



Neutral Citation Number: [2020] EWCA Civ 1756

Case No: C1/2020/0363, 0364, 0365 & 0366

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT
Mr Justice Holgate
[2020] EWHC 161 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2020

Before:

LORD JUSTICE HENDERSON
LORD JUSTICE HICKINBOTTOM
and
LORD JUSTICE NEWY

Between:

MR J.J. GLUCK
- and -
**(1) SECRETARY OF STATE FOR HOUSING,
COMMUNITIES AND LOCAL GOVERNMENT**
(2) CRAWLEY BOROUGH COUNCIL

Appellant

Respondents

Philippa Jackson (instructed by Asserson) for the **Appellant**
Charles Streeten (instructed by the **Government Legal Department**) for the **First**
Respondent
The **Second Respondent** was not represented

Hearing date: 24 November 2020

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be Monday 21 December at 10:30am

Lord Justice Newey:

1. The appellant, Mr J.J. Gluck, contends that he has planning permission to carry out two developments because the respondent local planning authority, Crawley Borough Council (“the Council”), refused applications for prior approval in respect of them only after the 56-day period specified in paragraph W(11) of part 3 of schedule 2 to the Town and Country Planning (General Permitted Development) Order 2015 (“the GPDO”) had already expired. Holgate J (“the Judge”), upholding an inspector, decided otherwise on the basis that the period could be extended by agreement pursuant to article 7(c) of the GPDO and, on the facts, had been. Mr Gluck appeals against that decision.

Basic facts

2. On 5 March 2018, Mr Gluck applied to the Council for prior approval for a change of use from offices to residential under class O of part 3 of schedule 2 to the GPDO. The applications related to two sites in Stephenson Way, Three Bridges, Crawley. Mr Gluck wished to convert one of them, Kingston House, into 51 apartments and the other, Saxon House, into 24 apartments.
3. On 19 April 2018, Allen Planning Limited, the planning consultant acting for Mr Gluck, sent Mr Hamish Walke, a principal planning officer with the Council, an email asking whether there were any outstanding matters on the applications. Responding on 26 April, Mr Walke said:

“Our Environmental Health team has objected to these applications on noise grounds. In view of their objections, I am currently writing both applications up for refusal. As a Prior Approval application and with the applicant having no available control over noise from nearby commercial premises, I can see no way in which the applications could be amended to address these concerns. I hope we will be able to issue a decision in the next day or two.”

4. Mr Tony Allen of Allen Planning Limited forwarded Mr Walke’s email to Mr Gluck, who replied at 11.33 am on 27 April 2018:

“Thanks Tony, I have arranged a meeting with our acoustic surveyor and Brian Cox the acoustic officer[r] in Crawley Council for Thursday the 4th to meet on site at 12 pm.

Can you pls call Hamish and have him push off the decision till after the meeting”.

It is to be noted that the Thursday to which Mr Allen was referring was in fact 3 May rather than 4 May and also that Mr Brian Cox, whom Mr Allen mentioned in his email, is the Council’s principal environmental protection officer.

5. At 12.52 pm, Mr Gluck sent Mr Allen a further email saying this:

“Tony, I have spoken now to Hamish as I can not get through to you and he has agreed that you should send him an email that we are meeting on Thursday at 12pm with Brian Cox and thus you

allow the decision to be extended (otherwise the decision is on the 5th of May which is Saturday and Hamish is not in on the Friday so it will be determined on Thursday so there is no point meeting..)

So please send Hamish a[n] email asap that you are allowing the decision to be extended.

He is waiting for your email”

6. About half an hour afterwards, at 1.20 pm, Mr Allen sent Mr Walke an email in these terms:

“Good afternoon and I hope that all is well with you and I refer to the two prior notification applications on the above sites.

As set out in my client’s email below I understand that the meeting is to occur in terms of the potential issue around noise disturbance and on the basis of Part W of the Order I set out that my client would be willing to agree a new determination date for both applications **until 12 May 2018** and if any further extensions are required in order to resolve this matter then I would be happy to agree these with you in advance.”

As the reference to “my client’s email below” suggests, the email chain included the emails I have quoted in the previous three paragraphs.

7. Mr Walke replied as follows in an email sent at 2.27 pm:

“Thanks for your email.

I will certainly discuss this with my manager although, as I explained to Mr Gluck earlier, I cannot see any way in which a Prior Approval application could be amended to address the noise concerns that have been raised.”

8. On 3 May 2018, Mr Walke and Mr Cox met Mr Gluck on site, but the noise consultant was not there. Mr Gluck explained that the noise consultant had said that he could not attend but that the Council would receive a report from the noise consultant by Tuesday 8 May.

9. In the event, no report from the noise consultant was forthcoming. Instead, the Council received on 7 May 2018 a letter of that date from Asserson, Mr Gluck’s solicitors. Asserson stated in their letter that the Council had failed to notify Mr Gluck of its decisions on his applications within the 56-day period required by the GPDO and that therefore prior approval was “deemed to be granted by virtue of paragraph W11(c) of Part 3 to Schedule 2 of the Order, and ... the Council is now no longer lawfully able to issue decision notices refusing the Applications”. Asserson also said this in their letter:

“We are aware that our client’s agent offered by email ... to extend the determination deadline for the Applications until 12 May 2018, and that a meeting was held to discuss the

Applications on 3 May 2018. However, there is no record of the Council agreeing in writing to extend the time limits, as expressly required by Article 7 of the Order.

