Neutral Citation Number: [2020] EWHC 161 (Admin)

Case No: CO/2292/2019, CO/2293/2019, CO/2302/2019, and CO/2304/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/01/2020

Before :

The Hon. Mr Justice Holgate

- -

Between :

Mr J. J. Gluck	**Claimant**
- and -	
(1) Secretary of State for Housing, Communities and Local Government	**Defendants**
(2) Crawley Borough Council	

- -
- -

Ms Philippa Jackson (instructed by **Asserson**) for the **Claimant**
Mr Charles Streeten (instructed by **Government Legal Department**) for the **First Defendant**
The **Second Defendant** did not appear and was not represented

Hearing date: 10 December 2019

- -

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.

.....

The Hon. Mr Justice Holgate:

The issues

1. This application raises important issues about the interpretation of the procedural provisions governing the prior approval regime for permitted development rights, in particular the operation of the time periods for the determination of prior approval applications by a local planning authority ("LPA"). It is helpful to begin by seeing this issue in a slightly broader statutory context.

2. Under the Town and Country Planning Act 1990 ("TCPA 1990") planning permission is generally required for the carrying out of any development of land (s.57(1)). Planning permission may be granted by (inter alia) a "development order" or by an LPA determining an application made under s. 62 (see s.58(1)). Where an LPA receives such an application it must issue its notice of determination within either 13 weeks (for "major development") or 8 weeks for "non-major development" (Art. 34 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 (SI 2015 No. 595) ("DMPO 2015")) or within 16 weeks for "EIA development". However, the authority may still issue a valid determination after the expiry of the relevant time period. The mere expiration of that period does not of itself bring the jurisdiction of the authority to decide the application to an end (James v Secretary of State for Wales [1996] 1 WLR 135). The TCPA 1990 also provides the applicant with alternative remedies if the authority does not determine the application within the relevant time period. Firstly, it may be extended for such period as "may at any time be agreed upon in writing between the applicant and the authority"; or secondly, the applicant may appeal to the Secretary of State against a deemed refusal by the authority of the application (s.78(2) and (5)).

3. Section 59 provides for the Secretary of State to make a development order granting planning permission by the order itself. The current development order which generally applies in England is the Town and Country Planning (General Permitted Development) (England) Order 2015 (SI 2015 No. 596) ("GPDO 2015"). If a landowner is entitled to rely upon the "permitted development" rights granted by such an order, he generally need not make an application for the grant of planning permission by the LPA. By s. 60(1) the order may impose conditions or limitations on such rights. More recent development orders have made the grant of certain permitted development rights subject to the "prior approval" of the LPA in relation to particular aspects or effects of a proposal (see also s.60).

4. In broad terms, there are two types of "prior approval" procedure. First, the grant of permitted rights by the GPDO 2015 may be expressed to be subject to the LPA's prior approval. In these cases, such prior approval is always required. But if it is refused by the LPA the applicant may appeal to the Secretary of State. Second, the grant of permitted development rights may be subject to the making of an application to the LPA for a determination as to whether its prior approval is required. If the LPA judges that a prior approval is necessary, then it will also consider whether to grant that approval and, in the event of a refusal, a right of appeal to the Secretary of State arises. The present case involves permitted development rights which were subject to this second procedure.

5. The GPDO 2015 stipulates "time periods" for the determination of either type of application. It is common ground that under the first procedure, an applicant's sole remedy for a failure by the LPA to determine an application for prior approval within the relevant time period is to appeal to the Secretary of State against a deemed refusal (under s.78(2) of TCPA 1990). This situation is analogous to the treatment of applications to an LPA under s. 62 for the grant of planning permission (see paragraph 2 above). In the second type of case, the effect of the GPDO 2015 is that where an LPA does not determine within the relevant time period whether prior approval is required and, if so, whether such approval should be granted or refused, the applicant may rely upon the permitted development rights provided that the development complies with the terms of the Order (Keenan v Woking Borough Council [2018] PTSR 697).

6. The GPDO 2015 provides for time periods to be extended by the agreement of the applicant and the authority. The first issue is whether, as the Claimant submits, that provision only applies to permitted development rights which are granted subject to prior approval being obtained in every case. The Claimant submits, relying upon the decision of Mr Mark Ockelton (sitting as a Deputy High Court judge) in R (Warren Farm (Wokingham) Limited v Wokingham Borough Council [2019] EWHC 2007 (Admin), that a time period specified in Schedule 2 of the GPDO 2015 for a determination by the authority as to *whether* its prior approval is required in a particular case is incapable of being extended, so that once it has expired without a decision being made the applicant may proceed with the development described in its application (in so far as it complies with the terms of the Order). The Secretary of State submits that that decision is incorrect and I should not follow it; the provision in the GPDO 2015 for agreeing an extension of time periods applies to all prior approval procedures.

7. The general principle is that I should follow the decision in Warren Farm unless I am satisfied that there is a powerful justification for not doing so (Willers v Joyce (No.2) [2018] AC 843 at [9]).

8. In Warren Farm the judge stated (at [34]) that he had not been referred to any prior approval procedure in the GPDO 2015 to which the provision for extending time could be applied if his construction of the legislation was correct. However, in the present case I have had the benefit of extensive and detailed submissions from counsel which have analysed a wide range of provisions in the GPDO 2015. Before going any further, I wish to express my gratitude to them for their assistance.

9. If the first issue is resolved in the Claimant's favour, then it is agreed that this application must succeed. If, however, the Court should decide that the relevant time period was capable of being extended by agreement, the second issue is whether in the circumstances of this case the Inspector who determined the Claimant's appeal was entitled to find that an extension had been "agreed by the applicant and the authority in writing".

10. Mr Charles Streeten, on behalf of the Secretary of State, has raised a third issue which was not argued before the Inspector. In the event of the Claimant succeeding on the second issue, by showing that the authority did not agree to an extension in writing, Mr Streeten submits that there is an estoppel by convention which prevents the Claimant from contending that the time period was not extended. On behalf of the Claimant, Ms Philippa Jackson resists that submission.

Factual Background

11. On 5 March 2018 the Claimant submitted two applications to Crawley Borough Council ("CBC") to determine whether prior approval was required for proposed changes of use from offices to residential under Class O of Part 3 in Schedule 2 to the GPDO 2015 on two sites in Stephenson Way, Three Bridges, Crawley. It was proposed to create 51 apartments on the Kingston House site and 24 apartments on the Saxon House site. The time period for determining the application expired on 1 May 2018, unless as a matter of law it was capable of being extended by agreement and, if so, extended. CBC issued decision notices refusing the applications on 8 and 11 May 2018.

12. The Claimant appealed to the Secretary of State against CBC's decision to refuse prior approval. Following the written representations procedure, the appeals were determined by a decision letter issued on 9 May 2019. At that stage the High Court had not determined Warren Farm and the Claimant did not argue that the relevant time period was incapable of being extended. That, of course, is a pure question of law, turning on the correct construction of the legislation and so there can be no objection to the Claimant raising the matter now in these proceedings. But the fact is that the Claimant's contention before the Inspector was that the time period had not been extended because the LPA had not agreed to that in writing and so the GPDO 2015 deemed the development described in each application to have been permitted.

