Neutral Citation Number: [2019] EWCA Civ 2250

Case No: C1/2019/0430

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
PLANNING COURT
THE HON MR JUSTICE OUSELEY
[2019] EWHC 176 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/12/19

Before :

LORD JUSTICE LEWISON

LORD JUSTICE HICKINBOTTOM
and
LADY JUSTICE ASPLIN

- -

Between :

NEW WORLD PAYPHONES LIMITED — **Appellant**

- and -

(1) WESTMINSTER CITY COUNCIL
(2) THE SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT — **Respondents**

- -
- -

Paul Stinchcombe QC (instructed by **Squire Patton Boggs (UK) LLP**) for the **Appellant**
Saira Kabir Sheikh QC (instructed by **Bi-Borough Legal Services**) for the **First Respondent**
The Second Respondent did not appear and was not represented

Hearing date: 19 November 2019
Further written submissions: 25 November 2019

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Approved Judgment

Lord Justice Hickinbottom :

The Background

1. Telephone boxes are a feature of the London landscape. There are 1,800 in the City of Westminster alone.

2. However, with the rise of the mobile phone, many are now rarely used, in poor condition and suffering from anti-social behaviour and vandalism. The City of Westminster Council ("the Council") considers that, for some, their function has largely or wholly disappeared and consequently they should be removed in accordance with the conditions which formed part of the permitted development provisions under which they were installed.

3. It is therefore initially curious that, as reflected nationwide, applications to the Council to install new or replacement telephone kiosks have burgeoned over the last few years. Prior to a change in the scheme earlier this year to exclude telephone kiosks as a class of permitted development, each application was for prior approval of permitted development and was invariably accompanied by a parallel application to the Council for advertisement consent to allow illuminated advertising on the whole of the back panel of the new kiosk. That, the Council suggests, betrayed the true purpose of these proposed structures. The Council considers it is unlikely that the new kiosks would be used by the public to make telephone calls; and the applications were in substance an attempt unlawfully to use the provisions for classes of development permitted by order of the Secretary of State to circumvent normal planning permission controls that properly apply to such development.

4. It is in that context that this appeal raises important questions concerning the proper approach to the scope of development covered by a permitted development order.

5. It does so in the form of an appeal and cross-appeal from the Order of Ouseley J dated 5 February 2019 in which he allowed the Council's application under section 288 of the Town and Country Planning Act 1990 ("the 1990 Act") quashing the decision of a Planning Inspector J Bell-Williamson MA MRTPI on behalf of the Secretary of State ("the Inspector") to grant approval to the Appellant developer ("NWP") to replace two existing telephone boxes in Marylebone Road with a single new kiosk incorporating a large back panel to display illuminated digital advertisements.

6. Before us, Paul Stinchcombe QC appeared for NWP and Saira Kabir Sheikh QC for the Council. At the outset, I thank them for their helpful submissions.

The Legal Background

7. Section 57(1) of the 1990 Act provides that planning permission is required for any "development" of land, defined in section 55 (so far as relevant to this appeal) as any building operations or material change in the use of any building or land.

8. The "use" of a building or land is therefore an important planning concept, as is the related concept of "purpose", i.e. the use for which the building or land is intended. By section 76(2) and (3) of the 1990 Act, where planning permission is granted for the

erection of a building, the grant of permission may specify the purposes for which the building may be used; and, if no purpose is specified, then the permission is construed as including permission to use the building for the purpose for which it is designed. "Purpose" in this context is not subjective – it does not depend upon what is in the mind of the developer – it is the use for which the (usually, proposed) development, looked at objectively, is intended. Development may of course have more than one purpose, and thus be "mixed use", e.g. if a development comprises both a farm (agricultural) and a farm shop (retail).

9. The installation of a telephone kiosk is undoubtedly development as a building operation, for which planning permission is required.

10. By section 58(1)(a), planning permission may be granted for classes of development by a development order made by the Secretary of State. The Town and Country Planning Act (General Permitted Development) (England) Order 2015 (SI 2015 No 596) ("the GPDO") is the principal development order made pursuant to that statutory power. By article 3(1) and (2) of the GPDO, subject to any relevant specified exception, limitation or condition, planning permission is granted for classes of development described as permitted development in Schedule 2 to the order.

