Hillside Parks Ltd v Snowdonia National Park Authority

Case Comment

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Cases cited
Hillside Parks Ltd v Snowdonia National Park Authority [2020] EWCA Civ 1440; [2021] J.P.L. 698; [2020] 11 WLUK 8 (CA (Civ Div))
F Lucas & Sons Ltd v Dorking and Horley Rural DC 62 L.G.R. 491; [1964] 5 WLUK 27 (QBD)

J.P.L. 699 This was an appeal against the order of HHJ Keyser QC (sitting as a judge of the High Court), dismissing the appellant's claim for certain declarations relating to the current status of a planning permission granted in 1967.

Planning permission for a site comprising 28.89ha ("the Site") was applied for on 19 December 1966. This was granted by Merioneth CC on 10 January 1967 ("the 1967 permission"). The relevant application, which incorporated a plan referred to as the "Master Plan", was for the development of 401 dwellings. The proposed siting for each of the dwellings was shown on the plan along with a proposed internal network of roads. The Master Plan detailed five key types of dwelling. The 1967 permission was granted subject to one condition, that water supply be agreed before work commenced. Building of the first two houses began on 29 March 1967 but the approved location was found to be on the site of an old quarry. Planning permission was applied for the houses as built and this was granted on 4 April 1967. Further planning permissions for departures from the Master Plan were granted between September 1967 and June 1973. Merioneth CC was replaced by Gwynedd CC on 1 April 1974. Landmaster Investments Ltd acquired the Site in June 1978.

A dispute arose between the parties in January 1985 which led to proceedings being issued in the High Court. Gwynedd CC denied that the 1967 planning permission was still valid. The statement of claim sought declarations as to the status of the 1967 permission. Judgment was given by Drake J on 9 July 1987 and an order was made granting four declarations to the following effect: (1) the 1967 permission was lawfully granted; (2) the 1967 permission was a full permission which could be implemented in its entirety without the need to obtain further planning permission or planning approval of details; (3) the development permitted by the 1967 permission had begun and that it could lawfully be completed at any time in the future; and the fourth declaration concerned the satisfaction of the condition attached to the 1967 permission.

On 6 February 1988, Hillside Parks Ltd, the appellant, acquired the Site. Snowdonia National Park Authority ("the Authority") came into existence on 23 November 1995 and became the relevant planning authority for the Site on 1 April 1996. Departures from the Master Plan were granted by the Authority between June 1996 and January 2011. On 23 May 2017, the Authority contacted the appellant, stating that the 1967 permission could no longer be implemented because the development carried out in accordance with the later planning permissions rendered it impossible to implement the original Master Plan. The Authority required that all works on the Site should be stopped until the planning situation had been regularised.

The appellant commenced proceedings and sought the following declarations: (1) the Authority was bound by the judgment and declarations of Drake J given on 9 July 1987; (2) the 1967 permission was a valid and extant permission; and (3) the 1967 permission could be carried on to completion, save insofar as development had been or was carried out pursuant to subsequent planning permissions granted for alternative residential development.

The judge set out and dealt with two issues. The first was whether Drake J was wrong in law in his determination that the 1967 permission could be implemented at any time in the future. The judge concluded that Drake J did not err in law and was entitled to make the declarations that he did. The second issue was whether the Authority was still bound by the third declaration in the order made by Drake J This issue ***J.P.L. 700*** was split by the judge into two sub-issues: "2a Does the declaration in the 1987 Order bind the Authority according to its terms regardless of whether it was wrongly made?"; "2b Do events since the 1987 Order mean that the development permitted by the January 1967 Permission may not now be completed lawfully, so that (whether rightly or wrongly made) the declaration can no longer bind according to its terms?" The judge held that question 2a did not need to be dealt with as he had determined that the 1987 Order had not been wrongly made. In relation to question 2b, the judge determined that the development which had occurred since 1987 now rendered the development granted by the 1967 permission a physical impossibility and that future development pursuant to that permission would no longer be lawful.

The appellant appealed against the judge's decision on the following grounds: (1) the judge erred in in his approach to the issue whether Drake J was wrong in law in holding that the 1967 permission could be completed at any time; (2) the judge was wrong to conclude that *F Lucas & Sons Ltd v Dorking and Horley Rural DC 62 L.G.R. 491; (1966) 17 P. & C.R. 111* ("*Lucas*") did not apply and therefore that the 1967 permission authorised one single scheme of development; (3) the judge did not correctly construe the additional permissions to the 1967 permission; (4) the judge took an inconsistent position in relation to whether developments could be carried out in accordance with different additional permissions that had been granted; and (5) the errors contained within the judgment meant that the appellant's case was not properly addressed, particularly the arguments in relation to res judicata.

Held, dismissing the appeal:

1. What was crucial was that the judge ultimately concluded on what he identified as the first issue before him that Drake J's judgment and the 1987 order made by him were not wrong. Accordingly, the judge approached what he identified as the second issue before him and, in particular issue 2b, on the footing that the judgment and order of Drake J in 1987 were to be treated as being correct.

