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AC-2023-LON-001410

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/01/2024

Before :

THE HON. MR. JUSTICE HOLGATE

- -

Between :

THE KING ON THE APPLICATION OF AYSEN DENNIS	**Claimant**
- and -	
LONDON BOROUGH OF SOUTHWARK	**Defendant**
NOTTING HILL GENESIS	**Interested Party**

- -

- -

Jenny Wigley KC and Alex Shattock (instructed by the **Public Interest Law Centre**) for the **Claimant**
Melissa Murphy KC and Heather Sargent (instructed by **Southwark London Borough Council**) for the **Defendant**
James Strachan KC (instructed by **Winckworth Sherwood LLP**) for the **Interested Party**

Hearing date: 28 November 2023

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APPROVED JUDGMENT

This judgment was handed down by circulation to the parties or their representatives by email and by release to the National Archives on 17 January 2024 at 10.30 am.

Mr. Justice Holgate:

Introduction

1. On 28 March 2023 the defendant, the London Borough of Southwark ("Southwark"), granted the application of the interested party, Notting Hill Genesis ("NHG") under s.96A of the Town and Country Planning Act ("TCPA 1990") to make a non-material amendment of an outline planning permission dated 5 August 2015 for the phased redevelopment and regeneration of the Aylesbury Estate in south-east London ("the OPP"). The amendment inserted the word "severable" into the description of the development authorised by the OPP. The claimant, Aysen Dennis, is a local resident. She contends that this amendment was "material" and therefore outside the power contained in s.96A.

2. Southwark and NHG submit that, properly construed, the OPP was severable in any event and that the amendment made under s.96A was only intended to confirm that position explicitly on the face of the consent.

3. The claimant submits that (a) on a true construction the OPP was not severable and (b) the amendment to make it severable cannot be treated as non-material. The purpose and effect of the amendment is to change the bundle of rights granted by the OPP, so as to disapply the *Pilkington* principle (*Pilkington v* Secretary of State for the Environment [1973] 1WLR 1527).

4. In summary, the *Pilkington* principle may arise where two or more planning permissions have been granted on the same area of land 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. In the present case, treating the OPP as severable would allow the developer to carry out under a new planning permission a phase of the redevelopment which is physically incompatible with the authorisation conferred by the OPP, without losing the right to carry out further phases under the OPP.

5. It is common ground between the parties that if on a true construction the OPP was not severable, the amendment was *ultra vires* s.96A and so the decision to alter the OPP by adding the word "severable" would have to be quashed. On the other hand, if, properly construed, the OPP was severable before the amendment then the claim must fail.

6. The s.96A amendment does not define in what way the OPP is said to be severable. But Southwark and NHG say that it is severable by reference to the phases defined by that permission. The parties have argued the case on the basis that that is the only form of severance which is said by Southwark and NHG to be authorised by the OPP, both before and after the s.96A amendment.

Factual background

7. The Aylesbury Estate was built between 1966 and 1977 as a council estate of around 2700 dwellings on an area of 28.5 ha.

8. In 2002 Southwark planned to refurbish the estate. Structural surveys revealed that considerable works were required. But these would not overcome fundamental shortcomings in the layout of the estate. So in 2005 Southwark decided that it should be redeveloped.

9. In 2010, Southwark adopted the Aylesbury Area Action Plan as part of its statutory development plan. It proposed to create a new neighbourhood over a 15 to 20 year period and to increase the number of dwellings to 4,200 houses and flats. The Plan required development proposals to be in general compliance with the masterplan (policy MP1). The masterplan provided areas for a range of community uses and transport routes. The Plan also provided for phasing of development across the site to allow for the rehousing of residents and gradual demolition of existing homes.

10. Two early developments were built by Southwark in partnership with London and Quadrant Housing Association between 2009 and 2016.

11. In 2014 Southwark entered into a development partnership with Notting Hill Housing Trust, which merged with another trust in 2018 to become NHG. The first development site to be brought forward by the partnership comprised the remainder of phase 1. That was the subject of a detailed planning permission granted on 5 August 2015. The development of this phase began in 2019 and is due to be completed in 2025.

12. On 5 August 2015 Southwark also granted the OPP for the regeneration of the remainder of the Aylesbury Estate. It covered an area of 22 ha and provided for buildings between 2 and 20 storeys high on 18 development parcels. The officer's report to committee explained that the outline scheme would be divided into 3 phases: phase 2 (2016 to 2025), phase 3 (2021 to 2027) and phase 4 (2023 to 2035). NHG has built out phase 2A between 2020 and 2023.

13. In February 2022 the Aylesbury Area Action Plan was superseded by policies in the Southwark Local Plan. Policy AV01 states that it is now necessary to increase the number of new homes beyond the level set by the former plan. In relation to the objective of providing 50% "social rented" and "intermediate" homes, the preference is for social housing in accordance with policy P1.

14. In July 2022 NHG submitted an application for detailed planning permission for phase 2B. The proposal was for a mixed use development comprising 5 buildings of between 5 and 26 storeys, providing *inter alia* 614 new homes, of which 50% would be affordable dwellings, split 76:24 between social rented and intermediate accommodation. This is said to reflect the change in development plan policy since the OPP was granted in 2015, which requires the scheme to deliver increased levels of housing. The officer's report to Southwark's Planning Committee on 17 January 2023 explains that this requirement cannot be achieved within the parameters set by the OPP, for example, as to building height. Consequently, the developer seeks a freestanding detailed planning permission for phase 2B rather than an approval of reserved matters under the OPP. Such an application is sometimes referred to as a "drop-in" application.

15. Paragraphs 26 to 30 of the officer's report considered the implications of the *Pilkington* principle in the light of the decision of the Supreme Court in *Hillside Parks Limited v Snowdonia National Park Authority* [2022] 1WLR 5077. The officer advised that the main issue was whether the OPP could still be relied upon to authorise subsequent phases of development if phase 2B were to be built pursuant to a detailed planning permission granted on the application before the committee. The officer advised that the present situation was different from *Hillside*. Here the 2015 OPP was a phased planning permission approved in outline only. The approval and implementation of a freestanding detailed scheme for phase 2B outside the parameters of the OPP would not prevent the remainder of that consent from being implemented. "Phase 2B can be severed from the OPP."

16. The committee was also advised that NHG intended to submit an application under s.96A of the TCPA 1990 "to formalise the severable nature of the OPP." The officer would not raise any objection to that amendment of the outline consent because "it would not alter the terms of the OPP and would confirm the ability to sever phases to deliver them independent (sic) from the OPP …"

17. On 17 January 2023 the Planning Committee resolved to grant the detailed planning permission sought for phase 2B, subject to a number of matters. In particular, the permission was not to be granted (i.e. the decision notice was not to be issued) until the s.96A application had been made and granted "to protect the validity of [the OPP]."