13. The Inspector dealt with this issue at DL 9 to DL 11, as follows:–

> "9. On 27 April 2018 the Council received an email from the appellant's agent, stating that, "my client would be willing to agree a new determination date for both applications until 12 May 2018 …". The Council argue that, in accordance with Article 7(c) of the GPDO, it had the appropriate written notice from the appellant that a longer period to the 56 day determination period had been agreed and both decisions were made before that period expired.
>
> 10. The appellant contends that he did not give written notice for a longer period to the 56 days and that the Council have implied an extension by context. This is unacceptable as the GPDO only allows deadlines to be extended "through express and unequivocal written agreement". Furthermore, the email of 27 April 2018 from his agent to the Council stated that the appellant would be "willing to extend the deadline which is an offer and not a formal agreement.
>
> 11. I have carefully considered the appellant's arguments regarding whether he agreed to a longer period to determine the applications and based on all the information before me, which includes other emails, I am satisfied that such an agreement was entered into by both parties. Moreover, I have not been provided with any substantive evidence that an email cannot be considered "in writing" for the purposes of agreeing the longer period. Furthermore, there is no requirement under Article 7 of the GPDO that both parties have to agree the longer period independently, only that there is an agreement "by the applicant and the authority in writing", and the email from the appellant's agent is that written agreement. Consequently, permission was not deemed to have been granted."

14. The Inspector then went on to determine the merits of the appeals against refusal of prior approval against the Claimant. He decided that the noise impact from traffic generated by

commercial premises on Stephenson Way would result in unacceptable conditions for the occupants of the proposed apartments and so he dismissed the appeals. The Claimant does not make any legal criticism of this part of the decision letter.

15. In a separate decision letter issued on 2 May 2019 the Inspector rejected applications made by the Claimant that CBC should pay his costs of the two appeals.

The proceedings before this court

16. The Claimant has made two applications under s.288 of the TCPA 1990 to quash the appeal decisions in relation to Kingston House and Saxon House (respectively CO/2292/2019 and CO/2293/2019). He has also made two further application to quash the costs decisions (CO/2302/2019 and CO/2304/2019).

17. On 18 September 2019 Sir Wyn Williams sitting as a High Court judge granted permission to apply in respect of all four claims.

18. It is common ground that:–

    (i) The legal issues raised affect the Inspector's determination of the appeals on Kingston House and Saxon House in the same way, and so the outcome of CO/2292/2019 and CO/2293/2019 must be the same;

    (ii) The outcome of the challenges to the costs decisions is dependent upon the challenges to the appeal decisions. If CO/2292/2019 and CO/2293/2019 succeed, then so should CO/2302/2019 and CO/2304/2019. The converse applies.

Key provisions of the GPDO 2015

19. Article 3 is entitled "Permitted development". Article 3(1) provides that "subject to the provisions of this Order" "… planning permission is hereby granted for the classes of development described as permitted development in Schedule 2". In my judgment the provisions of the GPDO 2015 to which Article 3(1) is subject include Article 7 (see below).

20. By Article 3(2):–

> "Any permission granted by paragraph (1) is subject to any relevant exception, limitation or condition specified in Schedule 2."

21. Permitted development rights cover a wide range of developments. Those to which prior approval procedures may apply are to be found in the following categories: development within the curtilage of a dwelling (Part 1), changes of use (Part 3), temporary uses of land (Part 4), development related to agriculture (Part 6), development related to roads (Part 9), demolition of a building (Part 11), renewable energy development (Part 14), electronic communications development (Part 16), development related to mining and minerals (Part 17) and development authorised by local or private Acts (Part 18).

22. Article 7 is entitled "Prior approval applications: time periods for decision" and provides:–

> "Where, in relation to development permitted by any Class in Schedule 2 which is expressed to be subject to prior approval, an application has been made to a local

> planning authority for such approval or a determination as to whether such approval is required, the decision in relation to the application must be made by the authority -
>
> (a) within the period specified in the relevant provision of Schedule 2,
>
> (b) where no period is specified, within a period of 8 weeks beginning with the day immediately following that on which the application is received by the authority, or
>
> (c) within such longer period as may be agreed by the applicant and the authority in writing."

23. Article 7ZA was inserted by the Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2018 (SI 2018 No. 343) with effect from 6 April 2018 to modify the prior approval procedure where applications for such approval are called in for determination by the Secretary of State under s.77 of TCPA 1990 instead of being dealt with by the relevant LPA.

24. Although the GPDO 2015 does not contain a general definition of "prior approval" or "prior approval application", paragraph (9) of Article 7ZA provides that in this article "prior approval application" has the same meaning as in s.69A(2) of TCPA 1990. Section 69A was inserted in TCPA 1990 with effect from 27 April 2017 by s.17 of the Neighbourhood Planning Act 2017. Section 69A imposes additional requirements on LPAs as to the information each authority must include on the planning register it keeps under s.69 in relation to a "prior approval application" which, by sub-section (2) is defined as follows:–

> "A "prior approval application", in connection with planning permission granted by a development order, means an application made to a local planning authority for –
>
> (a) any approval of the authority required under the order, or
>
> (b) a determination from the authority as to whether such approval is required."

25. Although s.69A of TCPA 1990 and Article 7ZA were enacted after the GPDO 2015 had come into force, the expression "prior approval application" had already appeared in the title of Article 7. The repetition of that language in Article 7ZA, which represents a modification of Article 7, together with the explicit cross-reference to s.69A(2) shows that the latter provision was understood by the legislature as correctly explaining what was meant by this term in the GPDO 2015. Furthermore, unless a contrary intention appears, expressions used in secondary legislation should bear the same meaning as in the primary legislation under which they are made (s.11 Interpretation Act 1978 and Bennion on Statutory Interpretation (7th ed) sections 3.13 and 19.13). It is also worth noting that the treatment of *both* applications for prior approval and applications to determine whether prior approval is required as "prior approval applications" is reflected in other parts of the GPDO 2015 (e.g. the application of Article 4(2)(a) to "development permitted by any Class in Schedule 2 which is expressed to be subject to prior approval" and the definition of "prior approval date" in Article 4(5)).

26. In the present case the Claimant relied upon the change of use from offices to dwelling houses allowed under Class O of Part 3 of Schedule 2 to the GPDO 2015. Class O applies to:–

> "Development consisting of a change of use of a building and any land within its curtilage from a use falling within Class B1(a) (offices) of the Schedule to the Use Classes Order, to a use falling within Class C3 (dwellinghouses) of that Schedule."

27. Paragraph O.1 defines certain exclusions from Class O.

28. Paragraph O.2 imposes conditions on the grant of permission under Class O as follows:–

> "(1) Development under Class O is permitted subject to the condition that before beginning the development, the developer must apply to the local planning authority for a determination as to whether the prior approval of the authority will be required as to –
>
> (a) transport and highways impacts of the development,
>
> (b) contamination risks on the site,
>
> (c) flooding risks on the site, and
>
> (d) impacts of noise from commercial premises on the intended occupiers of the development,
>
> and the provisions of paragraph W (prior approval) apply in relation to that application.
>
> (2) Development under Class O is permitted subject to the condition that it must be completed within a period of 3 years starting with the prior approval date."

29. "Prior approval date" is defined in paragraph X, the interpretation provision for Part 3 of Schedule 2, as follows:–

> "'prior approval date' means the date on which—
>
> (a) prior approval is given; or
>
> (b) a determination that such approval is not required is given or the period for giving such a determination set out in paragraph W(11)(c) of this Part has expired without the applicant being notified whether prior approval is required, given or refused;"

The reference to paragraph W(11)(c) is to a 56-day time period during which the LPA fails to notify whether a prior approval is required, given or refused.