2. It was inconceivable that, in 1987, Drake J could possibly have intended, certainly as an objective matter, that his declaration should continue to bind the parties regardless of future developments either as a matter of fact or in law. No judge could reasonably be taken to make such an order or declaration. Furthermore, the judge approached his task on the basis that, regardless of whether Drake J was right or wrong to conclude in 1987 that the remaining development could be completed in accordance with the 1967 permission, it was now plain that such a conclusion could no longer be reached. The correctness of the decision of Drake J was not material to the way in which the judge disposed of this case. For that reason, much of the argument about res judicata was not to the point. There could certainly be no question of issue estoppel in relation to this part of the judge's reasoning. The issue with which he was dealing concerned developments since 1987. He was not deciding anything which had already been decided by Drake J in 1987 on the basis of the facts as they were at that date.

3. With regard to the argument that the Authority's predecessor (in whose shoes it stood) had the opportunity to raise an argument before Drake J based on *Pilkington v Secretary of State for the Environment [1973] 1 W.L.R. 1527; [1974] 1 All E.R. 283* ("*Pilkington*") but did not do so for whatever reason and that it would be an abuse of process for the Authority now to argue that point, the doctrine in *Henderson v Henderson [1843-60] All E.R. Rep. 378; (1843) 3 Hare 100* /Abuse of Power did not prevent the Authority from arguing the *Pilkington* point in this case now even though its predecessor did not do so before Drake J in 1987. That would be too dogmatic an approach to take. The principle in *Henderson* /Abuse of Power was not an absolute one. It required a merits-based assessment of all the facts, including the public and private interests concerned. In this context, there were undoubtedly important private interests, including the commercial interests of the appellant. However, there were also important public interests at stake, including the public interest in not permitting development which would be inappropriate in a National Park. ***J.P.L. 701***

4. As a matter of fact and degree, the judge was perfectly entitled to reach the conclusion that it was no longer possible to implement the 1967 permission in the light of factual developments since the judgment of Drake J. It was clear that the development which had taken place consisted not only of a different type of housing, with different alignment, but had included the construction of roads on the estate which would clearly be incompatible with the road layout as depicted on the Master Plan. This did not necessarily mean that the appellant was wrong to say that some at least of the individual units shown in the original Master Plan could still be erected on those parts of the Site which were not affected by the actual development which had taken place. What it did tend to show was that the judge was entitled, having all the evidence before him, to reach the conclusion that events since 1987 had made it impossible now for the original 1967 permission to be implemented.

5. In view of the factual and legal developments which had taken place since the judgment of Drake J in 1987 and after balancing the public and private interests at stake in this case, it was not an abuse of process for the Authority to seek to argue the points which it had. On this part of the appeal, the judge was entitled to reach the conclusion which he did on the evidence before him. What then that left was reliance placed by the appellant on the decision of the High Court in *Lucas*.

6. This issue did raise a potential question of issue estoppel. This was because the appellant submitted that it was implicitly decided by Drake J in 1987 that the present case did indeed fall within the *Lucas* exception to the general requirement that a development had to be carried out fully in accordance with the permission granted for it. There were two difficulties with this submission. First, it was difficult to see how Drake J could be said to have decided the issue at all. *Lucas* was certainly not mentioned in his judgment and it did not appear to have been raised before him.

7. Secondly, *Lucas* was a highly exceptional case. It had never been approved by an appellate court. It had never been followed or applied, so far as counsel had been able to show, by any court since. It would not be appropriate for this court now to overrule *Lucas*. In order to do so the court would have to be satisfied that it was wrongly decided on its particular facts. It sufficed to say that the case should be regarded as having been decided on its own facts. It was conceivable that, on its proper construction, a particular planning permission did grant permission for the development to take place in a series of independent acts, each of which was separately permitted by it. That was unlikely to be the correct construction of a typical modern planning permission for the development of a large estate such as a housing estate.

8. The judge was entitled to reach the conclusions which he did. Appeal dismissed.

Mr Robin Green (Aaron & Partners LLP) for the appellant. ***J.P.L. 699***
Mr Gwion Lewis (Geldards LLP) for the respondent.

The following judgments were given.

Lord Justice Singh:

Introduction
1. This is an appeal against the order of HH Judge Keyser QC (sitting as a judge of the High Court), dismissing the appellant's claim for certain declarations relating to the current status of a planning permission granted in 1967. The judgment was given on 8 October 2019.

2. Permission to appeal to this court was granted by Leggatt LJ on 19 December 2019. ***J.P.L. 702***

Factual background

Events from 1966 to 1987
3. The case concerns a site comprising 28.89 acres of land at Balkan Hill, Aberdyfi, ("the Site"). Planning permission was applied for on 19 December 1966 by Mr John Madin and was granted by Merioneth CC, which was at that time the local

planning authority, on 10 January 1967 (”the 1967 permission”). The relevant application, which incorporated a plan referred to as the “Master Plan”, was for the development of 401 dwellings. The proposed siting for each of the dwellings was shown on the plan along with a proposed internal road network. The Master Plan detailed five key types of dwelling: Type A (three-bedroom semi or terrace); Type B (two-bedroom bungalow); Type C (two-bedroom flat); Type D (three-bedroom and study bedroom); and Type E (two-bedroom and study bedroom). The 1967 permission was granted subject to one condition, that water supply be agreed before work commenced. That condition does not give rise to any issue in the present appeal.

