Greyfort - Are There Still Grey Areas in Conditions Precedent?

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GREYFORT PROPERTIES LTD v (1) SECRETARY OF STATE FOR COMMUNITIES & LOCAL GOVERNMENT (2) TORBAY COUNCIL (2011)
Access works carried out by a company as part of a property development scheme could not constitute a lawful implementation of a planning permission where they had been carried out in breach of a planning condition. They therefore fell squarely within the principle set out in FG Whitley & Sons Co Ltd v Secretary of State for Wales (1992) 64 P & CR 296.
[2011] EWCA Civ 908
CA (Civ Div) (Maurice Kay LJ, Richards LJ, Leveson LJ) 28/7/2011

GREYFORT PROPERTIES LTD v SECRETARY OF STATE FOR COMMUNITIES & LOCAL GOVERNMENT (2010)
A planning inspector was entitled to conclude that a condition in a grant of planning permission which required that the ground floor levels of a block of flats be agreed in writing with a local planning authority before work on a site commenced was a condition precedent such that a failure to comply with it rendered any development on the site unlawful.
[2010] EWHC 3455 (Admin)
QBD (Admin) (Mitting J) 7/12/2010

The most intriguing aspect of this paper about the Greyfort case is that it isn't actually going to be about Greyfort. The reason for this is that, although Greyfort is one of the most recent in the suite of cases about "conditions precedent", and although it went from High Court to Court of Appeal, it does not, in fact, add a great deal that is new to a conundrum that has been puzzling practitioners now for nearly twenty years.

What is " a condition precedent"? In simplest terms, it is a condition which requires something to happen before something else happens. This simple formulation disguises layer upon layer of complexity.

As is very well known, LPA's can add to a planning permission "such conditions as they think fit". Conditions have to conform to well known tests, which used to be contained in Circular 11/95,and are now set out in the National Planning Practice Guidance (NPPG).

The Courts have confirmed long ago that it is acceptable to impose conditions that prevent certain matters from proceeding at all until a specific step has taken place.
This has been commonly known as a "Grampian Condition".
Originally, "Grampian Condition" meant something a little more specific –
[Grampian Regional Council v City of Aberdeen [1984] JPL 590].
But it came, in time, to mean any condition that required something to be completed before development could commence – a " condition precedent".

Conditions precedent can range widely from something as significant as:
"no development to commence until a bypass has been completed"
to something as mundane as:
"no development to commence until building materials have been approved".

The significance of a true condition precedent is that if it is breached, then any development that has begun in breach of that condition is unlawful in its entirety. The breach of any other kind of condition will simply result in a breach of condition notice, or enforcement notice., which can require the breach to be put right.

There are different parts of the 1990 Act that apply to carrying out development without planning control, (which is the result of breaching a condition precedent which prohibits all development until the condition is satisfied), and carrying out development merely in breach of a regular condition; (S171A). Different time limits

apply as well. If there is no planning permission, then operational development will become lawful after the lapsing of four years. The LPA, on the other hand, has 10 years in which to take action against a breach of condition. (S171B).

The starting point for deep consideration of conditions precedent is the case of ***Whitley***:
[Whitley and Sons v Secretary of State for Wales and Clwyd CC (1992) 64 P & CR 296.]
This is the case that gives rise to the oft cited "Whitley Principle" – not as often understood as it is mentioned.

This case related to a mining permission which had been granted subject to a condition that "no working should take place except in accordance with a scheme to be agreed with the LPA". The works under the permission had to begin within a time limit. Schemes were submitted in time, but not agreed. Works began before the schemes had been agreed, in order to comply with the permission deadline. The schemes were in the process of being agreed, and were ultimately agreed, after the deadline. The question was whether the works that had been commenced before the condition had been satisfied, and before the deadline, were enough to commence (and therefore save) the permission.

Ironically, the judgement of Woolf LJ in ***Whitley*** itself considered that this issue of "conditions precedent" was actually irrelevant to the issue at hand.

