solely, for UK Coal. However, in the remainder of that paragraph the inspector clearly had regard to the likely costs of refurbishing the buildings that had been put forward by Mr Turner, and

noted that the works would be "substantial and costly". Thus, the inspector had regard to Mr Turner's costs and to the fact that the economics of converting the buildings would depend not on generic values for B1, B2 and B8 uses to a developer, but on the precise requirements of the prospective user. The inspector was not required to (and indeed could not in the absence of information as to that prospective user's requirements) reach any firm conclusion as to whether refurbishment for a particular prospective user would or would not be viable. At best, the appellant's development appraisal was only capable of providing a snapshot of viability based upon certain inputs at a particular time. The inspector was not required to produce his own rival calculations or comment in detail upon the figures; it was entirely sufficient for him to say that, while the appellant's evidence in this respect had "undermined" UK Coal's case (see paragraph 10.32), it had not convinced him that no suitable user would be forthcoming (see paragraph 10.34).

30. In summary, Mr Village's two grounds boil down to the complaint that the inspector should have been convinced by the appellant's evidence, including the development appraisal, that no suitable use would be forthcoming. But whether the inspector was so convinced, or whether the Secretary of State was so convinced, was a matter for their planning judgment. If they were entitled to conclude, as in my judgment they were, that the prospect of reuse could not be ruled out, then they were also entitled to conclude that the possibility of securing the significant benefits that would flow from such reuse of the site with its railway infrastructure justified them in keeping the option open for five years by granting planning permission subject to Condition 7.

31. For my part, I would dismiss this appeal.

Sir Anthony Clarke, MR:

32. I agree.

Lord Justice Toulson:

33. I also agree.

Order: Appeal dismissed