Neutral Citation Number: [2019] EWHC 2587 (QB)

Case No: F90CF015

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
CARDIFF DISTRICT REGISTRY

Cardiff Civil Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 8 October 2019

Before:

HIS HONOUR JUDGE KEYSER Q.C.
sitting as a Judge of the High Court

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Between:

HILLSIDE PARKS LIMITED	**Claimant**
- and -	
SNOWDONIA NATIONAL PARK AUTHORITY	**Defendant**

- -
- -

Mr Mark Lowe QC and Mr Robin Green (instructed by **Aaron and Partners LLP**) for the **Claimant**
Mr Gwion Lewis (instructed by **Geldards LLP**) for the **Defendant**

Hearing dates: 4 and 5 September 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE KEYSER Q.C.

JUDGE KEYSER QC:

Introduction

1. The claimant, Hillside Parks Limited ("Hillside"), is the owner of a large parcel of land comprising about 29 acres at Balkan Hill, Aberdyfi ("the Site"). Hillside acquired the Site in 1988.

2. The defendant, Snowdonia National Park Authority ("the Authority"), came into existence on 23 November 1995 and became the local planning authority for the National Park that includes the Site on 1 April 1996.

3. These proceedings concern the status of planning permission granted by the Authority's predecessor as local planning authority, Merioneth County Council, in January 1967 in relation to the Site ("the January 1967 Permission") and the status of an order made by Drake J in this court on 9 July 1987 ("the 1987 Order"), when he declared that the January 1967 Permission had been lawfully granted and that the development permitted by it had been begun and might be lawfully completed at any time in the future.

4. In brief, Hillside contends that it is entitled to complete the remaining parts of the development permitted by the January 1967 Permission, because the Authority is bound by the 1987 Order and, in any event, because on its true construction the January 1967 Permission remains capable of being complied with. The Authority, to the contrary, contends that the 1987 Order was made *per incuriam* and does not bind the Authority and that the January 1967 Permission cannot now be complied with because, by reason of subsequent development of the Site pursuant to further grants of planning permission after January 1967 (the "Additional Permissions"), it is no longer possible to achieve full compliance with the January 1967 Permission.

5. I am grateful to Mr Lowe QC and Mr Green, counsel for Hillside, and to Mr Lewis, counsel for the Authority, for their helpful submissions.

The facts

Until 1987

6. The January 1967 Permission was granted by Merioneth County Council on 10 January 1967 upon the application of Hillside's predecessor in title. The application for planning permission, dated 19 December 1966, described the proposed development (Section 3) as "Clusters of residential dwellings" and stated (Section 9) that there were to be 401 dwellings. The standard form of wording on the back page of the application form, signed on behalf of the applicant, stated:

> "I/We hereby apply for permission to carry out the development described in this application and on the attached plans.
>
> I/We hereby undertake to carry out this development in all respects in conformity with the details now submitted and/or in

> accordance with the Town and Country Planning Acts and any permission granted thereunder."

Among the plans submitted with the application, only one ("the Master Plan") is relevant for present purposes. It showed the proposed siting of all 401 houses on the Site as well as the internal road network. A key on the Master Plan referred to five main types of dwelling on the Site: Type A (3-bedroom semi-detached or terrace); Type B (2-bedroom bungalow); Type C (2-bedroom flat); Type D (3-bedroom and study bedroom); and Type E (2-bedroom and study bedroom).

7. The letter dated 19 December 1966 from Mr John H. D. Madin (a planning consultant who acted for the owner of the Site and subsequently acquired the Site himself), under cover of which the application was submitted, explained:

> "The whole scheme has been designed so as to harmonise with the natural landscaping of the whole site, and to this end we have introduced a liberal amount of open space, which will be carefully maintained in conjunction with the development of the flats for the use of residents and visitors. The main lines of the public path have been retained so as to provide a further amenity to the citizens of Aberdovey and their visitors.
>
> The high land in the centre of this development overlooking the Estuary is to be retained as open space. It is proposed to construct a carefully designed gazebo from which to view the Estuary. We have tried to avoid continuous unbroken road frontages, and have clustered the dwellings in groups with the open space running between, and it would be the intention to complete each group with its landscaping as the development proceeds."

8. Merioneth County Council granted the January 1967 Permission on 10 January 1967 and expressly incorporated the application:

> "The above-named Local Planning Authority hereby grant permission for the development proposed by you in your application dated the 19th day of December 1966 of the land situate at Balkan Hill, Aberdovey by the erection of dwellinghouses and shown on the accompanying plans, subject to … the conditions specified hereunder:
>
> agreement being reached on water supply before any work is carried out."

9. Construction work on the first two houses on the Site began very shortly after the grant of permission and was soon completed. However, because of a problem with ground levels the houses were not in the position designated on the Master Plan. Accordingly, on 17 March 1967 Mr Madin applied for planning permission for the houses as built, and the permission was granted on 4 April 1967 in the following terms:

> "The above-named Local Planning Authority hereby grant permission for the development proposed by you in your application dated the 17th day of March 1967 of the land situate on the lower site of Balkan Hill development, Aberdovey by the erection of one pair of semi-detached dwellinghouses …"

10. In August 1967 Mr Madin submitted a further application, which he explained in a letter dated 30 August 1967:

> "Due to site conditions which only became apparent after the complete excavation for the first pair of houses within the old quarry, and to maintain the units as a pair as approved, it has been found necessary to further excavate.
>
> This gives an opportunity to create a further unit in the form of a three bedroom flat and would be finished in natural stone facing, to improve the appearance of the whole building.
>
> I enclose duplicate copies of my drawings nos. 587/101 and /400 indicating my proposals and would be grateful to receive your approval for this amendment to the approved designs."

Pursuant to that application, on 14 September 1967 Merioneth County Council granted permission for the development "of the land situate at Balkan Hill, Aberdovey by the erection of a three bedroom flat".

11. These were the first of the Additional Permissions. It is unnecessary to recite the subsequent planning history to 1987 in detail. Suffice it to say that in the period from April 1967 until October 1974 the local planning authority from time to time (Merioneth County Council before April 1974, and Gwynedd County Council thereafter) granted a total of eight planning permissions relating to the construction of houses, apartments and/or garages on the Site, all of them representing some kind of departure from the scheme of development set out in the Master Plan in respect of either the location or the nature of the buildings or both of them. (The last of these eight permissions, dated 14 October 1974 and the only one to be granted by Gwynedd County Council, was the approval of amendments to detailed plans for the "approved scheme at Hillside, Balkan Hill, Aberdyfi" but was given pursuant to a condition on a planning permission granted on 6 September 1966.)

12. In 1985, when seven of the total of 14 Additional Permissions had been granted, a dispute arose between Gwynedd County Council and the owner of the site at the time, Landmaster Investments Ltd ("Landmaster"). Gwynedd County Council denied that the January 1967 Permission was valid and extant. Landmaster issued a writ in the Queen's Bench Division of the High Court, claiming certain declarations: that the January 1967 Permission was lawfully granted (which in fact was never in issue); that it could be implemented in its entirety without the need for further permission or approval; that the development permitted by it had begun and might be lawfully completed at any time in the future; and that the condition in the January 1967 Permission was satisfied if, prior to the particular part of the development thereby permitted being undertaken, the agreement of the responsible water supply authority was obtained.