4. Building of the first two houses began on 29 March 1967, but the approved location was found to be the site of an old quarry. Planning permission was applied for the houses as built and granted on 4 April 1967. Further planning permissions for departures from the Master Plan were granted on:

- 14 September 1967 for the addition of a 3-bedroom flat to the two built houses;
- 22 October 1970 for two houses and five garages which departed from the Master Plan on the Site “as part of development already approved”;
- 9 May 1972 for “adjustments to the agreed layout”;
- 13 June 1972 for “variation to approved plans for two flats with garages beneath”;
- 19 October 1972 for the “erection of dwelling houses and garages”; and
- 28 June 1973 for another variation to the layout of the Master Plan.

5. Merioneth CC was replaced by Gwynedd CC on 1 April 1974.

6. Landmaster Investments Ltd acquired the Site in June 1978.

7. A dispute arose between the parties in January 1985, which led to proceedings being issued in the High Court. Gwynedd CC denied that the 1967 permission was still valid.

The action before Drake J in 1987

8. The action was commenced by writ on 8 May 1985. The statement of claim sought declarations as to the status of the 1967 permission.

9. In the pleaded defence, dated 21 June 1985, issue was taken with the application for the declarations numbered (2), (3) and (4). The two issues that were raised, at 6 and 7 of the defence, were that, first, the development permitted had not begun before 1 April 1974 and therefore could not lawfully be carried out because the permission had expired by operation of law; alternatively, if the development was begun before 1 April 1974, it was alleged to be in breach of the condition attached to the 1967 permission as to an adequate water supply.

10. Drake J gave judgment after a six-day trial on 9 July 1987. By the time of the hearing before him the issues had been clarified, as he set out at 2 of his judgment. It was agreed by the defendant that the 1967 permission was lawful. The defendant’s contentions were as follows:

- The condition as to water supply was never fulfilled.
- Certain development on the land was carried out but, as the condition had not been satisfied, such development was unlawful.
- As no lawful development was ever commenced, the 1967 permission lapsed on 1 April 1974 by operation of law as a result of the statutory time limit for implementation of a planning permission. ***J.P.L. 703***
- Such development as had been carried out was not pursuant to the 1967 permission but was pursuant to subsequent planning permissions granted in response to subsequent applications for certain development on the land.

11. It is clear from the judgment of Drake J that he viewed the subsequent grants of planning permission, for example that granted on 4 April 1967, as "a variation of the Master Plan": see e.g. 13G of his judgment.

12. It was common ground before us that, strictly speaking as a matter of law, the power to vary a planning permission did not exist at the material time and only exists in limited form even now, since amending legislation was enacted by Parliament in 1987 and subsequently. Nevertheless, what is submitted on behalf of the appellant is that, as a matter of substance, the judgment of Drake J (and indeed the understanding of the local planning authority at the time) was that the subsequent permissions which were granted were in effect variations of the 1967 permission rather than additional permissions. Certainly this is consistent with the conclusion reached by Drake J at 20C of his judgment:

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

13. Judgment was given by Drake J on 9 July 1987 and an order was made granting four declarations to the following effect. First, the full planning permission of 10 January 1967 was lawfully granted. Secondly, the 1967 permission was a "full permission which could be implemented in its entirety without the need to obtain any further planning permission or planning approval of details". Thirdly, "the development permitted by the January 1967 Permission has begun; and that it may lawfully be completed at any time in the future". The fourth declaration concerned the satisfaction of the condition attached to the 1967 permission. It is the third declaration that is of particular relevance to the present proceedings.

Events since the judgment of Drake J

14. Hillside Parks Ltd acquired the Site from Landmaster Investments Ltd on 6 February 1988. It is the appellant before this court.

15. Snowdonia National Park Authority ("the Authority" or "the respondent") came into existence on 23 November 1995 and became the relevant local planning authority for the Site on 1 April 1996.

16. Departures from the Master Plan were granted by the Authority on:

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

17. On 23 May 2017, the Authority contacted the appellant, stating that, in its view, the 1967 permission could no longer be implemented because the developments carried out in accordance with the later planning permissions rendered it impossible to implement the original Master Plan. The Authority required that all works at the Site should be stopped until the planning situation had been regularised. ***J.P.L. 704***

The present proceedings

18. The present proceedings were commenced by the appellant as a claim under CPR Pt 8. The details of the claim set out the history and the nature of the dispute which had arisen between the parties from 2017. The appellant sought the following declarations, at [17]:

- The respondent is bound by the judgment and declarations of Drake J given on 9 July 1987.
- The planning permission granted on 10 January 1967 by Merioneth CC with reference No.TOW.U/1115/P is a valid and extant permission.
- The said planning permission may be carried on to completion, save insofar as development has been or is carried out pursuant to subsequent planning permissions granted for alternative residential development.

19. It should be noted that there was an application by the Authority to strike out the claim on the ground, among others, that it was an abuse of process because the argument in the claim should have been made under the planning legislation by way of an application for a certificate of lawful development. An application for a certificate of lawfulness of proposed development can be made under the Town and Country Planning Act 1990 s.192. That application to strike out was dismissed by HH Judge Keyser QC on 10 May 2019 and no more need to be said about it in this appeal.

The judgment of the High Court

20. In his judgment, HH Judge Keyser QC set out and dealt with two issues as he had identified them to be. These were not the issues as formulated by the parties.

