Case Name: *Meisels & Anor v The Secretary of State for Housing Communities And Local Government* [2019] EWHC 1987 (Admin) (31 July 2019)

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Commentary: This case concerned a statutory challenge under section 289 of the Town and Country Planning Act 1990 ("TCPA 1990") in respect of a Planning Inspector's dismissal of an appeal against an enforcement notice. This case provides a useful exploration, in an enforcement context, of the legal principles relating to the lawful implementation of planning permissions without compliance with a pre-commencement condition and the extent to which operations carried out otherwise than in compliance with approved plans are capable of commencing development.

The appeal against the enforcement notice was on the following grounds (as per section 174(2) of the TCPA 1990): ground (a), namely that planning permission ought to be granted for the breach of planning control in question; ground (c), namely that there was no breach of planning control; and ground (f), namely that the steps required by the notice exceed what is necessary to remedy the breach. The statutory challenge focused on ground (c) (as the Planning Inspector did not deal with ground (a) due to non-payment of the relevant fee), with ground (f) being afforded less attention by the judge.

By way of brief background, planning permission was granted in 2006 for extensive building works to a row of Victorian terrace houses which had for some years been used as a synagogue. The proposals involved the creation of residential extensions as well as further space for the synagogue and its ancillary offices. The London Borough of Hackney (the "Council") served an enforcement notice in 2017 alleging a breach of planning control at the property for carrying out development without the benefit of planning permission.

The judge noted that, in respect of the ground (c) appeal, namely on the question of whether or not there was a breach of planning control, there were essentially three interlocking issues. The first issue concerned whether the failure to comply with a pre-commencement condition attached to the planning permission prevented the development from constituting implementation of the approved scheme. The second issue related to whether or not, as a matter of fact, any development had begun prior to the expiry of the planning permission and the third issue related to whether the development as built out was too different from that for which permission had been granted to amount to implementation of the approved scheme. The Inspector found against the appellants on each of the three issues and dismissed the appeal, and these conclusions (challenged on grounds of irrationality and failure to have regard to material considerations) were upheld by the judge.

In respect of the first issue, the judge rehearsed the case law deriving from the so-called 'Whitley Principle' and concluded that, because a condition precedent which 'went to the heart of the permission' had not been complied with, the development was unlawful as a matter of planning law when it began and so was begun without planning permission. Further, it was not saved by being shown that the breach was unenforceable. The relevant

condition required submission of full details of the materials to be used on the external surfaces of the buildings for approval prior to commencement of development and the Inspector's conclusion that this condition 'clearly fundamentally controls the final appearance of the building and its relationship to its surroundings' was upheld by the judge as a conclusion which the Inspector was entitled to draw. The Inspector was, moreover, entitled to draw a distinction between this condition and another similarly worded condition (requiring submission of soundproofing details) which did not to 'go to the heart of the permission'.

In respect of the second issue, the judge upheld the Inspector's conclusion that development had not begun prior to the expiry of the planning permission (noting that it would not assist in any event given his conclusion that the work did not qualify as development permitted by the planning permission).

In respect of the third issue, the judge concluded that the Inspector had adequately appraised the development as a whole, as required, in order to assess whether the works were operations comprised in the development rather than just focusing on the differences. The Inspector was entitled to conclude that, as a matter of fact and degree, the building was 'so significantly different' from that approved that the construction must be regarded as one for which permission had not been granted. In this instance, although the exterior was similar to that proposed, the interior was not and the differences were substantial.

As regards the ground (f) appeal, the judge emphasised that the power to allow an appeal under ground (f) is not a power to grant planning permission and, as such, only provides a remedy in a case where there is an extant planning permission. As the Inspector concluded that the planning permission had expired in 2009 without there being any development in accordance with the planning permission, this was not a case in which a ground (f) appeal could succeed. Notwithstanding this, the Inspector considered the ground (f) appeal and concluded that building out the approved scheme was unviable and that no scheme of modification was put forward so as to present an alternative to the measures in the enforcement notice. As such, this ground was also dismissed and the judge supported the Inspector's reasoning.

Case summary prepared by Victoria McKeegan