13. By its defence, Gwynedd admitted that the January 1967 Permission had been lawfully granted but averred that it had lapsed because the development permitted by it had not begun or, alternatively, had not been lawfully begun in accordance with the condition before 1 April 1974, which was taken as the date by which the permission had to be implemented. There was also a dispute as to the requirements of the condition; that dispute has no bearing on this case.

14. The action came on for trial in the Queen's Bench Division before Drake J over several days in June and July 1987. He gave judgment on 9 July 1987. In short, he accepted Landmaster's case and granted the relief sought.

The 1987 Judgment and Order

15. In his judgment, Drake J explained the issues before him, which concerned the requirements of effective implementation of the January 1967 Permission and, in particular, the meaning of the condition regarding the water supply (at page 8, he said that the construction of the condition was "crucial to the outcome of [the] action"). He summarised the planning history and the initial excavation works that took place in early 1967, and at pages 14 and 15, he continued:

> "What happened was that when the site for the first two houses was excavated it was found to be the site of an old quarry; so that the firm ground levels were not at all what they had appeared to be. This created difficulty in siting the two houses as shown on the Master Plan. Mr Madin found that they could be satisfactorily built by altering their position and in some respects their design. Accordingly, on 17 March 1967 he applied for what was, quite clearly, a variation of the consent granted on 10 January 1967. It was dealt with speedily by the planning authority and consent was given on 4 April 1967. I have no doubt at all that everyone regarded this as what it in fact was, namely a variation of the approved Master Plan. The planning authority gave it the same reference as the main consent. Subsequently a further variation in the design was applied for and approved, so that a three bedroomed flat was added to the unit. Again I am satisfied that this was rightly regarded as a variation of the main consent.
>
> Development proceeded very slowly indeed, and to date only 19 dwelling units have been built; and in some cases the units built were as substantial variations from the Master Plan.
>
> In place of the originally proposed next cluster of four houses there were built two separate units comprising flats over garages; and in a different location. These two units were each the subject of planning consent. The planning authority gave these consents a different reference number to that of the main consent. But in each case the applications were stated to be granted as a variation of the plans already approved, and in the whole context of the development I think this was in fact what they were.

> Finally, in place of the originally proposed four pairs of dwelling units in one block there were built eight flats and a garage. The eight flats were built on the same location as the originally proposed building. I find this, also, to be no more than a variation of the original main consent."

Drake J found as a fact that a lot of the work on the 19 houses had been done before 1 April 1974, "which is a relevant statutory date for considering whether the planning consent has been implemented". He continued at page 15:

> "Although these buildings had been the subject of individual planning consents, I am satisfied that each such consent was merely a variation of the original consent of 10 January 1967. This finding accords with the view of Mr Lazarus [who in 1967 was the Deputy County Planning Officer of Merioneth County Council], who gave evidence of some of the history of these variations for which consent was granted."

16. Drake J then found that there had been compliance with the condition in the January 1967 Permission. At page 20 he said:

> "Finally I add that although development has gone on very slowly and with a number of variations, the Master Plan remains in force, and if the development is allowed to progress further it can be completed substantially in accordance with the rest of the Master Plan."

17. I shall not refer at length to the rest of the judgment but need only note that, turning to address the proper construction of the condition in the January 1967 Planning Permission, Drake J held that the only relevant and admissible materials available for the purposes of construction were the permission itself, the application and the Master Plan, as well as the relevant statutory framework. (The judge's actual construction of the condition has no bearing on the present case.)

18. The Order made on 9 July 1987 pursuant to the judgment ("the 1987 Order") contained a number of declarations. The first was that the January 1967 planning permission was lawfully granted. The second was that the January 1967 permission was a full permission, which could be implemented in its entirety without the need to obtain any further planning permission or planning approval of details. Of most importance for the purposes of the present case was the third declaration:

> "3. That the development permitted by the January 1967 permission has been begun; and that it may lawfully be completed at any time in the future."

The fourth declaration concerned the condition and I need not refer to it further.

19. Two relevant matters concerning the erection of the 19 houses pursuant to the Additional Permissions should be noted in connection with the declarations. First, Drake J clearly considered that the works on those houses prior to April 1974 was work done under the January 1967 Permission; it was, for that reason, part of the

justification for the finding that the January 1967 Permission had been implemented before it expired. Second, it necessarily follows from the declaration that the fact that the 19 houses had been built either wholly or partly pursuant to the Additional Permissions already granted and that they were not in accordance with the Master Plan did not affect the ability lawfully to proceed with development in accordance with the January 1967 permission.

Since 1987

20. Nothing of relevance to this case happened for several years after the 1987 Order was made. No further Additional Permissions were granted before 1996, and any work that took place on the Site during that period (it is unclear whether there was any such work) was pursuant to the Additional Permissions granted up to 1974.

21. The Authority was established in 1996 pursuant to the Environment Act 1995. Its statutory aims are to conserve and enhance the natural beauty, wildlife and cultural heritage of the Snowdonia National Park and to promote opportunities for the understanding and enjoyment by the public of the special qualities of the area of the Snowdonia National Park. In April 1996 the Authority succeeded Gwynedd County Council as the local planning authority for the National Park.

22. Since April 1996 the Authority has granted the following Additional Permissions:

- 27 June 1996: permission for erection of a single dwellinghouse as a "variation" to the January 1967 Permission;
- 20 June 1997: permission for erection of "two terraces forming: 1 attached dwelling, six apartment units and 8 garages with apartments over", as a "variation" to the January 1967 Permission;
- 18 September 2000: permission for erection of a two-storey detached dwellinghouse and garage on Plot 5 on the Site;
- 24 August 2004: permission for erection of five detached houses and five garages, as a "variation" to the January 1967 Permission;
- 4 March 2005: permission for erection of a two-storey dwelling and detached garage on Plot 17 on the Site;
- 25 August 2005: permission for erection of a detached dwelling at Plot 3 of "Phase 1" on the Site;
- 20 May 2009: permission for erection of "3 pairs of dwellings" on the Site;
- 5 January 2011: permission for erection of one dwelling at Plot 3 on the Site.

Each of these Additional Permissions was a grant of full planning permission for the development mentioned in it, and each has been implemented.

23. On 23 May 2017 the Authority wrote to Mr Christopher Madin, the sole director of and shareholder in Hillside, which had acquired the Site in 1997. (Mr Madin is the son of Mr John Madin, already mentioned.) The letter said:

> "The Authority is of the view that it will not be possible to implement the [January 1967 Permission] further. This is because the developments carried out to date, in accordance with later planning permissions which have been granted and implemented, mean it is now physically impossible to implement the original planning permission further.
>
> The Authority has recently sought Counsel's opinion with regards to the planning situation at this site and has received advice, given the situation set out above, that [the January 1967 Permission] is no longer capable of being implemented further.
>
> Should you believe that there is planning permission for further development of the site, we would advise you to submit an application for a certificate of lawfulness of proposed use or development under section 192 of the Town and Country Planning Act 1990.
>
> In the meantime you are required to immediately stop all works until the planning situation has been regularised. Should you fail to immediately stop works at the site, the Authority will take enforcement action."