30. Paragraph W contains the "Procedure for applications for prior approval under Part 3". Paragraph W(1) makes it clear that the paragraph applies to cases under Part 3 where a developer must make an application to an LPA to determine whether its "prior approval … will be required". So, once again, applications to determine *whether* prior approval is required are treated as applications for prior approval. The language in the GPDO 2015 remains consistent.

31. Paragraph W(2) specifies the information that must be provided with an application. By way of example, in cases where the Environment Agency must be consulted under

paragraph W(6) because the site is located in flood zones 2 or 3 (or sometimes in zone 1), a site-specific flood risk assessment must be provided.

32. Under Class O the LPA has the power to exercise control in relation not only to flood risk, but also transport and highway impacts, on-site contamination risks, and noise impacts on future occupiers of the residential development from commercial premises. Paragraph W(9) enables the LPA to require the developer to submit such information as may reasonably be required for the determination of the application, including the assessment of impacts or risks, or how such impacts or risks are to be mitigated.

33. Paragraph W(3) sets out the LPA's powers to refuse an application in the following terms:-

> "The local planning authority may refuse an application where, in the opinion of the authority—
>
> (a) the proposed development does not comply with, or
>
> (b) the developer has provided insufficient information to enable the authority to establish whether the proposed development complies with,
>
> any conditions, limitations or restrictions specified in this Part as being applicable to the development in question."

34. The LPA may refuse the application if it considers that the proposed development does not comply with the relevant condition or that the applicant has provided insufficient information to enable it to determine whether the proposed development complies with that condition. The exercise of these powers to determine whether a prior approval is required and, if required, whether to grant or refuse an approval, may only be exercised by reference to the planning considerations listed in condition O.2(1).

35. Paragraph W(5) to (7) requires the LPA to consult with the highway authority and the Environment Agency in certain circumstances. Paragraph W(8) requires the authority to display site notices informing the public of an application and to serve notices on any adjoining owner or occupier. Paragraph W(10) requires the authority (inter alia) to take into account representations received as a result of consultation under paragraph W(5) or (6) or publicity under paragraph W(8).

36. Paragraph W(11) imposes restrictions on when the development may be begun:–

> "The development must not begin before the occurrence of one of the following –
>
> (a) the receipt by the applicant from the local planning authority of a written notice of their determination that such prior approval is not required;
>
> (b) the receipt by the applicant from the local planning authority of a written notice giving their prior approval; or
>
> (c) the expiry of 56 days following the date on which the application under sub-paragraph (2) was received by the local planning authority without the authority notifying the applicant as to whether prior approval is given or refused."

37. Paragraph W(12) imposes requirements on the way in which a development subject to paragraph W may be carried out, according to whether the authority decides that prior approval is or is not required and, if required, any approval granted, and otherwise in the absence of a decision on whether or not an approval is granted or refused within the 56 day time period set by paragraph W(11)(c):-

> "The development must be carried out—
>
> (a) where prior approval is required, in accordance with the details approved by the local planning authority;
>
> (b) where prior approval is not required, or where sub-paragraph (11)(c) applies, in accordance with the details provided in the application referred to in sub-paragraph (1),
>
> unless the local planning authority and the developer agree otherwise in writing."

38. In the present case the relevant condition for the purposes of paragraph W(3) is condition O.2(1). If this legislation were to be read in an overly literal manner, it might be said that the express language used in condition O.2(1) only obliges the applicant to make an application to the LPA as to *whether* a prior approval *is required* before he begins the proposed development. The condition does not explicitly state that if the LPA should determine that a prior approval is required, then it must also be obtained before development may commence. But paragraph W(3) confers a power to refuse an application, which, despite the wording of condition O.2(1), must embrace not only the determination of the application as to whether prior approval is required, but also, if required, the LPA's decision on whether it should be granted or refused. Although the draftsman has adopted a somewhat laconic (and in some places apparently incomplete) drafting style, it is necessarily implicit that an LPA can refuse prior approval under this provision in order to make the scheme workable. The process involves two stages or decisions, although in practice both decisions may sometimes be taken together.

39. This is confirmed by the restrictions imposed by paragraph W(11) on when the developer may begin to carry out the development. It is necessary to read the procedural code for prior approvals as a whole in order to discern the true statutory scheme. Similarly, condition O.2(2), which imposes a time limit for the completion of the development of 3 years beginning with the "prior approval date" (defined in paragraph X), and paragraph W(12) (carrying out the development in accordance with approved details or, in default of approval, application details) are both dependent upon the developer having to satisfy the second stage of the process, if it should be decided by the LPA that prior approval is required. The plain implication is that both of the LPA's decisions on whether prior approval is required and, if so, should be granted, must be taken within the 56-day period specified in sub-paragraph (c).

A summary of the submissions of the parties

40. The Claimant submits that this case falls within limb (a) of Article 7 because there is a time period specified in Schedule 2 for the determination of an application as to whether prior approval is required for development proposed under Class O (or any other development subject to the procedure in paragraph W), namely 56 days following the date on which the developer's application was received by the LPA. But Ms Jackson accepts

that this period is only specified in paragraph W(11), the provision which controls when a developer may begin to carry out the development.

41. The Claimant submits that permitted development rights granted by the GPDO 2015 subject to some form of prior approval procedure are divided into two groups. First, there are those cases where Schedule 2 grants such rights subject to a condition that prior approval be obtained in every case, i.e. where there is an absolute requirement to obtain prior approval imposed by the Order itself. Second, there are those Classes of permitted development which are granted subject to a condition that the developer must, before beginning the development, apply to the LPA for a determination as to whether prior approval is required. In this group it is a matter for the LPA to determine in each case whether prior approval is required, subject to the possibility of an appeal, and therefore prior approval does not always have to be obtained.

42. The Claimant says that in this second group of cases, Schedule 2 specifies a time period for the determination of the prior approval application which does not refer to the possibility of time being extended. It is said that, by contrast, in the first group of cases where permitted development rights are always subject to the grant of prior approval, Schedule 2 does not specify a time period for the determination of the application for that approval and so the default provision of 8 weeks in limb (b) of Article 7 applies.

43. The Claimant then submits that this division or pattern elucidates how Article 7 should be construed. That provision requires an application for prior approval or for a determination as to whether prior approval is required to be determined:–

    (a) within any period specified in Schedule 2,

    (b) where no period is so specified, within 8 weeks beginning with the day immediately following the receipt of the application by the LPA; or

    (c) within such longer period as may be agreed by the applicant and the LPA in writing.

    The Claimant says that limb (c) is an alternative to limb (b), but not to limb (a). A period specified in Schedule 2 is incapable of being extended (whether by agreement or otherwise). It is only where a period is not specified in Schedule 2 and the default position in limb (b) is engaged, that the ability to extend time by agreement under limb (c) applies.

44. The Claimant suggests that this interpretation not only accords with the language used in the relevant parts of Schedule 2, but produces a sensible outcome. It is reasonable that where a prior approval is always required for development within a particular Class, the time period of 8 weeks for reaching a decision should be capable of being extended by agreement. But where the issue of whether a prior approval is required depends in each case upon the making of a judgment by the LPA, it is reasonable that an absolute time limit is imposed, upon the expiration of which the developer may rely upon permitted development rights, unless prior approval has already been refused. This time limit applies not only to the decision whether prior approval is required but also the substantive decision whether to grant such approval. The Claimant accepts that on this analysis the provisions dealing with time periods for the determination of prior approval applications for Class O development and similar rights would be wholly contained within schedule 2 and there would be no need for article 7 to refer to this type of procedure.