18. The s.96A application had been submitted on 22 December 2022. The proposal was to add the words "severable" so that the description of the development in the OPP would read "…a severable phased development…". The officer's report stated that this amendment had been agreed between Southwark's officers and NHG "to confirm that the OPP is a planning permission comprising severable phases in the context of the Supreme Court decision" in *Hillside*.

19. The s.96A application was approved on 28 March 2023 by a planning officer acting under delegated powers. The assessment by the officer was in substantially the same terms as that contained in the report to committee on 17 January 2023. Paragraph 16 added:

> "The proposed addition of the word 'severable' to the development description of the OPP is considered to be non-material in nature. It is the first change to the proposal description, so there is no cumulative impact to consider. The EIA considered the redevelopment as a phased redevelopment; the amendment to the proposal description would not materially affect the assumptions within the ES nor the mitigation secured."

20. In the present case, phase 2B has not yet been developed. The s.96A decision has been taken in anticipation of a *potential Pilkington* problem arising. But the court is not being asked to decide in this claim whether the *Pilkington* principle *will* apply so as to prevent reliance upon the OPP for remaining phases. That is not an issue which the court needs to consider, or should consider, in order to decide whether the s.96A decision was lawful. Instead, the essential issue is the

scope of the rights conferred by the OPP and whether they have been changed materially by the s.96A amendment. This case turns on whether the authorisation granted by the OPP was itself a severed or severable consent. It will be necessary to consider what we mean by "severable" in this context.

Statutory framework

21. The general principle is that planning permission is required for the "development" of land (s.57(1) of TCPA 1990). "Development" means the carrying out of building, engineering, mining or other operations in, over or under land, or the making of any material change in the use of any buildings or other land (s.55(1)).

22. Planning permission may be granted in various ways, for example, on an application to a local planning authority or the Secretary of State (s.58(1)). A development order may make provision for such applications and for the grant of such permissions (s.59(2)(b) and s.62). The relevant order is the Town and Country Planning (Development Management Procedure) (England) Order 2015 (SI 2015 No. 595). Articles 2(1) and 5 allow an application to be made for the grant of an outline planning permission for the erection of a building, subject to a condition specifying "reserved matters" for subsequent approval by the local planning authority. The only aspects which may be dealt with as reserved matters are access, appearance, landscaping, layout and scale (as defined). Otherwise an application may be made for the grant of a full or detailed application. Some applications are required to be accompanied by a "design and access statement" (article 9).

23. Section 70, dealing with the determination of applications, provides that, subject to ss.91 and 92, the local planning authority may grant planning permission either unconditionally or subject to such conditions as they think fit (s.70(1)). Section 72(1) provides that the power to impose conditions under s.70(1) includes conditions for (a) regulating the development or use of land under the control of the applicant, whether or not it forms part of the application site, or for requiring works to be carried out on that land, or (b) for requiring the removal of any buildings or works, or the discontinuance of any use authorised by that permission, at the end of a specified period (i.e. a "planning permission granted for a limited period" – s.72(2)).

24. By s.91 every detailed planning permission is granted, or deemed to be granted, subject to a condition requiring the development to be begun within a specified time limit, or in default the 3 year period laid down in s.91(5). By s.92 every outline planning permission is granted, or is deemed to be granted, subject to conditions that (a) any application for approval of a reserved matter must be made within 3 years from the grant of the permission and (b) the development must be begun within 2 years from the final approval of reserved matters, or such alternative periods as the local planning authority may substitute in the decision notice granting permission. Section 56(2) and (5) define when development is begun for these purposes. The effect of s.93(4) is that the planning permission lapses if the relevant time limit is not satisfied; any development will not be authorised by that permission.

25. Under s.73 an application may be made for planning permission for the development of land without complying with conditions subject to which a previous permission was granted. The local planning authority may only consider the issue of the *conditions* subject to which planning permission should be granted. If they decide that the conditions should remain the same, then they must refuse the application. If they decide that different conditions should be imposed, then then they must grant a fresh planning permission to that effect. An application may not be made under s.73 to extend time limits set by ss.91 or 92, or in relation to a planning permission which has lapsed under those provisions (s.73(4) and (5)).

26. In *Finney v Welsh Ministers* [2020] PTSR 455 the Court of Appeal decided that a determination under s.73 can only consider whether different conditions should be imposed. The planning authority cannot determine that the *description* of the development authorised by an existing planning permission should be altered. If an applicant wishes that description to be changed, he must make an application for a fresh grant of planning permission. Under s.73 the only issue which the decision-maker may consider is what conditions should be imposed on the *same* description of development. That description is contained in the "operative part" of the existing planning permission, that is the part of the decision notice which is operative to grant planning permission. Conditions subject to which a planning permission is granted are not themselves operative to grant permission. Mr. James Strachan KC, who appeared on behalf of NHG, placed a good deal of emphasis on this distinction between the operative part and the conditions of a permission, but it is necessary to keep in mind the context in which Lewison LJ used that language, that is s.73 of the TCPA 1990.

27. Section 96A provides so far as is material:

> "(1) A local planning authority … may make a change to any planning permission, or any permission in principle (granted following an application to the authority), relating to land in their area if they are satisfied that the change is not material.
>
> (2) In deciding whether a change is material, a local planning authority must have regard to the effect of the change, together with any previous changes made under this section, on the planning permission or permission in principle as originally granted.
>
> (3) The power conferred by subsection (1) includes power to make a change to a planning permission –
>
> (a) to impose new conditions;
>
> (b) to remove or alter existing conditions.
>
> …"

28. It is common ground, and I agree, that s.96A, unlike s.73, enables a non-material amendment to be made to the grant or operative part of a planning permission,

and not merely the conditions. An amendment under s.96A has the effect of altering the permission which has previously been granted. No fresh planning permission is issued.

29. Mr. Strachan also emphasised the distinction between the operative part and the conditions of a planning permission which was drawn in the line of authority beginning with *I'm Your Man v Secretary of State for the Environment* [1998] 4 PLR 107. Those decisions were concerned with the scope of enforcement action under Part VII of the TPCA 1990. The breaches of planning control against which enforcement action may be taken are limited to development without planning permission or breach of a condition or "limitation" subject to which planning permission has been granted. The only kind of "limitation" which may give rise to enforcement action is one imposed on the grant of permitted development rights in a development order made by statutory instrument, and not a limitation in the operative part of a planning permission granted on an application to a local planning authority (contrast s.60(1) and s.70(1) of the TCPA 1990).