Indeed, the case officer responded to the above email stating that ‘I will certainly discuss this with my manager although, as I explained to Mr Gluck earlier, I cannot see any way in which a Prior Approval application could be amended to address the noise concerns that have been raised’. This is quite clearly not in any way an expression of agreement to an extension of time by the Council (though in any event it is not clear that an implied agreement would suffice), but instead is an affirmation that the Council was intending to determine the Applications in accordance with its own (albeit erroneous) calculation of the 56-day timescales. There was therefore no written agreement to extend time, and the 56-day timescales to determine the Applications remained.”

10. Undeterred, on 8 and 11 May 2018 the Council issued decision notices refusing Mr Gluck’s applications. Each proposal was “considered unacceptable on noise grounds due to the likely impact from adjoining commercial premises and the resulting harmful impact upon the residential environment that would be created for future occupiers”.
11. Mr Gluck appealed to the Secretary of State, but the appeals were dismissed in a decision letter dated 2 May 2019 on the basis that “the occupiers of the proposed flats would be exposed to ... noise which may occur at any time and would significantly affect their quality of life”. With regard to the timing of the Council’s decisions, the inspector said this:

“9. On 27 April 2018 the Council received an email from the appellant’s agent, stating that, ‘my client would be willing to agree a new determination date for both applications until 12 May 2018...’. The Council argue that, in accordance with Article 7 (c) of the GPDO, it had the appropriate written notice from the appellant that a longer period to the 56 day determination period had been agreed and both decisions were made before that period expired.

10. The appellant contends that he did not give written notice for a longer period to the 56 days and that the Council have implied an extension by context. This is unacceptable as the GPDO only allows deadlines to be extended ‘through express and unequivocal written agreement’. Furthermore, the email of 27 April 2018 from his agent to the Council stated that the appellant would be ‘willing’ to extend the deadline which is an offer and not a formal agreement.

11. I have carefully considered the appellant’s arguments regarding whether he agreed to a longer period to determine the applications and based on all the information before me, which includes other emails, I am satisfied that such an agreement was

entered into by both parties. Moreover, I have not been provided with any substantive evidence that an email cannot be considered ‘in writing’ for the purposes of agreeing the longer period. Furthermore, there is no requirement under Article 7 of the GPDO that both parties have to agree the longer period independently, only that there is an agreement ‘by the applicant and the authority in writing’, and the email from the appellant’s agent is that written agreement. Consequently, permission was not deemed to have been granted.”

12. Returning to the subject in his costs decisions of the same date, the inspector said:

“5. The email from the agent to the Council follows an email from the applicant which confirms that he had spoken to officers regarding the need for a further meeting to discuss matters at the sites and that an email is expedited ‘allowing the decision to be extended’. I do not find the phrase, ‘would be willing’ ambiguous as it is clear that the agent is following his client’s instruction and confirms the acceptance of a longer period to determine the applications. Moreover, the email concludes by stating that if further extensions are required to resolve matters, ‘I would be happy to agree these with you in advance’.

6. Furthermore, the email from the Council does not state that the agreement to the extension to the determination date is rejected, rather that it expresses a concern that the matter relating to noise is unlikely to be overcome, which the author will discuss with his manager. In addition, I have not been provided with any substantive evidence that an email cannot be considered ‘in writing’ for the purposes of agreeing the longer period. Moreover, there is no requirement under Article 7 of the GPDO that both parties have to agree the longer period independently, only that there is an agreement ‘by the applicant and the authority in writing’, and the email from the appellant’s agent is that written agreement.”

13. Mr Gluck challenged the inspector’s decisions pursuant to section 288 of the Town and Country Planning Act 1990, but on 31 January 2020 the Judge dismissed the claims. It is that decision against which Mr Gluck now appeals.

The legal framework

14. Planning permission is generally required for the carrying out of any development of land. One way in which such permission may be granted is by a development order made under section 59 of the Town and Country Planning Act 1990. The GPDO is such an order. Article 3(1) of the GPDO grants planning permission for the classes of development described as permitted development in schedule 2 to the order. That, however, is stated in article 3(1) to be “Subject to the provisions of this Order”, and article 3(2) provides that any permission granted by article 3(1) is “subject to any relevant exception, limitation or condition specified in Schedule 2”.

15. In some instances, the grant of planning permission pursuant to the GPDO involves a “prior approval” procedure. Permission to carry out a development may be expressed to depend on a particular matter having been approved. For example, paragraph A1 of part 18 of schedule 2 states that development is not permitted by class A of part 18:

“if it consists of or includes—

(a) the erection, construction, alteration or extension of any building, bridge, aqueduct, pier or dam; or

(b) the formation, laying out or alteration of a means of access to any highway used by vehicular traffic,

unless the *prior approval of the appropriate authority* to the detailed plans and specifications is first obtained” (emphasis added).

In other cases, a developer may have to apply to the local planning authority for a determination as to whether its prior approval is required. That is the position with the particular class of development with which this case is concerned, class O of part 3. Class O permits:

“Development consisting of a change of use of a building and any land within its curtilage from a use falling within Class B1(a)(offices) of the Schedule to the Use Classes Order, to a use falling within Class C3 (dwellinghouses) of that Schedule”.