The simple formulation of the issue in ***Whitley*** was this:
Woolf LJ:

> "…it is not necessary or helpful to try to determine whether or not the conditions contained in a planning permission are properly capable of being classified as conditions precedent. As I understand the effect of the authorities to which I am about to refer, it is only necessary to ask the single question:

> are the operations (in other situations the question would refer to the development[1]) permitted by the planning permission read together with its conditions?"
>
> "The permission is controlled by and subject to the conditions. If the operations contravene the conditions, they cannot be properly described as commencing the development authorised by the permission. If they do not comply with the permission, they constitute a breach of planning control and for planning purposes will be unauthorised, and thus unlawful."

This is, therefore the "Whitley Principle" - and the starting point. The further irony is that Woolf LJ then went on to say that the newly minted principle did not apply in the case before him – that the case was an exception.

Woolf LJ decided, in that case, that the requirement in the condition was simply that the scheme of working had to be agreed – it did not specify that the scheme had to be agreed *before* the deadline, or that no works were allowed before the scheme had been agreed.

The condition actually said:

"no working shall take place except in accordance with the agreed scheme" - this working *was* in accordance with the agreed scheme, even though the working came first and the agreed scheme came later. Woolf LJ also pointed out that if the schemes were ultimately approved, as here, then there would be no point taking enforcement action. This, as we shall see, became the real nub of the matter.

There then followed a string of cases that started to rub up against the impracticalities of pushing the Whitley Principle too far. The cases resulted in a series of exceptions to the Whitley Principle, until it got to the stage that there were so many ways around the Principle that the true meaning of it was in danger of being lost.

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[1] By this, Woolf J simply meant that not all development is operational.

R v Flintshire CC Ex P Somerfield Stores Ltd [1998] P & CR 336

In this case, no works were to be done until specific approval had been given. The developer had applied, and had been granted the approval for his works, and had commenced them, but the written notice of approval had not been sent out. There was, surprisingly, a later dispute as to whether the commencement of the works was lawful or not in that situation, but it was a clear situation where the condition had been complied with in principle, and the permission was therefore lawfully commenced.

Agecrest v Gwynedd CC [1998] J P L 325

Before the commencement of this development, schemes (for example, of landscaping) were required to be approved. There was a deadline for the commencement of development – that deadline was approaching and the schemes had not been approved. The LPA agreed that the developer could start work on a spur road, in order to commence the development and save the permission, even though the schemes had not been approved. Later, in Court, it was argued that the works on the spur road had not validly commenced the permission, because of the condition precedent that precluded any works before the approval of the other schemes. The Court was not receptive to this argument and said it was clear that the Council had known and approved of the situation, and that the conditions would have to be complied with in due course, but that did not prevent the spur road from lawfully commencing this permission.

Whitley and ***Somerfield*** were really all about timing – as opposed to the non-compliance with a condition precedent. The developers did comply with the conditions, in both cases – it was just that they had not been notified of the approval of the condition before the works had to begin. There was nothing that the LPA could or would have wanted to enforce against – the development was proceeding as intended and planned by all concerned.

Agecrest was more problematic, because it seemed to depend upon the LPA changing its mind, and agreeing that the developer did not have to comply with the condition precedent after all, and that they could commence a little bit of the development before they had even submitted their schemes in accordance with the conditions. That seems to be dependent upon the discretion of the LPA, and we have had important caselaw since that says that there is very little scope for LPAs to exercise discretion in changing terms of permissions or scope of conditions, outside of the clear terms of the permission. This is because planning is a comprehensive code, and it is in the public interest that LPAs are prevented from changing or waiving terms–

Henry Boot Homes Ltd v Bassetlaw DC [2003] JPL 1030.

Henry Boot would probably preclude an ***Agecrest*** conclusion from arising again.

From the foregoing, however, it starts to become clear as to what the true underlying rationale for the Whitley Principle is. It was canvassed in:

Hammerton v London Underground Ltd [2003] JPL 984.