30. However, in *Barton Park Estates Limited v Secretary of State for Housing, Communities and Local Government* [2022] PTSR 1699 Sir Keith Lindblom SPT made it clear that a limitation may be expressed in the operative part or grant of planning permission as part of the language which delimits the scope of the authorisation conferred by that permission. That is a different issue from the question of what enforcement action may be taken under Part VII of the TCPA 1990 if a limitation in the grant of planning permission is not adhered to. The *I'm Your Man* line of authority does not negate or erode that distinction or detract from the equally well established line of authority in the Court of Appeal which includes *Wilson v West Sussex County Council* [1963] 2 QB 764 and *Winchester City Council v Secretary of State for Communities and Local Government* [2015] JPL 1184.

31. Thus, a planning permission granted for an "agricultural cottage" is for a dwelling which may only be occupied by a worker engaged in agriculture. It is not a permission for a dwelling with a "rustic appearance" which any person might occupy (*Wilson* [1963] 2QB at p.776-777). A planning permission for a change of use of agricultural land to a travelling showpeople's site is not a permission for stationing caravans for residential purposes by persons who are not travelling showpeople (*Winchester*). A planning permission for 9 residential vans, 18 static holiday vans and 30 towing units is a permission for 57 vans and not, for example, for 80 vans (*Barton Park*).

32. In none of these cases did it matter for the purposes of determining the scope of the authorisation conferred by a planning permission that the limitation expressed in the grant was not also expressed as a condition. As the Court of Appeal held in *Barton Park*, the absence of such a condition does not have the effect of altering the description of development in the grant itself. "It does not change what the planning permission is actually for" ([2022] PTSR at [28]).

33. *Barton Park* also demonstrates that the conditions of a planning permission may be directly relevant to defining its scope, or the ambit of the authorisation it

confers. The permission has to be construed as a whole (see e.g. [21] and [24] to [30]).

34. This principle can also be seen in the case law dealing with compliance with the time limits in ss.91 and 92. In *F.G. Whitley & Sons Limited v Secretary of State for Wales* (1992) 64 P&C.R. 296 Woolf LJ (as he then was) said at p.302:

> "As I understand the effect of the authorities to which I am about to refer, it is only necessary to ask the single question; are the operations (in other situations the question would refer to the development) permitted by the planning permission read together with its conditions? The permission is controlled by and subject to the conditions. If the operations contravene the conditions they cannot be properly described as commencing the development authorised by the permission. If they do not comply with the permission they constitute a breach of planning control and for planning purposes will be unauthorised and thus unlawful. This is the principle which has now been clearly established by the authorities. It is a principle which I would have thought made good sense since I cannot conceive that when section 41(1) of the 1971 Act made the planning permission subject to a condition requiring the development to be begun by a specific date, it could have been referring to development other than that which is authorised by the permission…"

35. The conditions of a planning permission, as well as its operative part, are relevant to determining what is the development authorised by that permission and, thus, whether it has been begun within the relevant time limit (see also *Greyfort Properties Limited v Secretary of State for Communities and Local Government* [2012] J.P.L. 39).

36. Section 75(1) lays down the general rule for the duration of a planning permission:

> "Without prejudice to the provisions of this Part as to the duration, revocation or modification of planning permission or permission in principle, any grant of planning permission or permission in principle to develop land shall (except in so far as the permission otherwise provides) enure for the benefit of the land and of all persons for the time being interested in it."

In *Pioneer Aggregates Limited v Secretary of State for the Environment* [1985] AC 132 Lord Scarman described this provision as being of crucial importance. The clear implication is that only the statute or the terms of the planning permission itself can stop the permission enduring for the benefit of the land and of all the persons holding an interest in it (p.141G-H). Thus, the duration of a planning permission may be limited by express condition (s.72(1)(b)) or a permission may cease to exist if the time limits in ss.91 or 92 are not satisfied.

37. Lord Scarman stated that Parliament has provided a comprehensive statutory code for planning control in the public interest. Where the code is silent or

ambiguous, the courts may, in exceptional cases, resort to principles of private law to resolve an issue. But where the legislation covers a situation, it is impermissible for the court to go beyond the statutory language (p.141 A-C).

38. The House of Lords decided that a planning permission cannot be abandoned. Accordingly, the Court of Appeal had erred in *Slough Estates Limited v Slough Borough Council (No.2)* [1969] 2 Ch. 305 in holding that the private law doctrine of election between inconsistent rights should form part of planning law, either as the basis for a rule of abandonment or as an exception to the general rule that the duration of a planning permission is governed by the legislation (p.140 G-H).

39. However, the House of Lords did endorse three areas in which gaps in the legislation had been filled by the courts. The third was the *Pilkington* principle, which was approved as a common sense solution to a lacuna in the statutory code (pp.144-5). Lord Scarman also likened the *Pilkington* rule to the second type of case in which judicial intervention had been justified, namely the concept of a "new planning unit" (see pp.143-4 and *Petticoat Lane Rentals v Secretary of State for the Environment* [1971] 1 WLR 1112).

40. Finally, I note that Lord Scarman stated that if the 1945 outline planning permission in *Slough* had been valid, the Court of Appeal could have applied *Pilkington* in order to decide that that permission could no longer be relied upon. The industrial development carried out under subsequent freestanding planning permissions would have sufficed to make the earlier "outline plan" incapable of implementation (p.139 and p.145E). Thus, the *Pilkington* principle may apply to outline as well as to detailed planning permissions.

The Pilkington principle

41. In *Pilkington* the owner of a plot of land was granted detailed planning permission to build one house on part of that plot subject to a condition that, if built, it would be the only dwelling to be erected on the land. That building was erected. Subsequently the owner discovered an earlier permission for the erection of a dwelling in another part of the plot, with the remaining part of that area to be used as a smallholding. That use was described in the operative part of the planning permission. It was not the subject of a condition. The area of the smallholding was shown on an approved plan.

42. The Divisional Court held (pp.1532-3) that a landowner may make any number of planning applications on a site. That may result in the grant of mutually inconsistent planning permissions. If one of those permissions is implemented, the first step is to identify the full scope of what has been done, or can be done, under that permission. The second question is whether or not it is physically possible to carry out the development authorised by another permission, having regard to what has been done, or is authorised to be done, under the permission which has been implemented. In *Pilkington* the answer was no, because the earlier permission was for the building of a dwelling ancillary to use of the rest of the site as a smallholding. The dwelling which had been built made it physically impossible for the smallholding use to be carried on in accordance

with the earlier permission. Lord Widgery CJ made it clear that the court's decision did not rest upon the condition in the implemented permission.

43. In *Hillside* a detailed planning permission was granted in 1967 for 401 dwellings in accordance with a masterplan showing the location of each dwelling and the road system for the estate. Between 1996 and 2011 six planning permissions were granted for dwellings departing from the master plan, which were built and occupied. Many years later the local planning authority decided that it was no longer physically possible for the original detailed planning permission to be implemented. The developer sought a declaration in the High Court that the 1967 permission remained valid and could be carried out to completion. The Supreme Court upheld the decision to refuse that declaration.