11. At the relevant time, Part 16 Class A of Schedule 2 (headed "Electronic communications code operators: Permitted development"), so far as relevant to this appeal, permitted:

> "Development by or on behalf of an electronic communications code operator for the purpose of the operator's electronic communications network in, on, over or under land controlled by that operator or in accordance with the electronic communications code, consisting of—
>
> (a) the installation, alteration or replacement of any electronic communications apparatus…".

12. Paragraph A.2 provided, so far as relevant:

> "(2) Class A development is permitted subject to the condition that—
>
> (a) any electronic communications apparatus provided in accordance with that permission is removed from the land or building on which it is situated—
>
> (i) …
>
> (ii) … as soon as reasonably practicable after it is no longer required for electronic communications purposes; and
>
> (b) such land or building is restored to its condition before the development took place, or to any other condition as may

be agreed in writing between the local planning authority and the developer.

(3) … Class A development—

…

(c) on unprotected land where that development consists of—

…

(iii) the construction, installation, alteration or replacement of—

(aa) a public call box;…

is permitted subject… to the conditions set out in paragraph A.3 (prior approval).

13. The relevant condition is found in paragraph A.3(4):

> "Before beginning the development described in paragraph A.2(3), 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 the siting and appearance of the development."

Further requirements of the application are found in paragraph A.3(5). Paragraph A.3(8) essentially prohibits beginning the development without confirmation from the local planning authority that prior approval is not required or has been granted; although where, within a specified number of days (now, 56 days) of an application under paragraphs A.3(4) and (5), the authority fails to respond substantively to that application, then development is effectively deemed to be permitted and it can begin.

14. Paragraph A.4 defines "electronic communications code operator" as "a person in whose case the electronic communications code is applied by a direction under section 106(3)(a) of the Communications Act 2003 ['the 2003 Act']". Paragraph A.4 also says that "electronic communications network" shall have the same meaning as in the 2003 Act; and it is defined in section 32 of that Act to include "a transmission system for the conveyance, by the use of electrical, magnetic or electro-magnetic energy, of signals of any description". It is uncontroversial that, under these definitions, NWP is an electronic communications code operator operating a national electronic communications network.

15. Again by virtue of paragraph A.4, "electronic communications apparatus" also has the same meaning as in the 2003 Act, which, in paragraph 5 of the Electronic Communications Code (which is incorporated into the Act as Schedule 3A), defines the term as follows:

> "(1) In this code "electronic communications apparatus" means—

(a) apparatus designed or adapted for use in connection with the provision of an electronic communications network,

(b) apparatus designed or adapted for a use which consists of or includes the sending or receiving of communications or other signals that are transmitted by means of an electronic communications network,

(c) lines, and

(d) other structures or things designed or adapted for use in connection with the provision of an electronic communications network.

(2) ….

(3) In this code—

…

'structure' includes a building only if the sole purpose of that building is to enclose other electronic communications apparatus."

16. It is – in my view, rightly – common ground before us that, for these purposes, a telephone kiosk is a "building"; and, therefore, it falls within the definition of "structure" and thus "electronic communications apparatus" if, and only if, its "sole purpose... is to enclose other electronic communications apparatus".

17. To an extent, the inclusion of communications infrastructure within Part 16 of the GPDO reflects the support given in the public interest to that infrastructure by the National Planning Policy Framework ("NPPF"). The NPPF at the relevant time (the 2012 version) said, in particular (emphasis added):

> "42. Advanced, high quality communications infrastructure is essential for sustainable economic growth. The development of high speed broadband technology and other communications networks also plays a vital role in enhancing the provision of local community facilities and services.
>
> …
>
> 46. Local planning authorities must determine applications on planning grounds. They should not seek to prevent competition between different operators, [or] *question the need for the telecommunications system...*".

18. Where a proposed development falls within one of the GPDO classes, as a result of these provisions, the principle of development is not in issue – although that is not in itself necessarily determinative of the application because, to fall within the scope of permitted development within the GPDO, development has also to comply with any

specified "exception, limitation or condition" which applies to the particular class (see, e.g., Infocus Public Networks Limited v Secretary of State for Communities and Local Government and the London Borough of Hammersmith and Fulham [2013] EWHC 4622 (Admin) ("Infocus No 2") at [15]-[16]). Thus, for Part 16 Class A, the prior approval of the planning authority is still required for the siting and appearance of the development. Consequently, on the basis that the proposed development otherwise falls within the permitted development definition for that class, in considering an application for prior approval under Part 16 Class A, the focus of the decision-maker is exclusively on whether, on balance and as a matter of planning judgment, the siting and appearance of the development are acceptable in planning terms. Other conditions etc apply to other defined classes of permitted development.