24. The parties proceeded to exchange opinions from their respective counsel, which largely foreshadowed the arguments made in these proceedings. The opinions are in evidence before me, but I shall not refer to them here as they have no bearing on my decision. The question for me is what the legal position actually is, not what counsel have opined it to be. Suffice it to say that neither side managed to persuade the other that it was in error. Hillside put further development of the Site on hold. A total of 41 dwellings had been completed and a further six were under construction; I shall say more below about the development that has occurred.

The present claim

25. Hillside commenced the present proceedings by the issue of a Part 8 claim form on 20 February 2019. The Details of Claim summarised the factual background and then succinctly stated the case that Hillside has advanced at trial:

> "14. Unless set aside by a court of competent jurisdiction, the judgment and declarations of Mr Justice Drake given on 9 July 1987 are binding on the defendant.
>
> 15. Furthermore, the arguments advanced by the defendant through the opinion of Mr Lewis could have been made to

> Mr Justice Drake, but were not. The matter is now res judicata.
>
> 16. Further or alternatively, properly construed, the January 1967 Permission permits a number of independent acts of development. The subsequent grants of planning permission for what are in effect variations of the development shown in the 1967 Master Plan do not prevent the remainder of the development from being completed. Accordingly, the arguments now advanced by the defendant would have made no difference to the outcome of the claim before Mr Justice Drake.
>
> 17. For these reasons the claimant seeks the following declarations:
>
> (1) The defendant is bound by the judgment and declarations of Mr Justice Drake given on 9 July 1987 in claim no. 1985 L No. 1504.
>
> (2) The [January 1967 Permission] is a valid and extant permission.
>
> (3) The said planning permission may be carried on to completion, save insofar as development has been or is carried out pursuant to subsequent planning permissions granted for alternative residential development."

26. Each side filed and served witness statements. I need not refer to them here; their relevant contents are summarised elsewhere in this judgment. The parties did not seek to adduce oral evidence at the trial of the claim, which was dealt with by written and oral submissions.

The Issues

27. The parties formulated and ordered the issues in the case rather differently, though they did not differ in essentials. For convenience of exposition, I shall for the present state the issues as follows:

1) Was Drake J wrong in law to hold that the remainder of the development permitted by the January 1967 Permission could lawfully be completed at any time in the future?

2) Is the Authority still bound by the declaration in the 1987 Order that the January 1967 Permission "may lawfully be completed at any time in the future"?

However, the second issue itself breaks down into two questions:

2a) Does the declaration in the 1987 Order bind the Authority according to its terms regardless of whether it was wrongly made?

2b) Do events since the 1987 Order mean that the development permitted by the January 1967 Permission may not now be completed lawfully, so that (whether rightly or wrongly made) the declaration can no longer bind according to its terms?

First Issue: Was Drake J wrong in law?

28. A landowner is entitled to make, and a local planning authority is required to deal with, any number of applications for planning permission to develop the same land, even if the proposed developments are inconsistent with one another. The facts of the present case concern the position where development carried out under one grant of planning permission is inconsistent with future development under another grant of planning permission in respect of the same land. The Authority's case is that the carrying out of development in accordance with the Additional Permissions has the effect that compliance with the January 1967 Permission is impossible and that therefore no development pursuant to the January 1967 Permission would be lawful. The Authority relies on a line of authorities extending both before and after the 1987 Order.

29. In *Pilkington v Secretary of State for the Environment* [1973] 1 WLR 1527, the Divisional Court considered a simple case of two planning permissions for inconsistent developments. The landowner built a bungalow on part of his land pursuant to a grant of planning permission (number 756) that contained a condition that the bungalow be the only dwelling to be built on the land; the permission was construed as meaning that the bungalow would have the rest of the land as its curtilage (see 1530A-B). The landowner subsequently began to build another bungalow on a different part of his land pursuant to an earlier planning permission (number 601) for a bungalow and a garage; the earlier permission contemplated the use of the remainder of the land as a smallholding and was to be construed as permitting the building of a bungalow upon a smallholding (see 1529G). The Court held that the development carried out pursuant to the later permission meant that the development permitted by the earlier permission was no longer capable of implementation. Having identified the issue in the case, Lord Widgery C.J., with whom Bridge and May JJ agreed, said at 1531E – 1532C:

> "There is, perhaps surprisingly, not very much authority on this point which one would think could often arise in practice, so I venture to start at the beginning with the more elementary principles which arise. In the first place I have no doubt that a landowner is entitled to make any number of applications for planning permission which his fancy dictates, even though the development referred to is quite different when one compares one application to another. It is open to a landowner to test the market by putting in a number of applications and seeing what the attitude of the planning authority is to his proposals.

> Equally it seems to me that a planning authority receiving a number of planning applications in respect of the same land is required to deal with them, and to deal with them even though they are mutually inconsistent one with the other. Of course, special cases will arise where one application deliberately and expressly refers to or incorporates another, but we are not concerned with that type of application in the present case.
>
> In the absence of any such complication, I would regard it as the duty of the planning authority to regard each application as a proposal in itself, and to apply its mind to each application, asking itself whether the proposal there contained is consistent with good planning in the factual background against which the application is made.
>
> I do not regard it as part of the duty of the local planning authority itself to relate one planning application or one planning permission to another to see if they are contradictory. Indeed I think it would be unnecessary officiousness if a planning authority did such a thing. They should regard each application as a proposal for a separate and independent development, and they should consider the merits of the application upon that basis. What is the consequence here? The fact that application 756 related to a bungalow central in the site, and the fact that it contemplated only one bungalow on the whole site, and the fact that that permission has now been implemented, means in my judgment that one must look back at permission 601, and see whether in fact that development there contemplated can now be carried out consistently with the development sanctioned in the implemented application number 756.
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> For this purpose I think one looks to see what is the development authorised in the permission which has been implemented. One looks first of all to see the full scope of that which has been done or can be done pursuant to the permission which has been implemented. One then looks at the development which was permitted in the second permission, now sought to be implemented, and one asks oneself whether it is possible to carry out the development proposed in that second permission, having regard to that which was done or authorised to be done under the permission which has been implemented."

At 1532H – 1533A, Lord Widgery C.J. made it clear that his conclusion that the development identified in the earlier permission could not be carried out did not rest on any election or abandonment on the part of the landowner, nor even on the condition in the later permission: "I base my decision on the physical impossibility of carrying out that which was authorised in number 601."

30. The decision in *Pilkington* lies at the heart of the Authority's case. Hillside acknowledges "that what has been constructed since 1987 does not accord with the approved Master Plan for the January 1967 Permission and it is not therefore physically possible to build out the entirety of the scheme of development approved in 1967" (second witness statement of Christopher John Madin, paragraph 3). Therefore, contends the Authority, the *ratio* of the decision in *Pilkington* is directly in point and means that it is not lawful to carry out the development permitted by the January 1967 Permission.

