Neutral Citation Number: [2014] EWHC 3809 (Admin)

Case No: CO/1130/2014

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

Birmingham Civil Justice Centre
Priory Courts, 33 Bull Street
Birmingham

Date: 18/11/2014

Before:

MR JUSTICE HICKINBOTTOM

- -

Between:

THE QUEEN on the application of
ROBERT HITCHINS LIMITED

Claimant

- and -

WORCESTERSHIRE COUNTY COUNCIL

Defendant

- and -

WORCESTER CITY COUNCIL

Interested Party

- -
- -

Anthony Crean QC (instructed by **Eversheds LLP**) for the **Claimant**
John Hobson QC (instructed by **Simon Mallinson, Head of Legal and Democratic Services, Worcestershire County Council**) for the **Defendant**
The Interested Party not appearing or being represented

Hearing date: 4 November 2014
Further written submissions: 7-10 November 2014

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Approved Judgment

Mr Justice Hickinbottom:

Introduction

1. This claim concerns the site of the former Ronkswood Hospital, Newtown Road, Worcester ("the Site"). The Interested Party ("the Council") is the planning authority for the area, and the Defendant ("the County Council") is the highway authority. The Claimant is a property developer, which purchased the Site for housing development.

2. In short, the issue in this claim is whether an obligation under section 106 of the Town and Country Planning Act 1990 ("section 106"), entered into by the Claimant by agreement, to pay an amount per dwelling within a proposed development as a contribution towards the Worcester Transport Strategy has survived the grant of planning permission by the Secretary of State on a second application – identical to the first, save for that particular section 106 obligation – and the steps said to have been taken to implement that second permission.

3. Before me, Anthony Crean QC appeared for the Claimant, and John Hobson QC for the County Council. Their juniors, John Hunter and Stephen Whale respectively, assisted with the written submissions. At the outset, I thank them all for their valuable contributions.

The Law

4. In this judgment, references to statutory provisions are to the Town and Country Planning Act 1990, unless otherwise indicated.

5. Section 57(1) provides that "planning permission is required for the carrying out of any development of land", "development" being defined in section 55 to include "the carrying out of building, engineering, mining or other operations in, on, over or under land…". Section 56, headed "Time when development begun", provides that, if the development consists of carrying out operations, then "development shall be taken to be begun on the earliest date on which any material operation comprised in the development begins to be carried out" (section 56(2)). "Material operation" is defined to include any work on the demolition or construction of a building, the laying of any foundation, and indeed the digging of a foundations trench (section 56(4)).

6. An application for planning permission is made to the relevant local authority, as identified in section 1. By virtue of section 78(1) and (2), there is an appeal to the Secretary of State where there is a refusal of an application, or a grant subject to conditions, or a failure of the authority to notify the applicant of a decision within the period set by the Town and Country Planning (Development Management Procedure) Order 2010 (SI 2010 No 2184) which is generally eight weeks.

7. Section 34 of the Town and Country Planning Act 1932 gave local planning authorities the power to enter into planning agreements for the regulation of development and use of land. That survived until section 12(1) of the Planning and Compensation Act 1991 which replaced that power, by then found in section 106 of the 1990 Act, with a power to enter into planning obligations, "by agreement or

otherwise", set out in a new, substituted section 106. Obligations may only be entered into by an instrument executed as a deed (section 106(9)).

8. To deter abuse, the Secretary of State issued successive policy guidance in relation to the exercise of this new power, now found in paragraphs 203-204 of the National Planning Policy Framework ("the NPPF"), issued in March 2012, making clear that such obligations can only be required where they render acceptable a proposed development otherwise unacceptable in planning terms. Echoing earlier guidance, the NPPF states:

> "203. Local planning authorities should consider whether otherwise unacceptable development could be made acceptable through the use of… planning obligations….
>
> 204. Planning obligations should only be sought where they meet all the following tests:
>
> - necessary to make the development acceptable in planning terms;
> - directly related to the development; and
> - fairly and reasonably related in scale and in kind to the development."

9. However, that is not now merely policy; because regulation 122(2) of the Community Infrastructure Levy Regulations 2010 (SI 2010 No 948, "the CIL Regulations") provides that, where a determination is made which results in a planning permission being granted for development:

> "A planning obligation may only constitute a reason for granting planning permission if the obligation is:
>
> (a) necessary to make the development acceptable in planning terms;
>
> (b) directly related to the development; and
>
> (c) fairly and reasonably related in scale and in kind to the development."

"Planning obligation" is defined in terms of a section 106 obligation (regulation 122(3)).

10. A planning obligation may be modified or discharged, but only in accordance with the provisions of section 106A, i.e. by agreement between the appropriate authority and any person against whom the obligation is enforceable; or on the application of a person against whom a planning obligation is enforceable, at any time after the expiry of a period of five years after the obligation is entered into.

The Factual Background

11. On 1 June 2012, the Claimant applied for planning permission to develop the Site with up to 200 dwellings and associated works.

12. Although during one of the pre-application meetings one of the Council's officers indicated that the proposed residential development would be exempt from providing a contribution to the transport infrastructure, on 6 July 2012 the Council indicated to the Claimant that, following the publication of the NPPF on 27 March 2012, it considered that contributions were appropriate. They particularly referred to paragraph 32 of the NPPF, which provides:

> "Development should only be prevented or refused on transport grounds where the residual cumulative impacts are severe."