However, paragraph O2(1) imposes this condition:

“Development under Class O is permitted subject to the condition that before beginning the development, the developer must apply to the local planning authority for a determination as to whether the prior approval of the authority will be required as to—

(a) transport and highways impacts of the development,

(b) contamination risks on the site,

(c) flooding risks on the site,

(d) impacts of noise from commercial premises on the intended occupiers of the development, and

(e) the provision of adequate natural light in all habitable rooms of the dwellinghouses,

and the provisions of paragraph W (prior approval) apply in relation to that application.”

16. Paragraph W of part 3 of schedule 2 to the GPDO, to which there is reference in paragraph O2 of part 3, is headed “Procedure for applications for prior approval under Part 3”. During the relevant period, it provided as follows:

“(1) The following provisions apply where under this Part a developer is required to make an application to a local planning authority for a determination as to whether the prior approval of the authority will be required.

...

(3) The local planning authority may refuse an application where, in the opinion of the authority—

(a) the proposed development does not comply with, or

(b) the developer has provided insufficient information to enable the authority to establish whether the proposed development complies with,

any conditions, limitations or restrictions specified in this Part as being applicable to the development in question.

...

(9) The local planning authority may require the developer to submit such information as the authority may reasonably require in order to determine the application, which may include—

(a) assessments of impacts or risks;

(b) statements setting out how impacts or risks are to be mitigated; or

(c) details of proposed building or other operations.

...

(11) The development must not begin before the occurrence of one of the following—

(a) the receipt by the applicant from the local planning authority of a written notice of their determination that such prior approval is not required;

(b) the receipt by the applicant from the local planning authority of a written notice giving their prior approval; or

(c) the expiry of 56 days following the date on which the application under sub-paragraph (2) was received by the local planning authority without the authority notifying the applicant as to whether prior approval is given or refused.

...

(13) The local planning authority may grant prior approval unconditionally or subject to conditions reasonably related to the subject matter of the prior approval....”

17. For the purposes of part 3 of schedule 2 to the GPDO, paragraph X of part 3 defines “prior approval date” to mean:

“the date on which—

(a) prior approval is given; or

(b) a determination that such approval is not required is given or the period for giving such a determination set out in paragraph W(11)(c) of this Part has expired without the applicant being notified whether prior approval is required, given or refused”.

18. The present appeal involves issues as to the relationship between paragraph W(11) of part 3 of schedule 2 to the GPDO and article 7 of the GPDO. Article 7, headed “Prior approval applications: time periods for decision”, was at the material times in these terms:

“Where, in relation to development permitted by any Class in Schedule 2 which is expressed to be subject to prior approval, an application has been made to a local planning authority for such approval or a determination as to whether such approval is required, the decision in relation to the application must be made by the authority—

(a) within the period specified in the relevant provision of Schedule 2,

(b) where no period is specified, within a period of 8 weeks beginning with the day immediately following that on which the application is received by the authority, or

(c) within such longer period as may be agreed by the applicant and the authority in writing.”

19. Article 7(c) of the GPDO has recently been amended by the Town and Country Planning (Permitted Development and Miscellaneous Amendments) (England) (Coronavirus) Regulations 2020 to read “within such longer period than is referred to in paragraph (a) or (b) as may be agreed by the applicant and the authority in writing”. The new wording does not, however, apply to the present case.

20. There was also reference in submissions to article 7ZA of the GPDO, headed “Prior approval applications: modified procedure in relation to call-in of applications”. Article 7ZA(8) provides:

“Where the Secretary of State makes a call-in direction in relation to a prior approval application any deemed prior

approval provision shall have no effect in relation to such an application.”

The expression “deemed prior approval provision” is defined by article 7ZA(9) to mean “a provision in Schedule 2 in reliance on which, after the expiry of a time period for decision under article 7 where the application has not been determined, development may begin”.

The issues

21. The appeal gives rise to the following issues:
- i) Can the 56-day period mentioned in paragraph W(11)(c) of part 3 of schedule 2 to the GPDO be extended by agreement pursuant to article 7 of the GPDO?
 - ii) If the 56-day period is capable of extension, was it extended in the present case?
 - iii) If the answer to (i) or (ii) is “No”, should the Court nevertheless decline to quash the Council’s decision letters in the exercise of its discretion or on the basis either that there was substantial compliance with article 7 or that Mr Gluck is estopped by convention from arguing that there was no extension of time?

Issue (i): Power to extend time

22. The Judge concluded that the 56-day period mentioned in paragraph W(11)(c) of part 3 of schedule 2 to the GPDO can be extended by agreement pursuant to article 7 of the GPDO. Rejecting the submission that article 7(c) provides an alternative only to article 7(b), not to article 7(a), the Judge said in paragraph 74 of his judgment:

“In my judgment, the language of the GPDO 2015 does not require the Court to conclude that limb (c) is an alternative only to limb (b). The specification of a time period in Schedule 2 (such as 56 days) for a decision on whether prior approval is required, linked to a restriction on commencement of development, is not incompatible with the possibility of extending time under limb (c). Limb (b) lays down a finite period of 8 weeks for decision-making, but that is to be read together with, and subject to, any extension under limb (c). The language of limb (a) does not preclude an extension of time under limb (c) simply because the time period is specified in Schedule 2 rather than in Article 7. Nor is any such extension precluded because the time period is used to control when development may lawfully commence. A provision such as paragraph W in Part 3 of Schedule 2 is capable of being read together with Article 7. Permitted development rights granted under schedule 2 are expressly subject to other provisions of GPDO 2015 including Article 7 (Article 3(1)). I accept [counsel for the Secretary of State’s] submission that limb (a) refers to a period specified in Schedule 2 but (like limb (b)) that is subject to any extension agreed under limb (c), and the time period stated in, for example, paragraph W(11) must be read and understood accordingly.”