21. The first issue was whether Drake J was wrong in law in his determination that the 1967 permission could be completed at any time in the future. The judge concluded that Drake J did not err in law and was entitled to make the declarations that he did.

22. The second issue was whether the Authority is still bound by the third declaration in the Order made by Drake J that the 1967 permission "may lawfully be completed at any time in the future". This issue was split by the judge into two sub-issues:

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

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

23. The judge held that the question that he identified as 2a did not need to be dealt with as he had determined that the 1987 Order was not wrongly made.

24. In relation to the question that he identified as 2b, he determined that the development which has occurred since 1987 now renders the development granted by the 1967 permission a physical impossibility and that future development pursuant to that permission would no longer be lawful.

Grounds of appeal

25. *Ground 1*: HH Judge Keyser QC erred in his approach to the issue whether Drake J was wrong in law in holding that the 1967 permission could be completed at any time. The judge did not follow Drake J's interpretation of the 1967 permission, but rather gave his own interpretation of the 1967 Permission.

26. *Ground 2*: The judge was wrong to conclude that *F Lucas & Sons Ltd v Dorking and Horley Rural DC 62 L.G.R. 491; (1966) 17 P. & C.R. 111* did not apply and therefore that the 1967 permission authorised one single scheme of development. ***J.P.L. 705***

27. *Ground 3*: The judge did not correctly construe the Additional Permissions to the 1967 permission.

28. *Ground 4*: The judge took an inconsistent position in regard to whether developments could be carried out in accordance with different Additional Permissions that had been granted.

29. *Ground 5*: The errors contained within the judgment meant that the claimant's case was not properly addressed, particularly the arguments in relation to res judicata.

Submissions of the parties

The appellant's submissions

30. On behalf of the appellant, Mr Robin Green submits that the judge erred in saying that the first issue to be dealt with was whether Drake J was wrong to determine that the 1967 permission could be completed at any time in the future. The respondent could not provide any legal basis on which it could say that it was not bound by the judgment of Drake J. Unless it could be shown that the respondent was not bound by the 1987 Order then the question of whether Drake J was correct in law did not arise and should not have been dealt with by the judge.

31. Mr Green submits that the Authority was bound by Drake J's judgment by virtue of the statutory continuity of functions and the binding effect of a judgment in rem.

32. He also submits that the effect of subsequent variations to the 1967 permission is res judicata as it was determined by Drake J in 1987. The Authority cannot now raise a defence which was available at the time of the 1987 judgment by reason of the doctrine of issue estoppel and the rule in *Henderson v Henderson [1843–1860] All E.R. Rep. 378; (1843) 3 Hare 100*. It would also be an abuse of process for the Authority to pursue the argument that the building work being completed pursuant to the variations of the Master Plan render the 1967 permission no longer capable of completion. The Authority has itself granted such variations of the 1967 permission since it came into existence in 1995.

33. Mr Green submits that there has been no material change in circumstances since the judgment of Drake J in 1987.

34. It is also submitted that the judge's reasoning was internally inconsistent. He found that the Additional Permissions granted before 1987, and therefore considered by Drake J, were variations of the 1967 Permission with specific modifications but implicitly held that the same was not true of the Additional Permissions granted after 1987. Complaint is made that there is no reasoning given in the judgment to show that the Additional Permissions granted after 1987 should be considered differently from the ones before 1987. If all the Additional Permissions were considered in this way, then the remainder of the Master Plan with the specific modifications which were granted could still be developed.

35. It is further submitted that the judge was wrong to determine that *Lucas* did not apply to the present case and that the 1967 permission was only for the Master Plan in its entirety and could not be considered as permitting separate acts of development.

36. By way of summary, Mr Green submits that the errors in the judgment below had the effect that the case of the appellant before the judge was not properly addressed by him.

The respondent's submissions

37. On the issue of whether the Authority is bound by the judgment of Drake J, it is accepted by Mr Gwion Lewis on behalf of the respondent that the judge should have dealt with this issue first in his judgment. However, submits Mr Lewis, the principle of res judicata does not compel the court to determine that the judgment of Drake J still binds the parties. The court should make its own determination of whether the 1967 permission is still valid for three reasons:

- The circumstances have changed significantly since the Order of Drake J in 1987. ***J.P.L. 706***
- The decision of the House of Lords in *Sage v Secretary of State for the Environment [2003] UKHL 22; [2003] 1 W.L.R. 983; [2003] J.P.L. 1299* holds that a "holistic approach" should be taken and regard should be had to the totality of the operations which the grant of a planning permission originally contemplated would be carried out.

- Although the line of authority beginning with *Pilkington v Secretary of State for the Environment [1973] 1 W.L.R. 1527; [1974] 1 All E.R. 283* was not presented to Drake J, it would not be an abuse of process for the Authority to rely on it in these proceedings. It is entitled to seek to prevent building in a National Park which could be against the public interest.

38. Mr Lewis further submits that the judge was correct in determining that *Lucas* does not apply to the present case.

The principles of res judicata

39. It was common ground before us that the general principles of res judicata were correctly summarised by Lord Sumption JSC in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd [2013] UKSC 46; [2014] A.C. 160* at [17]–[26]. In particular, at [17], Lord Sumption said that the phrase res judicata is "a portmanteau term which is used to describe a number of different legal principles with different juridical origins". The three particular principles which, it is common ground, potentially arise in the present case are the fourth, fifth and sixth as outlined by Lord Sumption. The fourth was the doctrine of "issue estoppel", that is where some issue which is necessarily common to both disputes has been decided on an earlier occasion and is binding on the parties. The fifth principle was that based on *Henderson*, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been, raised in the earlier case. Sixthly, Lord Sumption said, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles.