13. Further correspondence ensued. On matters of transport, the Council deferred to the County Council as the relevant highway authority. The County Council said that the proposed development would generate significant demands on the strategic transport network, and that additional burden would be part of the cumulative transport impact of the developments within the emerging South Worcestershire Development Plan; thus it was appropriate to seek a financial contribution toward the transport infrastructure and services set out in the Worcester Transport Strategy. The costs of the improvements proposed by that Strategy were estimated at £145.5m. From that figure the County Council calculated the contribution required from each extra trip expected to be generated by the draft South Worcestershire Development Plan (i.e. £653.80), and multiplied that by the estimated number of trips within the relevant area or accessed by the relevant transport network that the proposed development on the Site would generate (i.e. 1,600). The transport contribution sought was consequently £653.80 x 1,600, then calculated (with more or less mathematical accuracy) to be £1,046,050.46.

14. The Claimant denied that this approach was correct. The focus (it was submitted) must be on this particular proposed development; and, on the available evidence, it simply could not be said that the net cumulative adverse impact of this development on transport was "severe", so that paragraph 32 of the NPPF could not possibly justify the change of stance or the insistence on the contribution. Further, it was in conflict with the extant Policy TR14 of the Worcester City Local Plan and Supplementary Planning Document 12, which provided for developer contributions to transport infrastructure but expressly exempted residential developments.

15. Thus, there was an impasse, the Council requiring a transport contribution of some £1m and the Claimant insisting that no such contribution was appropriate. However, the Claimant was in a challenging commercial position. The property crash precipitated by the financial crisis in the late 2000s had caused a significant reduction in the value of the land held by the Claimant for the purposes of future development, such that the valuation of its assets was close to the amount of the bank loans that those assets secured. If the loans became undersecured, then that would be a potentially calamitous breach of the Claimant's covenants with the bank. The Claimant was consequently very anxious to obtain planning permission for the Site – and sell it on – quickly.

16. The Claimant therefore began what Mr Crean described as "commercial horsetrading". Against the required £1m plus, it offered to pay £250,000 as a

transport contribution, an offer declined by the County Council through the Council on 21 November 2012 as unacceptably low. On 4 December, the Claimant made a further offer of a financial contribution to the Worcester Transport Strategy of £4,530 per dwelling, somewhat below that sought by the County Council but nevertheless the equivalent of over £900,000 for 200 dwellings. The reduction was justified by the Claimant by reliance on an allowance for the costs of restructuring a particular local access junction that was to be part of the associated works within the development. It proposed that the contribution be paid in three equal instalments, "on occupation of 25% of the units, 50% of the units and 75% of the units". The Claimant's letter continued:

> "I hope you see that we have come a very long way towards the County [Council's] position in the spirit of seeking to negotiate an agreement and I would be grateful for a response today." "

17. Mr Crean submitted that these offers were put, and the negotiation conducted, by the Claimant in good faith; but without prejudice to its contention that the imposition of a transport contribution requirement was unlawful, and without prejudice to legal steps in the future to avoid payment of the sum agreed – which, he said, it was always the Claimant's intention to take. However, there is no evidence that that intention was ever made manifest to the Council or County Council.

18. Subject to some fine details as to instalments, index linking etc, the Council accepted that offer the following day, 5 December 2012.

19. On 22 January 2013, the Council, the County Council, the Claimant and Lloyds TSB Bank plc as mortgagee entered into an agreement by way of deed ("the First Section 106 Agreement"). Each of the obligations imposed on the Claimant was expressly a planning obligation for the purposes of section 106 (clause 2.7). The "Commencement Date" for the Agreement was defined as the date on which the development permitted by the First Planning Permission was begun on the Site by the starting of a first material operation as defined by section 56(4), and the development was deemed to commence on that date (clause 1).

20. By paragraph 3 of the Fourth Schedule of the First Section 106 Agreement, the Claimant agreed:

> "To pay the County Council the Worcester Strategy Transport Contribution… in three equal instalments, the first instalment to be paid on or before the Commencement Date the second instalment to be paid on or before the occupation of no more than 50% of the Dwellings on the Development and the third instalment to be paid on or before the occupation of no more than 75% of the Dwellings on the Development…".

"Dwellings" was defined in clause 1 as "dwellings… to be constructed within the Development…", "the Development" being defined as the development described in the Claimant's First Planning Application (clause 2.5). In line with the earlier agreement struck in correspondence, "the Worcester Strategy Transport Contribution" was defined in clause 1 as the sum equivalent to £4,530 in respect of each dwelling on the development (or such other sum on future review under clause 4.7), to be applied

to the particular purposes of "the Worcester Transport Strategy", which was itself defined as meaning "a package of transport infrastructure and service enhancements across all modes of transport identified as being required to support the planned growth set out in the Draft South Worcestershire Development Plan". For 181 dwellings, the contribution was £819,930.

21. Other relevant clauses of the First Section 106 Agreement were as follows:

> "4.5 Nothing in this Deed shall be construed as prohibiting or limiting any right to develop any part of the [Site] in accordance with a planning permission (other than the Planning Permission) granted by the City Council or the County Council or by the First Secretary of State on Appeal or by reference to him after the date of this Deed.
>
> …
>
> 4.16 No person shall be liable for breach of a covenant contained in this Deed occurring after he shall have transferred to a third party all interest in the [Site] or the part of which such breach occurs but without prejudice to liability for any subsisting breach of covenant prior to parting with such interest."