31. *Pilkington* was approved by the Court of Appeal in *Hoveringham Gravels Ltd v Chiltern District Council* (1977) 76 L.G.R. 533. Both decisions were approved by the House of Lords in *Pioneer Aggregates (U.K.) Ltd v Secretary of State for the Environment* [1985] AC 132. The relevant part of the speech of Lord Scarman (with whom the other members of the Judicial Committee agreed) is at 144B – 145C:

> "The third class of case comes nearer to the facts and law of the present appeal. These cases are concerned not with existing use rights but with two planning permissions in respect of the same land. It is, of course, trite law that any number of planning permissions can validly coexist for the development of the same land, even though they be mutually inconsistent. In this respect planning permission reveals its true nature—a permission that certain rights of ownership may be exercised but not a requirement that they must be.
>
> But, what happens where there are mutually inconsistent permissions (as there may well be) and one of them is taken up and developed? The answer is not to be found in the legislation. The first reported case appears to have been *Ellis v. Worcestershire County Council* (1961) 12 P&CR 178, a decision of Mr Erskine Simes QC to which Lord Widgery CJ referred with approval in what must now be regarded as the leading case on the point, *Pilkington v. Secretary of State for the Environment* [1973] 1 WLR 1527.
>
> Mr Erskine Simes, in a passage which Lord Widgery CJ was later to describe as exactly illustrating the principle, said, at p.183:
>
> > 'If permission were granted for the erection of a dwelling house on a site showing one acre of land as that to be occupied with the dwelling house, and subsequently permission were applied for and granted for a dwelling house on a different part of the same acre which was again shown as the area to be occupied with the dwelling house, it would, in my judgment, be impossible to construe these two permissions so as to permit the erection of two dwelling houses on the same acre of land. The owner of the land has permission to build on either of the sites, but wherever he places his house it must be occupied with the whole acre.'

> *Pilkington* was a Divisional Court decision. It has been approved by the Court of Appeal in *Hoveringham Gravels Ltd. v. Chiltern District Council* (1977) 76 LGR 533. Its facts were that the owner of land was granted planning permission to build a bungalow on part of the land, site 'B'. It was a condition of the permission that the bungalow should be the only house to be built on the land. He built the bungalow. Later the owner discovered the existence of an earlier permission to build a bungalow and garage on another part of the same land, site 'A'. That permission contemplated the use of the rest of the land as a smallholding. He began to build the second bungalow, when he was served with an enforcement notice alleging a breach of planning control. The Divisional Court held that the two permissions could not stand in respect of the same land, once the development sanctioned by the second permission had been carried out. The effect of building on site 'B' was to make the development authorised in the earlier permission incapable of implementation. The bungalow built on site 'B' had destroyed the smallholding: and the erection of two bungalows on the site had never been sanctioned. This was certainly a common sense decision, and, in my judgment, correct in law. The *Pilkington* problem is not dealt with in the planning legislation. It was, therefore, necessary for the courts to formulate a rule which would strengthen and support the planning control imposed by the legislation. And this is exactly what the Divisional Court achieved. There is, or need be, no uncertainty arising from the application of the rule. Both planning permissions will be on a public register: examination of their terms combined with an inspection of the land will suffice to reveal whether development has been carried out which renders one or other of the planning permissions incapable of implementation."

32. The decisions in *Pilkington, Hoveringham* and *Pioneer Aggregates* all pre-dated the judgment of Drake J and the 1987 Order. So far as appears from his judgment, none of the cases were cited to him.

33. Some 15 years later, the House of Lords decided *Sage v Secretary of State for the Environment, Transport and the Regions* [2003] UKHL 22, [2003] 1 WLR 983. The case concerned enforcement action in respect of a partially completed dwelling for which there was no grant of planning permission. The central issue on the appeal was whether the building operation was "substantially completed" for the purpose of section 171(B)(1) of the Town and Country Planning Act 1990. The other members of the Judicial Committee agreed with the reasoning of Lord Hobhouse of Woodborough, who said at [23] – [25]:

> "23. When an application for planning consent is made for permission for a single operation, it is made in respect of the whole of the building operation. There are two reasons for this. The first is the practical one that an application for permission partially to erect a building would, save in exceptional

> circumstances, fail. The second is that the concept of final permission requires a fully detailed building of a certain character, not a structure which is incomplete. This is one of the differences between an outline permission and a final permission: section 92 of the Act. As counsel for Mr Sage accepted, if a building operation is not carried out, both externally and internally, fully in accordance with the permission, the whole operation is unlawful. She contrasted that with a case where the building has been completed but is then altered or improved. This demonstrates the fallacy in Mr Sage's case. He comes into the first category not the second.
>
> 24. The same holistic approach is implicit in the decisions on what an enforcement notice relating to a single operation may require. Where a lesser operation might have been carried out without permission or where an operation was started outside the four-year period but not substantially completed outside that period, the notice may nevertheless require the removal of all the works including ancillary works: *Ewen Developments Ltd v Secretary of State for the Environment* [1980] JPL 404; *Howes v Secretary of State for the Environment* [1984] JPL 439, Hodgson J; *Somak Travel Ltd v Secretary of State for the Environment* [1987] JPL 630, Stuart-Smith J. The first of these upheld a requirement that the whole of an embankment be removed. In the second the inspector had directed himself that the removal of a hedge and the creation of an access was 'a continuous operation and each step in the work prolong[ed] the period for serving the enforcement notice as regards every earlier step of the development': the judge upheld the notice. The third case involved an unauthorised change of use case from residential to commercial use. The notice not only required the cessation of the commercial use but also the removal of an internal staircase which had been put in to facilitate that use though in itself the staircase had not required permission.
>
> 25. These decisions underline the holistic structure of planning law and contradict the basis upon which the Court of Appeal reached its decision in favour of Mr Sage."