40. In his skeleton argument for the present appeal, Mr Green invoked the sixth principle separately as well as the fourth and fifth principles. At the hearing before us he accepted, on reflection, that in the present case the sixth principle adds nothing of substance to the fifth and made submissions about both principles together.

41. An example of a situation in which there may be "materially altered circumstances" which justify a departure from the *Henderson* principle was given by Lord Sumption in *Virgin Atlantic* at [20]: the decision of the House of Lords in *Arnold v National Westminster Bank Plc [1991] 2 A.C. 93; [1991] 2 W.L.R. 1177*. In that case there had been a subsequent development in the law.

42. At [24] Lord Sumption quoted Lord Bingham of Cornhill in the decision of the House of Lords in *Johnson v Gore-Wood and Co [2002] 2 A.C. 1 at [31]; [2001] 2 W.L.R. 72*:

"The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter … It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

43. In *Thrasyvoulou v Secretary of State for the Environment [1990] 2 A.C. 273; [1990] 2 W.L.R. 1*, the House of Lords considered whether and to what extent the doctrine of res judicata applies in public law proceedings. The main opinion was given by Lord Bridge of Harwich: see in particular at 289. He concluded that, in principle, that doctrine does apply to adjudications in the field of public law. This is ***J.P.L. 707*** subject to the important public law requirement that a statutory body cannot fetter its own freedom to perform its statutory duties or exercise its statutory powers. As Lord Bridge explained, it is for this reason that there can be no such fetter which arises from an estoppel by representation. I would add, in the light of more recent developments in public law, that there could not be any such fetter arising from the doctrine of legitimate expectation.

Analysis

44. Although there are five grounds of appeal, the submissions before us were not made separately by reference to those

grounds. In similar vein, I will address the substance of the grounds rather than address each one of them separately.

45. Both in the grounds of appeal and in his oral submissions Mr Green complained on behalf of the appellant about the way in which the judge dealt with the judgment of Drake J. Particular complaint is made that the judge failed to deal with the principles of res judicata: see e.g. [57] of the judgment. To a large extent, Mr Lewis on behalf of the respondent agreed that it would have been preferable for the judge to address the issue of res judicata; indeed that is how the case for the respondent had been argued before him.

46. Nevertheless, in my view, what is crucial is that the judge ultimately concluded on what he identified as the first issue before him that Drake J's judgment and the 1987 order made by him were not wrong. In reaching that conclusion, he rejected the respondent's contention that they were wrong: see [55] of his judgment. Accordingly, the judge approached what he identified as the second issue before him (and in particular issue 2b) on the footing that the judgment and order of Drake J in 1987 were to be treated as being correct. He set out his reasoning for deciding that issue in favour of the respondent and against the appellant at [56]–[62] of his judgment.

47. At [58] the judge said that:

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

48. The judge then said, at [59]:

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

49. I hope it will be convenient if I set out the two matters to which he referred in the opposite order to that used by the judge. The second reason he gave was set out as follows at [61]:

"Second, it is physically impossible to complete the development fully in accordance with the January 1967 Permission in the circumstances briefly set out in [37] above. This is not a matter of minor deviations from the detail in the Master Plan: the state of affairs existing on the ground in the north-west part of the Site means that the remaining development there cannot be carried out and ***J.P.L. 708*** that further development will require new design and fresh permission. Regardless of whether Drake J was right or wrong to conclude in 1987 that the remaining development could be completed in accordance with the January 1967 Permission, it is plain that such a conclusion can no longer be reached. Mr Christopher Madin rightly conceded in his second witness statement that by reason of what had been constructed since 1987 'it [was] not … physically possible to build out the entirety of the scheme of development approved in 1967'."

50. Since the judge in that passage cross-referred back to [37] of his judgment, it is necessary to set out that paragraph here:

"The first contention concerns the effect of what has already been put on the land on the ability to comply with the January 1967 Permission in the future on the undeveloped parts of the Site. At the time of the hearing before Drake J, only a few houses in the extreme south of the Site had been built, all of them pursuant to Additional Permissions. The evidence shows that the positions of some of those houses conflicts not only with their positions as shown on the Master Plan but also to some extent with the positions of estate roads and a footpath as shown on the Master Plan. More important, perhaps, is what has happened since 1987. This later development is all in the north-west part of the Site and, again, has all been carried out pursuant to Additional Permissions. The easternmost row of terraced houses in this later development has been built across the positions shown on the Master Plan for two distinct rows of houses and an access cul-de-sac between them. To the

north-west of these houses, an estate road has been constructed along the line of part of a row of terraced houses shown on the Master Plan; the estate road also runs through the positions of another house and garden shown on the Master Plan. Other examples could be given here and are given in the first statement of Mr Jonathan Cawley (the Authority's director of Planning and Land Management) of the knock-on effect of what has already been done on the ability to develop the rest of the Site in accordance with the January 1967 Permission. The result is that, although there are large parts of the development shown on the Master Plan that could be carried out in accordance with the Master Plan, there are other parts, particularly in the north-west of the Site, where further development will necessarily involve departure from what is shown on the Master Plan."