45. The Secretary of State submits that Article 7 contains 3 limbs which are alternatives to each other. The possibility of extending time by agreement under limb (c) is an alternative to the time period under limb (a), as well as to the default period given by limb (b). That is the natural reading of a list of provisions of this kind where the draftsman has only inserted the word "or" between the last two in the list. That natural meaning is supported by the surrounding language used in Articles 7 and 7ZA.

46. That reading of Article 7 is not inconsistent with time periods specified in Schedule 2 such as paragraph W(11)(c). It is necessary to read the legislation as a whole. Although a time period is laid down in limb (b) of Article 7 where no period is specified in Schedule 2, this is capable of being extended under limb (c). As a matter of language, the analysis is no different where limb (a) of Article 7 refers to a time limit specified in that Schedule. The effect of Article 7 is that such a time limit is capable of being extended under limb (c). Furthermore, Article 3(1) makes the permitted development rights granted under Schedule 2 subject to the provisions of the Order, including Article 7.

47. Mr Streeten submits that the Claimant's construction treats a time period specified in Schedule 2, such as that contained in paragraph W(11), as a self-contained and complete legal rule on the time within which the developer's prior approval application must be determined by the LPA, failing which the relevant permitted development rights are deemed to have been granted. He submits that if the Claimant is correct there was no need for Article 7 to have included limb (a) or to have referred to any time period specified in Schedule 2. Article 7 need only have addressed limbs (b) and (c).

48. The Secretary of State also submits that the natural reading of Article 7 is not displaced by any pattern revealed by a proper analysis of permitted development rights under Schedule 2 which are made subject to prior approval procedures.

49. Mr Streeten then submits that the Claimant's construction conflicts with the purpose of including limb (c) in Article 7. That provision recognises that prior approval applications of all kinds will sometimes involve technical issues requiring detailed assessment and consultation with other authorities. That may apply, for example, to the amenities of the future occupants of the residential development to be carried out under Class O. The same time period specified in Schedule 2 provisions such as paragraph W(11)(c) applies both to the LPA's decision as to whether prior approval is required and, if so, whether it should be granted. These provisions involve a *single* time period for decision-making. Insufficient information may have been submitted with the application to enable the LPA to decide whether prior approval should be granted (if required) within that period. In that respect the position is similar to that which may arise for permitted development rights which are subject to the grant of prior approval in all cases. A developer faced with the prospect of his application being refused, for example because of the inadequacy of the information he has supplied with the application, might well prefer to have the period for determination extended so as to avoid a refusal and the prospect of having to appeal to the Secretary of State. The flexibility which limb (c) was designed to provide logically applies to cases falling within both limbs (a) and (b).

Analysis of GPDO 2015

50. At the heart of the dispute between the parties lies the relationship between Article 7 and the prior approval procedures for permitted development rights in Schedule 2.

51. I should record the parties' confirmation that there is no relevant Pepper v Hart ([1993] AC 593) material or Explanatory Notes to assist the court on the points of construction. It appears that the relevant delegated legislation was not subject to the affirmative resolution procedure.

52. The opening words of Article 7 make it plain that it applies to *any* development permitted by Schedule 2 "which is expressed to be subject to prior approval". Both TCPA 1990 and GPDO 2015 treat the term "prior approval" as embracing development rights where prior approval is an absolute requirement in all cases and also those which are subject to a determination by the LPA as to whether such approval is required in each case. That is also made plain by the following words in Article 7: "an application has been made to a local planning authority for such approval or a determination as to whether such approval is required". It is clear from the language of Article 7 preceding limbs (a) to (c), that the second group of permitted development rights falls within its ambit and within the description in the title "prior approval applications". If that were not so, a substantial part of this text, as well as limb (a), would be otiose.

53. It is therefore plain that the immediately following words in Article 7 "the decision in relation to the application must be made by the authority" must apply to both types of decision-making, whether to determine whether prior approval is required or whether such approval should be granted. When the straightforward language used in Article 7 is read as a whole, it is plain that this provision is structured so that limb (c) applies to decision-making on both types of prior approval procedure, whether they fall entirely within limb (a) or entirely within limb (b) (or, indeed, within both). The contrary view is not sustainable.

54. Bennion states at section 16.6:–

> "Where a single sentence is broken up into several paragraphs with the word 'or' or 'and' at the end of the penultimate paragraph, there is an implication that each of the preceding paragraphs is to be treated as if separated by the same conjunction."

Phillips v Price [1959] Ch. 181 is an example of this principle being applied. It represents the natural way of reading the statute and layout of Article 7. By contrast, the Claimant's argument depends on reading limbs (a) and (b) as if they were separated by the word "and" instead of "or". Accordingly, Ms Jackson accepted that the issue is whether the Claimant can point to language or a legal principle elsewhere in the GPDO 2015 which would displace the normal approach to the use of the conjunction "or" in Article 7 and, indeed, the clear wording of that provision read as a whole.

55. The Claimant's argument is based firstly upon treating limb (a) as relating to a separate group of permitted development rights in Schedule 2, and limbs (b) and (c) as relating to another separate group of such rights. That is why it is submitted that limb (c) is an alternative to limb (b), but not to limb (a). The first group comprising only those permitted development rights which are subject to the making of an application to determine whether prior approval is required in each case are said to fall within limb (a). Those requirements derive solely from the relevant conditions imposed in schedule 2 and it is said that article 7 forms no part of those conditions. It stands apart from Schedule 2. The second group is said to comprise permitted development rights which are always subject to the grant of prior approval and fall within limb (b). This part of the Claimant's argument really depends upon whether two such independent groups can be identified, as well as the relationship

between Article 7 and Schedule 2. It also depends upon a second submission, namely that limb (c) could not apply to cases falling within limb (a) compatibly with the language used in Schedule 2 for those cases.

56. I turn to consider the relationship between Article 7 and Schedule 2. The purpose of Article 7 is to impose an obligation on LPAs to determine either type of prior approval application within the time period defined in limbs (a), (b) or (c). The enactment of limbs (a) and (b) assumes that such periods are specified in Schedule 2 for that purpose. But Schedule 2 does not expressly set out any time period within which an LPA is required to determine a prior approval application. There is no provision in Schedule 2 similar to Article 34 of the DMPO 2015. Once again, this illustrates the undesirability of taking an overly literal approach to the construction of the prior approval code in the GPDO 2015. The absence of a provision answering to limb (a) in Article 7 could mean that all "prior approval" cases in Schedule 2 fall within limb (b). It would then follow ineluctably that limb (c) would apply in all such cases and an extension of the time period could be agreed. Furthermore, limb (a) would be otiose. The Claimant's legal argument on the main issue would collapse. But the procedural code for dealing with prior approval applications should not be construed so literally where that would produce unreasonable or unworkable results and the legislation does not require that approach to be taken. The code has to be read as a whole. Article 7 and Schedule 2 have to be read together.

57. The permitted development rights in Class O of Part 3 illustrate the point. It is common ground that in the present case the only time period which could fall within limb (a) in Article 7 is the 56 day period specified in paragraph W(11)(c) in Part 3 of Schedule 2. But that time period simply forms part of a restriction on the time when the developer may begin the development, which is linked to the condition in paragraph O.2(1). Thus, the obligation imposed by Article 7 on an *LPA* to make decisions on applications falling within limb (a) within a certain timescale therefore depends upon a condition in schedule 2 directed to the *developer* to control the timing of when he may carry out the development. The same statutory framework applies to the other cases falling within limb (a).