34. *Sage* concerned a single building; the circumstances are very different from those of the present case. However, the Authority relies on Lord Hobhouse's judgment as confirmation of the approach in the earlier authorities already mentioned and as emphasising the need for development to be carried out "fully in accordance with" the full planning permission under which it is purportedly carried out. In that regard, the Authority further relies on the decision of Hickinbottom J in *Singh v Secretary of State for Communities and Local Government* [2010] EWHC 1621 (Admin). That case concerned two grants of planning permission in respect of the same land, one in 2003 and the other in 2005. The earlier permission was for construction of an extension to an existing house. The later permission was for construction of a new

dwelling alongside the existing house. Some limited works were done pursuant to the 2003 permission; the development thereby permitted was commenced. Then the development permitted by the 2005 permission was commenced and completed. The question arose whether the development permitted by the 2003 permission could lawfully be completed. Hickinbottom J considered the earlier authorities and, having referred to the "principle" stated by Lord Scarman in *Pioneer Aggregates* that proceeding with one development might make it impossible to implement development authorised by another permission, he made four observations in respect of that principle:

> "18. First, the principle derives from the general law. Of course, in a specific case, the terms of the planning permissions granted may be particular. They may be crucial.
>
> 19. Second, of the subsequent development, Lord Scarman used the term 'incapable of *implementation*' (emphasis added). 'Implementation' is a term of art in planning. A development does not have to be completed for the permission under which it is done to have been 'implemented'. There is no dispute before me that the 2003 Permission had been both 'commenced' and 'implemented' by the operations under it which had been performed. The Inspector found it so. The issue in this case is not whether the 2003 Permission can be lawfully *implemented*, but rather whether or not the development or building operation permitted by it can be lawfully *completed*, having regard to the circumstances as they appeared to the Inspector at the time of his decision, including of course the operations which had already been done in pursuance of development permitted by the 2005 Permission.
>
> 20. Third, reflecting the holistic structure of the planning regime, for a development to be lawful it must be carried out fully in accordance with any *final* permission under which it is done, failing which the whole development is unlawful (*Sage* per Lord Hobhouse, giving the only substantive speech, at [23] -[25]). Taken with my second observation, that means that if a development for which permission has been granted cannot be completed because of the impact of other operations under another permission, that subsequent development as a whole will be unlawful.
>
> 21. Fourth, Miss Clover for the Claimant expressly relies upon the *de minimis* principle. Whilst there is no doubt room for that principle in relation to changes to a development for which planning permission has been granted (see for example *Lucas* at page 114), Miss Clover conceded that a change to a development for which permission has been granted is not allowed under that permission merely because it is minor or immaterial. That concession was well made. On application by a person with an interest in the relevant land, section 96A of the 1990 Act (enacted in the light of the decision in *Sage*) gives

> a planning authority express power to change a planning permission if they are satisfied that that change is not material. Such a provision would be otiose if they could make such (immaterial) changes in any event. Whether a change is material or not is a matter of fact and degree for the authority, which must have regard to the effect of the change in making that decision. If the change is material, then it requires the consent of the planning authority following an application under section 73, which, for self-evident reasons, requires a more sophisticated procedure. However, any change—material or not—requires the consent of the planning authority under section 73 or section 96A."

For the Authority, Mr Lewis relies in particular on [20] as confirming that a development will be unlawful unless it is carried out *fully* in accordance with any final permission under which it is done and, therefore, that a development will be unlawful if it cannot be completed because of the impact of operations carried out under another permission. That, he submits, is precisely the present case.

35. In *Singh*, Hickinbottom J recorded the submission on behalf of the landowner that it was not necessary to implement the 2003 permission "in its entirety, exactly as it appears in the application and plans as granted" and that there was "a sliding scale based on fact and degree, and common sense, as to whether what is proposed to be implemented is substantially the same as the originally permission envisaged (sic), or whether it is so different that it cannot really be said that the original permission is being implemented at all." The judge continued:

> "23. Although [counsel for the landowner] concedes that, 'The driveway and garden layout are no longer physically capable of being implemented as shown on the plan and application of [the 2003 Permission]', it is sufficient, she submits, that the development can be 'substantially implemented as originally envisaged' (written submissions, conclusions (iv) and (v)): and the Inspector erred in law finding otherwise.
>
> 24. I do not find this submission compelling. It is based upon the false premise that, where a *final* planning permission has been granted (as it has been under the 2003 Permission), it is not necessary to implement that permission '… in its entirety, exactly as it appears in the application and plans as granted'. But that is precisely what *is* necessary.
>
> 25. As I have indicated, as a matter of law, a development generally must be regarded holistically and, where some parts of it are physically incapable of being implemented (or completed), then the whole development becomes unlawful. Of course, on its proper construction, a particular planning permission may authorise the carrying out of a number of independent acts of development. …"

For the Authority, Mr Lewis relies particularly on [24] and on the first sentence of [25]. (I shall refer to the remaining part of [25] later in this judgment.)

36. In the light of these authorities, the Authority's submission includes two slightly different, though closely related, contentions. First, it is now impossible to carry out the *remaining* development under the January 1967 Permission in accordance with its terms; therefore it is impossible to complete the development in accordance with the permission. Second, even if every remaining item within the entire development could be carried out in strict compliance with the January 1967 Permission, yet the entire development would not be fully compliant with the January 1967, by reason of the departures that have *already* been made, and it would therefore be unlawful in its entirety.

37. The first contention concerns the effect of what has already been put on the land on the ability to comply with the January 1967 Permission in the future on the undeveloped parts of the Site. At the time of the hearing before Drake J, only a few houses in the extreme south of the Site had been built, all of them pursuant to Additional Permissions. The evidence shows that the positions of some of those houses conflicts not only with their positions as shown on the Master Plan but also to some extent with the positions of estate roads and a footpath as shown on the Master Plan. More important, perhaps, is what has happened since 1987. This later development is all in the north-west part of the Site and, again, has all been carried out pursuant to Additional Permissions. The easternmost row of terraced houses in this later development has been built across the positions shown on the Master Plan for two distinct rows of houses and an access cul-de-sac between them. To the north-west of these houses, an estate road has been constructed along the line of part of a row of terraced houses shown on the Master Plan; the estate road also runs through the positions of another house and garden shown on the Master Plan. Other examples could be given here and are given in the first statement of Mr Jonathan Cawley (the Authority's director of Planning and Land Management) of the knock-on effect of what has already been done on the ability to develop the rest of the Site in accordance with the January 1967 Permission. The result is that, although there are large parts of the development shown on the Master Plan that could be carried out in accordance with the Master Plan, there are other parts, particularly in the north-west of the Site, where further development will necessarily involve departure from what is shown on the Master Plan.

38. The second contention goes further. Even if what had been done in the past had no effect on the ability to develop the rest of the Site in accordance with the Master Plan, yet the result of the entire development would not comply with the January 1967 Permission for the simple reason that what has already been done does not comply with it. Mr Lewis did not shy away from the implication of this contention: from the very moment when the first house was built on the Site in the spring of 1967 in a position different from that shown on the Master Plan, it has been impossible to carry out the development in full compliance with the January 1967 Permission; therefore further development under that permission would be unlawful.

39. For Hillside, Mr Lowe QC and Mr Green do not seek to deny the correctness of the approach in the cases from *Pilkington* to *Singh*, but they submit that the approach is not properly applicable to a composite development such as the present and that what has rightly been seen as a common-sense solution in *Pilkington* to a lacuna in the

legislation would be contrary to common sense if pressed into use in the circumstances of this case. It was right that the line of authorities relied on by the Authority were not cited to Drake J and he was correct to analyse the case as he did.