44. The Supreme Court approved *Pilkington* and endorsed the explanation of the principle in *Pioneer Aggregates* [40]. The court clarified two points.

45. First, the test of physical impossibility extends to the whole site covered by the unimplemented permission and not just the part of that site upon which the developer now wishes to build [41].

46. Second, Lord Widgery's test in *Pilkington* at p.1532B should be amended. The true question is whether it is possible to carry out the development approved by the unimplemented permission having regard to what has been done, and not also that which is *authorised* to be done, under the implemented permission [42]. Mere inconsistency between the terms of two planning permissions is insufficient to engage the *Pilkington* principle. What matters is whether the things which have been done under one permission make it physically impossible to carry out development authorised by another permission [43]-[45].

47. The developer advanced three arguments to overcome the problem that it had become physically impossible to carry out development under the original permission across the whole of the site. First, it was submitted that the decision in *Pilkington* had rested upon a principle of abandonment, for which there was no evidence in *Hillside.* The Supreme Court rejected that contention as being directly contrary to the reasoning in *Pilkington* itself and the decision in *Pioneer Aggregates.* Whether a planning permission does or does not exist should be capable of ascertainment by inspection of the planning register and of the land itself. Abandonment is inconsistent with this requirement of public accessibility [38].

48. The developer's second argument was that a permission for the construction of multiple buildings should be construed as authorising the construction of "any sub-set" of those buildings. Accordingly, there was no reason why a developer could not combine development pursuant to the original permission on parts of the site with development on other parts of the site authorised by other planning permissions. This was referred to by the Supreme Court as "mix and match", or by Singh LJ in the Court of Appeal as "pick and choose" ([2021] JPL 698 at [90]).

49. In *Hillside* the developer contended that the original permission should be construed as a "freestanding permission" for *each* element of the masterplan, so that the ability to carry out 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 [46]. Despite contrary submissions in the present case from Southwark and NHG, it is clear from [47] that the Supreme Court considered whether the original permission should be treated as "a set of discrete permissions to construct each individual element of the scheme (however exactly those elements are individuated)."

50. The Supreme Court decided that where a planning permission is granted for a development such as a housing estate, comprising multiple units, it is a question of construction whether "the permission authorises a number of independent acts of development, each of which is separately permitted by it" or whether it is to be construed as a permission for a single scheme which cannot be disaggregated in that way [46].

51. At [71] the Supreme Court held that where a planning permission is granted for the development of a site comprising multiple units, such as a housing estate, it is unlikely to be the correct interpretation of the permission that it is severable, for the reasons given in [50]. Planning permission for a multi-unit development is applied for and granted as an integral whole. In deciding whether to grant the permission, the local planning authority will generally have had to consider a range of factors relevant to the proposal taken as a whole.

52. Accordingly, when granting permission for such a scheme the authority cannot be taken, "absent some clear contrary indication" to have authorised the developer to combine building part only of the proposed development with building something different from and inconsistent with the approved scheme on another part of the site [50]. In my judgment that last statement confirms that severability is being spoken of in this particular context as a means of disapplying the *Pilkington* principle. To the extent that a permission is severable, the *Pilkington* principle cannot be applied.

53. Mr. Strachan was correct in submitting that the law does not require that a planning permission be implemented in full. A developer is entitled to carry out part of the development authorised. But it is clear from *Hillside* that that provides no assistance in deciding whether a permission is, or is not, severable so that the *Pilkington* principle is disapplied. That entitlement is consistent with the legal position that a permission granted for a multi-unit development authorises each part thereof which is carried out at a time when it remains physically possible for the whole scheme to be built in accordance with that consent. Where the earlier stages of the development are carried out in accordance with that permission they are and remain lawful, even if the remainder of the site is not developed, or is developed incompatibly under a different permission so as to engage the *Pilkington* principle [52]-[68].

54. At [68] the Supreme Court reiterated that, in the absence of clear express provision making it severable, a planning permission is not to be construed as authorising further development if at any stage compliance with that permission becomes physically impossible.

55. The Court then went on to say that the *Pilkington* principle should not be pressed too far. Continuing authorisation by a planning permission does not depend on exact compliance with that consent, such that any departure from the permitted scheme, however minor, has the result that no further development is authorised. That would be an unduly rigid and unrealistic approach and generally, therefore, an unreasonable construction to put on the planning permission, *a fortiori* for a large multi-unit development. "The ordinary presumption must be that a departure will have this effect only if it is material in the context of the scheme as a whole" [69].

The terms of the outline planning permission granted in 2015

56. The principles for the interpretation of planning permissions are well-established (see e.g. *R v Ashford Borough Council ex parte Shepway District Council* [1999] PLCR 12; *UBB Waste Essex Limited v Essex County Council* [2019] EWHC 1924 (Admin); *Trump International Golf Club Scotland Limited v Scottish Ministers* [2016] 1 WLR 85; *Lambeth London Borough Council v Secretary of State for Housing, Communities and Local Government* [2019] 1 WLR 4317 and *Barton Park*). They do not need to be repeated in detail here.

57. The interpretation of a planning permission is an objective question of law for the court to determine. A permission must be interpreted as a whole, comprising not only the grant but also the conditions imposed and the reasons stated for imposing those conditions. The court asks itself what a reasonable reader would understand the language of the permission to mean. The court will have regard to the ordinary and natural meaning of the words used, the purposes of the permission, the statutory context and common sense.

58. The parties are agreed upon which plans and documents are incorporated by reference in the OPP so as to become part of that permission.

59. None of the parties relied upon the implication of any language into the OPP. The court was asked to construe the permission according to the language used in the document.

60. The operational part of the OPP reads as follows:

> "**Planning Permission was GRANTED for the following development:**
>
> Outline application for: demolition of existing buildings and phased redevelopment to provide a mixed use development comprising a number of buildings ranging between 2 to 20 storeys in height (12.45m - 68.85m AOD) with capacity for up to 2,745 residential units (Class C3), up to 2,500sqm of employment use (Class B1); up to 500sqm of retail space (Class A1); 3,100 to 4,750sqm of community use; medical centre and early years facility (Class D1); in addition to up to 3,000sqm flexible retail use (Class A1/A3/A4) or workspace use (Class B1); new landscaping; parks, public realm; energy centre; gas

> pressure reduction station; up to 1,098 car parking spaces; cycle parking; landscaping and associated works."
>
> at the Aylesbury Estate."

