British Railways Board v Secretary of State for the Environment and Others

Positive/Neutral Judicial Consideration

Court
House of Lords

Judgment Date
28 October 1993

House of Lords

1993 WL 963747

Lord Keith of Kinkel Lord Templeman Lord Jauncey of Tullichettle Lord Browne-Wilkinson Lord Mustill

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Judgment

Lord Keith of Kinkel

My Lords.

In May 1988 the appellants the British Railways Board ("British Rail") applied to Hounslow London Borough Council ("Hounslow") for outline planning permission to develop for housing and ancillary purposes part of the former Feltham marshalling yard. The site shown on the plan annexed to the application covered land belonging to British Rail but also an area of land owned by Hounslow, lying between British Rail's property and the A314 road. It was proposed that a vehicular access to the housing development should be formed over the land so owned by Hounslow. Hounslow failed to determine the application within the statutory period, and so British Rail appealed to the Secretary of State for the Environment ("the Secretary of State") against the deemed refusal of it.

The Secretary of State appointed an inspector, Mr. David Fenton, to hold a public local inquiry into the appeal and to report to him. Mr. Fenton duly held the inquiry in July 1989 and reported on 13 September 1989. He recommended that the application providing for access from the A314 be granted, subject to the completion of an agreement with Hounslow under section 52 of the Town and Country Planning Act 1971 and to certain conditions set out in the report. These conditions included:

> "10. The residential development hereby approved shall not exceed 440 dwelling units.
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> "13. The works to provide the main access road shall be completed to base course level prior to the commencement of the construction of the residential development hereby approved, and shall be fully completed prior to the occupation of buildings."

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The Department of the Environment on 7 November 1989 sent copies of Mr. Fenton's report to British Rail and to Hounslow with a letter stating that the Secretary of State agreed generally with the inspector's view but that before making a decision he desired confirmation of the completion of a legal agreement under section 52 within 28 days. Thereafter British Rail made strenuous efforts to persuade Hounslow to enter into such an agreement, but without success. Hounslow's objection was based on environmental grounds. The former marshalling yards, disused for 30 years, had become the habitat for various interesting species, and the land belonging to Hounslow over which the proposed access road was to pass, consisted in the Pevensey Road Open Space and former sewage pits, which the inspector found to be areas with their own nature conservation interest and public amenity value. Various correspondence followed until on 21 March 1990 the Department sent to British Rail a letter stating inter alia

> "2. There are, of course, similar difficulties about your alternative suggestion of imposing a "Grampian" condition or conditions. A House of Lords decision in 1984 was to the effect that a condition prohibiting the carrying out of development or the occupation of buildings until such time as works (or other action) have been carried out by a third party is a valid condition provided its imposition is reasonable in the circumstances of the case. The 'reasonableness' of the condition is to be judged on the basis of whether there is at least a reasonable prospect of the works in question (or other action to be taken) being carried out within a reasonable time. The relevant timescale to be considered is that within which the permission must be implemented.
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> "3. Given the present circumstances there appears to be no reason to believe that the council would be willing to co-operate. That being so, it is felt that there is no reasonable prospect of the works in question being carried out within a reasonable time. A Grampian condition or conditions would therefore not seem appropriate."

A "Grampian" type condition, which takes the name from the decision of this House in *Grampian Regional Council v. Aberdeen District Council (1984) 47 P.&C.R. 633* , is one which provides that approved development shall not be commenced until some event, in that case the closure of a section of public road, has taken place. The proposed condition 13 in the inspector's report was a Grampian type condition. It will be seen that the Secretary of State took the view that the adjection to the planning permission of this condition would not be valid unless there was a reasonable prospect of its being fulfilled. Hounslow on 28 March 1990 wrote to the Secretary of State stating that the council at a meeting on 27 March had decided not to enter into a section 52 agreement with British Rail. By decision letter dated 5 June 1990 the Secretary of State refused planning permission. He did so on the basis that he was precluded in law from granting the permission subject to conditions which appeared to have no reasonable prospect of fulfilment within the five year life of the permission. The question in the case is whether he was correct in that view of the law.

British Rail applied to the High Court, under section 288 of the Town and Country Planning Act 1990 , to quash the Secretary of State's decision. The application was heard by Mr Gerald Moriarty, Q.C., sitting as a Deputy Judge of the Queen's Bench Division, who on 20 December 1991 dismissed it, and his decision was affirmed by the Court of Appeal (Dillon, Kennedy and Hirst L.JJ.) on 6 October 1992. British Rail now appeals to your Lordships' House.

The power to adject conditions to the grant of planning permission is contained in section 29(1) of the Act of 1971. which provides in its latter part that a local planning authority: "(*a*) subject to sections 41 and 42 of this Act, may grant planning permission, either unconditionally or subject to such conditions as they think fit: or (*b*) may refuse planning permission."