In ***Hammerton***, Ouseley J said this:

> " ***Whitley*** dealt with circumstances where the necessary approvals of details were sought and did go through all the relevant statutory procedures. It would have been irrational for the Council thereafter to have thought it expedient to take enforcement proceedings.
>
> "I consider that the principle discernable in Woolf LJ's reasoning is that where it would be unlawful in accordance with public law principles, notably irrationality or abuse of power, for a local planning authority to take enforcement action to prevent development proceeding, the development, albeit in breach of planning control is nevertheless effective to commence development. Enforcement action may still be taken to remedy the breach by requiring compliance with the condition. But the development cannot be stopped from proceeding….. ***I see no reason why the development which cannot be enforced against should not be regarded as effective to commence development…"*** [Emphasis added].

> "Once the jurisprudential basis for the Whitley case is clear, other cases can be seen as further illustrations of the application of the principle, rather than as further ad hoc exceptions to the statutory code."

> "….. A breach of planning control and it would be rare, which could not lawfully be the subject matter of enforcement action ought to have a different legal effect from one which could be enforced against. That I believe to be the public law principle, and not an ad hoc piece of judicial legislation which underlies ***Whitley***."

Hammerton thus changed the jurisprudential basis for determining whether operations commenced in breach of condition are effective to lawfully implement a planning permission. It is no longer necessary to see if a case fits into one of the previously labelled "exceptions" to the Whitley rule, but rather to ask the overall question as to whether the breach of planning control can be enforced against. This interpretation of the ***Whitley*** exceptions was confirmed by the Court of Appeal in

R on the application of Prokopp v London Underground Ltd [2004] Env LR.

Where enforcement action is no longer possible, either because the time limit for taking enforcement action has expired or because it would be irrational and therefore unlawful to take enforcement action, the planning permission is to be viewed as having been lawfully implemented, despite the fact that the operations may have commenced in breach of a condition precedent. It is important to note that the date at which the court will look when deciding whether the LPA could or could not lawfully take enforcement action is the date on which the disputed works were commenced.

This is all very well, but it is not the end of the story. Whether it would be irrational or not for the LPA to enforce against the development because of a breach of a condition precedent will depend upon what that condition is actually saying.

Subsequent caselaw, and particularly ***Hart,*** uses the terminology of "conditions precedent", and the specific wording of such conditions as a highly technical tool to answer the question as to whether development has or has not commenced lawfully in any given situation.

A basic "condition precedent" simply means one which specifies that something is to happen before something else happens. What those two 'things' are will make all the difference as to whether the condition is a "true condition precedent", controlling the entire development, or not.

There is also a world of difference between a condition precedent that is phrased in terms that something shall be done "….before development is commenced", and one that is phrased: "No development shall commence until….". On the face of it, there may not seem to be much practical difference between the two. In the world of conditions precedent, however, the latter prohibitive wording is important to make a "true" condition precedent. A true condition precedent must *explicitly prohibit the commencement of the whole development* before the stated conditioned step has occurred.

A true condition precedent must be judged holistically, therefore, by wording and content, and the question asked: "is this condition truly intended to prohibit *all and any* development until the step required in the condition has been discharged?".

This involves a dual judgement as to whether it is worded prohibitively, and whether it is directed at the subject matter of the permission (the 'heart of the permission') - that is, the very development itself, or whether it is simply directed at some peripheral issue. A condition which "goes to the heart of the permission" does not mean a condition that is about some important step in the permission. Restoration is an important step in a mining permission; appropriate materials are an important part of residential development – they are not peripheral or insignificant, but these things

are not what the permission was granted *for*. A "true condition precedent" means a condition that is intended to control the whole of the development – the thing that the permission was granted for - and not just a part or element of it.

Sullivan J in **R (On the application of Hart Aggregates Ltd) v Hartlepool BC (2005) EWHC 840 (Admin)** took the Whitley principle and turned it around.
The case involved an old mining permission from 1971.
Condition 10 said:
"the worked out areas shall be progressively back filled and the areas restored to levels shown on the submitted plan or to a level to be agreed by the LPA in accordance with a restoration scheme to be agreed by the LPA before extraction is commenced"
Was this a condition precedent or not?