61. The grant also incorporated by reference a number of documents including:

- Planning Statement
- Design and Access Statement
- Design Code Strategy

62. The grant incorporated a number of plans, including the following parameter plans (for which abbreviated drawing numbers are given):

- PP 02 – Access
- PP 03 – Circulation
- PP 04 – Development parcel extents
- PP 05 – Publicly accessible open space
- PP 06 – Development phasing

63. According to the Planning Statement the OPP application, together with the detailed application for the remainder of phase 1, sought permission for the "comprehensive regeneration" of the Estate (4.1). The objectives included the creation of "connected neighbourhoods" around a "network of open spaces and community facilities" and the introduction of streets as part of the design (4.2). The masterplanning provided for the distribution of residential blocks of different densities, with the tallest blocks up to 20 storeys high in the southern part of the site along the frontage to Burgess Park and the smallest blocks up to 4 storeys in height in the northern part of the site adjacent to a conservation area (pp.58-9 and 90-91).

64. The Design and Access Statement explained that the development is to be phased, to minimise the impact on existing residents through having to leave their current homes. The development is to be delivered on an incremental basis along with infrastructure and social amenities to ensure that the process of regeneration delivers "sustainable development" which is "viable" at each stage. The process is complex because it involves phased relocation of residents within the Estate, demolition, and flexibility in unit types and sizes (6.1).

65. The aim of the Design Code Strategy is to ensure a degree of continuity and consistency across the very large development area of the Estate. One of the key principles of the masterplan is the creation of attractive, safe and legible cycle and pedestrian routes (1.1). The parameter plans set out a series of phases, development parcels and sub-plots. Each parcel and sub-plot has a specific set of parameters explained in the plans and the subsequent chapters of the Strategy.

"These must be read as an interrelated series of constraints to gain a holistic understanding of the subplot conditions" (4.1).

66. Parameter plan PP02 shows the existing and proposed access points into and out of the perimeter of the whole of the OPP site, showing how the regeneration will "stitch into the existing neighbourhoods and street networks" (Design Code Strategy p.53). Parameter plan PP03 sets out the layout of "mandatory streets" which provide the foundation for circulation across the whole of the OPP site. It also specifies which development parcels need to be subdivided by additional streets and which type of road would be suitable (p.54). Parameter plan PP04 sets out the development parcels across the OPP site, showing both the maximum developable area for each plot and no build zones which are to be used primarily for open space (p.56). Parameter plan PP05 identifies the minimum extent and type of open space areas to be provided, so as to be within easy walking distance of the new homes (p.58). Parameter plan PP09 shows the areas of each phase of the development of the OPP. There are three phases (2, 3 and 4) in addition to the first phase. Phase 2 is made up of phases 2A, 2B and 2C, although the plan does not show any boundary between 2B and 2C (p.65). In addition, the design principles for the "Park Edge character area" and the "Tall Buildings Strategy" apply across a range of development plots in two different phases (pp.148-154 and 155-156).

67. The OPP was granted subject to conditions.

68. Condition 2 provides that the development permitted by the OPP "shall not be carried out otherwise than in accordance with" the Design Code Strategy referred to in [61] above and a series of specified plans, which includes the parameter plans referred to in [62] above.

69. Condition 1 defines the reserved matters which are required to be submitted. "Each reserved matters application shall include a reconciliation plan or statement showing how the proposed development plot complies with the approved site wide development controls" which include the parameter plans and the Design Code Strategy.

70. In relation to "scale", condition 1 requires each reserved matters application to include a statement, including design material and detailed plans, to "demonstrate that the scale of the development accords with the relevant thresholds and parameters set out in the approved Parameter Plans and Design Code Strategy".

71. The parameter plans are an important feature of the operative part of the OPP defining the scope or envelope of the permission. Conditions 1 and 2 ensure that that envelope may not be exceeded by the details subsequently submitted for approval of reserved matters. They are one means by which the local planning authority ensures that the environmental effects of the detailed scheme which comes forward fall within the ambit of the environmental impact assessment carried out at the outline stage (*R v Rochdale Metropolitan Borough Council ex parte Milne* [2001] Env. L.R. 22).

72. The documents referred to in [61] above contain principles and requirements relevant to defining the consent granted by the OPP. In addition, condition 2 requires the development carried out under the OPP to conform to the Design Code Strategy.

73. Condition 4 sets time limits pursuant to s.92 of TCPA 1990. Reserved matters for the first phase had to be submitted for approval by 5 August 2018 and development of that phase had to be begun by 5 August 2020 or within 2 years of the final approval of those matters and only in accordance with the OPP and those approvals. For the reserved matters of all other phases or parts of the development site, condition 4 sets a single longstop of 5 August 2033 by which all applications must be submitted. Development within a development plot must be begun within 2 years of the final approval of reserved matters for that plot and only in accordance with the OPP and those approvals.

74. During her oral submissions Ms. Melissa Murphy KC for Southwark referred to figure 6.3 of the Design and Access Statement, which formed part of the material incorporated into the operative part or grant of the OPP. This shows the sequence of the phases authorised by that permission. Phase 1 is followed by phase 2A which is followed by phase 2B/2C, then phase 3 and lastly phase 4.

75. The day after the hearing I asked for the following question to be answered by counsel in a single document setting out points of agreement and disagreement:

> "1. To be entitled to carry out under the outline permission remaining phases of that permission other than 2B (such as phase 2C, phase 3 etc) is the landowner required by the outline permission:
>
> a. To have developed phase 2B before those other phases and;
>
> b. To have done so under the terms of the outline permission?
>
> 2. To what extent are any such requirements set out (a) in the permission or (b) elsewhere?"

This was essentially a question of construction focusing mainly on the terms of the OPP.

76. In a joint statement dated 1 December 2023 all three parties appeared to answer yes to questions 1(a) and (b). But because the wording of their joint statement did not precisely follow the language of the question put to them, the parties were asked to confirm whether their answers remained the same on the basis of the court's formulation. On 6 December 2023 the claimant said yes. But Southwark and NHG said that although their answer to question 1(a) remained yes, their answer to question 1(b) was now no. Despite requests, no substantive explanation for that change in stance has been given.

77. However, it is clear from the position statement dated 6 December 2023 that this difference between the parties is really concerned with whether later phases would continue to be authorised by the OPP if an earlier phase is built under another permission so as to be physically incompatible with the OPP in a "material" way (*Hillside* at [69]). But that is to do with the possible future application of the *Pilkington* principle, not the interpretation of the OPP. Nevertheless, Southwark and NHG have made it clear that it is important to them that (a) the OPP is severable and (b) the s.96A decision confirms that to be the case.

78. The parties did not ask for the hearing to be reconvened and, in the light of those matters which do remain agreed between them, I did not consider that to be necessary.

79. There are no conditions in the OPP which require any particular sequencing as between phases 2, 3 and 4. However, it is also necessary to consider what the OPP authorises.