22. The section 106 agreement having been completed, outline planning permission was granted, also on 22 January 2013 ("the First Planning Permission")

23. On 4 March 2013, the Claimant sold its entire interest in the Site to BDW Trading Limited ("BDW") for just over £7.2m. Under the clause 4.16 of the First Section 106 Agreement, that would have meant that the Claimant's liability for the section 106 obligations ceased; but, under the Claimant's Contract with BDW:

    i) The Claimant agreed, "for so long as the same is enforceable", to observe and perform the obligation to make the transport contribution under the First Section 106 Agreement, and to indemnify BDW against any breach or non-performance of that obligation (clause 15.2).

    ii) BDW agreed to the Claimant submitting a duplicate planning application for the Site, in identical terms to that granted in the First Planning Permission except without the obligation to pay the transport contribution ("the Second Planning Application") (clause 15.3).

    iii) If the Second Planning Application were successful, BDW agreed that it would make an application for approval of reserved matters under the Second Planning Permission and:

    > "… in such circumstances [BDW] shall either only implement the [Second] Planning Permission, or if the [First] Planning Permission… has already been implemented, [BDW] shall ensure that once the aforementioned approval of reserved matters has been

> granted, any further development at the [Site] is carried out under the [Second] Planning Permission" (clause 15.5).

The Contract also made provision for circumstances in which the Second Planning Application was partially successful, in that it resulted in a transport contribution but less onerous than the First Planning Permission.

24. The sale of the Site to BDW was of course in pursuit of the Claimant's wish to reduce its exposure to its bank; and the provisions in the Contract in respect of the proposed Second Planning Application were in line with the Claimant's intention (apparently hidden from the Council and County Council) to challenge the imposition of a transport contribution in the First Planning Application. Although such a challenge could have been made in a number of ways – e.g. by appealing to the Secretary of State for non-determination of the application, or forcing a refusal of the application on the grounds that the proposed development was unacceptable in planning terms without the transport contribution and then appealing against that refusal – Mr Crean submitted that it was done by way of a further planning application to enable the Site to be sold quickly whilst retaining the ability to challenge the requirement for the contribution, the sale price reflecting the risk the Claimant bore of that challenge, in whole or in part, being unsuccessful.

25. As envisaged in its Contract with BDW on 23 April 2013, the Claimant submitted a further planning application for residential development of the Site. So far as material, "development" is defined in section 55 of the 1990 Act as "the carrying out of building, engineering, mining or other operations in, on, over or under land…". The proposed development in the further application was identical to the development in the first application and the First Planning Permission. However, it was proposed without any transport contribution.

26. The Council failed to determine the application in time, and the Claimant made a non-determination appeal to the Secretary of State under section 78. On 22 August 2013, the Council indicated that it would have refused planning permission, because the proposed development would have a severe impact on the transport network due to mitigation measures not being secured by a way of commuted sum through a section 106 agreement.

27. The Secretary of State appointed Martin Whitehead LLB BSC CEng MICE as inspector ("the Inspector"). Following a public inquiry on 26-27 November 2013, in a decision letter dated 10 January 2014:

    i) The Inspector identified that the main issue before him was whether a planning obligation to provide contributions to the transport infrastructure would meet the tripartite test of regulation 122 of the CIL Regulations (paragraph 4 of his decision letter).

    ii) He acknowledged that the development proposal would result in additional traffic on the highway network which, with traffic from other future development, would add to traffic congestion in the area (paragraph 19).

iii) However, focusing on the impact on transport of the development itself rather than the cumulative impact of the development with other future developments (see, e.g., paragraph 14), he concluded that the net impact would not be severe (paragraph 19).

iv) He noted that extant Policy TR24 did not apply to residential development, and did not support the requirement for a transport contribution for the development proposal (paragraph 22); and that, in his view, neither did the emerging South Worcestershire Development Plan (paragraph 23). He also noted that the emerging policy referred to the production of a Developer Contribution Supplementary Planning Document, to be used in conjunction with a Community Infrastructure Levy Charging Schedule prepared under section 211 of the Planning Act 2008 which would be capable of requiring a transport contribution on the basis of pooled contributions towards the aggregated burden of development proposed in the development plan on the transport infrastructure and services – but that neither of those documents had been prepared in this case (paragraph 23).

v) He found that the evidence did not demonstrate that the contribution would be fairly and reasonably related in scale and kind to the development (paragraph 25); and a planning obligation to secure a contribution towards the Worcester Transport Strategy would not meet the requirements of regulation 122 of the CIL Regulations (paragraph 26).

28. In short, as Mr Crean submitted, the Inspector substantially vindicated the Claimant's position with regard to the transport contribution requirement; and he allowed the appeal, granting planning permission for the same development as the First Planning Permission but without an obligation to provide a transport contribution ("the Second Planning Permission"). As I understand it, on 10 December 2013, BDW entered into a unilateral undertaking under section 106 ("the Second Section 106 Agreement") in the same terms as the First Section 106 Agreement, save for the obligation to provide a transport contribution.

29. In the meantime, on 23 May 2013, reserved matters approval had been granted for 181 dwellings further to the First Planning Permission; and it is uncontentious that, for section 56 purposes, the development was begun pursuant to that permission on or about 8 October 2013.

30. On being asked by the County Council for the first instalment of the transport contribution, BDW indicated that it had an indemnity from the Claimant, and they invited the County Council to seek payment there. After correspondence, on 22 November 2013, the Claimant paid the County Council the first instalment.

31. Two sets of proceedings were then commenced.

32. First, on 17 February 2014, the County Council issued an application under section 288 of the 1990 Act challenging the Inspector's decision of 10 January 2014 to grant the Second Planning Permission without any transport contribution.

33. Second, on 13 March 2014, the Claimant issued judicial review proceedings seeking to challenge, on discrete grounds, three separate decisions of the County Council, namely:

Ground 1: The County Council erred in asserting that the First Planning Permission and First Agreement would continue to govern the development of the Site, on the ground that, two planning permissions existing for the Site, a developer might choose the permission upon which to rely.