Quarrying began, and continued, but no restoration scheme was ever presented or agreed. In 2004, the mine owners made an application for new conditions to be applied to the permission. The LPS contended that the 1971 permission had lapsed and was no longer extant, because it had been commenced in breach of condition 10, which, the LPA said, was a condition precedent.

Sullivan said that condition 10 was not a "true condition precedent" – for two reasons. Firstly, – the ***Hammerton*** reason; that it would be irrational and an abuse of power for the Council to start enforcement proceedings after 34 years, to prevent or control extraction that had been going on all that time

Sullivan J could have left it there – but he didn't. He got busy with the ***Whitley*** principle.

The second reason that he determined condition 10 was not a true condition precedent was because of the way in which it was worded, and its subject matter. Sullivan J said

that the ***Whitley*** principle should not be applied in an "overrigid way". That is always shorthand for a Judge who is about to rewrite the law.

He said where there was a breach of a fairly minor condition precedent, the effect could cut both ways, with some " absurd and wholly unforeseen consequences". It might mean that a Council could enforce, and that might, on occasion serve the Council's purposes. On the other hand, however, if a developer could show that he had developed the whole development without complying with a minor condition precedent, then that would render the whole development unlawful. If the immunity period of four years had lapsed, however, there could be no enforcement against it, and the development would be able to remain without compliance with any of the conditions upon it at all. This could be disastrous for a LPA – conditions relating to important controls on the property – such as agricultural occupation conditions, could no longer be applied in such a circumstance.

Sullivan J therefore got busy in explaining why Condition 10 was not a condition precedent at all –

> "If [The Council] had wished to prohibit *any* extraction before a restoration scheme for the worked out area was agreed, it could have said so, by imposing a condition expressly to that effect, similar in form to condition 2 in Whitley [which was:]
>
> "No extraction shall take place except in accordance with a restoration scheme to be agreed…etc" ,
>
> or it could have ..[imposed a condition] "details of a restoration scheme shall be submitted to and approved by the LPA before any development takes place'.
>
> But such a prohibition should not be implied merely because a condition requires a restoration scheme to be agreed 'before extraction is commenced'."

Here we see the importance Sullivan J gives to the prohibitive form of wording. We also learn from the judgment that a true condition precedent must be something more

than simply a condition that specifies that something must happen before something else.

Sullivan J said this:

> ”I believe that the statutory purpose is better served by drawing a distinction between those cases where there is only a permission in principle because no details whatsoever have been submitted, and those cases where the failure has been limited to a failure to obtain approval for one particular aspect of the development. In the former case, common sense suggests that the planning permission has not been implemented at all. In the latter case, common sense suggests that the planning permission has been implemented, but there has been a breach of condition which can be enforced against. I appreciate that these are two opposite ends of a spectrum. Each case will have to be considered upon its own particular facts, and the outcome may well depend upon the number and the significance of the conditions that have not been complied with.”

> “The need for a LPA to spell out any requirement or prohibition in clear terms applies with particular force where the condition is said to prevent not merely some detail of the development, but the commencement of *any* development pursuant to the planning permission.” [Emphasis added].

HHJ Waksman QC in **Bedford Borough Council v Secretary of State *(Murzyn*) [2008] EWHC 2304 (Admin)** developed these ideas further:

"(4) Provided that it is made clear enough in the condition that *the development's commencement itself is truly conditional* upon the fulfillment of the condition…."
[Emphasis added].

"(5) ……..the language here is also important. It refers to before "any" development takes place."

"(6) Where, therefore, there is a condition which is manifestly not about the essential subject matter of the permission, the fact that it has to be fulfilled before the relevant operation commences does not mean that the essential operation cannot begin without its fulfillment. Condition 10 fell into this category in the judgement of Sullivan J ***[Hart***]."

He said, however, that the actual step required to be performed by the condition, (such as the restoration, or the approval of materials), does not always have to be *in itself* a central operation to the development in order to constitute a "true condition precedent":

" [35(4)] provided that it is made clear enough in the condition that the *development's commencement itself* is truly conditional upon the fulfilment of the condition, the subject matter of the condition need not be central – ie: not concern itself directly with the activity permitted, for example the extraction or the building." [Emphasis added].