23. Miss Philippa Jackson, who appeared for Mr Gluck, took issue with these conclusions. She maintained that article 7(c) of the GPDO is properly to be understood as relating only to article 7(b) and so as having no application to the 56-day period laid down in article W(11)(c) of part 3 of schedule 2, that being a “period specified in the relevant provision of Schedule 2” within article 7(a). That interpretation of article 7, she argued, is consistent with its wording and supported by both analysis of the GPDO and its antecedents.
24. Miss Jackson said that the Judge had not adequately explained how paragraph W(11)(c) of part 3 of schedule 2 to the GPDO can be reconciled with the existence of a power to extend and pointed out that the definition of “prior approval date” in paragraph X of part 3 speaks simply of the period “set out in paragraph W(11)(c)” without making any reference to any possibility of extension. She submitted, moreover, that the role of article 7 is to state the periods within which a local planning authority must consider a prior approval application, not to impose a limitation on the grant of planning permission.
25. Miss Jackson suggested, too, that her approach to article 7 of the GPDO chimes with the structure of schedule 2. Three types of prior approval procedure can be discerned in schedule 2, she said. In some cases, such as class O of part 3, the schedule sets a single period within which the local planning authority must determine both whether prior approval is required and whether approval should be given. At the other end of the spectrum, parts 17 and 18 just make planning permission conditional on prior approval having been granted, without providing for any determination as to whether prior approval is needed, and no time limit is prescribed by schedule 2. There is also a third category of “hybrid” cases, where a developer must first obtain a determination as to whether prior approval will be required and then, if it is, obtain that approval. Class A of part 6 provides an example. There, paragraph A2 stipulates that “the developer must, before beginning the development, apply to the local planning authority for a determination as to whether the prior approval of the authority will be required as to the siting, design and external appearance of the building, the siting and means of construction of the private way, the siting of the excavation or deposit or the siting and appearance of the tank, as the case may be” and a 28-day period for that determination is set by paragraph A2(iii), which states:

“the development must not begin before the occurrence of one of the following—

(aa) the receipt by the applicant from the local planning authority of a written notice of their determination that such prior approval is not required;

(bb) where the local planning authority give the applicant notice within 28 days following the date of receiving the applicant's application of their determination that such prior approval is required, the giving of such approval; or

(cc) the expiry of 28 days following the date on which the application under sub-paragraph (2)(ii) was received by the local planning authority without the local planning authority making

any determination as to whether such approval is required or notifying the applicant of their determination”.

In contrast, part 6 does not specify any deadline by which approval must be given or refused where it has been determined that it is required. Miss Jackson contended that it can be seen that Parliament chose to include in schedule 2 time limits on decisions involving a determination as to whether prior approval is required, but not for other decisions, and that that distinction is reflected in article 7. While time can otherwise be extended, it has not been thought appropriate for the periods within which decisions involving a determination as to whether prior approval is required to be susceptible to extension. That, moreover, makes sense since such decisions should be capable of being made relatively quickly and fixed deadlines are apt to deter local planning authorities from sitting on their hands.

26. With regard to the GPDO’s antecedents, Miss Jackson explained that article 21 of the Town and Country Planning (General Development Procedure) Order 1995 (“the 1995 GPDO”) and, subsequently, article 30 of the Town and Country Planning (Development Management Procedure) (England) Order 2010 (which replaced article 21 of the 1995 GPDO) required a local planning authority to give its decision on a prior approval application within eight weeks but expressly referred to the possibility of the period being extended by agreement. In contrast, neither the 56-day period specified in paragraph A3(7) of part 24 of schedule 2 to the 1995 GPDO nor the 42-day period applied to home extensions following the Town and Country Planning (General Permitted Development) (Amendment) (England) Order 2013 could be extended and, in a “hybrid” case, there was no scope for extending the deadline within which a local planning authority had to determine whether prior approval was required (see in this respect *Murrell v Secretary of State for Communities and Local Government* [2010] EWCA Civ 1367, [2011] 1 P&CR 6). If, Miss Jackson submitted, Parliament had intended to alter the way in which time limits in respect of prior approval applications operated, there would surely have been some reference to that in the explanatory materials, but there was none. The explanatory memorandum to the GPDO detailed certain policy changes without mentioning any shift in the approach to time limits.
27. Miss Jackson further relied on the decision of Mr C.M.G. Ockleton, sitting as a Judge of the Queen’s Bench Division, in *R (Warren Farm (Wokingham) Ltd) v Wokingham Borough Council* [2019] EWHC 2007 (Admin). Mr Ockleton there accepted arguments to the effect that article 7(c) of the GPDO is to be read as an alternative to article 7(b) only, not to article 7(a).
28. In my view, however, the Judge was right to consider that article 7(c) of the GPDO provides an alternative to article 7(a) as well as article 7(b) and, hence, that the 8-week period specified in paragraph W(11)(c) of part 3 of schedule 2 can be extended by agreement under article 7(c).
29. The key point is that the Judge’s conclusions are supported by the language of article 7 of the GPDO. Were Miss Jackson’s interpretation of article 7 correct, article 7(c) would not have warranted a separate sub-article: since sub-article (c) would merely represent a qualification to sub-article (b), the two could (and surely would) have been combined. Miss Jackson’s construction of article 7 is also hard to reconcile with the existence of article 7(a): the periods specified in schedule 2 to which article 7(a) refers are of course anyway so specified so it is difficult to see the need for article 7(a) unless article 7(c)