Ground 2: The County Council erred in refusing to consider varying the planning obligation in respect of the transport obligation under section 106A, on the ground that, whilst an authority has a discretion to modify or discharge a section 106 obligation, that discretion must be exercised for planning purposes. In this case, in considering whether the transport contribution could possibly have any continuing valid planning purpose, the County Council simply failed to grapple with the findings in the Inspector's recent decision or attempt to justify not following his conclusions.

Ground 3: The transport contribution obligation in the First Section 106 Agreement should be set aside because it was entered into by the Claimant under duress and/or as a result of the County Council's unconscionable conduct.

34. These claims have had a somewhat unhappy procedural history. The Claimant's application for judicial review was accompanied by applications for expedition and for a direction that it be consolidated and heard with the County Council's section 288 application. In response to those applications, on 17 March 2014 and prior to the County Council having had an opportunity to lodge summary grounds in the judicial review, His Honour Judge Cooke gave permission to proceed and directed that the substantive application for judicial review be heard with the section 288 application; and the combined hearing was in due course set down for 7 July 2014 with a time estimate of two days. Promptly, on 2 April 2014, the Defendant lodged detailed grounds of opposition; and at the same time applied for orders setting aside the order for permission to proceed and refusing permission on the papers. Unfortunately, that application did not come before a judge until 11 June 2014, when it was referred to me with an application by the Claimant for disclosure. Anxious to maintain the 7 July hearing date and cognisant of the fact that the County Council had already produced full grounds of opposition, I refused the application to set aside permission, and adjourned the application for disclosure to be heard at the beginning of that hearing. The Claimant appealed the former, and, on 27 June, Sullivan LJ granted permission to appeal, but (if I might respectfully say so, wisely and astutely) directed the application to set aside and, if successful, for permission to proceed be heard at the outset of the hearing on 7 July. In the meantime, he stayed the appeal, formally dismissing the appeal as academic on 16 October 2014.

35. The various applications came before Patterson J on 7 and 8 July, the judge giving judgment on the second day ([2014] EWHC 3667 (Admin)). In short:

i) Patterson J refused the County Council's section 288 application, thereby upholding the Inspector's decision to grant the Second Planning Permission in the terms of the Second Application, i.e. without an obligation to make any transport contribution.

ii) She set aside Judge Cooke's order granting permission to proceed in the Claimant's judicial review. She refused permission to proceed on Grounds 2 and 3, but gave permission to proceed on Ground 1. Under Ground 1, the Claimant sought the following declaration:

> "The Claimant and any subsequent owners of the [Site] [can]not lawfully be required to pay further instalments of the [transport contribution] under the [First Section 106] Agreement if, upon grant of reserved matters for [the Second Planning Permission], they should choose to carry out development pursuant to [the Second Planning Permission] rather than [the First Planning Permission]."

Patterson J appears to have considered it at least arguable that the position with regard to the enforceability of the obligation to make a transport contribution under the First Section 106 Agreement was potentially affected by the progress of the Second Planning Permission in respect of which (at the time of the hearing before her) outline permission had been granted but reserved matters had not been approved. She expressly granted permission to proceed "because of that uncertainty".

iii) She directed that the Defendant's costs in relation to Ground 3 be paid by the Claimant in any event. She reserved the costs of Grounds 1 and 2.

36. To complete the chronology, on 25 June 2014, BDW executed a unilateral undertaking by deed pursuant to section 106 ("the Second Section 106 Undertaking").

37. Recital (G) of the Undertaking recorded:

> "[BDW] intends to implement the Second Planning Permission and the Reserved Matters Approval. [BDW] enters into this Undertaking in order to dispense with the implementation of the First Planning Permission and to dispense with the discharge of the obligations under the First Section 106 Agreement and to implement the Second Planning Permission and the reserved Matters Approval and comply with the terms of the Second Section 106 Agreement."

Accordingly, by clause 4.1, BDW undertook to comply with the obligations set out in Schedule 1, and, under paragraph 1 of Schedule 1, it was provided:

> "… [BDW] hereby covenants with the… Council and the County Council from the Commencement Date:
>
> 1.1 to discharge the obligations under the Second Section 106 Agreement in relation to the [Site];
>
> 1.2 to dispense with the implementation of the First Planning Permission; and

> 1.3 to dispense with the discharge of the obligations under the First Section 106 Agreement in relation to the [Site]…"

38. "The Commencement Date" was defined as "the date on which the Reserved Matters Approval commences by the carrying out on the [Site] of a material operation as specified in section 56(4)…" (clause 1). However, by clause 3.1.2, the obligations in the undertaking were not to come into effect "until the period of six weeks starting on the date printed or stamped on the reserved Matters Approval has expired…". It is common ground that the Council granted BDW's application for reserved matters approval pursuant to the Second Planning Permission on 6 August 2014, and that was the date on that approval; and thus the date upon which the obligations under the Second Section 106 Undertaking arose was 18 September 2014. In passing, I note that, by clause 5.1.2 of the Second Section 106 Undertaking:

> "This Undertaking will come to an end if… the Second Planning Permission expires before the Commencement Date without having been implemented."

39. The development has, of course, been progressed. The evidence is that, as at 23 October 2014, of the 181 dwellings comprising the development, 63 are completed, have been sold to householders and are in fact occupied. A further 21 dwellings had been completed, but are not yet occupied. It is common ground that, as at 18 September 2014 and as the date of the hearing before me, less than 50% of the 181 dwellings were occupied, or indeed completed.