40. Hillside relies on the decision of Winn J in *F. Lucas & Sons Ltd v Dorking and Horley Rural District Council* (1964) 17 P&CR 111 as authority for the proposition that, as a matter of construction, a permission may permit a number of separate acts of development, so that a later permission varying one element of a larger scheme will not prevent the remainder of the scheme from being implemented. In 1952 the plaintiff landowner was granted planning permission to develop the land by the erection of twenty-eight houses in a cul-de-sac layout, with fourteen houses on either side of the cul-de-sac. Subsequently, in 1957, the plaintiff was granted planning permission to develop the same land by the erection of six detached houses fronting the main road. The plaintiff erected two detached houses in accordance with the 1957 permission and then proposed to construct a cul-de-sac and erect fourteen houses on one side of it (a side not taken up with the two detached houses) pursuant to the 1952 permission. Winn J held that the plaintiff could proceed as it proposed, because the 1952 permission was to be construed not as a permission to develop the plot as a whole and in accordance with the complete layout there shown, but rather as permission for *any* of the development comprised in it. He said at 116-117:

> "It seems to me that such development as is contemplated would be permitted and would be development permitted by the 1952 planning permission. It has been said that there are inconveniences which would arise if that be the right view; it has been said, on the other hand, that there would be inconveniences if it were not the right view. I do not propose to enumerate all those considerations. Quite a number of them have been raised and canvassed before the court. The more basic matter, I think, is that, whilst a planning authority may well have as its object in granting planning permission for a contemplated housing estate upon a lay-out, considered by the planners, the achievement of a whole, it does not follow as a matter of law that development conforming with that lay-out is only permitted if the whole lay-out is completed and conditionally upon its completion. The motive for acceptance of a change of use—for example, from agricultural land to residential use—may well be the achievement by the planning authorities, in their area of jurisdiction, of a well-laid-out, symmetrical, balanced housing estate; but, as I see it, those are matters of motivation, matters of planning policy which operate in the minds of the planning authorities, but are not the subject or defining scope of the planning permission which for those reasons they see fit to grant. The authorities do not permit the development of a housing estate of, e.g. , twenty-eight houses, they permit the development of sites of land delineated upon the plan respectively and separately by the erection upon them of dwelling-houses to be occupied as such with those areas of land, contemplating that cumulatively such items or exercises of development will produce the intended housing estate.

> What would be contrary to the statute, unless done in pursuance of planning permission, would be the erection of any one of those houses, or occupancy of any building erected upon any of these sites, otherwise than in conjunction with the area of land shown on the application or otherwise than for use as a dwelling-house.
>
> Without, as I say, going into any detailed consideration of inconvenience, I think that it is right to approach this problem on the basis of an assumption that Parliament cannot have intended to leave individual owners of separate plots comprised in the contemplated total housing scheme dependent upon completion of the whole of the scheme by the original developer, or by some purchaser from him, so that they would be vulnerable, were the whole scheme not completed, separately to enforcement procedure which might deprive them of their houses and of the money which they would have invested in those houses, whether or not they built them themselves."

In *Lucas*, the 1952 permission was construed as giving discrete grants of planning permission for individual houses. (The concern expressed by Winn J regarding the position of individual householders does not apply in this case, because each completed house at the Site has been erected pursuant to an Additional Permission and any house erected in the future will be immune from enforcement action provided it is erected in accordance with a valid and subsisting planning permission.)

41. The approach in *Lucas* is, in my judgment, very different from that adopted in the later cases from *Pilkington* onwards, and it is notable that *Lucas* has been treated warily in the three cases cited to me in which it received judicial consideration. In *Pilkington*, Lord Widgery CJ said at 1533-4:

> "Before I complete this judgment I ought briefly to refer to the two authorities to which I have had regard in reaching the conclusions already expressed. The first is a decision of Winn J in *F. Lucas & Sons Ltd v Dorking and Horley Rural District Council* (1964) 62 LGR 491. That was a rather exceptional case where planning permission had been granted for the erection of a substantial number of houses in conformity to a layout plan which had accompanied the application. Later a further permission was granted for the development of two houses on part of the land contemplated in the first permission, but in a manner inconsistent with the layout prescribed in the first permission. Winn J had to consider whether, those two houses having been built in implementation of the second permission, it was still open to the owner of the rest of the land to develop it in accordance with the original permission. He came to the conclusion that it was, but as I understand his judgment, for the reason that he construed the first planning permission as authorising the carrying out of a number of independent acts of development, and taking that view it

> naturally followed that the implementation of the second permission did not deprive the owner of the rest of the land from carrying out the independent acts of development authorised on such part of the site as remained under his control.
>
> More helpful I find the second authority to which we have been referred, and an authority on which the Secretary of State himself relied, that is *Ellis v Worcestershire County Council* (1961) 12 P&CR 178, a decision of Mr Erskine Simes QC. I refer to this for one passage which seems to me exactly to express the conclusion that I have independently reached in regard to the propriety of endeavouring to implement the second conflicting planning permission. He said, at p. 183:
>
> > 'If permission were granted for the erection of a dwelling house on a site showing one acre of land as that to be occupied with the dwelling house, and subsequently permission were applied for and granted for a dwelling house on a different part of the same area which was again shown as the area to be occupied with the dwelling house, it would, in my judgment, be impossible to construe these two permissions so as to permit the erection of two dwelling houses on the same acre of land. The owner of the land had permission to build on either of the sites, but wherever he places his house it must be occupied with the whole acre.'
>
> That exactly illustrates the principle upon which I would base my decision in this case and in the result I would regard the Secretary of State's decision as showing no error of law and I would dismiss the appeal."

In *Hoveringham Gravels*, Roskill LJ said at 302:

> "The appellants relied upon a decision of Winn J in *F. Lucas & Sons Ltd v Dorking and Horley Rural District Council* (1966) [sic] 17 P&CR 111. But there the partial development proposed was held to be comprised within the planning permission originally granted. This decision was subsequently treated by the Divisional Court in *Pilkington v Secretary of State for the Environment* [1973] 1 WLR 1527, 1533, (rightly, if we may respectfully say so) as 'a rather exceptional case'. In *Pilkington's* case it was held that where one of a number of grants of planning permission had been implemented, it was not thereafter permissible for the landowner to implement another grant of planning permission which was inconsistent with the permission already implemented. We respectfully agree with and adopt the reasoning in the judgment of Lord Widgery CJ."

Finally, in *Singh* Hickinbottom J said at [25], which I have so far quoted only in part:

> "As I have indicated, as a matter of law, a development generally must be regarded holistically and, where some parts of it are physically incapable of being implemented (or completed), then the whole development becomes unlawful. Of course, on its proper construction, a particular planning permission may authorise the carrying out of a number of independent acts of development. That was found by Winn J to be the case in *Lucas* (see *Pilkington* per Lord Widgery at page 1533H). But *Lucas* was an exceptional case (*Pilkington* at page 1533F), and in this case it was not suggested (nor could it be properly suggested) by Miss Clover that the development permitted by the 2003 Permission was severable in that way. Miss Clover submitted that the driveway and landscaping elements of that permission were severable, only in the sense that they were such unimportant elements of the development as to be *de minimis*."