51. I turn to the other reason which the judge gave, which was in fact his first reason and which he set out as follows at [60]:

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

52. At [62] the judge then said the following:

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

53. At the hearing before us, Mr Green made clear that he does not contend that the third declaration made by Drake J in 1987, when properly construed, could have binding effect in perpetuity regardless of how the facts and the law might develop subsequently. In that regard therefore, what the judge said at the beginning of [58] of his judgment is common ground. In my view, that concession was correctly made. ***J.P.L. 709*** It is inconceivable that, in 1987, Drake J could possibly have intended, certainly as an objective matter, that his declaration should continue to bind the parties regardless of future developments either as a matter of fact or in law. No judge could reasonably be taken to make such an order or declaration.

54. Furthermore, as is plain from the middle of [61] of the judgment, HH Judge Keyser QC approached his task on the basis that, regardless of whether Drake J was right or wrong to conclude in 1987 that the remaining development could be completed in accordance with the 1967 permission, it was now plain that such a conclusion could no longer be reached. The correctness of the decision of Drake J therefore was not material to the way in which the judge disposed of this case. For that reason, in my view, much of the argument about res judicata (although interesting) is not to the point.

55. There can certainly be no question of issue estoppel in relation to this part of the judge's reasoning. The issue with which he was dealing concerned developments since 1987. He was not deciding anything which had already been decided by Drake J in 1987 on the basis of the facts as they were up to that date.

56. That said, the judge's reasoning at [61] does call for some consideration by this court of whether the principle in *Henderson* /Abuse of Process has the consequence that the judge was wrong to reason as he did in that passage.

57. What Mr Green submits is that the respondent's predecessor (in whose shoes it stands) had the opportunity to raise an argument before Drake J based on *Pilkington*, which had been decided in 1973, but did not do so for whatever reason. He submits that it would be an abuse of process for the respondent now to argue that point.

58. In *Pilkington*, at 1531, Lord Widgery CJ said that a landowner is entitled to make any number of applications for planning permission which his fancy dictates, even though the development referred to is quite different when one compares one application to another. It is open to a landowner to test the market by putting in a number of applications and seeing what the attitude of the planning authority is to his proposals.

59. Where there are arguably inconsistent planning permissions in respect of the same land, Lord Widgery CJ said, at 1532:

”One looks first of all to see the full scope of that which is being done or can be done pursuant to the permission which has been implemented. One then looks at the development which was permitted in the second permission, now sought to be implemented, and one asks oneself whether it is possible to carry out the development proposed in that second permission, having regard to that which was done or authorised to be done under the permission which has been implemented.”

60. *Pilkington* was subsequently approved by the Court of Appeal in *Hoveringham Gravels Ltd v Chiltern DC (1978) 35 P. & C.R. 295; [1977] J.P.L. 784*.

61. In *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment [1985] A.C. 132; [1984] J.P.L. 651*, *Pilkington* was approved in the opinion of Lord Scarman at 144–145.

62. At 145 Lord Scarman said:

”The *Pilkington* problem is not dealt with in the planning legislation. It was, therefore, necessary for the courts to formulate a rule which would strengthen and support the planning control imposed by the legislation. And this is exactly what the Divisional Court achieved. There is, or need be, no uncertainty arising from the application of the rule. Both planning permissions will be on a public register: examination of their terms combined with an inspection of the land will suffice to reveal whether development has been carried out which renders one or other of the planning permissions incapable of implementation. ***J.P.L. 710*** “

63. I do not accept Mr Green’s submissions in this regard. In my view, the doctrine in *Henderson* /Abuse of Process does not prevent the respondent from arguing the *Pilkington* point in this case now even though its predecessor did not do so before Drake J in 1987.

64. It is clear from *Johnson v Gore-Wood*, in the passage from the opinion of Lord Bingham which I have cited earlier, that that would be too “dogmatic” an approach to take. The principle in *Henderson* /Abuse of Process is not an absolute one. It requires a merits-based assessment of all the facts, including the public and private interests concerned. In this context, there are undoubtedly important private interests, including the commercial interests of the appellant. However, there are also important public interests at stake, including the public interest in not permitting development which would be inappropriate in a National Park.

65. Furthermore, I would accept the submission made by Mr Lewis on behalf of the respondent that there have been significant legal developments since the decision of Drake J in 1987. In particular, the decision of the House of Lords in *Sage* has placed greater emphasis on the need for a planning permission to be construed as a whole. It has now become clearer than it was before 2003 that a planning permission needs to be implemented in full. A “holistic approach” is required.

66. In *Sage*, the main opinion was given by Lord Hobhouse of Woodborough, although there was also a concurring opinion by Lord Hope of Craighead. Mr Green emphasised that, on the facts of that case, what Lord Hobhouse was considering in terms was a planning permission for “a single operation”: see e.g. [23]. It was in that context, submits Mr Green, that the House of Lords held that a planning permission must be implemented “fully” and that a “holistic approach” must be taken. Mr Lewis observed that, at [6], Lord Hope used the word “totality of the operations” (plural rather than singular). In my view, the important point of principle which arises cannot be determined according to semantic differences between the different opinions in the House of Lords. I would accept Mr Lewis’s fundamental submission that the decision in *Sage* made it clearer than it had previously been that a planning permission should be construed “holistically.”