19. Where development does not satisfy the class definition and conditions so as to fall within a class of permitted development, then the GPDO does not apply; although, of course, the developer can still apply for express planning permission in the usual way. However, in considering such an application, the consideration of the local planning authority will not be restricted to consideration of whether the class conditions (e.g., so far as Part 16 Class A is concerned, siting and appearance) are satisfied. The application will need to satisfy all of the planning requirements for an express grant, and will be the subject of the full rigour of the planning application regime to that end.

20. Section 220 in Chapter 3 of the 1990 Act gives the Secretary of State power to make provision "for restricting or regulating the display of advertisements". For these purposes, "advertisement" is defined in section 336(1) as:

> "any word, letter, model, sign, placard, board, notice, awning, blind, device or representation, whether illuminated or not, in the nature of, and employed wholly or partly for the purposes of, advertisement, announcement or direction, and (without prejudice to the previous provisions of this definition) includes any hoarding or similar structure used or designed, or adapted for use and anything else principally used, or designed or adapted principally for use, for the display of advertisements".

21. The relevant regulations are the Town and Country Planning (Control of Advertisement) (England) Regulations 2007 (SI 2007 No 783) ("the Advertisement Regulations"). By regulation 4, no advertisement can be displayed unless consent for its display has been granted either (i) by way of deemed consent under Part 2 or (ii) following an application, by way of express consent from the local planning authority under Part 3.

22. So far as deemed consent is concerned, by regulation 6, subject to identified limitations and conditions, consent is granted for the display of an advertisement of any class specified in Part 1 of Schedule 3. Class 16 is:

> "An advertisement displayed on the glazed surface of a telephone kiosk…";

which is subject to a number of limitations including, so far as relevant to this appeal:

> "(2) Illumination is not permitted."

> "(4) … [N]o advertisement may be displayed on more than one face of the kiosk."

23. The relationship between the prior approval regime and the advertising consent regime was considered in Infocus Public Networks Limited v Secretary of State for Communities and Local Government and the Mayor and Commonality of the Citizens of London [2010] EWHC 3309 (Admin) ("Infocus No 1"), another case concerning permission for a telephone kiosk with an advertising display, in which (at [66]) Foskett J described the procedure for obtaining advertising consent as "a self-contained code for the regulation of advertising material generally and, in this particular context, of advertising attached to the surface of a telephone kiosk".

24. In addition to the provisions of the Advertising Regulations, section 222 of the 1990 Act, under the heading "Planning permission not needed for advertisements complying with regulations", provides that, where the display of advertisements in accordance with the Advertising Regulations involves development of land, planning permission for that development shall be deemed granted without any application for express grant. Given the definition of "advertisement" (see paragraph 20 above), this means that where it is proposed to erect (e.g.) an awning or hoarding displaying an advertisement, then if consent for that advertisement is obtained under the Advertisement Regulations, then any required planning permission for that awning or hoarding will be deemed to have been granted.

25. I have set out the relevant provisions as at the time of the Inspector's decision. However, since then, both sets of regulations have materially changed. From 25 May 2019, regulations 16 and 17 of the Town and Country Planning (Permitted Development, Advertisement and Compensation Amendments) (England) Regulations 2019 (SI 2019 No 907) amended the GPDO and the Advertisement Regulations so as to remove the permitted development right and any deemed advertising consent for telephone kiosks. Therefore, any proposed new telephone kiosk in the future will be subject to the full regime for express grant or consent.

26. However, this appeal is still of real significance because, aside from the issue of the lawfulness of the particular decision under the old regime in this case, the issues of law arising in this appeal remain potentially relevant to both the status of telephone kiosks already installed and to the interpretation of permitted development rights in other, extant classes.

The Factual Background

27. NWP owns two telephone kiosks on the pavement outside 25-27 Marylebone Road, which it wishes to replace with one new kiosk, larger than each of the individual kiosks it would replace but not quite as large as both together. The "multi-functional capability" of the new kiosk is described in paragraph 2.3 of NWP's Written Representations to the Inspector, as follows:

> "• New telephone equipment with the ability to accept credit/debit card, contactless and/or cash payment;
>
> • 24 inch LCD display providing an interactive wayfinding capability;

> • Equipment for provision of public Wi-Fi access points and/or equipment for provision of public small-cell access nodes;
>
> • Location-based information (NFC, Bluetooth 4.0 LE); and
>
> • On the reverse side, a 1650mm (h) x 928mm (w) LCD display for digital advertising purposes, recessed behind toughened glass."