42. For Hillside, Mr Lowe and Mr Green rightly point out that *Lucas* has never been overruled or disapproved. However, that is only of limited assistance to Hillside. *Lucas* is authority for the proposition that, where on its true construction a planning permission authorises a number of independent acts of development, each such act will be lawful if carried out in accordance with the permission, regardless of whether any other such act is carried out at all or in accordance with the permission. Hickinbottom J appears implicitly to have accepted the correctness of that proposition in *Singh* and I see no reason to doubt it. However, both the dicta in *Pilkington, Hoveringham Gravels* and *Singh* and the approach in the line of authorities of which they form part show that the application of the proposition is very narrow and that grants of planning permission will generally and save in exceptional cases be construed holistically. I think it unlikely that *Lucas* would be decided in the same way today, though it is unnecessary to reach a conclusion on the point.

Conclusions on the first issue

43. I shall set out the steps in my reasoning on the first issue in some detail.

44. First, in my judgment *Lucas* does not apply to the present case. I see no basis for construing the January 1967 Permission as authorising independent acts of development, however many such acts might be identified. Rather it provides for a scheme of development of a housing estate comprising dwellings, amenity space and access roads. It is true that the permission refers to "clusters of dwellings", but that is no more than a reference to the fact that the applicant had "clustered the dwellings" (as mentioned in Mr John Madin's letter of 19 December 1996) and no more indicates that each cluster was a separate development than mention of such-and-such a number of houses would indicate that each house was a separate development. The application was for a "whole scheme" (in the words, again, of Mr Madin's letter), which was clearly designed as such, and the permission clearly embodied the decision that the scheme shown on the Master Plan was coherent and acceptable as a scheme, not that it represented a potpourri from which the landowner could make a selection as it chose.

45. Second, accordingly, in the light of the authorities discussed above, development would only be authorised by the January 1967 Permission if it were carried out fully in accordance with that permission. Deviation in any material respect from the Master Plan (see further below) would mean that the January 1967 Permission provided no legal authority for any part of the development shown on the Master Plan.

46. Third, development carried out in accordance with an Additional Permission would be lawful by reason of such an Additional Permission although it was not in accordance with the Master Plan.

47. Fourth, in accordance with the principles established in the case-law discussed above, the fact that development already carried out in accordance with Additional Permissions is materially inconsistent with the Master Plan will *prima facie* mean that no further development can be carried out pursuant to the January 1967 Permission on the simple ground that the totality of the development could not be carried out wholly in accordance with the January 1967 Permission. This is so by reason of the fact of past departures, regardless of whether every outstanding part of the development on the Master Plan could be carried out without further departure from the Master Plan: the existing departures from the January 1967 Permission would *prima facie* mean that the entire development would necessarily involve an unlawful departure from that permission.

48. Fifth, however, the fourth conclusion is only provisional; hence "*prima facie*". Drake J's decision will have been consistent with planning law (at least, so far as purely "backward-looking" considerations are concerned) if it is justified on the basis that the Additional Permissions granted before his decision were, on their true construction, variations of the January 1967 Permission. For the Authority, Mr Lewis submitted that this cannot be the case, because the planning legislation makes no provision for variations of planning permissions. Although it is correct that it is strictly improper to speak of "variations" of permissions, I do not find that objection persuasive. I can see no reason why a grant of permission might not, on its true construction, authorise development in accordance with an earlier permission (e.g. the Master Plan) but with a specified modification. As the passages I have quoted from his judgment clearly show, this is how Drake J construed the Additional Permissions: not merely as free-standing permissions but as authorising modifications of the previously approved development. In my judgment, the question in this as in every such case is whether a particular planning permission is properly capable of being construed in that way.

49. The principles of construction of a grant of planning permission were set out by Keene J in *R v Ashford Borough Council, ex parte Shepway District Council* [1998] EWHC Admin 488, [1999] PLCR 12, at [27]:

> "The legal principles applicable to the use of other documents to construe a planning permission are not really in dispute in these proceedings. It is nonetheless necessary to summarise them:
>
> 1. The general rule is that in construing a planning permission which is clear, unambiguous and valid on its face, regard may

> only be had to the planning permission itself, including the conditions (if any) on it and the express reasons for those conditions: see *Slough Borough Council v Secretary of State for the Environment* (1995) JPL 1128, and *Miller-Mead v Minister of Housing and Local Government* [1963] 2 QB 196.
>
> 2. This rule excludes reference to the planning application as well as to other extrinsic evidence, unless the planning permission incorporates the application by reference. In that situation the application is treated as having become part of the permission. The reason for normally not having regard to the application is that the public should be able to rely on a document which is plain on its face without having to consider whether there is any discrepancy between the permission and the application: see *Slough Borough Council v Secretary of State* (ante); *Wilson v West Sussex County Council* [1963] 2 QB 764; and *Slough Estates Limited v Slough Borough Council* [1971] AC 958.
>
> 3. For incorporation of the application in the permission to be achieved, more is required than a mere reference to the application on the face of the permission. While there is no magic formula, some words sufficient to inform a reasonable reader that the application forms part of the permission are needed, such as '... in accordance with the plans and application ...' or '... on the terms of the application ...', and in either case those words appearing in the operative part of the permission dealing with the development and the terms in which permission is granted. These words need to govern the description of the development permitted: See *Wilson* (ante); *Slough Borough Council v Secretary of State for the Environment* (ante).
>
> 4. If there is an ambiguity in the wording of the permission, it is permissible to look at extrinsic material, including the application, to resolve that ambiguity: see *Staffordshire Moorlands District Council v Cartwright* (1992) JPL 138 at 139; *Slough Estates Limited v Slough Borough Council* (ante); *Creighton Estates Limited v London County Council* (1958) The Times, 20th March 1958.
>
> 5. If a planning permission is challenged on the ground of absence of authority or mistake, it is permissible to look at extrinsic evidence to resolve that issue: see *Slough Borough Council v Secretary of State* (ante); *Co-operative Retail Services v Taff-Ely Borough Council* (1979) 39 P&CR 223 affirmed (1981) 42 P&CR 1."

Those principles were modified, in respect of the construction of grants of full planning permission, in *Barnett v Secretary of State for Communities and Local Government* [2009] EWCA Civ 476, where Keene LJ noted that they were not

intended to apply to the interpretation of a full detailed planning permission because, as Sullivan J had pointed out at first instance, such a permission does not purport to be a complete and self-contained description of the permitted development and any member of the public reading such a decision notice will realise that it has to be interpreted in conjunction with the approved plans and drawings that are a vital part of the permission. That modification does not affect the essential point underlying the principles, which is that grants of planning permission are to be construed on the basis of the publicly available documents forming part of the permission, not on the basis of private understandings or assumptions that are not publicly available documents.