was meant to apply to it. Miss Jackson sought to explain article 7(a)'s inclusion on the basis that article 7 is directed at the local planning authority's duties, but that would not seem to add anything useful. The Judge's approach derives support, too, from the principle that "Where a provision consists of several numbered paragraphs with the word 'and' or 'or' at the end of the penultimate paragraph, there is a strong implication that each of the preceding paragraphs is separated by the same conjunction" (see Bennion, Bailey and Norbury on Statutory Interpretation, 8th ed., at s 16.6). I agree with Mr Charles Streeten, who appeared for the Secretary of State, that, read naturally, article 7 means that time may be extended pursuant to article 7(c) either where a period is specified in schedule 2 or where the default 8-week period for which article 7(b) provides is applicable.

30. There are further reasons for thinking that to be the correct interpretation of article 7 of the GPDO. First, the definition of "deemed prior approval provision" given in article 7ZA ("a provision in Schedule 2 in reliance on which, after the expiry of a time period for decision under article 7 where the application has not been determined, development may begin") underlines the primary role of article 7: it is treated as governing when development may begin, albeit that it cross-refers to schedule 2. As the Judge put it in paragraph 64 of his judgment, "Article 7ZA(9) makes it clear that the time periods for decision-making referred to in Article 7 are integral to the conditions in schedule 2 which control when development may lawfully begin in reliance upon the prior approval deeming provision". Secondly, it makes sense that periods specified in schedule 2 should be capable of extension under article 7(c). Were Miss Jackson's approach correct, it would be impossible to extend such a period even where both a developer and the local planning authority wanted to do so, for example to allow the developer to supply further information or to hold discussions with the local planning authority or consultees. Take paragraph W of part 3 of schedule 2. That states that a local planning authority may refuse an application where the developer has provided insufficient information on certain matters (paragraph W(3)), authorises a local planning authority to require a developer to submit information (paragraph W(9)) and allows a local planning authority to grant prior approval subject to conditions (paragraph W(13)). Since, moreover, paragraph O2 provides for a local planning authority to determine whether prior approval will be required as to "transport and highways impacts", "contamination risks", "flooding risks", "impacts of noise" and "the provision of adequate natural light", an application may raise technical issues calling for expert reports. In the circumstances, it is easy to envisage circumstances in which a developer and the local planning authority might both think it desirable that the 56-day period specified in paragraph W(11)(c) should be extended. Miss Jackson's construction of article 7(c) could result in a local planning authority having to refuse an application because the 56-day period was running out and a further application needing to be made with additional information. In contrast, the interpretation of article 7(c) which I favour allows the scheme to work efficiently and sensibly for the mutual benefit of developer and local planning authority. It is significant in this context that the possibility of extension under article 7(c) should not prejudice developers as time could not be extended without their agreement. As the Judge noted in paragraph 72 of his judgment, "The protection provided to applicants by the so-called 'deemed approval' provisions in Schedule 2 is not removed by treating limb (c) in Article 7 as applying to limb (a) as well as limb (b)".

31. Nor is the Judge’s construction of article 7 undermined by Miss Jackson’s analysis of the GPDO’s structure and antecedents. With regard to the former, it is hard to see why it should have been thought appropriate to preclude extensions in respect of decisions involving a determination as to whether prior approval is required while permitting them with other decisions. Moreover, the prior approval provisions do not create as neat a picture as Miss Jackson’s three-part division would suggest. There are hardly any instances of planning permission simply being conditional on prior approval having been granted without a determination as to whether prior approval is needed: parts 17 and 18 of schedule 2 are encountered only rarely. Again, on occasions schedule 2 specifies time limits for both stages of a “hybrid” case. For example, paragraph A3(8) of part 16 sets the period within which approval must be given or refused in circumstances where it has already been determined that prior approval is required. Turning to the GPDO’s antecedents, predecessor provisions cannot be taken as a reliable guide to the present law when the GPDO did more than merely consolidate and article 7 had no precise equivalent in the earlier legislation. In this connection, the Judge observed in paragraph 80 of his judgment:

“Article 7 has been framed in a completely different way to the earlier legislation. It now deals comprehensively with all permitted development rights which are subject to one of the prior approval procedures and deals with the time periods in each of those cases, allowing for any such time period to be extended by agreement.”

32. In short, my answer to issue (i) is “Yes”. I agree with the Judge that the 56-day period mentioned in paragraph W(11)(c) of part 3 of schedule 2 to the GPDO can be extended by agreement pursuant to article 7 of the GPDO.

Issue (ii): Extension in the present case

33. Article 7(c) provides for a decision in relation to an application to be made “within such longer period as may be agreed by the applicant and the authority in writing”.
34. As the Judge explained in paragraph 99 of his judgment, one of the issues before him was:

“whether it suffices for limb (c) of Article 7 that, as the Secretary of State contends, an agreement to extend the time for determination be made verbally but then evidenced or recorded subsequently in writing from one party or whether, as the Claimant submits, it is necessary that the applicant and the LPA [i.e. local planning authority] must both agree to the extension in writing”.