67. As a matter of principle, I would endorse the approach taken by Hickinbottom J in *Singh v Secretary of State for Communities and Local Government [2010] EWHC 1621 (Admin)*, in particular at [19]–[20], where *Sage* was cited. Hickinbottom J was of the view that, reflecting the holistic structure of the planning regime, for a development to be lawful it must be carried out “fully in accordance with any *final* permission under which it is done” (emphasis in original). He continued:

”That means that if a development for which permission has been granted cannot be completed because of the impact of other operations under another permission, that subsequent development as a whole will be unlawful.”

68. At the hearing before us there was an interesting debate about a point which ultimately this court does not need to resolve on this appeal. That issue is whether, in the circumstances envisaged by Hickinbottom J, all the development which has already taken place, apparently in accordance with the first grant of permission, is rendered unlawful simply by virtue of the fact that subsequent operations take place pursuant to another permission which is inconsistent with the first. The phrase used by Hickinbottom J ("subsequent development") might suggest that it is only the later development which would fall to be regarded as unlawful. Mr Lewis contended that as a matter of principle it must be the whole of the development, including any development that has already taken place. That would have the consequence that there could be enforcement action, and potentially criminal liability, in relation to the development that has already taken place, even though it was at the time apparently in accordance with a valid planning permission. Mr Lewis submitted that in such circumstances it would be unlikely that enforcement action would be taken in practice. Even if that is right, that would mean that whether or not enforcement action is taken would be a matter of discretion rather than law. These are potentially important questions on ***J.P.L. 711*** which we did not receive full argument because they do not need to be decided on this appeal. I would therefore prefer to express no view on them.

69. Returning to the present case, in my view, Mr Lewis was correct in his submission that, as a matter of fact and degree, the judge was perfectly entitled to reach the conclusion that it is no longer possible to implement the 1967 Permission in the light of factual developments since the judgment of Drake J in 1987. For that purpose, it is necessary to turn to the evidence that was before the judge, at least briefly.

The evidence

70. In the second witness statement of Mr Madin, at [3], as the judge noted, it was accepted that what has been constructed since 1987 on the Site does not accord with the approved Master Plan and it is not therefore physically possible to build out the entirety of the scheme of development approved in 1967. However, Mr Green pointed out that, at para.4 of his statement, Mr Madin had gone on to say:

"… While I accept that it is no longer possible to create the whole development layout as shown on the Master Plan, there is no physical impediment to completing the remainder of the Master Plan scheme as shown on my 2019 plan."

71. Although we have been assisted by a number of plans, including one which shows the original permitted development on the Site together with what has happened subsequently by way of actual development, it has to be noted that these plans will not be on the public register. As Lord Scarman observed in *Pioneer Aggregates*, it is important that the public, including potential purchasers of land and neighbours who may be affected by development, should be able to ascertain with reasonable certainty what is or is not permitted development by reference to what is available on a public register. This is important not least because a planning permission runs with the land.

72. At the hearing before us we were taken in some detail through the various plans and shown what has been developed on the Site since 1987. It is unnecessary to go into those matters in detail for present purposes, since this is an appellate court and it is not our function to redetermine questions of fact. Nevertheless, what is clear to us is that the development which has taken place consists not only of a different type of housing, with different alignment, but has included the construction of roads on the estate which would be clearly incompatible with the road layout as depicted on the Master Plan. This does not necessarily mean that the appellant is wrong to say that some at least of the individual units shown in the original Master Plan could still be erected on those parts of the Site which are not affected by the actual development which has taken place. What it does tend to show, in my view, is that the judge was entitled, having all the evidence before him, to reach the conclusion that events since 1987 have made it impossible now for the original planning permission of 1967 to be implemented.

73. That indeed was the expert view of Mr Jonathan Cawley, in his first witness statement filed in these proceedings, at [12]–[13], where he set out in detail the development which has taken place since 1987, including the roads which have been constructed on the Site, and concluded that:

"The development carried out on Site since 1987 is accordingly entirely incompatible with the 1967 Permission."

74. Mr Green complains on behalf of the appellant that the Authority itself has changed its view since around 2017. Before that time the Authority itself took the view that the 1967 permission could still be implemented on those parts of the Site where there had not been subsequent development pursuant to a variation: see e.g. a letter from the Director of Planning and

Cultural Heritage at the Authority dated 10 October 2008. ***J.P.L. 712***

75. In my view, while the stance which the Authority took between 1995 and 2017 is a relevant factor to be taken into account, it is certainly not conclusive that it has acted in a way which leads to an abuse of process because it is now arguing the contrary in these proceedings.

76. In view of the factual and legal developments which have taken place since the judgment of Drake J in 1987 and after balancing the public and private interests at stake in this case, I conclude that it was not an abuse of process for the Authority to seek to argue the points which it has. Further, I conclude on this part of the appeal that the judge was entitled to reach the conclusion which he did at [61] on the evidence before him.

77. What that then leaves is the reliance placed by the appellant before this court, as it was before the trial judge, on the decision of the High Court in *Lucas*.