80. The joint position statement states: "the parties agree that the OPP requires the delivery of phases in the order shown in [figure 6.3 of the Design and Access Statement] by virtue of [that Statement's] incorporation into the OPP…" The parties also "agree that the OPP requires that Phase 2B has to be built before subsequent phases (i.e. Phase 3 and Phase 4) and that it is built in accordance with the OPP." Given the absence of any conditions to secure those requirements, I understand the parties to be referring to what needs to be done in order for development to be authorised by the grant of the OPP. For example, phase 3 is authorised by the OPP if phase 2B/2C is built beforehand. I agree with that analysis.

A summary of the submissions.

81. Ms. Jenny Wigley KC for the claimant submitted that the terms of the OPP summarised above demonstrate that the consent was granted for the scheme integrated as a whole, with interconnected and interdependent constituent parts. It was not granted on a "mix and match" basis, allowing the developer to implement another permission so as to insert, or "drop in", a phase physically incompatible with the OPP and yet still be able to rely upon the OPP for later phases. The OPP was not severable.

82. The claimant submitted that although the OPP allows for flexibility over the longer duration of the scheme, it also requires a certain level of consistency and cohesion across the whole site, including adherence to the parameters set by the grant of permission and by the conditions. The outline nature of the permission, its phasing and flexibility are consistent with the OPP being non-severable. They are not contra-indications, let alone clear provisions, that the OPP is, on a true construction, severable.

83. Ms. Murphy relied upon the "very outline" nature of the consent and its phasing provisions, together with the flexibility envisaged for such a large scheme taking place over such a long period. This was supported not only by the Design and Access Statement, but also by the officer's report in April 2015 on the

outline application. Much detail remained to be approved under the reserved matters. This stands in contrast to the detailed permissions which were the subject of the decision in *Hillside*.

84. Ms. Murphy said that "the carrying out of development of land which is in one identified phase of an outline area, in a permission like the one in this case, is less likely to give rise to a physical impossibility issue than full permissions, bearing in mind the inherent flexibility of the outline consent." She advanced two reasons. First, where the development in question is taking place in "discrete areas" or phases, there is no necessary overlap or conflict. Second, a phased outline permission gives scope for the developer and the local planning authority to react to whatever has already been developed in earlier phases when considering a subsequent phase. Accordingly, the physical impossibility test in *Hillside* will not apply in the same way that it does to full planning permissions. An outline planning permission establishes the principle of development and reserves the details. On the point of construction, the key issue is whether an outline permission authorises a number of independent acts of development on spatially discrete areas of land through a phasing arrangement, not whether the word "severable" was used in the consent.

85. Mr. Strachan submitted that it was inappropriate to read across the reasoning of the Supreme Court in *Hillside* to the OPP or the s.96A decision in this case or to outline permissions (with phasing provisions) more generally. Nevertheless, both Mr. Strachan and Ms. Murphy relied upon the concept of severability as advanced by the developer in *Hillside* to explain the use of the word "severable" in the present case.

86. Mr. Strachan said that in relation to the s.96A decision in this case and more generally, severability does not connote the grant of separate planning permissions. Instead, it refers to a single planning permission which identifies severable components of the overall development approved. Here, the insertion of the word "severable" into the operative grant of the OPP referred to severable phased development, not separate permissions for each phase. "Severable" is shorthand for the developer's submission in *Hillside* at [33] that the permission in that case for the construction of multiple buildings was to be interpreted as permitting "the construction of any sub-set of those buildings" (see [48] above).

87. Mr. Strachan said that there are differences between full or detailed permissions and outline permissions which affect the way in which the *Pilkington* principle may operate. He took as one example a detailed permission for the construction of 10 houses across a site. If the developer builds offices pursuant to a separate permission on a part of the site where the first permission had authorised the construction of 2 houses, the *Pilkington* principle will apply. It will be physically impossible to build those two houses. The issue then becomes whether the first permission is to be interpreted as severable, so that it continues to authorise the building of the remaining 8 houses.

88. He then contrasted a case where an outline planning permission is granted for 10 houses, reserved matters are approved including the location of those houses within the site, and then office development is carried out under another permission on the area where 2 of those houses would have been sited. It is

clearly established that, in the absence of any contrary indication in the permission, a developer may apply for and obtain any number of approvals of reserved matters for different layouts, even mutually incompatible layouts, covering the whole or part of the site. Furthermore, a developer is generally not required to complete all the development authorised by a planning permission (*Heron Corporation Limited v Manchester City Council* [1978] 1 WLR 937; *R v Secretary of State for the Environment ex parte Percy Bilton Industrial Properties Limited* (1975) 31 P & CR 154).

89. Mr. Strachan then submitted that the developer in his second example can apply for reserved matters approval for the construction of the remaining 8 houses on the undeveloped part of the site. Although it would be physically impossible to build out the whole of the reserved matters approval for 10 houses, he said that the developer can rely upon that approval for 8 houses on the remainder of the site without the *Pilkington* principle preventing him from doing so. On this analysis Mr. Strachan submitted that there is no need to consider whether the outline permission is severable in the sense of comprising a collection of separate permissions. Instead, he says that the developer is entitled to rely upon intrinsic legal characteristics of an outline planning permission, in particular the ability to obtain mutually inconsistent approvals of reserved matters.

90. Mr. Strachan emphasised the inherent flexibility of an outline planning permission in granting approval for the principle of development, leaving a substantial amount of the details of the scheme to be approved subsequently.

91. He said that an outline planning permission for EIA development may need to be subject to conditions which restrict the scope of what may come forward as reserved matters within certain parameters, a "Rochdale envelope". That does not prevent the separate development of a sub-set of what is permitted by the outline consent. Nor does it alter the operative part of that consent and the ability of a developer to promote subsequent development under that consent consistent with its description.

92. Mr. Strachan contended that the OPP is different in nature from a detailed permission. In seeking approval for just the principle of development described in the grant, leaving reserved matters to be approved subsequently in phases and up to specified maximum amounts, "there is an obvious and inherent form of severability contemplated." The grant of permission for "phased development" permits the developer to bring forward development in phases without imposing any obligation to promote all of the phases, or in any particular order.

93. Mr. Strachan emphasised the following features of the grant in the OPP:

    (a) Outline planning permission for "phased redevelopment" where the nature of those phases is not specified or regulated in the operative grant;

    (b) Outline permission for mixed use development where the quantum of uses permitted are not specified save by way of maxima;

(c) A permission which does not specify or require the development to be authorised in particular phases;

(d) No requirement in the grant to deliver each and every phase or all of the development allowed by the specified maxima.

Consequently, the OPP is a "severable" permission in that it allows the developer to bring forward a reserved matters scheme as a sub-set of the number of buildings permitted "and also build on the same site under the auspices of another planning permission, so combining the forms of development, without offending the terms of the OPP itself."