Having noted in paragraph 101 that article 7(c) “imposes a requirement for ‘writing’ so as to avoid uncertainty or disputes as to whether an extension of time has been agreed” and that the context is “to do with administrative decision-making in the public interest” and “not conveyancing or even the formation of contracts”, the Judge said in paragraph 102:

“It may be good practice for emails or correspondence to be sent by both the applicant and the authority to each other setting out their agreement to an extension of time, or for them both to sign a single document in which they express their agreement to an extension. But I do not think that limb (c) necessarily insists upon an agreement being expressed by both parties in writing. Here the only party who argues that the time period was not lawfully extended, the Claimant, agrees that there was a verbal agreement between the LPA’s planning officer and himself to extend time. I accept the Secretary of State’s submission that in the present case it is sufficient that a verbal agreement was made by both parties which was then appropriately evidenced in writing. For example, that written evidence may simply be an email from the applicant (the Claimant) sent to the LPA to confirm what had been discussed and agreed verbally. Where both parties accept that they agreed an extension of time, albeit verbally, I do not accept that that agreement would be ineffective for the purposes of Article 7 (and Schedule 2) unless, in that scenario, the LPA responded in writing to confirm the content of the email which they received from the applicant.”

The Judge also said, in paragraph 107, that article 7 is concerned with documentary evidence of the existence of an agreement and “does not insist that a qualifying ‘agreement’ can only be made entirely in writing”.

35. Before us, Miss Jackson once again submitted that, to satisfy article 7(c) of the GPDO, an agreement must be made in writing. It is not enough, she said, that an agreement is evidenced in writing. Had that been intended to suffice, she argued, the GPDO would have said so, as section 5 of the Arbitration Act 1996 does and the now repealed section 107 of the Housing Grants, Construction and Regeneration Act 1996 formerly did.
36. In a different context, I might accept that the words “agreed ... in writing” called for an agreement made in writing rather than one merely evidenced in writing. As, however, the Judge pointed out, article 7(c) of the GPDO is not concerned with either property transactions or contractual relations. It is an aspect of the planning system, and this Court “has cautioned against the dangers of excessive legalism infecting the planning system” (per Lindblom LJ in *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2018] EWCA Civ 1643, [2018] PTSR 746, at paragraph 7). Expanding on the point in *East Staffordshire Borough Council v Secretary of State for Communities and Local Government* [2017] EWCA Civ 893, [2018] PTSR 88, Lindblom LJ had explained at paragraph 50:

“The court should always resist over complication of concepts that are basically simple. Planning decision-making is far from being a mechanical, or quasi-mathematical activity. It is essentially a flexible process, not rigid or formulaic.”

In the present context, it is very hard to see how it could have been thought necessary to insist that an agreement to extend should be *made*, and not just evidenced, in writing. Suppose, say, that a developer and a local planning authority had orally agreed on an extension to a particular date and recorded that agreement meticulously in an exchange

of emails. What reason could there have been for not seeing that as good enough for the purposes of article 7?

37. In the circumstances, I would read article 7(c) of the GPDO as demanding no more than that an applicant and the local planning authority each agree in writing to a longer period. An agreement made in writing will of course meet that requirement, but I do not see that as a necessity. It would be sufficient for the applicant and the local planning authority both to have evidenced in writing an agreement they had made orally.
38. On the other hand, there must, in my view, be something in writing from each of the applicant and the local planning authority. That seems to me to follow from the terms of article 7(c) and also to accord with the desirability of certainty which the provision implies. In other words, there has to be something in writing by or on behalf of each party to comply with article 7(c). It is, I suppose, possible to conceive of a case in which an individual was authorised by both applicant and local planning authority to record an agreement. That (presumably rare) situation apart, however, documentation will have to have been subscribed to by or on behalf of the applicant and, separately, the local planning authority. The Judge thought it enough that an applicant had sent the local planning authority something confirming a verbal agreement. I do not agree.
39. Henderson and Hickinbottom LJJ disagree with me on this point. However, article 7(c) is applicable only where a longer period has been “agreed by the applicant and the authority in writing”. Read naturally, that seems to me to signify that – as in fact article 7(c) says in terms – a longer period must have been agreed by the applicant and the authority (i.e. both of them) in writing. That can be achieved, as I see it, either by a written agreement between the applicant and the authority or by written evidence emanating from each. As I understand it, the approach preferred by Henderson and Hickinbottom LJJ involves construing article 7(c) as if it spoke of a longer period having been “agreed by the applicant and the authority *and* in writing”, uncoupling the “by the applicant and the authority” from “in writing”. I am not myself convinced by this. First, article 7(c) does not include either “and” or anything to similar effect; on the face of it, it simply refers to the applicant and the authority having agreed in writing. Secondly, if the “in writing” is divorced from the preceding words, article 7(c) imposes no limit on the source of the writing: it need not come from either the applicant or the authority. Thirdly, article 7(c)’s insistence on writing appears to me to make it inherently unlikely that it was intended to have the breadth that Henderson and Hickinbottom LJJ’s approach implies. Article 7(c) could presumably be satisfied even by, say, an assertion of an oral agreement advanced for the first time in a letter from solicitors acting for an authority sent in the context of an established dispute as to whether the authority had been entitled to issue a decision letter.
40. I would add two points. First, it was (rightly) common ground that emails can meet the requirements of article 7(c): see in this respect *Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd* [2012] EWCA Civ 265, [2012] 1 WLR 3674, at paragraph 22. Secondly, a relevant agreement must be to a “longer period”. It will not do, therefore, for an applicant and local planning authority to agree that there should be *some* extension but not for how long. It must be possible to identify the “longer period”.
41. Turning to the facts of the present case, the inspector considered that “the email from the appellant’s agent [i.e. Mr Allen’s 1.20 pm email to Mr Walke] is that written agreement [i.e. the agreement ‘by the applicant and the authority in writing’]”. For his

part, the Judge proceeded on the basis that it sufficed for an agreement to be evidenced in writing by one party. He further expressed the view that there was “no genuine evidential uncertainty about the agreement upon the extension of time or the exchange of emails between the parties”.