The power, though widely expressed, is not unrestricted. In *Newbury District Council v. Secretary of State for the Environment [1981] A.C. 578* , Lord Lane said, at p.627:

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> "Despite the breadth of the words 'subject to such conditions as they think fit', subsequent decisions have shown that to come within the ambit of the Act and therefore to be intra vires and valid a condition must fulfil the following three conditions: (1) it must be imposed for a planning purpose; (2) it must fairly and reasonably relate to the development for which permission is being given: (3) it must be reasonable; that is to say, it must be a condition which a reasonable local authority properly advised might impose…. The third test is probably derived from *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223* , and ensures that the Minister, if he is asked to review the actions of a local authority, may, even if tests (1) and (2) are quite satisfied, nevertheless allow an appeal on much broader grounds, if the effect of the condition would be to impose an obviously unreasonable burden upon the appellant. Decisions of the local planning authority should not, however, lightly be set aside on this ground."

It is clear from the latter part of this passage that Lord Lane had in mind that where a local planning authority adjected to a planning consent a condition which was unreasonable in the *Wednesbury* sense an appeal by the would-be developer would be allowed to the effect of rendering the consent free of the condition, as happened in *City of Bradford Metropolitan Council v. Secretary of State for the Environment (1987) 53 P & CR 55* . However, it appears to have come about that the law is viewed, particularly in the Court of Appeal, as being to the effect that if a condition which on its merits is reasonable and necessary on planning grounds has no reasonable prospects of fulfilment then that condition cannot validly be imposed and planning permission must be refused. That view is apparently thought to be supported by a passage in the speech which I delivered, with the concurrence of my colleagues, in *Grampian Regional Council v. City of Aberdeen District Council (1984) 47 P.&C.R. 633* . That was a case where the regional council had applied to the district council and another local planning authority for planning consent to industrial development on a site which spanned the boundary between the authorities. The reporter to whom the Secretary of State for Scotland had delegated the decision on the application considered that the development, while desirable on planning grounds, would generate a volume of traffic likely to cause a road safety hazard. This hazard could, however, be eliminated if a section of public road leading to a certain junction were to be closed. The reporter took the view that it would not be competent to grant permission for the development subject to the condition that the road in question should be closed, since it was not in the power of the applicants to close the road at their own hand. An appeal by the applicants to the Court of Session was allowed, and the decision was affirmed by this House, the permission being granted subject to the condition that the development should not commence until the relevant section of road had been closed. It was argued for the district council before this House that there was no practical distinctions between a condition requiring a result which it was not within the power of the applicant to bring about and one providing that no development should begin until that result had been achieved. In either case the practical effect was to require the applicant to bring about something which was not within his power. In rejecting this argument I said, at pp. 636–637:

> "My Lords, in my opinion there is no substance in the appellants' contentions. In the first place, there is a crucial difference between the positive and the negative type of condition in this context, namely that the latter is enforceable while the former is not. In the second place, the reasonableness of any condition has to be considered in the light of the circumstances of the case. In this case the proposals for development put forward by the first respondents were found by the reporter to be generally desirable in the public interest. The only aspect of them which he regarded as disadvantageous was the traffic problem they would be likely to cause at the Findon House junction. That problem was capable of being solved by the closing of the southern part of Wellington Road, something which had at least reasonable prospects of being achieved under statutory powers to that effect. In the circumstances, it would have been not only not unreasonable but highly appropriate to grant planning permission subject to the condition that the development was not to proceed unless and until the closure had been brought about. In any event, it is impossible to view a condition of that nature as unreasonable and not within the scope of section 26(1) of the Act if regard is had to the provisions of section 198. Subsection (1) provides: 'the Secretary of State may by order authorise

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> the stopping up or diversion of any highway if he is satisfied that it is necessary to do so in order to enable development to be carried out in accordance with planning permission granted under Part III of this Act, or to be carried out by a government department.'
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> "A situation where planning permission has been granted subject to a condition that the development is not to proceed until a particular highway has been closed is plainly one situation within the contemplation of this enactment, though no doubt there are others. The stopping up of the highway would very obviously be necessary in order to enable the development to be carried out. So it is reasonable to infer that precisely the type of condition which is in issue in this appeal was envisaged by the legislature when enacting section 26(1). As it happens, the first respondents have themselves power, under section 12 of the Roads (Scotland) Act 1970 . to promote an order for the closure of Wellington Road. But that is an accident, though it may perhaps make the case an a fortiori one. Section 198 is entirely general and is apt to favour strongly the reasonableness of negative conditions relating to the closure of highways in all appropriate cases."