58. Even then, this scheme has to be gleaned by reading condition O.2 and paragraphs W(11) and (12) as a whole (see paragraphs 38 to 39 above). Thus, the draftsman has once again relied upon a laconic style of drafting. Indeed, if read too strictly the drafting is incomplete and an important part of the legislation ineffective.

59. In the case of permitted development rights which are always subject to prior approval, the relevant condition (e.g. condition C.2(1) of Part 17) grants such rights "subject to the prior approval" of the authority. This is a pre-condition to the lawful carrying out of the development. The effect is that the development may not lawfully be commenced until the prior approval is obtained, whether from the authority or from the Secretary of State on appeal. But permitted development rights depend upon limb (b) of Article 7 to supply the time period within which the authority must determine the application, so as to trigger the applicant's right to appeal against a failure to determine, or deemed refusal, under s. 78(2) of TCPA 1990. So, the operation of the condition depends in part upon Article 7. Similarly, the obligation on the *LPA* imposed by limb (b) of Article 7 has no practical effect save that it may trigger the right of appeal against a deemed refusal of the approval which the developer is required to obtain by the condition in Schedule 2. There is an interdependency between Article 7 and Schedule 2 for this group of cases as well.

60. What I have described as a laconic drafting style is not unusual for a statutory instrument. Although the principles of statutory construction for primary legislation generally apply also to secondary legislation, Bennion notes in section 3.13 that the quality of drafting may be lower in the latter case, little of which is undertaken by Parliamentary Counsel. A similar point was made by Jay J. in R (Skipton Properties Ltd v Craven District Council [2017] EWHC 534 (Admin) at [61].

61. As we have seen, Article 7 does not treat applications for prior approval, or applications to determine whether prior approval is required, as two types of application to which entirely separate rules on time apply. The relationship between Article 7 and Schedule 2 demonstrated above suggests that it is necessary to approach with caution the Claimant's submission that there are two wholly independent groups of permitted development rights subject to prior approval to see whether that is what the legislature has truly sought to achieve.

62. Article 7 should also be read alongside Article 7ZA. The latter applies where the Secretary of State is considering whether to call in for his own determination under s.77 of TCPA 1990 a "prior approval application", a term defined in s.69A(2) (see Article 7ZA(9)). Section 69A(2) makes it plain that a "prior approval application" covers not only an application for a prior approval required by a development order, but also an application to determine whether such an approval is required. Here again, the two types of application are treated together, and not separately (see e.g.. Article 7ZA(7)).

63. Article 7ZA(8) provides that where a "prior approval application" (meaning either type of application) is called in, "any deemed prior approval provision shall have no effect in relation to such an application". Article 7ZA(9) defines a "deemed prior approval provision" as "*a provision in Schedule 2* in reliance on which, after the expiry of *a time period for decision under Article 7* where the application has not been determined, development may begin" (emphasis added). The object is to prevent a developer from being able to proceed with the proposed development simply because the call-in procedure would never in practice be completed within the time periods referred to in Article 7.

64. Article 7ZA(9) makes it clear that the time periods for decision-making referred to in Article 7 are integral to the conditions in schedule 2 which control when development may lawfully begin in reliance upon the prior approval deeming provisions. It is common ground that for those permitted development rights where prior approval is required in every case, Schedule 2 achieves this outcome by imposing a condition that the permission is granted subject to obtaining prior approval (see Part 17 Class B, Class C, Class F and Class G, and Part 18 Class A). In those cases there is no "deemed prior approval provision". So in practice Article 7ZA(8) applies to those cases where the grant of permitted development rights is subject to an application to determine whether prior approval is required. But if the legislature's understanding was that the time period for such cases fell solely within limb (a) in Article 7, Article 7ZA(8) and (9) could easily have been drafted so as to refer to limb (a) alone, or indeed not to have referred to Article 7 at all but merely to Schedule 2. The implication is that those provisions in Article 7ZA refer to Article 7 as a whole, and so the ability to extend time under limb (c) applies to time periods under limb (a), and not just to those under limb (b).

65. In any event, there remains the question whether, as the Claimant contends, all prior approval cases fit wholly within either limb (a) or limb (b) of Article 7.

66. As we have seen, there are Classes of permitted development where the GPDO 2015 always makes the grant of permission subject to some form of prior approval being obtained (i.e. in Parts 17 and 18). Other permitted development rights are expressed to be subject to a condition that before the development is begun the developer must apply to the LPA for a determination as to whether prior approval is required. Cases falling within this second group are to be found in Part 3 (paragraphs C.2, J.2, M.2, N.2, O.2, P.2, Q.2, R.3, S.2 and T.2), Part 4 (paragraph E.2), Part 6 (paragraphs A.2, B.5 and E.2), Part 7 (paragraph C.2), Part 9 (paragraph D.2), Part 11 (paragraph B2, Part 14 (paragraph J.4) and Part 16 (paragraph A.3(4)).

67. However, not all types of permitted development may be assigned wholly to one or other of the two groups identified by the Claimant. For example, where an extension or alteration of a dwelling house falls within paragraph A.1(g) of Part 1 (large extensions), the issue of whether a prior approval is required is not determined by the LPA, but depends upon whether an owner or occupier of adjoining premises objects to the proposal (paragraph A.4(7)).

68. More importantly, the time periods for decision-making do not align with the two groups suggested by the Claimant. There are indeed several examples of permitted development rights subject to a determination whether prior approval is required, where the provisions governing the time for decision-making and "deemed approvals" where a decision is not made in time are not materially different from those contained in paragraph W of Part 3. In these cases Schedule 2 sets a *single* overall time period, for example 56 days, for the conclusion of both aspects of the process, the decision as to whether prior approval is required and the decision as to whether to grant approval if so required.

69. However, there are a number of other permitted development rights subject to an application for determination whether prior approval is required, where Schedule 2 specifies a separate period of 28 days for that first decision, but, if it be decided that prior approval is required, does *not* specify *any* time period for the second decision (see Part 6 (paragraphs A.2 and E.2), Part 9 (paragraph D.2) and Part 11 (paragraph B.2)). It was common ground between the parties, and I agree, that these are "hybrid" provisions" under which the relevant time period for decision-making on the second stage is the default period of 8 weeks given by limb (b) in Article 7 and, of course, this may be extended by agreement under limb (c). The Court of Appeal accepted that to be the correct legal analysis of preceding legislation which was similar to GPDO 2015 in this particular respect (Murrell v Secretary of State for Communities and Local Government [2012] 1 P & CR 6 at [30]). The Court also accepted what was common ground between the parties in that case, namely that the permission granted by the Order accrued if the time period for the first stage expired without the applicant being notified that prior approval was required [40]. That was the effect of the condition controlling the time when development could begin (nowadays referred to in Article 7ZA(9) of GPDO 2015 as a "deemed prior approval provision"). The outcome would be the same if the LPA decided in time that prior approval was required but then failed to reach a substantive decision within the time period for that decision on whether or not to grant approval.

70. Accordingly, the permitted development rights conferred by Schedule 2 do not conform to the framework for which the Claimant contends; they do not fall exclusively into either limb (a) or limb (b) of Article 7. There are a number of important "hybrid" cases which also involve a two stage process of deciding whether prior approval is required and, if so, whether it should be granted, but where the time period for the first stage falls within limb

(a) and the time period for the second stage falls within limb (b) (unlike paragraph W of Part 3 and similar provisions where both stages are the subject of a single time period falling within limb (a) of Article 7).