42. As I have already said, though, my own view is that evidence of an agreement emanating from only one party will not satisfy article 7(c) of the GPDO. Mr Allen’s 1.20 pm email to Mr Walke cannot of itself suffice, therefore. In any event, I do not think an agreement of a relevant kind can have been concluded, even orally, by the time Mr Allen sent his email. In this regard, Mr Streeten relied on a statutory declaration made by Mr Walke on 14 February 2019 in which he referred to agreement having been reached on 27 April 2018 “on extending the time period for determination of both Applications to 12 May 2018 by telephone with Mr Gluck and subsequent email from Tony Allen”. However, it is not clear from this passage whether Mr Walke considered an extension *to 12 May* to have been agreed in advance of Mr Allen’s email, and the terms of that email themselves suggest that Mr Allen was *proposing* that date. More than that, Mr Gluck had told Mr Allen no more than that Mr Walke had “agreed that you should send him an email that we are meeting on Thursday at 12pm with Brian Cox and thus you allow the decision to be extended”. There was no mention in Mr Gluck’s email of a 12 May extension having been agreed, and Mr Allen sent his own email only 28 minutes later without, it seems, having spoken to Mr Gluck in the interim.
43. In the circumstances, I do not think that the inspector’s analysis can be sustained. However, Mr Streeten argued that the inspector had none the less arrived at the right conclusion on the basis that an agreement on an extension is to be found in Mr Allen’s 1.20 pm email and Mr Walke’s 2.27 pm reply. Mr Streeten stressed in particular the first paragraph of Mr Walke’s email, “Thanks for your email”. In the context, Mr Streeten said, Mr Walke should be understood as agreeing what Mr Allen had proposed. In the light of his earlier conversation with Mr Gluck, Mr Walke was expecting to receive an email from Mr Allen allowing an extension of time and, when he did so, he “put a tick in the box”. The second paragraph of Mr Walke’s email, Mr Streeten submitted, did not relate to the extension but to the noise issue.
44. For her part, Miss Jackson emphasised that Mr Walke’s 2.27 pm email could not have been considered to constitute acceptance of an offer made in Mr Allen’s 1.20 pm email under contractual principles. She took us in this respect to Chitty on Contracts, 33rd. ed., at paragraph 2-026, where this is said:
- “An acceptance is a final and unqualified expression of assent to the terms of an offer. The objective test of agreement applies to an acceptance no less than to an offer. On this test, a mere acknowledgement of the receipt of an offer does not amount to an acceptance”
45. There is undoubtedly force in Miss Jackson’s submissions on this point. On the other hand, it once again has to be remembered that we are not concerned with whether a contract was made but rather with the operation of the planning system and the Courts must there be wary of “the dangers of excessive legalism”. On the facts, it is apparent both from the email correspondence and from Mr Walke’s statutory declaration that in advance of receiving Mr Allen’s 1.20 pm email Mr Walke had orally agreed with Mr Gluck that time should be extended but was waiting for an email from Mr Allen to

confirm that the latter was “allowing the decision to be extended” (to quote Mr Gluck’s 12.52 pm email to Mr Allen). The 1.20 pm email was what Mr Walke had been waiting for and provided the requisite confirmation. In the very particular circumstances, it is fair to read Mr Walke’s reply, with its “Thanks for your email” and absence of dissent, as agreement. Mr Walke had been waiting for a box to be ticked (to adopt Mr Streeten’s words) and, finding that it had been, he needed to do no more than acknowledge Mr Allen’s email with thanks to indicate his agreement on the Council’s behalf. Plainly, it would in the context have been appropriate, not to say important, for Mr Walke to tell Mr Allen if he was not prepared to go along with what was proposed, and he did not do so. True it is that in the second paragraph of his email Mr Walke said that he would “discuss this” with his manager, but this is sensibly to be read as relating to “the potential issue around noise disturbance” to which Mr Allen had referred. Mr Walke did not voice the slightest objection to an extension to 12 May in line with what he had already agreed with Mr Gluck and it appears to have been common ground that Mr Walke had authority to agree an extension without reference to his manager.

46. I thus consider that the 56-day period mentioned in paragraph W(11)(c) of part 3 of schedule 2 to the GPDO was extended in the present case.

Issue (iii): Refusal of relief

47. The conclusions I have arrived at on the previous issues make it unnecessary to address this one.

Conclusion

48. I would dismiss the appeal. In my view, the 56-day period for which paragraph W(11)(c) of part 3 of schedule 2 to the GPDO provided was capable of extension by agreement under article 7(c) of the GPDO and such an extension was in fact agreed in the present case.