The Parties' Respective Cases

40. Patterson J severely restricted the issues in this claim. She found that, insofar as the obligation to make a transport contribution was concerned, the First Section 106 Agreement was a valid and enforceable section 106 agreement – and thus the Claimant's claim that the first transport contribution instalment was never payable, and so now recoverable, was bad – and the County Council did not err in failing to modify or discharge that obligation. Consequently, Grounds 2 and 3 are no longer alive: she found them to be unarguable.

41. However, she left one matter open under Ground 1. Mr Crean put it thus. Although, as a result of clause 4.16 of the First Section 106 Agreement, the Claimant's obligation to pay the transport contribution would have otherwise ended when it "parted with the entirety of its interest in the [Site]" to BDW on 23 March 2013, it entered into a private indemnity agreement with BDW whereby the Claimant remained liable to observe and perform the obligation to make the transport contribution and to indemnify BDW in that regard. In respect of the second and third instalments, on the proper interpretation of the First Planning Permission and First Section 106 Agreement, these only become due on the occupation of 50% and 75% of the 181 dwellings respectively – a construction conceded by Mr Hobson, during the course of the hearing, as correct – and, as at 18 September 2014, less than 50% of the dwellings were occupied, and so neither the second nor third instalment was payable. Where more than one planning permission is extant for the same land, a developer may choose which planning permission to implement. Once reserved matters approval had been granted in respect of the Second Planning Permission, and the developer's obligations in the Second Section 106 Undertaking came into effect on 18

September 2014, it was open to BDW to choose to forgo any further implementation of the First Planning Permission in favour of implementing the Second Planning Permission. When looked at objectively, that is exactly what BDW did. Paragraph 1.2 of Schedule 1 to the Second Section 106 Undertaking, when properly construed, made it clear that, from 18 September 2014, BDW ceased to perform material operations within the development under the First Planning Permission. They were entitled to act under the Second Planning Permission; which they did as soon as they performed a material operation within the development after that date. Any material operation after that date could only be performed under the Second Planning Permission. Any dwellings completed after that date, were completed under the permission granted in the Second Planning Permission; and, under that grant, no transport contribution is due.

42. Therefore, Mr Crean submitted that the County Council could not lawfully demand any further contribution towards the transport strategy from the Claimant or any subsequent owners of the Site; and, given the progress of matters since the hearing before Patterson J, he sought a declaration in these terms:

> "The Claimant and any subsequent owners of the Site cannot lawfully be required to pay further instalments of the Worcester Transport Strategy contribution under the First Section 106 Agreement having, upon the grant of reserved matters for the Second Planning Permission, elected to carry out development pursuant to the Second Planning Permission rather than the First Planning Permission".

43. I should add that, particularly in his grounds and skeleton argument, Mr Crean relied upon alternative submissions; but, at the hearing before me, he focused on the argument summarised above. In my view, he was right to do so: I found the other ways in which matters were put elsewhere unconvincing. I need say nothing further about them.

44. Mr Hobson for the County Council accepted that, where two planning permissions exist for the same land, a developer has the choice as to which to implement. There are two extant planning permissions here. The development in both the First and the Second Planning Permissions is identical, in the sense that the building and other operations to be carried out are exactly the same. It is uncontroversial that, under the First Planning Permission, the development was begun for the purposes of section 56 on or about 8 October 2013. However, he submitted, there is no direct evidence that, subsequent to the grant of reserved matters approval for the Second Planning Permission, the developer (BDW) has relied on the Second Planning Permission when carrying out the remainder of the development on the Site. The unilateral covenant in paragraph 1.2 of Schedule 1 to the Second Section 106 Undertaking is of no effect, because (i) the development was taken to have begun for the purposes of section 56 on or about 8 October 2013, and a unilateral declaration by BDW cannot alter that fact; and (ii) it expresses only a subjective intention on the part of BDW, which is irrelevant for the purposes of ascertaining when a development shall be taken to be begun. Further, he submitted that there is as yet no evidence of any section 56 "material operation" subsequent to and pursuant to the reserved matters approval for the Second Planning Permission. In any event, he submitted that, in the

circumstances of this case, in its discretion the court should deny the Claimant the relief that it seeks.

The Issues

45. The remaining ground in this claim therefore gives rise to the following issues:

    i) Whether, after the reserved matters approval perfected the Second Planning Permission and as a matter of law, the developer was able to elect to continue and complete the development under the Second Planning Permission rather than the First Planning Permission.

    ii) If so, whether the developer, on the evidence available, in fact elected to continue and complete the development under the Second Planning Permission.

    iii) If so, what relief, if any, is appropriate.

46. I will deal with those in turn.

The First Issue

47. In relation to the first issue, I consider that, as a matter of law, the developer was, after the reserved matters approval perfected the Second Planning Permission, able to elect to continue and complete the development under the Second Planning Permission rather than the First Planning Permission. Indeed, at the hearing before me, Mr Hobson did not argue with any vigour to the contrary.

48. It was common ground between Mr Crean and Mr Hobson that, where two planning permissions exist in respect of the same land, as a matter of principle, a developer may chose between them. Pye v Secretary of State for the Environment [1998] 3 PLR 72 concerned an application under section 73 to develop land without compliance with conditions previously attached to a planning permission, the relevant condition in that case being that the development commence within five years of the date of planning permission. Sullivan J (as he then was) said this (at page 85C-H):

> "An application under section 73 is an application for planning permission: see section 73(1)…
>
> Whilst section 73 applications are commonly referred to as applications to 'amend' the conditions attached to a planning permission, a decision under section 73(2) leaves the original planning permission intact and unamended. That is so whether the decision is to grant planning permission unconditionally or subject to different conditions under paragraph (a), or to refuse the application under paragraph (b), because planning permission should be granted subject to the same conditions.
>
> In the former case, *the applicant may choose whether to implement the original planning permission or the new planning permission*; in the latter case, he is still free to

> implement the original planning permission…" (emphasis added).