71. The hybrid cases show to be incorrect the Claimant's argument that the legislation imposes an absolute time limit for decision-making which is incapable of extension whenever a permitted development right is subject to an application for determination by the LPA as to whether prior approval is required. Given that Article 7 has been phrased so that under limb (c) an agreement may be made to extend a time period under either limb (a) or limb (b), the same should also hold good in those cases where both the LPA's judgment as to whether prior approval is required and, if so, the substantive decision, are to be made within a single time period specified in Schedule 2. Indeed, in the "single period" cases limb (c) applies *a fortiori*, because all the procedural requirements (including obtaining sufficient information, consultation and publicity) have to be met within a period of typically 56 days.

72. I do not consider that the Claimant's interpretation of the legislation can be supported by a purposive approach to the language used. Plainly the avoidance of delay in decision-making by LPAs is an important objective. But sound decision-making on matters of public interest is no less important. That needs to be based upon adequate information from an applicant and necessary consultation. Some of the issues involved may be of a highly technical nature. These considerations apply with just as much force to permitted development rights where the time period for decision-making falls within limb (a) of Article 7 as to those within limb (b). It may well be in the interests of an applicant to agree to extend the time period for determination to enable him to remedy a deficiency in the information he has supplied and/or to hold discussions with the LPA and consultees, so as to avoid a decision by the LPA that prior approval is both required and refused, and the consequential need to pursue an appeal, or to submit a fresh application, together with additional costs and delay. It would be undesirable to deny that option to developers seeking to rely upon permitted development rights falling within limb (a) of Article 7 unless the language of the GPDO 2015 compels that conclusion, particularly as the ability to extend time under limb (c), and the length of any extension, would be subject to the developer's agreement. The protection provided to applicants by the so-called "deemed approval" provisions in Schedule 2 is not removed by treating limb (c) in Article 7 as applying to limb (a) as well as limb (b).

73. Furthermore, the practical effect of treating time periods falling within limb (a) as incapable of extension would probably lead to more decisions by LPAs refusing applications (e.g. because the information provided in the time available for decision-making is inadequate) and more appeals to the Secretary of State. That would not be conducive to efficient decision-making or to encouraging acceptable forms of development to proceed without undue delay.

74. In my judgment, the language of the GPDO 2015 does not require the Court to conclude that limb (c) is an alternative only to limb (b). The specification of a time period in Schedule 2 (such as 56 days) for a decision on whether prior approval is required, linked to a restriction on commencement of development, is not incompatible with the possibility of extending time under limb (c). Limb (b) lays down a finite period of 8 weeks for decision-making, but that is to be read together with, and subject to, any extension under limb (c). The language of limb (a) does not preclude an extension of time under limb (c) simply because the time period is specified in Schedule 2 rather than in Article 7. Nor is

any such extension precluded because the time period is used to control when development may lawfully commence. A provision such as paragraph W in Part 3 of Schedule 2 is capable of being read together with Article 7. Permitted development rights granted under schedule 2 are expressly subject to other provisions of GPDO 2015 including Article 7 (Article 3(1)). I accept Mr Streeten's submission that limb (a) refers to a period specified in Schedule 2 but (like limb (b)) that is subject to any extension agreed under limb (c), and the time period stated in, for example, paragraph W(11) must be read and understood accordingly.

75. On a separate point, I also accept Mr Streeten's submission that if the legislature's intention had been to treat time limits specified in Schedule 2 as operating independently, and to be incapable of extension by agreement, which would be the effect of the Claimant's argument, then there would have been no need to include limb (a) or to refer to those time limits in Article 7 when the GPDO 2015 was enacted.

Pre-2015 legislation

76. In response to a question from the Court the parties carried out some helpful research and made written submissions on the antecedents to Article 7 and the prior approval provisions in the GPDO 2015.

77. The Explanatory Note to the GPDO 2015 states that the instrument consolidates previous legislation with some amendments. The general principles on the construction of consolidating legislation are summarised in Bennion at section 24.7 and, for example in R v Secretary of State for Environment, Transport and the Regions, ex parte Spath Holme Ltd [2001] 2 AC 349, 385-8. The starting point is to construe the consolidating legislation without reference back to earlier material. But where, for example, there is a genuine doubt as to the meaning of a provision in such legislation then it may be appropriate to consider antecedent material to see whether that does provide any real help in resolving the issue.

78. The submissions made on the pre-2015 legislation illustrate why the general approach is not to delve back into the antecedent history. I intend no disrespect when I say that the written submissions do not appear to cover all the antecedents to the prior approval provisions in the GPDO 2015 or to identify certain changes made in 2015 or subsequently to the statutory instruments considered. I am not satisfied that the analysis is complete, although I do acknowledge that this is a complex exercise.

79. Nevertheless, it is to be noted that "hybrid" provisions of the kind discussed above were well-established in the pre-2015 legislation, indeed going at least as far back as the previous consolidation in the Town and Country Planning (General Permitted Development) Order 1995 (SI 1995 No. 419) ("GPDO 1995"). Thus, the earlier legislation does not lend support to the Claimant's core submission that the legislation imposes an absolute time limit for decision-making whenever a permitted development right is subject to an application for determination by the LPA as to whether prior approval is required, as opposed to being automatically required by the Order.

80. More importantly, the pre-2015 legislation contained no provision equivalent to Article 7. Article 30 (as amended) of the Town and Country Planning (Development Management Procedure) (England) Order 2010 (SI 2010 No. 2184) ("DMPO 2010") simply laid down a time period of 8 weeks for the determination of any application for a consent, agreement or approval required by a condition or limitation attached to a grant of permission. This

provision can be traced back at least as far as Article 21 of the Town and Country Planning (General Development Procedure) Order 1995 (SI 1995 No. 418). Unlike Article 7 of GPDO 2015, Article 30 of DMPO 2010 did not either (i) refer to applications to determine *whether* a prior approval should be required (Murrell [36]) or (ii) apply to decision-making the subject of time periods *expressly* specified in other legislation, notably time periods set under Schedule 2 to GPDO 1995 for decisions on prior approval applications[1]. Article 7 has been framed in a completely different way to the earlier legislation. It now deals comprehensively with all permitted development rights which are subject to one of the prior approval procedures and deals with the time periods in each of those cases, allowing for any such time period to be extended by agreement.

81. Article 30 of the DMPO 2010 was repealed in England at the same time as Article 7 of the GPDO 2015 came into force. Article 27 of the DMPO 2015, which replaces Article 30 of the DMPO 2010, expressly excludes applications for approval under Schedule 2 to the GPDO 2015. That is because those applications are now dealt with as a whole by Article 7 of the GPDO 2015.

82. Accordingly, I do not find anything in the discussion of pre-2015 legislation which supports the Claimant's case. If anything, the earlier legislation lends support to the analysis of the GPDO 2015 set out above.

The Warren Farm decision

83. As I have already indicated, I have had the benefit of much fuller argument than the Court received in Warren Farm. In the event, I find myself obliged to disagree, with the greatest of respect to the judge in that case, with the conclusions he reached on the interpretation of Article 7 and its interaction with prior approval provisions in Schedule 2 to the GPDO 2015. There are powerful reasons for concluding that limb (c) in Article 7 is an alternative to both limbs (a) and (b), which were not addressed in Warren Farm.