28. With regard to the last bullet-point, it was said that the telephone kiosk would "incorporate an internally illuminated digital advertisement panel on the reverse side thereof" (paragraph 1.2); and that the replacement telephone kiosk and "integrated advertisement display" were "inextricably linked" (paragraph 1.3). Paragraph 2.5 gave a further description of the proposed LCD panel:

> "As noted, the reverse side of the replacement telephone kiosk would incorporate a 1650mm high by 928mm wide 1.5 sq m integrated LCD digital display panel. This is slightly less tall, narrower and 0.5 sq m (or 25%) smaller in terms of display area compared to a standard 6-sheet advertising display, of the type commonly found in bus shelters. The digital panel would display static advertising images in sequence, changing no more frequently than every 10 seconds, the change via a smooth fade…".

29. NWP considered that the development fell within Part 16 Class A of Schedule 2 to the GPDO, so that it was permitted development subject to prior approval from the local planning authority for its siting and appearance. On 4 July 2017, NWP applied to the Council for that approval. Given that it wished to use the display panel for illuminated advertisements, which were not permitted under the Advertisement Regulations, on 26 July 2017 it also applied to the Council for an express grant of advertising consent under those regulations.

30. On 6 September 2017, the Council refused both applications, giving the following reasons in respect of each:

> "a. Prior approval
>
> Because of its appearance, size and siting within the street scene, the telephone kiosk would be harmful to visual amenity and add street clutter to this part of the City. This would not meet S25 and S28 of Westminster's City Plan (November 2016) and DES 1 and DES 7 of our Unitary Development Plan that we adopted in January 2007 and the Westminster Way Supplementary Planning Document (adopted 2011).
>
> b. Advertisement consent
>
> Because of its location, capable display of (dynamic) moving images, size and method of illumination, the digital advertisement panel attached to a telephone kiosk, would harm

> the appearance (amenity) of the area. This would not meet S25 and S28 of Westminster's City Plan (November 2016), DES 1, DES 8, DES 9 of our Unitary Development Plan that we adopted in January 2007."

31. Under section 78 of the 1990 Act and regulation 17 of the Advertisement Regulations respectively, NWP appealed to the Secretary of State in respect of both refusals. The Secretary of State appointed the Inspector to determine the appeals, which proceeded by way of written representations.

32. In paragraph 35 of its Written Representations to the Inspector, the Council said:

> "Planning permission is not required for the installation of a new telephone kiosk. They are permitted development but prior approval is required from the local planning authority…. The only issues that can be considered are design and siting of the kiosk."

33. However, the Council considered that there was generally no need for new telephone kiosks, and no need for this particular kiosk; and, following its refusal of these applications, it sought legal advice as to whether applications for prior approval could be refused on the basis of the lack of need. Having received that advice, on 31 January 2018 the Council formally determined that the application for prior approval in this case should be refused on the additional basis that there was no need for further kiosks for the purposes of an operator's electronic communications network. It also decided that, where such a need was not raised as a reason for refusal but there was an extant appeal, the issue should be raised at the appeal. Thus, it was raised before the Inspector.

The Inspector's Decision

34. In fact, in Appendix 2 to its Written Representations to the Inspector, the Council raised not one but two grounds of refusal over and above those relating to siting and appearance. First, as presaged, it submitted that an additional reason for the refusal was the lack of need for the new telephone kiosk (paragraph 11). Second, as a yet further ground for refusal, it said (at paragraph 12):

> "The application for prior approval does not fall within the ambit of Part 16 of the [GPDO], as it is not considered to be for the purpose of the electronic operator's communication network and is not required for these purposes".

35. In a decision letter dated 27 June 2018, the Inspector dismissed the appeal in respect of the refusal of consent under the Advertisement Regulations (and there has been no challenge to that part of his decision); but allowed the appeal in respect of the GPDO, and he granted prior approval in respect of the new kiosk.

36. With regard to prior approval, at paragraph 7, he identified the main issue as:

> "… whether or not approval should be given in respect of the siting and appearance of the proposed kiosk, with particular regard to the effect on the character and appearance of the area."