In *Jones v. Secretary of State for Wales and Ogwr Borough Council (1991) 61 P.& C.R. 238, a decision of the Court of Appeal* which that court followed in the present case, Purchas L.J. regarded this passage in my speech as laying down that a negative condition was necessarily unreasonable in the *Wednesbury* sense unless there was a reasonable prospect of it being fulfilled. The case was similar to the present in respect that the applicant for planning permission to build a house required vehicular access to it over land which formed part of a common. The owners of the common refused to consent to this so long as the association of commoners and the board of conservators were in opposition to it. The inspector refused planning permission on the ground that a condition regarding the vehicular access could not be imposed unless there was a reasonable prospect of the condition being satisfied. His decision was quashed by His Honour Judge Marder Q.C. but restored by the Court of Appeal. Purchas L.J. said, at p. 241, after quoting from the Grampian case:

> "The issue with which we are concerned is whether that part of the speech in particular and the authority in general is to be read as putting a restriction upon the use of Grampian conditions to those circumstances in which there is some evidence that there was at least a reasonable prospect of the circumstance or the removal of the obstacle to which the condition is applied coming to pass within a reasonable time, which it seems to be common ground would be the time envisaged in the planning statutes as the life of a planning consent."

and later, at p. 245:

> "In my reading of the speech of Lord Keith, he clearly had in mind that a condition of this kind would be reasonable and, in certain circumstances, more than reasonable, but only if and in so far as it was established that there was a reasonable prospect of the removal of the obstacle being achieved."

Nourse L.J. did not base his judgment so directly on the Grampian case. He said, at pp. 246–247:

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> "If planning permission had been granted subject to a condition that the development should not commence until such a right had been obtained, it would necessarily have followed that the condition, being one with no reasonable prospect of fulfilment, could not reasonably be imposed. The condition would thus have failed to meet the third of the requirements for a valid condition which were authoritatively stated by the House of Lords in Newbury District Council v. Secretary of State for the Environment . It must be unreasonable to impose a condition which at once shuts out any reasonable prospect of the permission's being implemented.
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> "In order to arrive at this conclusion it is not really necessary to rely on the later decision of the House of Lords in Grampian Regional Council v. City of Aberdeen District Council , where the precise question with which we are confronted was not in point. But there is certainly nothing in the speech of Lord Keith of Kinkel which is inconsistent with the conclusion and, on a reading of what he said, I think it highly likely that he and the others of their Lordships would have agreed with it."

The third member of the Court, Glidewell L.J. said, at p. 248:

> "For the reasons which have already been explained in my Lords' judgments, the condition, if it is to be imposed, has itself to be a reasonable one and it cannot be reasonable to impose a condition where there is no reasonable prospect of the problem being overcome since this would inevitably stultify the permission."

In the present case (1992) 65 P.& C.R. 401 Dillon L.J., who delivered the leading judgment in the Court of Appeal said, at p. 408, in dealing with the argument that it made a difference that the proposed access was within the site covered by the application:

> "But to my mind there is no logic in that position at all. The fundamental flaw in the Grampian case is imposing a condition in granting a planning permission which, on the information available, the applicant has no prospect of satisfying within the life of the permission. That is so however the plan on the planning application happens to have been drawn, and I cannot see that there is any justifiable logical distinction between the one case and the other. It is on either view a nonsense to grant a planning permission subject to a condition which the planning authority, or the Secretary of State on an appeal, knows perfectly well there is no reasonable prospect of the applicant being able to satisfy.
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> "It was submitted to us by Mr. Sullivan that the decision in Jones , in so far as the approach road in question was part of the appeal site in that case, must be treated as having been given per incuriam. But I do not take that view. It is a considered decision of this court with which I respectfully agree. It would be a nonsense to grant planning permission, subject to the suggested condition in the present case, in view of the attitude firmly adopted by the Hounslow Council in the correspondence that followed the inspector's report".

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Kennedy L.J. said, at p. 408:

> "It is clear from the speech of Lord Keith in Grampian , and from the other authorities to which my Lord has referred, that a negative condition can be imposed on land which an applicant seeks to develop, which condition can only be satisfied by, for example, getting control of adjacent land required for access; and Grampian is also authority for the proposition that planning permission may be refused if there are no reasonable prospects of the applicant being able to fulfil the condition because, for example, the owner of the adjacent land simply will not sell".

Hirst L.J. agreed with both judgments.