84. The nub of the judge's reasoning in Warren Farm is contained in [23] to [34]. I hope that it will already be clear from the earlier parts of this judgment why I disagree with those conclusions. But in summary:–

    (i) The construction of Article 7 which I adopt does not produce internal inconsistency with the GPDO 2015 as indicated in [23] to [26]. The grant of permitted development rights by Article 3(1) and Schedule 2 is expressly made subject to other provisions of the Order. The possibility of extending time under limb (c) is applicable just as much to the time periods referred to in limb (a) as to that described in limb (b). Furthermore, the analysis in Warren Farm did not address the "hybrid" prior approval provisions;

    (ii) The construction of Article 7 which I adopt is preferable in the interests of good administration (cf. [27]). It enables the developer to agree an extension of time in all prior approval cases whenever he considers that to be appropriate and is more

[1] The Claimant pointed out that Article 30 (as amended) expressly excluded from its ambit approvals required for permitted development under Parts 1, 3 and 24 of the GPDO 1995. But this analysis was incomplete and does not assist. During the period when Article 30 was in force there were additional permitted development rights subject to an application being made to determine whether prior approval was required (eg. under Part 6 of Schedule 2 to GPDO 1995).

likely to reduce the number of applications refused and consequential appeals with attendant delays and costs;

(iii) The construction of Article 7 which I adopt is no less effective in promoting certainty (cf. [28]). Any variation of a time period is dependent upon the agreement of the applicant and the requirement for evidence in writing;

(iv) The fact that Article 7 is not expressed to be a condition does not support the construction favoured in Warren Farm [29]. The conditions in Schedule 2 and the provisions in Article 7 are inextricably linked. It is necessary to read them closely together in order to address several examples of laconic, or even incomplete, drafting in the GPDO 2015. For example, Article 7 is integral to the proper understanding and operation of permitted development rights subject to "hybrid" prior approval. Without Article 7 the conditions in those cases controlling the commencement of development would be unworkable where the LPA has decided that a prior approval is required and a substantive decision remains to be taken. Furthermore, the conditions in cases where prior approval is always required by the GPDO 2015 depend upon Article 7 for the provision of a time period for determination;

(v) For the reasons I have given, the supposed difficulties in [30] to [34] do not arise.

Conclusion on the construction of Article 7 of the GPDO 2015

85. Article 7 must be read as if limb (c) is an alternative to both limbs (a) and (b). The consequence is that any of the prior approval time periods specified either in Schedule 2 or in Article 7 is capable of being extended by an agreement by the applicant and the LPA in writing. The decision in Warren Farm should not be followed.

Whether an extension of time was agreed by the Claimant and the Borough Council in writing

86. The facts can be gathered from a sequence of emails and a statutory declaration by Hamish Walke, dated 14 February 2019, a principal planning officer at CBC and the case officer for the Claimant's applications. These documents were before the Inspector. The Court was told that the Claimant did not dispute the factual account given in the declaration. It is agreed that on 5 March 2018 the Claimant submitted the applications for prior approval to CBC and that the 56-day time period in paragraph W(11)(c) expired on 1 May.

87. On Thursday 26 April 2018 Mr Allen, the planning consultant acting as the Claimant's agent on the prior approval applications, emailed Mr Walke to ask whether there were any outstanding issues on either of the two applications. He responded by email that same day to the effect that the Council's environmental health team had objected to the proposals on noise grounds and that he was currently preparing a report for the determination of the applications by refusal on those grounds. He explained why he did not think that the objections could be overcome and that he expected to issue the decisions on the applications in the next day or so, which would have been by Monday 30 April. In fact, Mr Walke completed his report on 26 April.

88. On 26 April Mr Allen sent Mr Walke's email to his client. Mr Allen said that he was not surprised to learn of CBC's intention to refuse the applications on noise grounds and

advised his client to await that decision and the officer's report before obtaining advice from his own noise consultant. He advised Mr Gluck that it was highly probable that he would need to appeal the decisions to refuse, the alternative being to submit fresh applications.

89. On Friday 27 April 2018 the Claimant emailed Mr Allen to say that he had arranged for a meeting to take place on site between his acoustic surveyor and CBC's noise expert on Thursday 3 May 2018 at noon. He asked Mr Allen to call Mr Walke to "have him push off the decision till after the meeting". It is perfectly plain, as Ms Jackson accepted, that the Claimant wished to avoid CBC issuing decision notices refusing the applications before the experts had met to see whether noise issues could be resolved and to that end wanted the decision to be deferred.

90. Mr Gluck sent a further email to Mr Allen just over an hour later (12.52), because he had been unable to speak with his agent. In the meantime, the Claimant had rung Mr Walke and agreed with him that an email should be sent by Mr Allen to Mr Walke extending the time for determination until after the meeting had taken place on 3 May.

91. In paragraph 5 of his unchallenged statutory declaration Mr Walke states that when Mr Gluck called him on 27 April, they agreed an extension of time for the determination of the applications, which would be confirmed in writing by his agent, Mr Allen.

92. Shortly after Mr Gluck's email at 12.52, Mr Allen sent an email at 13.20 to both Mr Walke and his client (which included the email at 12.52) in which he said:–

> "As set out on my client's email below I understand that the meeting is to occur in terms of the potential issue around noise disturbance on the basis of Part W of the Order I set that my client would be willing to agree a new determination date for both applications **until 12 May 2018** and if any further extensions are required in order to resolve this matter then I would be happy to agree these with you in advance."

Mr Walke says that this email provided "the required written confirmation of the earlier verbal agreement that I had reached with Mr Gluck" (paragraph 6 of the statutory declaration).

93. At 14.28 on 27 April Mr Walke replied as follows:–

> "I will certainly discuss this with my manager although, as I explained to Mr Gluck earlier, I cannot see any way in which a Prior Approval application could be amended to address the noise concerns that have been raised."

94. On 3 May 2018 a meeting did take place on site as arranged, save that when Mr Walke arrived the Claimant announced that his noise expert would not be attending. The absence of that expert had not been notified beforehand. Not surprisingly the noise issues could not be discussed in any depth at the meeting. But Mr Gluck did say that his noise expert would produce a report responding to CBC's concerns by 8 May (see paragraph 8 of Mr Walke's statutory declaration).

95. In fact, the Claimant's expert did not submit the promised report. Instead, on 7 May his Solicitor sent a long letter explaining why it was considered that the applications for prior

approval were deemed to have been granted already, because CBC had not determined them within the 56-day time period under paragraph W(11)(c). In particular, it was said:–

> "There is no record of the Council agreeing in writing to extend the time limit, as expressly required by Article 7 of the Order" (original emphasis)

No doubt the Solicitor emphasised the absence of a written agreement by CBC to an extension of time, because both the author and his client knew full well that Mr Walke had agreed to the extension of time verbally in the telephone conversation with the Claimant on 27 April. The same approach was taken in paragraphs 2.7 and 2.9 of the Claimant's Response to CBC's Appeal Statement submitted to the Planning Inspectorate.

96. Ms Jackson submits that the email from Mr Allen at 13.20 on 27 April merely constituted an offer by the Claimant to extend the time for determination to 12 May. It did not address any verbal agreement which had been reached between the Claimant and Mr Walke. Furthermore, the email only expressed the Claimant's "willingness" to extend the period for determination. This submission is inconsistent with the Claimant's acceptance in court that Mr Walke's statutory declaration (which was never challenged before the Inspector in any material respect) is accurate. Ms Jackson accepted that she only advanced the submission because in his response at 14.28 Mr Walke had said that he would "certainly discuss this with my manager". She sought to suggest that by using the word "this" Mr Walke was saying that he was going to obtain instructions on a proposal to extend the time for determination and so CBC had not previously agreed to the extension requested by Mr Gluck during the earlier telephone conversation.