37. In paragraphs 5 and 6, he explained why:

> "5. … The Council makes reference to Policies S25 and S28 of Westminster's City Plan and Policies DES 1 and DES 7 of its Unitary Development Plan. However, the principle of development is established by the GPDO and the prior approval provisions include no requirement that regard be had to the development plan. The provisions of the GPDO require the local planning authority to assess the proposed development solely on the basis of its siting and appearance, taking into account any representations received….
>
> 6. The [NPPF]… deals with supporting high quality communications infrastructure, including applications for prior approval, and requires that local planning authorities must determine applications on planning grounds. The Council has expressed concern relating to the need for a proposed kiosk. However, the principle of development is established by the GPDO and the [NPPF] confirms that considerations such as need for the payphone kiosk, a telecommunications system, should not be questioned."

38. The Inspector expressly rejected any requirement to consider the purpose of the development. He stated (at paragraph 14):

> "The Council has also expressed concern that the purpose of the proposed kiosk is primarily to facilitate the display of a large advertisement. However, the construction of a kiosk and the display of advertisements are distinct and separate matters requiring different applications where necessary."

39. He considered siting and appearance, for example finding (at paragraph 13) that the kiosks would be "sufficiently well-separated" so as not to appear as "visual clutter", and concluding (at paragraph 16):

> "… that the siting and appearance of the proposed kiosk would not have an unacceptable effect on the character and appearance of the area and, therefore, the appeal should succeed."

40. With regard to conditions, he said (at paragraph 23):

> "… [T]he grant of prior approval for the payphone kiosk is subject to the standard conditions set out in the GPDO, including an implementation timescale, removal of the structure/apparatus when it is no longer required for electronic telecommunications purposes and accordance with the details submitted with the application…".

The Section 288 Application

41. On 7 August 2018, Westminster issued proceedings under section 288 of the 1990 Act to challenge the Inspector's prior approval decision, raising in substance two grounds of challenge, namely:

    i) The Inspector erred in not accepting that the proposed development did not fall within Part 16 Class A of Schedule 2 of the GPDO because it was not for the purpose of the provision of an electronic communications network.

    ii) The Inspector erred by refusing to address the need for the development.

42. In a judgment dated 5 February 2019, Ouseley J allowed the appeal on the first ground, and quashed the Inspector's decision. Referring to the judgment of Lindblom LJ in Keenan v Woking Borough Council and Secretary of State for Communities and Local Government [2017] EWCA Civ 438, he stressed the requirement for any development to fall "fully" or "squarely" within the applicable class of the GPDO in order for permission to be granted by it (see [37]). As Ouseley J put it:

> "38. The concept of the principle of development being established [by the GPDO itself]… means that the development which is being considered must all fall within the class in question, otherwise its 'principle' cannot be taken to have been established.
>
> 39. A development therefore falls outside the scope of Class A Part 16 of it is not 'for the purpose' of the operator's network. That means, at least in the specific context of a GPDO permission, that a proposed development falls outside it, if part of it falls outside it. It cannot be said that the whole falls within the GPDO. The benefits of the GPDO, a quicker process, the limited range of material considerations, and the restricted range of conditions would be used for a development, part of which they were not intended for, and which had not been judged to merit permission on that basis. A development which is partly 'for the purpose' of the operator's network, and partly for some other purpose, is not a development 'for the purpose' of the operator's network, precisely because it is for something else as well. The single dual purpose development must be judged as a whole."

43. Having rejected a test based on "dominant purpose", in favour of one essentially based on "single purpose", he continued (at [42]):

> "I do not consider that the evidence here could permit of any conclusion other than that the kiosk served a dual purpose. Part of its purpose was for the operator's network, as a telephone kiosk. Part of it was to be the electrified advertising panel. The panel was for the purpose of displaying advertisements. It was not ancillary or incidental to the kiosk, nor legally insignificant. It does not matter whether it would have been lit if no advertisements were displayed. No relative significance has to be attributed to either part of the dual purpose; it is sufficient if

> the two purposes exist without the advertising use being ancillary or incidental or of no legal significance. There was no suggestion from the [decision letter] or the parties that the Inspector had or could have considered the advertising panel, for which separate consent had to be obtained, to be legally insignificant or merely incidental to the telecommunications use."