In R v Leicester City Council ex parte Powergen UK Limited [2000] 81 P&CR 5 at [27], the Court of Appeal expressly approved those comments. Although both cases concerned section 73 applications, there is no reason why the principles set out in Pye should not be of general application in all cases where there are multiple extant planning permissions for the same site.

49. However, in practice, steps taken in pursuance of one planning permission may make it impossible to implement a second permission. In Pilkington v Secretary of State for the Environment [1973] 1 WLR 1527, Mr Pilkington was granted planning permission to build a bungalow on part of land that he owned. He built the bungalow. He then discovered an earlier planning permission, granted to a predecessor in title but still in time, for the erection of a bungalow on a different part of the same land which contemplated the use of the rest of the land as a smallholding. Mr Pilkington began building the second bungalow; but, unsurprisingly, the planning authority served him with an enforcement notice. He appealed to the Secretary of State, who took the view that the later permission was inconsistent with, and thus necessarily alternative to, the earlier permission; and so, when the later permission was implemented, the earlier one became incapable of implementation. Mr Pilkington's further appeal was dismissed by the Divisional Court. Lord Widgery CJ, giving the substantive judgment of the court, deliberately left open the question of whether the earlier permission was determined or simply suspended by the implementation of the latter (page 1532F); but he was clear that it was not open to Mr Pilkington to implement both permissions in respect of inconsistent and contradictory developments (page 1532C-G). It was physically impossible to implement the second permission, once the first permission had been implemented.

50. In the context of the claim before me, several points arise in the light of that case:

   i) Lord Widgery clearly accepted the general principle, set out later by Sullivan J in Pye, that, where there are two planning permissions in respect of one site, then a developer may chose which he implements.

   ii) However, he held that a developer cannot implement two planning permissions for inconsistent developments, such that both are pursued.

   iii) Although in Pilkington the first planning permission was fully implemented – the bungalow etc was built – there is no reason why the principle should not apply where the first development is only begun but not completed.

   iv) Pilkington has no application in this case; because, although the two planning permissions in this case were alternatives (in the sense that, if one were pursued, the other could not be pursued at the same time because it is conceptually impossible for a development to be both subject to, and at the same time not subject to, a particular requirement), they were not inconsistent in the sense that the development in each case was identical. Therefore, at whatever stage the development had reached, a change in authorisation from one planning permission to the other would not be impossible and indeed would not cause any difficulties, conceptually or in practice.

v) In their written representations of 7 November 2014, Mr Hobson and Mr Whale submitted that any development purportedly done under the Second Planning Permission would in any event be unlawful because:

> "… [I]t *is* physically impossible to carry out the development authorised by the Second Planning Permission in the light of the full scope of that which has been done or can be done pursuant to the First Planning Permission which has been implemented. Put simply, two houses cannot occupy the same footprint on the self-same plot."

But, here, we are not talking about two different developments – as I have explained, the development in the First and Second Planning Permissions is identical. We are not considering the equivalent of two houses – but rather the same house – occupying the same footprint on the self-same plot. Whatever part of the development has been completed, it would clearly be possible to carry out the development in accordance with the Second Planning Permission in the light of that which has been done pursuant to the First Planning Permission.

51. Therefore, once the Second Planning Permission was fully granted by the grant of reserved matters approval, BDW as developer had two extant planning permissions in respect of the Site; the planning permissions were not inconsistent; nothing had been done under the First Planning Permission that meant that the Second Planning Permission could not be implemented or that the development could not be carried out under Second Planning Permission; and therefore, as a matter of law, BDW were entitled to chose or elect under which authorisation it wished to proceed.

The Second Issue

52. Whilst, other than the late-running point discussed at paragraph 50(iv) above, there was no real dispute between the parties on the first issue, Mr Hobson did take particular issue with Mr Crean's contention that, on the available evidence, as a matter of fact BDW has elected to proceed with the development under the Second Planning Permission.

53. The relevant legal principles are again uncontroversial. It was common ground before me that, as a matter of law, whether work is done in accordance with a particular planning permission is subject to an objective test, the intention of the parties being irrelevant (see Encyclopaedia of Planning, paragraph P56.10 and the cases referred to therein).

54. Mr Crean relied upon the following evidence as justifying the conclusion that, objectively, the material operations in the development on the Site after 18 September 2014 were performed under the Second Planning Permission, namely (i) paragraph 1.2 of Schedule 1 to the Second Section 106 Undertaking, and (ii) the evidence that, after 18 September 2014, material operations (i.e. works) were done on the Site towards completion of the development. In my respectful view, (ii) does not get the submission very far: the development in the First and Second Planning Permissions was identical (see paragraph 25 above), and the simple fact that the operations in that

development continued after 18 September 2014 cannot of itself assist with the question, under which planning permission were those operations performed.

55. The crucial focus is therefore on paragraph 1.2 of Schedule 1 to the Second Section 106 Undertaking. In short, Mr Crean submitted that, by that paragraph, on its true construction, reliance on the authorisation for the development under the First Planning Permission was objectively abandoned, so that any operations within the development thereafter could only have been, and were, under authorised by the Second Planning Permission. The development was initiated so far as the Second Planning Permission was concerned when the first material operation comprised in the development was performed after 18 September 2014. It is uncontroversial that such operations were carried out on or very shortly after that date. Thus, said Mr Crean, BDW did, in fact, change planning authorisation horse on 18 September 2014, from the First to the Second Planning Permission, as they were, as a matter of law, entitled to do. Mr Hobson submitted that paragraph 1.2 did not have the effect of terminating the developer's reliance on the First Planning Permission.