The argument based on Lucas

78. *Lucas* was decided by Winn J in 1964. In that case, in 1952, planning permission was granted to develop a plot of land by the erection of 28 houses in a cul-de-sac layout. Later the plaintiffs applied for permission to develop the same plot by building six detached houses, each on a plot fronting the main road. Permission for this later development was granted in 1957 and two houses were built in accordance with it. Later, however, the plaintiffs proposed to proceed in reliance on the earlier permission from 1952 by building the cul-de-sac and the 14 houses on the southern side of it. That land was still undeveloped at that time. The plaintiffs sought a declaration that the earlier permission was still effective and entitled them to carry out the proposed development on that part of the site where it could still take place. Winn J concluded that the 1952 permission was not to be regarded in law as a permission to develop the plot as a whole but as a permission for any of the development comprised within it. Accordingly, it did authorise the "partial" development proposed by the plaintiffs.

79. At 116 Winn J said:

"… Whilst a planning authority may well have as its object in granting planning permission for a contemplated housing estate upon a lay-out, considered by the planners, the achievement of a whole, it does not follow as a matter of law that development conforming with that lay-out is only permitted if the whole lay-out is completed and conditionally upon its completion."

80. At 117 he continued:

"… I think that it is right to approach this problem on the basis of an assumption that Parliament cannot have intended to leave individual owners of separate plots comprised in the contemplated total housing scheme dependent upon completion of the whole of the scheme by the original developer, or by some purchaser from him, so that they would be vulnerable, were the whole scheme not completed, separately to enforcement procedure which might deprive them of their houses and of the money which they would have invested in those houses, whether or not they built them themselves."

81. Later on the same page he said:

"Were it right to say that the grantee of such a planning permission as this 1952 planning permission was only enabled thereby to develop the area of land conditional upon his completing the whole contemplated development, it would be very difficult at any given moment to say whether (assuming that some houses had been built but that not all the sites included in the scheme had been filled) the development already achieved was permitted development or development without permission, ***J.P.L. 713*** insofar as it could possibly in those circumstances be said to depend upon the intention of the developer … I think that the right view is that this planning permission in 1952 permitted each and every item comprised in the application made and granted."

82. *Lucas* was considered by the Divisional Court in *Pilkington*. At 1533 Lord Widgery CJ described it as "a rather exceptional case". He said that Winn J had, in that case, construed the first planning permission as authorising the carrying out of a number of independent acts of development, and taking that view it naturally followed that the implementation of the

second permission did not prevent the owner of the rest of the land from carrying out the independent acts of development authorised on such part of the site as remained under his control.

83. In *Hoveringham*, at 302, Roskill LJ also considered the decision in *Lucas* and noted that it was subsequently treated by the Divisional Court in *Pilkington* as a rather exceptional case (he thought "rightly").

84. Although *Lucas* does not appear to have been cited to the House of Lords in *Pioneer Aggregates*, both *Pilkington* and *Hoveringham* were cited and they did refer to *Lucas*.

85. In my view, this is not a *Lucas* case.

86. This issue does squarely raise a potential question of issue estoppel. This is because Mr Green submits that it was implicitly decided by Drake J in 1987 that the present case did indeed fall within the *Lucas* exception to the general requirement that a development must be carried out fully in accordance with the permission granted for it. There are two difficulties with that submission.

87. First, it is difficult to see how Drake J can be said to have decided this issue at all. *Lucas* was certainly not mentioned in his judgment and it does not appear to have been raised before him. It did not feature in the pleaded case between the parties before him nor, so far as one can now tell, in the way in which the case was argued before him at a six-day trial.

88. Secondly, *Lucas* was a highly exceptional case. It has never been approved by an appellate court. It has never been followed or applied, so far as counsel have been able to show us, by any court since. Furthermore, it was described as being an exceptional case by Lord Widgery CJ (a judge with immense experience in the field of planning law) in *Pilkington*. Both this court and the House of Lords have had the opportunity in the many decades since *Lucas* to consider whether it should be regarded as setting out a general principle or not.

89. In my view, it would not be appropriate for this court now to overrule *Lucas*. In order to do so we would have to be satisfied that it was wrongly decided on its particular facts. It is not possible to be satisfied of that, not least because we do not have the advantage of seeing the precise terms of the planning permission which was granted in that case. It suffices to say that the case should be regarded as having been decided on its own facts.

90. As Hickinbottom J observed in the case of *Singh*, at [25], it is conceivable that, on its proper construction, a particular planning permission does indeed grant permission for the development to take place in a series of independent acts, each of which is separately permitted by it. I would merely add that, in my respectful view, that is unlikely to be the correct construction of a typical modern planning permission for the development of a large estate such as a housing estate. Typically there would be not only many different residential units to be constructed in accordance with that scheme, there may well be other requirements concerning highways, landscaping, possibly even employment or educational uses, which are all stipulated as being an integral part of the overall scheme which is being permitted. I doubt very much in those circumstances whether a developer could lawfully "pick and choose" different parts of the development to be implemented. ***J.P.L. 714***

Conclusion

91. For those reasons I consider that the judge was entitled to reach the conclusions which he did. I would therefore dismiss this appeal.

LJ Nicola Davies:

92. I agree.

LJ David Richards:

93. I also agree.