44. However, having allowed the appeal on that ground, in respect of need, he accepted that the GPDO, with its limited range of material considerations, precluded any argument about whether electronic communications networks (and the facilities required for their use, including telephone kiosks) are "needed" in the public interest; and he therefore refused the Council's appeal on the second ground.

The Grounds of Appeal: The Appellant's Submissions

45. The issue in the appeal by NWP is whether the proposed development, in the form of a telephone kiosk with an integrated illuminated advertisement display panel, fell within the scope of development permitted by Part 16 Class A of Schedule 2 to the GPDO. The judge concluded that it did not. Ms Sheikh contends that he was correct, essentially for the reasons he gave.

46. Mr Stinchcombe submits that the judge erred in concluding that the proposed development fell outside the scope of development permitted by Part 16 Class A because it was "dual purpose", on the following basis.

    i) Proposals to place a telephone kiosk on the footway and to incorporate advertising into that kiosk respectively engage two entirely discrete regimes: the prior approval regime (under which permission can be obtained as permitted development) and the self-contained regime controlling advertisement (under which consent is required which can in some circumstances be deemed, but if the proposed advertisement is illuminated then consent must be by way of express grant on the basis of an application) (Infocus No 1).

    ii) In its application under the GPDO, NWP applied for only prior approval for the development under the Class 16 Part A, under which only siting and appearance fall to be considered (Infocus No 1 and Infocus No 2).

    iii) Since the Inspector concluded that the siting and appearance of the proposed kiosk were acceptable in planning terms, he was bound to grant approval. He certainly did not err in doing so.

47. Mr Stinchcombe relied upon eight strands of argument in support of these propositions and his submission that Ouseley J was wrong to overturn the Inspector's decision.

    i) NWP's subjective purpose in pursuing the development is irrelevant. Under the prior approval regime, an application can only seek approval on the restricted basis that the siting and appearance of the proposed development are acceptable in planning terms. That is all that NWP applied for here. The scope of the Inspector's task was restricted by the application that was made and which, on appeal, he was re-considering. The kiosk will serve a communications purpose,

even if that is not its only or main purpose. The proposed advertising was not the subject of the prior approval application, but rather of the application for consent under the discrete, entirely self-contained Advertisement Regulations regime. Indeed, when considering the prior approval application, the Inspector was well aware that he was going to uphold the refusal of the advertising consent, and so was aware that any kiosk installed as permitted development would and could only be used exclusively for communications purposes.

ii) In oral argument confirming paragraph 42 of his skeleton argument, Mr Stinchcombe accepted the proposition at [47] of Ouseley J's judgment that, if a kiosk is not designed from the outset potentially to accommodate an illuminated panel and an application is subsequently made to alter the kiosk for that sole purpose, the GPDO would not apply and express planning consent would be required. Ouseley J considered that this supported the construction he favoured; because there was no good reason why the application of the GPDO should depend on a difference in the way in which an identical kiosk came to be proposed, i.e. the sequencing of the applications. However, Mr Stinchcombe submitted that it did not support that construction, because, under the proposed development to include the advertising panel:

a) the kiosk would continue to serve a communications purpose;

b) it would be inevitable that any application for planning permission for the alteration of the kiosk to accommodate the advertising panel would be granted, because it has to be assumed that the design of the kiosk in planning terms – the only material consideration – would already have been accepted; and

c) in any event, an advertisement could only be displayed if it obtained deemed or express advertising consent in which case only if independently considered by the local planning authority to be acceptable.

In any event, he submitted, there is no reason to remove permitted development rights for a telephone kiosk which provides communications services solely because an advertisement might, subsequently and acceptably, be added.

iii) Mr Stinchcombe submitted that Ouseley J's "dual purpose" approach to the interpretation of the GPDO is impossible to reconcile with the facility to display non-illuminated advertisement on a telephone kiosk with the benefit of deemed consent under the Advertisement Regulations. At the relevant time, subject only to prior approval for siting and appearance, an electronic communications code operator such a NWP could install a kiosk which would serve communications purposes and host a non-illuminated advertisement. Parliament has thus already approved the "dual purpose" approach; and, if that is true for non-illuminated advertisements, it must be true for illuminated advertisements.

iv) Ouseley J said that a "dominant purpose" approach inevitably and wrongly engages the planning decision-maker in an investigation of the motive of the operator; but, Mr Stinchcombe submitted, so does the "sole purpose" approach the judge himself adopted, because, although using a different threshold, the

decision-maker would be required to ascertain whether advertising use was part of a "dual purpose" or whether it was merely "incidental or ancillary" to communications as a "single purpose". For the same reason as Ouseley J rejected "dominant purpose", he should also have rejected the "single purpose" approach.