56. Those contentions led to a considerable debate as to the meaning of "implementation" in a planning context.

57. Mr Hobson submitted that "implementation of planning permission" in a planning context is routinely used as a synonym for "begun the development" as used in section 56(2). He referred to cases such as Greyfort Properties Limited v Secretary of State for Communities and Local Government [2011] EWCA Civ 908 at [39], where Richards LJ clearly equated implementation of planning permission with the start of the permitted works, saying: "It was the commencement of the access works that was found to be sufficient to amount to implementation of the planning permission"; and, perhaps the high point of the submission, Melap Singh v Secretary of State for Communities and Local Government [2010] EWHC 1621 (Admin) at [19], in which I described "implementation" as "a term of art in planning", meaning the commencement of the development for which permission has been granted. Furthermore, the term has been used in that sense in some documents in this case, e.g. in clause 15.5 of the Contract between the Claimant and BDW (quoted at paragraph 23(iii) above) and clause 5.1.2 of the Second Section 106 Undertaking (quoted at paragraph 38 above).

58. However, Mr Crean submitted that "implementation of planning permission" could not simply be equated with "initiation of development" in section 56. A starting point was the ordinary meaning of "implementation", which (he submitted by reference to the Oxford English Dictionary) is "fulfilment", i.e. a continuing act until completion, e.g. as the word is used in the context of the implementation of a policy. But, given that ordinary meanings might not be helpful in a technical context, he said that the Encyclopaedia of Planning (in the Introductory Note to section 56) indicates that there is no necessary relationship between the concepts of beginning the development and implementing a planning permission; some cases (e.g. Staffordshire County Council v NGR Land Developments Limited [2002] EWCA Civ 856) clearly use "implementation" as meaning something other than merely the commencement of a development, but rather a series of separate acts which cumulatively result in the fulfilment of the development authorised by the permission; in a planning context, there is routinely reference to "partial implementation" of planning permission, which presupposes implementation is a process; and other documents in this case refer to the

term in this continuous sense. Indeed, he submitted that the County Council itself had used the term thus: in the letter of 3 March 2014 from the County Council's Senior Solicitor to the Claimant's Solicitors, he said of the First Planning Permission, "The developer has elected to implement it *and is implementing it*" (emphasis added).

59. However, although both parties' submissions refer to their preferred definition as being correct "as a matter of law", in their post-hearing written submissions, both accept that, in a planning context, the term "implementation of planning permission" is used in a variety of ways (see, e.g., paragraph 6 of the further submissions on behalf the County Council dated 7 November 2014). That mutual concession was appropriately made.

60. Section 56 (see paragraph 5 above) concerns and defines when *development* – usually, the permitted works – is begun or (in the words of section 54(1)) when "for the purposes of this Act development of land shall be taken to be initiated". "Begun" and "initiated", as used in section 54, are both defined terms, and conceptually clear. "Implementation of a planning permission" is something different. It is not a term used in the planning Acts; and, despite their diligent researches, Counsel were unable to refer me to any other relevant statutory context in which the term appears. The authorities to which I was referred indicate that the meaning of the term varies depending upon its context. "Implementation of a planning permission" may be used to indicate a single point event that occurred at the time the development began (and so, in effect, it is synonymous with "beginning or initiating development authorised by a planning permission"); but it may also be used to indicate the whole process whereby, under the permission, the development is commenced, progressed and completed.

61. In the event, Mr Crean and Mr Hobson agreed: the meaning of "implementation" in paragraph 1.2 of Schedule 1 to the Second Section 106 Undertaking is essentially a matter of contractual construction. In the language of Lord Hoffmann in Investors Compensation Scheme Limited v West Bromwich Building Society [1998] 1 WLR 896 at page 913C, "the meaning of the document is what the parties using those words against the relevant background would reasonably have understood to mean".

62. I have already set out, at some length, the relevant background. Mr Hobson submitted that, in the light of that background, BDW's unilateral covenant with the Council and County Council "to dispense with the implementation of the First Planning Permission" was not a reference to a continuous process towards completion of the development, as Mr Crean suggests; but rather "to dispense with the beginning of the First Planning Permission". However, that had already taken place, and could not be undone. Paragraph 1.2 of Schedule 1 to the Second Section 106 Undertaking is therefore of no effect; although, he stressed, its ineffectiveness does not alter its proper interpretation. Mr Hobson pointed out that paragraph 1.3 (by which BDW covenanted to "dispense with the discharge of the obligations under the First Section 106 Agreement in relation to the [Site]…) was clearly ineffective, because of section 106A.

63. Forcefully as those submissions were made, I cannot accept them.

64. Clause 4.5 of the First Section 106 Agreement (which imposed the transport contribution obligation) provided that nothing in that Agreement prohibited or limited

any right to develop the Site in accordance with another planning permission. So far as that section 106 obligation to contribute was concerned, it would have ended with the transfer of the Site to BDW, but for the scheme entered into by the Claimant and BDW. Under that scheme, the Claimant remained liable for the obligation; but the Claimant also reserved the right to apply for planning permission for the same development as in the First Planning Permission, but without the transport contribution. It was part of the scheme that, if and when planning permission were granted without the transport contribution obligation, BDW would take effective steps to cease reliance on the First Planning Permission in favour of the Second Planning Permission. That is not simply a matter of subjective intention: the scheme was part of the objective background against which paragraph 1.2 of Schedule 1 comes to be construed.