Lord Justice Hickinbottom:

49. I am very grateful to my Lord, Newey LJ, for his recitation of the legal background and facts of this case, and for his analysis of the issues with which I materially agree. I agree, in particular, with his conclusion that the 56-day period referred to in paragraph W(11)(c) of part 3 of schedule 2 to the GPDO can be extended by agreement between an applicant and the relevant local planning authority (see paragraphs 22-32 above); that article 7(c) of the GPDO requires only that an agreement to extend should be evidenced, and not made, in writing (see paragraph 36); and that, in this case, there was in fact an agreement between Mr Gluck and the Council to extend time for a decision on his application to 12 May 2018 of which there was written evidence emanating from or on behalf of each of Mr Gluck and the Council (see paragraph 44). That is sufficient to determine the appeal by dismissing it.
50. The only point where I doubt my Lord’s analysis is his conclusion that article 7(c) requires that evidence of the agreement to be in the form of something in writing from each of the applicant and the local planning authority.
51. Article 7(c) requires a decision to be made by an authority “within such longer period as may be agreed by the applicant and the authority in writing”. As I have indicated, I

agree with Newey LJ that “agreed... in writing” refers to an agreement evidenced in writing, for the reasons he has given. However, whilst the issue does not arise for determination in this appeal – because, as I have also indicated, I agree with Newey LJ that in this case the agreement for an extension was duly acknowledged in writing by or on behalf of both Mr Gluck and the Council – in my view, on a natural reading of these words, “in writing” does not refer to “the applicant and the authority” but to “agreed”; so that the relevant phrase is properly construed as “agreed (i) by the applicant and the authority (ii) in writing”. Thus, article 7(c) requires no more than for the agreement to be evidenced in writing, and I would not be minded to put a gloss on it to require, as a matter of law, that that evidence must be in the particular form of writing emanating from or on behalf of each of the applicant and the authority. Consequently, if (for example) an applicant and an authority orally agree to an extension, and that agreement is acknowledged in writing by the applicant, the applicant could not then, in the absence of something in writing from the authority, say that deemed planning permission had been granted under the GPDO by the effluxion of the unextended period, which would be the result of Newey LJ’s construction.

52. I am not troubled by the consequence that, as a matter of law, the written evidence of an agreement might emanate from someone other than the applicant or the authority; although it seems to me that that is moving even further away from the facts of this case and into a realm of practical unlikelihood. It is unnecessary for me to come to a firm conclusion upon such circumstances; but, as a matter of principle, I do not see why the required written evidence should not come from such a source.
53. Of course, simply because something in writing is not required as a matter of law, that does not mean that, in practice, if an applicant or authority seeks to rely upon an agreement which has not been acknowledged in writing by the other, it may not have substantial evidential difficulties – clearly, to avoid potential difficulties in the future, it would be good practice (and a practice that I would certainly strongly encourage) for both applicant and authority promptly to acknowledge in writing any agreement to extend time to which they have come – but that, again, is a different issue. In my view, the benefits of certainty do not warrant the construction of article 7(c) that Newey LJ favours which, in my respectful view, is not the natural meaning of the words used.
54. However, as I have indicated, that difference between Newey LJ and me is not material to the outcome of this appeal. Save for that single point, I agree with his analysis; and, on the basis of that analysis, I agree with his conclusion that this appeal should be dismissed.

Lord Justice Henderson:

55. Subject to one reservation, I agree that the appeal should be dismissed for the reasons so clearly given by Newey LJ. In particular, I too agree with his conclusions of law that (a) the relevant 56-day period can be extended by agreement between the applicant and the local planning authority, and (b) the wording of article 7(1) of the GPDO, on its true construction, requires only that an agreement to extend should be evidenced, and not necessarily made, in writing. On the facts, as Newey LJ has explained, an agreement was reached between Mr Gluck and the Council on both the principle and the duration of an extension, each ingredient being necessary in order to satisfy the words “*such longer period as may be agreed*” (my emphasis). Although the principle of an extension had been agreed between Mr Gluck and Mr Walke in the telephone conversation

referred to by Mr Gluck in his 12.52 pm email to Mr Allen on 27 April 2018, it seems probable that the duration (until 12 May 2018) was not agreed until it had been proposed by Mr Allen in his 1.20 pm email to Mr Walke and implicitly accepted by the latter in his reply at 2.27 pm.

56. In those circumstances, the agreement was in my opinion clearly evidenced in writing by or on behalf of both Mr Gluck and the Council. That makes it unnecessary for us to decide the one point of law on which differing views have been expressed by my Lords, Newey LJ and Hickinbottom LJ, namely whether (as Newey LJ considers) it is necessary for written evidence of an oral agreement extending time under article 7(c) to be forthcoming from each of the applicant and the local authority: see [38] above. On that one point, however, I do respectfully disagree with Newey LJ, as he has indicated, and I agree with the construction of the phrase “agreed by the applicant and the authority in writing” put forward by Hickinbottom LJ in [51] above.
57. In common with Hickinbottom LJ, I would prefer not to put a gloss on the words “in writing”, nor would I wish to be prescriptive about the form which the necessary writing must take, or from what sources it may emanate. I would, however, emphasise that the question should always be approached in the spirit of practical good sense and avoidance of legalism which it is appropriate to adopt in interpreting the planning system and the process of decision making within it: see the authorities referred to by Newey LJ at [36].
58. I would also associate myself with the encouragement given by Hickinbottom LJ, at [53], for both sides to take prompt steps to record or otherwise acknowledge in writing any agreement to extend time to which they may have come.