v) Mr Stinchcombe submitted that Ouseley J's approach potentially has widespread implications for many other parts of the GPDO. For example, Schedule 2 Part 9 Class C grants highway authorities deemed consent for development "required for the purposes of the carrying on of any tramway or road transport undertaking consisting of… the erection… of passenger shelters"; Part 12 Class A grants local authorities deemed consent for the erection of "passenger shelters, public shelters… required in connection with the operation of any public service administered by them"; and Part 19 Class A grants deemed consent for development by or on behalf of the Crown for the erection of "passenger shelters, shelters… required in connection with the operational purposes of the Crown". Many of these shelters have advertisements on them which to an extent, in the public interest, defray the cost of the shelters. If such development could not fall within the GPDO because it had a dual purpose, then none of this development would fall within the provisions of permitted development and it would have to be the subject of an application for express grant. That is not a consequence which Parliament or the draftsman of the GPDO could have intended.

vi) Even where such public facilities are funded by advertising, the fundamental identity, public service and purposes of such facilities remain unchanged. A telephone kiosk with an advertising revenue stream is still a telephone kiosk.

vii) The Council's concern, that the real purpose behind the application for prior approval was not to provide communications services but advertising, is unfounded. If that were the case, this kiosk will not now be installed, because it has no advertising consent. On the other hand, if that were not the case, then the kiosk will be installed without advertising and will be used exclusively for communications purposes. In either event, there is no mischief here.

viii) However, if there were a mischief, then it is not a matter for the courts to address: it is a result of the scope of the GPDO, and it is a matter for Parliament or the executive to address it by amending the GPDO (as, of course, the Secretary of State has now done in respect of telephone kiosks and advertising on such kiosks).

The Grounds of Appeal: Discussion and Conclusion

48. With regard to the relevant principles, forcefully as these submissions were made, I am unable to accept them, largely for the reasons set out in Ms Sheikh's submissions.

i) The GPDO describes classes of "permitted development" for which planning permission is granted without the requirement for a planning application to be made under Part 3 of the 1990 Act. To fall within a class, development not only has to comply with the class description, but also has to satisfy a series of conditions and limitations unique to that particular class. If it does not do so,

then it is not permitted under the GPDO; and planning permission can only be obtained on the basis of a full application.

ii) To take the advantage of being permitted development, the proposed development must fall entirely within the scope of the GPDO. Mixed use development cannot take advantage of that benefit – because, if it were to be able to do so, the GPDO could and would be used for permitting development for something outside its scope, i.e. the part of the development that does not fall with a permitted development class.

iii) In support of that proposition, Ms Sheikh relied upon Keenan upon which Ouseley J also relied (see paragraph 42 above). In Keenan, the local planning authority failed to respond within time (in that case, 28 days) to an application for prior approval for the "siting and means of construction" for a hardcore track in a unit of land which, it was said, fell within Part 6 (or Part 7) Class A in Schedule 2 to the GPDO as being a private way reasonably necessary for the purposes of agriculture (or forestry) in that unit. It was submitted that, in those circumstances, there was deemed prior approval, and the development could begin (see paragraph 13 above). However, Lindblom LJ (with whom Lewison LJ agreed) held that the track did not become permitted development by default, because "the development proposed had to fall squarely within the description of 'permitted development', in the relevant class" (see [35]). It did not do so because the unit of land was not being used for the purpose of agriculture or forestry at that time. The condition requiring a developer to apply for a determination as to whether its "prior approval" would be required to the siting and means of construction of the private way "[did not] confer upon the authority a power to grant planning permission for development outside the defined class of permitted development" (see [36]). I accept that the reason why the development in that case fell outside the scope of the GPDO was very different from why the development in this case is said to do so: but, in my view, the principle equally applies. In particular, contrary to Mr Stinchcombe's (in my view, somewhat circular) submission, an application for prior approval on the basis that the development satisfies the restricted criteria relevant to such approval (i.e. in this case, siting and appearance) cannot in any way extend the scope of the GPDO.