97. I have no hesitation in rejecting Ms Jackson's submission on this point. The Claimant did not ask the Inspector for Mr Walke to give oral evidence so that he could be cross-examined on his statutory declaration, particularly paragraph 5. The Claimant did not submit any evidence himself that he did not reach any verbal agreement with Mr Walke on 27 April for the determination period to be extended. There was no challenge to Mr Walke's evidence that a verbal agreement to extend time was made on 27 April other than a forensic attempt in Ms Jackson's submissions to draw inferences from the email sent by Mr Walke later on that day at 14.28. The short answer is that it is plain from his unchallenged statutory declaration that during the telephone conversation with Mr Gluck earlier that day the latter has discussed the noise issues with him and "was keen to be given time" (i.e. by CBC) to deal with them. When Mr Walke's email at 14.28 is read fairly and as a whole it is plain that "I will certainly discuss this with my manager" refers to the issue described in the following text, namely whether the noise concerns could be overcome. Mr Walke then continued to act in good faith by attending the meeting on 3 May 2018 which had been arranged so that noise issues could be discussed with the Claimant's expert. It is also plain that Mr Gluck wished to avoid CBC's imminent refusal of his applications by agreeing with Mr Walke an extension of time and then instructing his agent to confirm what had been arranged.

98. Accordingly, I can see no error in the factual conclusions drawn by the Inspector in his decision letter on the planning appeals, which was further elaborated in his decision letter on the Claimant's application for an award of costs.

Whether an agreement was sufficiently evidenced in writing

99. The remaining issue is whether it suffices for limb (c) of Article 7 that, as the Secretary of State contends, an agreement to extend the time for determination be made verbally but then evidenced or recorded subsequently in writing from one party or whether, as the Claimant submits, it is necessary that the applicant and the LPA must both agree to the extension *in writing*.

100. Limb (c) simply refers to:–

> "Such longer period as may be agreed by the applicant and the authority in writing."

No authority was cited to the Court on the interpretation of this language in the context of decision-making under the planning system, or indeed any other similar context.

101. Plainly, the need for "writing" does not refer to legal formalities, such as requirements for the carrying out of property or contractual transactions, including the execution of legal transfers or assignments, the making of wills or the creation of trusts. The context for limb (c) is not conveyancing or even the formation of contracts. It is to do with administrative decision-making in the public interest. Limb (c) imposes a requirement for "writing" so as to avoid uncertainty or disputes as to whether an extension of time has been agreed.

102. It may be good practice for emails or correspondence to be sent by both the applicant and the authority to each other setting out their agreement to an extension of time, or for them both to sign a single document in which they express their agreement to an extension. But I do not think that limb (c) necessarily insists upon an agreement being expressed by both parties in writing. Here the only party who argues that the time period was not lawfully extended, the Claimant, agrees that there was a verbal agreement between the LPA's planning officer and himself to extend time. I accept the Secretary of State's submission that in the present case it is sufficient that a verbal agreement was made by both parties which was then appropriately evidenced in writing. For example, that written evidence may simply be an email from the applicant (the Claimant) sent to the LPA to confirm what had been discussed and agreed verbally. Where both parties accept that they agreed an extension of time, albeit verbally, I do not accept that that agreement would be ineffective for the purposes of Article 7 (and Schedule 2) unless, in that scenario, the LPA responded in writing to confirm the content of the email which they received from the applicant.

103. In the present case an email was sent to Mr Walke which included a chain comprising both internal and external communications. Reading all this material in its true and proper context I do not think the Inspector's conclusions on the sufficiency of the written evidence of an agreement to extend time can be faulted. An important consideration in this case is that the Claimant has never disputed Mr Walke's evidence that when he spoke to Mr Walke on the telephone, the latter agreed to the extension of time sought by the Claimant for the determination of his applications. There is no genuine evidential uncertainty about the agreement upon the extension of time or the exchange of emails between the parties. The position is clear.

104. Perhaps the outcome might be different if the only written evidence of an agreement is an internal note which was not sent to the other party, so that they could reply to say that they disagreed with it, *a fortiori*, if there was a dispute as to whether any verbal agreement had

been reached. But I do not need to reach a conclusion on such matters and they should be left to be dealt with in a case where they do arise.

105. Mr Streeten cited Bewley v Atkinson (1879) 13 Ch. D 283. There the Court of Appeal had to decide whether a claim to acquire a right to light by prescription was defeated because the enjoyment had been by consent or agreement. Section 3 of the Prescription Act 1832 required that such consent or agreement be "expressly made or given for that purpose by deed or writing". The Court held that it sufficed that a consent to the installation of windows was signed by only one party, whether the party benefiting from, or the party burdened by, access to light through those windows (see e.g. pp.298-9).

106. The creation of such an easement by prescription involves considerations which have little to do with the administrative determination of an application for a statutory consent such as a planning permission. However, it is worth noting the parallel drawn at p. 292 with s.4 of the Statute of Frauds 1677, which ultimately was replaced by s.40(1) of the Law of Property Act 1925. Under that legislation the object of requiring an agreement in writing was to avoid an issue having to depend upon oral evidence (p.292). The case law on s.40(1) is summarised in, for example, Megarry and Wade: The Law of Real Property (5th ed.). Section 40(1) prevented the bringing of an action upon a contract for the sale of land unless some note of the agreement was in writing and "signed by the party to be charged", i.e. the party against whom the action was to be brought. Thus, the document did not have to be signed by both parties to the contract. It sufficed that the party to be charged signed a document acknowledging the existence of the contract and its terms (pp.571-586).

107. As I have said, Article 7 does not seek to impose the formalities required for property law transactions. But it is useful to note the distinction drawn in the cases under s.40(1) between the formation of a contract (whether written or verbal) and documentary evidence of the existence of an agreement. I agree with the Secretary of State that limb (c) of Article 7 is concerned with the latter and does not insist that a qualifying "agreement" can only be made entirely in writing.

108. For these reasons, this second ground of challenge to the Inspector's decisions must be rejected.

Estoppel

109. If the Claimant had succeeded on the second ground of challenge, the Secretary of State would have asked the Court to determine that in the exercise of its discretion the quashing of the decision should be refused because the Claimant was bound by an estoppel by convention to treat the time period for determination as having been extended for the purposes of Article 7 and Schedule 2. He submitted that for that reason it would be unconscionable and "an affront to justice" for the Claimant to succeed in having the decision quashed, and that this amounted to an exceptional circumstance justifying the exercise of the court's discretion to refuse relief (Bolton Metropolitan Borough Council v Secretary of State for the Environment [2017] PTSR 1063, 1072H).

110. In view of the conclusions I have already reached it is unnecessary for me to determine this issue. It would also be inappropriate. The issue of estoppel by convention was not raised before the Inspector. It has only been raised by the Secretary of State in response to the Claimant's legal challenges. I do not think that the Court can be sufficiently confident that this new issue can now be determined as a pure point of law and without any further

fact finding by the tribunal whose decision is under review, namely the Inspector (Barker Mill Estates Trustees v Test Valley Borough Council [2017] PTSR 408 [77]). Furthermore, although estoppel by convention has sometimes been relied upon successfully in planning cases (e.g. Hillingdon London Borough Council v Secretary of State for the Environment (30 July 1999 – Forbes J)), and although the estoppel here would be relied upon against a private individual rather than a public body, there are difficult issues as to whether that doctrine may still be invoked in the light of R (Reprotech (Pebsham) Ltd) v East Sussex County Council [2003] 1 WLR 348 and, if so, the principles governing the exercise of the court's discretion. Those issues would require full argument and should await a case in which they need to be determined.

Decision

111. For the reasons set out above all the claims are dismissed.