65. The parties are agreed that the term "the implementation of the First Planning Permission" used in paragraph 1.2 is ambiguous: it is properly capable of having more than one meaning. Lord Hoffmann reminds us (at page 913E of the <u>West Bromwich Building Society</u> case), that "the law does not require judges to attribute to the parties an intention which they plainly could not have had"; and he also reminds us of the comment of Lord Diplock in <u>Antaios Compania Naviera SA v Salen Rederierna AB</u> [1985] AC 191 at page 201 that, where semantic and syntactical analysis of words used in a commercial document would lead to a conclusion that flouts common sense, "it must be made to yield to business commonsense".

66. In the case of paragraph 1.2, given that there is a viable alternative construction of the words used, BDW could not sensibly have intended to "dispense with the beginning of the First Planning Permission" at a time when it well-knew that that Planning Permission had long-since begun: the development under that planning permission commenced on 8 October 2013, the covenant was given on 25 June 2014. Where more than one construction is reasonably open, it is a tenet of construction of commercial documents that the parties intended something of effect rather than a provision which is necessarily entirely empty. Furthermore, recital (G) of the Second Section 106 Undertaking (quoted at paragraph 37 above) assists with the interpretation of paragraph 1.2 of Schedule 1, because, in circumstances in which the development could not be carried out under both planning permissions at the same time, it makes clear that BDW "intends to implement the Second Planning Permission…" and so is undertaking to "dispense with the implementation of the First Planning Permission".

67. It is also noteworthy, as Mr Crean emphasised, Mr Hobson failed to identify what would be sufficient to evidence objectively a move from the First Planning Permission to the Second Planning Permission as BDW could, as a matter of law, make, if, as he contended, paragraph 1.2 of Schedule 1 was evidentially insufficient.

68. In all of the circumstances, I consider the true construction of paragraph 1.2 is tolerably clear: looked at objectively and against the relevant background, the party using those words (BDW) would reasonably have been understood to mean that, once the Second Section 106 Undertaking took effect on 18 September 2014, it would not to progress the development in terms of any material operation under the authorisation of the First Planning Permission. On or very soon after that date, undoubtedly material operations within the development were carried out. As reliance on the First Planning Permission had been given up, those material operations could only have

been carried out under the Second Planning Permission. The trigger for the second and third instalments of the transport contribution obligation never arrived, before reliance on the Second Planning Permission kicked in. That permission had no such obligation.

69. For those reasons, on the evidence available, I am satisfied that, from 18 September 2014, the developer in fact elected to continue and complete the development under the Second Planning Permission.

The Third Issue

70. Mr Hobson submitted that, even if the developer could as a matter of law cease reliance on the authorisation of the First Planning Permission in favour of the Second Planning Permission – and, as a matter of fact elected to do so – nevertheless, the court should not grant the declaration sought by the Claimant. The Claimant is not now the beneficiary of the Second Planning Permission. It is not the developer. It does not own the Site. It sold the Site to BDW in March 2013 for just over £7.2m, which, it can be inferred, was a price reflecting the indemnity it gave to BDW in respect of the future transport contribution instalments. There is no claim by BDW. Furthermore, it is said, the Claimant's conduct is reprehensible: it pursued Grounds 2 and 3, including resisting the County Council's application to set aside the permission to proceed which had been granted by Judge Cooke, and failed to give full and frank disclosure when making the application for judicial review in that it failed to disclose the costs determination of the Inspector which was not favourable to the Claimant.

71. However, I am unpersuaded that this is a case in which relief should be withheld.

72. This court has power to grant a declaration in judicial review proceedings where it considers it "just and convenient in all the circumstances of the case" (section 31(2) of the Superior Courts Act 1981, and CPR rule 54.3), even where a declaration is the only relief claimed (CPR rule 40.20). That is clearly a wide discretion, but it has to be exercised judicially. It has been said that the court should only make such a declaration if three conditions are satisfied, namely (i) the question under consideration is a "real question", (ii) the person seeking the declaration has a "real interest", and (iii) there has been "proper argument" (Greenwich Healthcare NHS Trust v London and Quadrant Housing Trust [1998] 1 WLR 1749 at page 1756A-B, citing In re F [1990] 2 AC 1 at page 82 per Lord Goff).

73. The Claimant clearly has a sufficient interest to bring this claim, and a real interest in the issues raised in it: it remains liable for any transport contributions due under the First Planning Permission. It was part of the contractual scheme entered into between the Claimant and BDW that BDW would not – or, at least, need not – take part in these proceedings. The sale price of the Site was presumably not reduced pound-for-pound by the amount of the potential further contributions towards transport; but only took into account the risk of these proceedings being ineffective in bringing to an end any liability for the transport contributions under the First Section 106 Agreement. The central issue raised in this claim is, clearly, a "real question", with real potential consequences for all parties. There is no doubt that the issue has been the subject of not only proper, but vigorous, debate.

74. In my judgment, the Greenwich conditions are satisfied; and there is no good reason to deprive the Claimant, which has succeeded on the merits, from the relief it seeks. Indeed, it would seem to me to be incongruous for the Claimant to have succeeded on the merits as to the transport contribution before the Inspector, with the result that it obtained planning permission without that obligation, and then to deprive the Claimant of the practical effect of that victory. In my view, it is just and convenient to make a declaratory order.

Disposal

75. Therefore, subject to any submissions on the precise formulation of the order, I would propose allowing the judicial review and making a declaration in the terms sought during the course of the hearing, set out at paragraph 42 above.