Severability

94. The s.96A amendment simply inserted the word "severable" into the OPP without providing any explanation as to what is meant by that term in this context. During the hearing Southwark and NHG submitted that it means that the OPP is severable in relation to the areas of phases 2, 3 and 4, but not otherwise. There is nothing on the face of the OPP to indicate that the meaning of "severable" is so limited. That term could apply to smaller units, down to the authorisation of individual plots or buildings. The permission itself refers to details being submitted for development parcels and sub-plots. Indeed, in their written submissions Southwark and NHG suggest that the OPP, both as originally issued and as amended, authorises *any* subset of the maximum amount of the development permitted.

95. Quite apart from the uncertainty in the case advanced by Southwark and NHG on the severability of the OPP, there is the more fundamental question: what do we mean by severable? Its meaning is sensitive to context.

96. Severance may be used to deal with a part of a legal instrument which is held to be unlawful, as in the law of contract (see e.g. Chitty on Contracts (35th edition) 19-264 et seq). The severed part is treated as not forming part of the contract. Similarly, it may be possible to treat a contractual provision which is void for uncertainty as severable (Lewison: The Interpretation of Contracts (7th ed) para. 8.131). This is severance in the sense of excision.

97. This usage is also found in planning law, where the court severs an invalid condition in a planning permission which does not go to the root of that consent, but deals with some incidental or trivial matter, so that the untainted remainder of that consent can be left legally intact (*Kent County Council v Kingsway Investments (Kent) Limited* [1971] AC 72).

98. But when addressing the *Pilkington* principle in *Hillside* and the present case, severance is referred to in the sense of disaggregation rather than excision. Nonetheless, both usages involve a division into separate, freestanding parts.

99. I begin by considering the severability of a detailed permission. In *Hillside* the implementation of the six subsequent permissions made it physically impossible for the developer to carry out the 1967 permission for 401 dwellings on the whole of the land to which it related. So, if the 1967 permission were to be

treated as a single consent, *Pilkington* prevented reliance upon that permission for the carrying out of any further development on the site. It was therefore necessary for the developer to seek to circumvent *Pilkington* by arguing that the 1967 consent was severable "into a set of discrete permissions to construct each individual element of the scheme" [49], or a "freestanding permission" for each element of the scheme" [46]. If that contention had succeeded, the developer would still have been able to rely upon those discrete permissions granted in 1967 which related to land not already developed. Disaggregation into separate permissions would have confined the potential application of *Pilkington* to those 1967 consents which related to land already developed under the subsequent planning permissions. Nothing less than severance into discrete permissions would have sufficed for the developer's argument to succeed in the Supreme Court.

100. The suggestion by Southwark and NHG that the developer in *Hillside* only needed the 1967 permission to be treated as authorising the construction of any "subset" of the multiple buildings permitted, based upon part of the developer's submissions at [33], is therefore wrong. Mr. Strachan went on to submit that a single detailed permission allows the building of any subset of the development authorised (in the absence of any provision to the contrary), in the sense that the developer can choose to build only part of that development. That statement is correct as far as it goes. But it could not have overcome the effect of the *Pilkington* principle in *Hillside*, namely that development carried out under a planning permission which makes it physically impossible to implement the development authorised by another permission prevents any further reliance upon that second permission. If the "any subset" suggestion by Southwark and NHG could have operated in *Hillside* so as to overcome the *Pilkington* principle, it is difficult to see what would have been left of that principle.

101. In any event, the argument raised by Southwark and NHG is inconsistent with the reasoning in *Pilkington* and that of the Supreme Court in *Hillside*. The test of physical impossibility applies to the whole of the site covered by the permission in question (*Hillside* at [41]). It is if the decision notice can properly be read as severed, in the sense of having created separate permissions for development, that the physical impossibility test in *Pilkington* and *Hillside* need not be applied, depending upon the precise nature and extent of that severance.

102. Whether a detailed permission is to be treated as severed, or a collection of discrete planning permissions, is a matter of construction of that consent. This question of interpretation will often relate to the permission as originally granted, as in the present case.

103. A detailed planning permission may authorise or require the development approved to be carried out in phases. The *Pilkington* principle is capable of applying to such a consent. Provisions in a detailed consent for phasing are compatible with that consent being treated as a single planning permission. Consequently, the mere inclusion of phasing provisions in a detailed permission would be insufficient to amount to a "clear contrary indication" that the consent is severed into discrete planning permissions. The same is true of an outline permission.

104. Furthermore, if the inclusion of phasing provisions were to be sufficient to sever a planning permission, whether detailed or outline, that could have consequences which nobody involved in seeking or granting that permission would have envisaged, such as the application of the statutory time limits for the implementation of each separate permission. For example, if the outline permission in *Percy Bilton* had been treated by the court as severed, the statutory time limits for submitting reserved matters for approval would have applied to each of the resulting discrete permissions and so some of those consents would have become time-expired. That was the issue in the case. Practitioners will therefore need to consider carefully the possible consequences of seeking to argue that a single planning permission should be treated as severed.

105. Because of considerations such as these, and also the variety of ways in which a permission might be severed, it is important that any decision to grant a severed planning permission be expressed unequivocally. Where that is not done, any contra-indications said to support severance must be equally clear.

106. Mr. Strachan submitted that there are circumstances in which the carrying out of inconsistent development would cause a detailed permission to cease to have effect, but would not do so in the case of an outline permission for the same type and scale of development (see [87]-[89] above). I have reservations about the correctness of his analysis in [89] in the light of the "whole site" principle laid down by the Supreme Court in *Hillside* (see [45] above). But this was not the subject of full argument and I need not resolve that point. Assuming, without deciding, that his analysis in [89] above is correct, all that would go to show is that in those circumstances the *Pilkington* principle would not prevent further reliance upon the outline planning permission. But even taking Mr. Strachan's example at face value, there comes a point when the time limit for submission of reserved matters expires. An issue could arise whether any development carried on thereafter pursuant to a different permission makes it physically impossible to carry out development previously approved as reserved matters under the outline permission. If the answer is yes, then that approval of reserved matters could no longer be relied upon unless, on a true interpretation, the grant of outline planning permission was severable in some relevant way. The same considerations would arise as in *Hillside*.

107. I agree that an outline planning permission, where all or most matters are reserved, is a decision on the acceptability of the principle of development defined by that permission, and gives a good deal of flexibility on the details of the scheme which may subsequently come forward. But, the outline permission will typically set the framework and terms (or parameters) within which those details may properly be proposed and approved in order to be authorised by that consent. The apparent flexibility of an outline permission may *defer* the stage when the *Pilkington* principle can in practice be applied, but where the physical impossibility test is satisfied, the severability issue arises, as it would in the case of a detailed planning permission.