As I observed in the Grampian case, the question whether or not a certain condition is unreasonable depends on the circumstances of the case. The circumstances of the Grampian case itself were such that the proposed condition was not only reasonable but highly appropriate. One of these circumstances was that the closure of the southern part of Wellington Road had reasonable prospects of being brought about. It is a mistake, however, to turn the decision on its head to the effect of treating it as carrying the necessary implication that a condition is unreasonable and invalid if it does not have such reasonable prospects. The Act of 1971 contemplates that an application for planning permission may be made by a person who does not own the land to which it relates. This is made plain by section 27(1)(b) , which provides that an application for planning permission is not to be entertained unless, in the appropriate case, the applicant accompanies it with:

> "a certificate stating that the applicant has given the requisite notice of the application to all the persons (other than the applicant) who, at the beginning of the period of twenty-one days ending with the date of the application, were owners of any of the land to which the application relates, and setting out the names of those persons, the addresses at which notice of the application was given to them respectively, and the date of service of each such notice."

Section 29(3) provides that where the application is accompanied by such a certificate the local planning authority:

> "(a) in determining the application, shall take into account any representation relating thereto which are made to them, before the end of the period mentioned in subsection (4) of that section, by any person who satisfies them that he is an owner of any land to which the application relates or that he is the tenant of an agricultural holding any part of which is comprised in that land: and (*b*) shall give notice of their decision to every person who has made representations which they were required to take into account in accordance with the preceding paragraph."

The owner of the land to which the application relates may object to the grant of planning permission for reasons which may or not be sound on planning grounds. If his reasons are sound on planning grounds no doubt the application will be refused. But if they are unsound, the mere fact that the owner objects and is unwilling that the development should go ahead cannot in itself necessarily lead to a refusal. The function of the planning authority is to decide whether or not the proposed

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development is desirable in the public interest. The answer to that question is not to be affected by the consideration that the owner of the land is determined not to allow the development so that permission for it, if granted, would not have reasonable prospects of being implemented. That does not mean that the planning authority, if it decides that the proposed development is in the public interest, is absolutely disentitled from taking into account the improbability of permission for it, if granted, being implemented. For example, if there were a competition between two alternative sites for a desirable development, difficulties of bringing about implementation on one site which were not present in relation to the other might very properly lead to the refusal of planning permission for the site affected by the difficulties and the grant of it for the other. But there is no absolute rule that the existence of difficulties, even if apparently insuperable, must necessarily lead to refusal of planning permission for a desirable development. A would be developer may be faced with difficulties of many different kinds, in the way of site assembly or securing the discharge of restrictive covenants. If he considers that it is in his interests to secure planning permission notwithstanding the existence of such difficulties, it is not for the planning authority to refuse it simply on their view of how serious the difficulties are.

In the present case British Rail have applied for a planning permission which would cover their own land and also land belonging to Hounslow. Hounslow's land is to be site of the access road which they seek. The proposed condition relates simply to the stage which construction of the access road must have reached before the construction of the houses starts and before the houses are occupied. The condition, if imposed, would not derogate from the planning permission if granted. So the position is essentially that British Rail have applied for planning permission affecting land not in their ownership, a common state of affairs specifically contemplated by the Act. The proposed condition does not relate to land outside the ambit of the permission applied for. Even if it did, the relevant considerations would be the same as those to be applied where an application for planning permission relates to land not in ownership of the applicant. If the condition is of a negative character and appropriate in the light of sound planning principles the fact that it appears to have no reasonable prospects of being implemented does not mean that the grant of planning permission subject to it would be irrational in the *Wednesbury* sense so that it would be unlawful to grant it. If it is irrational to grant planning permission subject to a condition which has no reasonable prospects of being implemented then it must be no less irrational to refuse planning permission on the ground that a desirable condition has no reasonable prospects of implementation and therefore cannot be imposed. In truth, neither course is irrational. What is appropriate depends on the circumstances and is to be determined in the exercise of the discretion of the planning authority. But the mere fact that a desirable condition appears to have no reasonable prospects of fulfilment does not mean that planning permission must necessarily be refused. Something more is required before that can be the correct result.

My Lords, for these reasons I am of opinion that the Secretary of State misdirected himself in law in considering that imposition of the proposed condition regarding the access road to the development would be invalid. I would therefore allow the appeal and remit the matter to the Secretary of State for reconsideration in the light of your Lordships' judgment. *Jones v. Secretary of State for Wales and Ogwr Borough Council (1990) 61 P.& C.R. 238* was wrongly decided and must be overruled.

Lord Templeman

My Lords,

I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Keith of Kinkel, and for the reasons he gives I, too, would allow the appeal.

Lord Jauncey of Tullichettle

My Lords,

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For the reasons given by my noble and learned friend Lord Keith of Kinkel I too would allow the appeal and remit the matter to the Secretary of State.

Lord Browne-Wilkinson

My Lords,

For the reasons given by my noble and learned friend Lord Keith of Kinkel I too would allow the appeal and remit the matter to the Secretary of State.

Lord Mustill

My Lords,

I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Keith of Kinkel, and for the reasons he gives I, too, would allow the appeal.

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