50. The evidence adduced in the present case includes only a very limited amount of documentation concerning the eight Additional Permissions that had been granted by the date of the 1987 Order. The terms of the first Additional Permission (4 April 1967) have been set out above. The letter submitting the plans for the application referred to "the erection of the first pair of houses on the lower site" and explained why a departure from what was originally envisaged was required. I have not seen the application or the plans. The second Additional Permission (14 September 1967) has also been set out, as has the relevant content of the letter submitting the plans, which made it clear that the applicant was speaking of "amendment to the approved designs". Again, I have not seen the application or the plans. I have not seen the documents relating to the third Additional Permission (22 October 1970), the fourth Additional Permission (9 May 1972), or the fifth Additional Permission (13 June 1972), all of which are referred to as revisions or variations by Drake J. Similarly, I do not have the documents relating to the sixth Additional Permission (19 October 1972), which was mentioned in passing by Drake J. The seventh Additional Permission (22 May 1973) was simply described as being for "housing development" at Balkan Hill as shown on the accompanying plans, but I have seen none of the other documentation. The eighth Additional Permission (14 October 1974) was for "amendments to approved scheme at Hillside, Balkan Hill, Aberdyfi, seeking permission to retain buildings erected contrary to the approved plans" but was approval pursuant to a condition in planning permission granted on 5 September 1966. I have not seen that earlier permission and do not know how it relates to the January 1967 Permission, and I have not seen the documents relating to the eighth Additional Permission.

51. Sixth, therefore, on the basis of the limited evidence adduced before me, I do not consider that the Authority has established that Drake J was wrong to construe the Additional Permissions as variations (in the sense I have explained) of the January 1967 Permission. It follows that the backward-looking objection to the 1987 Order fails. (In reaching this conclusion, I have necessarily had regard to my views on the ability to comply with the January 1967 Permission in the future. These are set out below.)

52. Seventh, however, it remains necessary to consider a forward-looking objection to the 1987 Order. What I mean is this. Even if the development that had already been carried out by 1987 did not constitute a departure from the January 1967 Permission (that is, because it was in accordance with that permission as varied), it might be that any *future* development would necessarily conflict with the January 1967 Permission and could therefore not be carried out except with a further grant of planning permission.

53. Drake J addressed the future position by saying (page 20 of the judgment) that "if the development is allowed to progress further it can be completed substantially in accordance with the Master Plan", and he declared that the development "may lawfully be completed at any time in the future." Mr Lewis submitted that Drake J fell into error, because the concept of "substantial" compliance with planning permission is inapplicable (see *Singh*): full compliance is required (see *Sage*) and was not possible, because, as I have recorded above, the positions of some of the houses that had been built by 1987 conflicted to some extent with the positions of estate roads and a footpath as shown on the Master Plan.

54. In my judgment, the Authority has not established that Drake J was wrong in his conclusion that, as at 1987, the remainder of the development could be completed lawfully under the January 1967 Permission. It is to press matters too far to suppose that Drake J was relying on some concept of "substantial" compliance unknown to law. Neither his judgment nor, for that matter, the judgments and speeches in the authorities mentioned above are to be read as though they were statutory provisions or with a literalism inappropriate to their context. A developer carrying out development under a single permission must fully comply with the permission, and physical impossibility of implementing or completing some parts of the development in accordance with the permission will render the entire development unlawful (see *Singh* at [25]). However, this principle, based as it is on practical common-sense (see *Pioneer Aggregates* at 145), would be impractical if it were pressed with undue literalism to the extent of supposing, for example, that in a large and complex development, such as a housing estate, the slightest departure from the approved layout plans (for example, regarding the precise contours of the cul-de-sacs) necessarily rendered the entire development unlawful. In the present case, the works done pursuant to the Additional Permissions until 1987 would necessarily require some minor adjustments to the estate roads at a few points around the houses that had been built (it is not shown on the evidence whether the estate roads at those points had been built), but there is no evidence to support the conclusion that it would necessitate any departure from the Master Plan in respect of the houses that remained to be built. Even as regards the estate roads, the necessary adjustments would, so far as appears from the evidence, be very minor and not such as to undermine Drake J's conclusion that the Additional Permissions were variations of the January 1967 Permission. In my judgment, it is not established that he was not entitled to find that the necessary adjustments would not prevent sufficient compliance with the Master Plan to constitute lawful development under the January 1967 Permission.

55. Accordingly, I reject the Authority's contention that Drake J's judgment and the 1987 Order were wrong. So far as the evidence before me shows, he was (with respect) entitled to make the decisions he did.

Second Issue: Is the Authority bound by the 1987 Order?

56. My reasoning and conclusions regarding the first issue have a substantial effect on my analysis of the second issue and my reasoning in respect of it.

57. Argument concerning the second issue was very largely addressed to what I have identified in paragraph 27 above as issue 2a, namely the question whether, even if

Drake J's judgment and the 1987 Order were wrong in law, the Authority, as statutory successor to Gwynedd, was nevertheless bound by them on principles of *res judicata* and cause of action estoppel or issue estoppel. My decision on the first issue means that I do not need to answer this question. However, what I have identified as issue 2b does remain.

58. The third declaration in the 1987 Order obviously does not mean that, regardless of how the facts and the law may change or develop at any time thereafter, the development permitted by the January 1967 Permission would necessarily be capable of lawful completion in perpetuity. Events might occur that would render it physically impossible to complete the development "substantially in accordance with the rest of the Master Plan". Or the law might change. The declaration was concerned, as was Drake J in his judgment, with two questions: first, whether the January 1967 Permission had been implemented; second, if it had been implemented, whether completion of the development thereby permitted was possible. The declaration reflects and gives effect to the judge's affirmative answers to both questions. It does not determine whether completion of the development remains possible in the light of the physical alterations that have taken place since 1987.

59. In my judgment, the development permitted by the January 1967 Permission cannot now be completed lawfully in accordance with that permission. This conclusion follows from two matters that have already been mentioned in this judgment, as I shall explain.

60. First, the facts of this case do not fall within the *Lucas* exception to the general requirement that a development be carried out fully in accordance with the permission said to authorise it. See paragraph 44 above.

61. Second, it is physically impossible to complete the development fully in accordance with the January 1967 Permission in the circumstances briefly set out in paragraph 37 above. This is not a matter of minor deviations from the detail in the Master Plan: the state of affairs existing on the ground in the north-west part of the Site means that the remaining development there cannot be carried out and that further development will require new design and fresh permission. Regardless of whether Drake J was right or wrong to conclude in 1987 that the remaining development could be completed in accordance with the January 1967 Permission, it is plain that such a conclusion can no longer be reached. Mr Christopher Madin rightly conceded in his second witness statement that by reason of what had been constructed since 1987 "it [was] not … physically possible to build out the entirety of the scheme of development approved in 1967".

62. Hillside did not advance any cogent answer to the problem of physical impossibility, other than reliance on *Lucas*. Mr Lowe said, and I accept, that much of the Site is unaffected by the development that has taken place. The conflicts with the provisions of the Master Plan regarding the remainder of the north-west part of the Site remain. Mr Lowe submitted that the issues could be worked out. That may well be right. However, they can only be worked out by a fresh grant of planning permission. The consequence is that, if the *Lucas* exception does not apply, the Authority is correct to say that future development pursuant to the January 1967 Permission would be unlawful.

Conclusion

63. For the reasons set out above, the claim fails.

64. I shall ask counsel to file written submissions regarding the form of the order and any consequential matters, including costs.