108. Accordingly, Mr. Strachan's analysis of differences between detailed and outline planning permissions and his examples do not take the argument in this case anywhere. They do not demonstrate that the *Pilkington* principle cannot apply to outline planning permissions in general, or to the OPP in particular, or

that the severability of such permissions is unnecessary in order to circumvent the application of *Pilkington* in such cases. As we have seen, in *Pioneer Aggregates* Lord Scarman accepted that the *Pilkington* principle is applicable to outline planning permissions (see [40] above). At most Mr Strachan's analysis indicates that the *Pilkington* principle may be encountered less often when dealing with outline permissions. For much the same reasons the submissions of Ms. Murphy at [84] above do not assist the court to determine the real issue before it.

109. As I have said, this case is not concerned with establishing in what circumstances *Pilkington* would prevent reliance upon the OPP or, more generally, a phased outline planning permission. The only issue is whether Southwark and NHG are correct to assert that, as a matter of interpretation, the OPP was a severed permission in any event and that the s.96A amendment was simply made in order to confirm that position in express terms. The effect of their argument would be to avoid the *Pilkington* principle preventing further reliance upon the OPP (in so far as that permission is treated as severed).

110. Ms. Murphy and Mr. Strachan placed heavy reliance on the inclusion of phasing and maximum amounts of development in the grant of an outline planning permission. Mr. Strachan asserted that this connotes an "obvious and inherent form of severability." The only severability in the OPP for which he contended related to the phases themselves. He eschewed the idea that severability in the context of a phased outline permission needs to involve a collection of discrete planning permissions. I disagree. As explained above, it is the identification of freestanding permissions which enables the effect of the *Pilkington* principle to be disapplied. The mere fact that development is to be implemented in phases (following approval of reserved matters) does not alter the effect of the *Pilkington* principle where an inability to satisfy the physical impossibility test cannot be circumvented. In this regard there is no material difference as a matter of principle between detailed and outline permissions. Indeed, if phasing in an outline planning permission were to be sufficient to disapply *Pilkington*, it is difficult to see why that would not apply generally to permissions of that kind. Although Southwark and NHG said that they were not seeking to go so far, they did not explain how their submissions could fail to have that effect. With respect, their submissions lacked coherence.

The interpretation of the OPP

111. Having discussed points of principle raised by Southwark and NHG, I can deal with the interpretation of the OPP more briefly.

112. It is essential to bear in mind the key question: what was the scope of the bundle of rights conferred by the OPP prior to and after the s.96A decision?The meaning of the OPP is not affected by a separate issue which may arise at some future point, namely whether development actually carried out under another permission would engage the *Pilkington* principle. That second question will be affected by the correct interpretation of the OPP, but not the other way round.

113. I accept that the phasing provided for by the OPP does involve spatially discrete phases. But that is compatible with the grant of a single permission, and does not in itself indicate the grant of several separate permissions.

114. I accept that there is some temporal differentiation in the OPP. Condition 4(c) of the permission sets separate time limits for the commencement of development in each "development plot" in accordance with s.92(5) of the TCPA 1990 (see also *Powergen UK plc v Leicester City Council* [2001] 81 P & CR 5). But this is compatible with the grant of a single planning permission. It does not point towards the grant of a severed permission.

115. Condition 2 of the OPP requires the development to be carried out in accordance with *inter alia* the phasing plan PP09. That shows the phases of the scheme but not any sequence. The operative part of the permission is also relevant to what is *authorised* by that consent. The OPP was granted for the development described in accordance with *inter alia* the Design and Access Statement. It is common ground that the OPP only authorises the delivery of phases in the order shown in figure 6.3 of the Design and Access Statement and that phases 2B and 2C are to be built before phase 3 and then phase 4 and built in accordance with the OPP (see [80] above). In my judgment these provisions are inconsistent with the grant of a severed permission or a collection of separate permissions. Alternatively, and put at its very lowest, these phasing arrangements are entirely consistent with the grant of a single, integrated planning permission. They do not amount to a contra-indication pointing to severability of the phases.

116. Returning to Mr. Strachan's analysis summarised in [90]-[93] above, the nature of the phasing is specified in the grant of permission (see e.g. the incorporation of the phasing plan PP09 and the Design and Access Statement). That is relevant to the nature and scope of the development authorised by the OPP, along with the other incorporated parameter plans and the parameters set in the Design Code Strategy. Similarly the description of the development permitted by the grant indicates maximum amounts of development types. The fact that the developer may build up to those amounts of development, and may choose to build substantially less, does not lend any support to the case advanced by Southwark and NHG. On the analysis I have already set out above, these factors are consistent with the grant of a single, indivisible planning permission. They do not point towards the grant of a severed permission, or a collection of freestanding permissions.

117. Looking at the OPP and the submissions as a whole, there is no contra-indication, let alone a clear indication, that the OPP was severable.

118. The officer's report to committee on the application for the OPP considered a range of factors relevant to the proposed development taken as a whole, including matters such as the maximum amounts of different types of floorspace, the distribution of development and character areas, maximum storey heights, phasing, infrastructure requirements, sustainability and the benefits of the scheme (see [51] above and *Hillside* at [50]). It was not suggested by Southwark or NHG that the report considered, for example, the merits of individual phases on the basis that they might subsequently be replaced by a materially different "drop in" application. It was not suggested that the position

was any different for the Environmental Statement, or any of the other documents referred to in [61] above, which were (a) considered by Southwark when it decided to grant the OPP and (b) incorporated into the operative part of the permission.

119. Accordingly, I am in no doubt that on a true construction the OPP was not severable prior to the s.96A amendment. It was a single planning permission with provisions for phasing. To the extent that the amendment made on 28 March 2023 severed the OPP, it had the effect of disapplying the *Pilkington* principle, i.e. it made it unnecessary to apply the physical impossibility test to a *future* "material" departure from the development authorised by the grant of the OPP. It therefore significantly enlarged the bundle of rights granted by that permission. In these circumstances, I agree with the parties that it must follow that this was a "material" amendment of the OPP for the purposes of s.96A of the TCPA 1990. Accordingly, Southwark's decision dated 28 March 2023 was *ultra vires* that provision.

120. On that basis the claim must be allowed. But I would add that I have strong reservations in any event about the legality of an amendment to a planning permission which simply inserts language as uncertain as the bare term "severable". There was nothing to indicate the extent to which the OPP was purportedly severed. For a large-scale development it would have been possible to conceive of many different alternatives.

121. Finally, and for completeness, I mention the decision of the Court of Appeal in *R (Fiske) v Test Valley Borough Council* [2023] EWCA Civ 1495 which was handed down after the hearing in this case. Although counsel kindly drew this to my attention, they did not suggest that it had any bearing on the issue I have to resolve. I do not think that it does.

Conclusion

122. For the above reasons the claim for judicial review succeeds. The decision dated 28 March 2023 to amend the OPP must be quashed.