There was a neat exposition of the ***Hammerton*** line of authorities in the more recent case of: **Ian Norris v Secretary of State and Stoke on Trent City Council [2006] EWCA Civ 12 CA (Civ Div)**

Laws LJ:

" ***Henry Boot Homes*** was decided in this court only some three weeks after Ouseley J's decision in ***Hammerton*** , and the latter is not referred to in Keene LJ's judgment. But it was taken up in this court's judgment in ***Prokopp*** [2004] Env LR 8, [2003] EWCA Civ 961.

Buxton LJ said this:

> "83. The '***Whitley*** principle' is that development in breach of a condition is not development relevant to the planning permission, and thus must be ignored for the purposes of deciding whether that permission has been implemented. Woolf LJ however recognised an exception to that principle, in cases where enforcement action in respect of the breach of condition would not be possible: that is, would constitute a breach of the authority's public law obligations.
>
> 85. I would respectfully agree with the view of Ouseley J in *Hammerton* that irrationality of enforcement action falls within the public law exception to the *Whitley* principle"

" [40]. We can see from this line of authority how the ***Whitley*** principle stands today. It is to the effect that unlawful operations cannot amount to the commencement of development under a planning permission. On the face of it operations undertaken in breach of a condition will be unlawful. But there will be circumstances in which, for one reason or another, operations which on their face violate a condition are not to be treated as unlawful: notably, but not exclusively, where enforcement action taken against such operations would on the facts be irrational within the meaning of the ***Wednesbury*** principle ([1948] 1 KB 223). As the citation from Buxton LJ's judgment in ***Prokopp*** at paragraph 85 shows, the ***Whitley*** principle has heretofore been expressed as a

rule that operations *in breach of condition* cannot suffice to commence development under a planning permission, and then there is recognised exception to the effect that the breach of condition is excused for the purpose of the rule if it could not lawfully be the subject of enforcement process. I venture to think that this formulation fails to catch the principle's true basis. The reason why operations in breach of condition will not ordinarily suffice to commence development is that a developer (like anyone else) should not be advantaged by his own unlawful act. But a breach of condition will not be treated as unlawful for this purpose if it would be irrational, or otherwise legally objectionable, to enforce against it. As it seems to me the true principle, therefore, is that *unlawful* operations cannot amount to the commencement of development."

This not only reformulates the ***Whitley*** principle, but reconciles the ***Hammerton*** line of authorities with the ***Whitley*** principle.

So what does Greyfort add to this line of authority? Very little, except to endorse it.
In another old permission, from 1974, the developer was attempting to demonstrate that commencement had taken place, and that, therefore, the permission was still alive. The Council claimed that the commencement had taken place in breach of a true condition precedent, and that therefore, the permission had lapsed.

The condition was in these terms:
(4) Before any work is commenced on the site the ground floor
levels of the building hereby permitted shall be agreed with the
Local Planning Authority in writing."

The prohibitive wording element of the condition precedent was there. The step of agreeing the levels had to be agreed before *any* work was commenced on site. The levels had not been agreed, and the work had commenced. The argument turned (in

very simple terms) on whether "the levels of the building" went to the heart of the permission.

The High Court, and thereafter, the Court of Appeal rejected some rather creative legal argument as to why the levels did not go to the heart of the permission, and why this was not a true condition precedent. The Court of Appeal conducted an instructive trawl through the caselaw outlined above, and concluded that this certainly was a true condition precedent, and that any works had therefore been conducted unlawfully, in breach of condition. The whole development was unlawful; the permission had not been commenced and it had lapsed. There were no grey areas to the Court of Appeal's conclusions on the matter.

So, whilst Greyfort may be perceived as a new thing in the law of conditions precedent, the above exposition hopefully demonstrates that it is merely the latest consistent case in a somewhat tortuous line of cases, in one of the more complex areas of planning enforcement.

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