iv) Part 16 Class A in Schedule 2 to the GPDO includes, as permitted development, "the installation, alteration or replacement of any electronic communications apparatus", which expressly includes "the construction, installation, alteration or replacement of… a public call box" (see paragraphs 11-12 above). The proposed development in this case patently includes such "electronic communications apparatus" including the telephone kiosk itself. However, it also includes "an integrated advertisement display panel" (see paragraphs 27-28 above). Ouseley J found (see paragraph 43 above), as is clearly the case, that this panel is not merely incidental or ancillary to the electronic communications apparatus: indeed, that part of the development has an entirely different purpose, namely advertising. The development could therefore be described, as Ouseley J put it, as "dual purpose": the use or purpose of the panel, as a structure, was advertising whilst the use or purpose of the telephone kiosk including its equipment was electronic communications. Absent the panel, the development

would have fallen within Part 16 Class A and would have been permitted development; but, with that panel, only part of the proposed development fell within that class; and the permitted development route could not be used to avoid the rigours of the full planning application process for that other part. In my view, to allow it to have done so would have been a clear abuse of the permitted development scheme.

v) Therefore, the true construction of the GPDO means that, as a general proposition, to be "permitted development", the whole of any development must fall within the scope of a class in Schedule 2 of the GPDO, by falling within the relevant definition and satisfying any express restrictions as to "exceptions, conditions and limitations"; and therefore a mixed use or dual purpose development, where one use or purpose is outside the scope of the class, cannot generally be permitted development.

vi) Mr Stinchcombe relied upon the "concession" of the Council in paragraph 35 of its Written Representations to the Inspector (quoted at paragraph 32 above), that "the only issues that can be considered [in an application for prior approval for Part 16 Class A permitted development] are design and siting of the kiosk"; but that concession was clearly made only on the basis that the development otherwise met the Part 16 Class A definition for permitted development. Similarly, his reliance on Infocus No 1 and Infocus No 2 was, in my view, misplaced: the observations made in those cases about the principle of development not being in issue (see paragraph 17 above) were made in the context of cases in which it was not in issue that, but for prior approval, the development satisfied the definition of permitted development in Part 16 Class A. In the case before the Inspector, Ouseley J and now us, whether the development falls within the definition of the class was and is very much in issue.

vii) In my view, the Advertisement Regulations are also something of a red herring. Subject to the effect of section 222 of the 1990 Act, those Regulations concern the display of advertisements, not planning permission for buildings etc upon which advertisements might be displayed.

viii) At [45] of his judgment, Ouseley J said that:

> "On a cruder description, part of the purpose of the kiosk was as a hoarding for the display of illuminated advertising…".

Whilst a "hoarding" may fall within the scope of section 222 (see paragraph 20 above), in both his skeleton argument (at paragraph 47) and in his oral submissions, Mr Stinchcombe accepted that, if a telephone kiosk had been constructed as permitted development without an electronic advertising display panel as proposed in this case, and then it was later proposed to add such a panel, that would require express planning permission. But, even if the proposed back panel can properly be described as a "hoarding" or otherwise falls within the definition of "advertisement", that does not affect the mixed use nature of the development proposed here as a whole. As I understood him, Mr Stinchcombe submitted that planning permission was not required for the panel as part of the

proposed development, because of the deeming effect of section 222; but, certainly at this stage, in my view that is not correct. Section 222 cannot be used to piggy-back a much more substantial development than envisaged by the definition of "advertisement" (i.e. in this case, the telephone kiosk); and, until that telephone kiosk has planning permission, section 222 cannot be engaged to make (deemed) planning permission for a hoarding dependent upon advertising consent. On the same principle as that which underlies Keenan, neither the Advertisement Regulations nor section 222 can extend any class of permitted development under the GPDO. Consequently, Section 222 does not assist Mr Stinchcombe's cause in this appeal.

49. Before applying those principles to this case, I should deal specifically with the strands of argument relied upon by Mr Stinchcombe which I have already identified. I do so in the same order.

i) It is, rightly, common ground that NWP's subjective purpose in pursuing the development is irrelevant: what is relevant is the use or purpose of the proposed physical structure that comprises the development. In any event, as I have explained, the form of the application cannot determine whether any proposal falls within a permitted development class. In Keenan (at [36]), Lindblom LJ said that an application to a local planning authority for a determination as to whether its "prior approval" would be required does not impose on the authority a duty to decide whether the proposed development is in fact permitted development under the GPDO. But the thrust of that paragraph of Lindblom LJ's judgment was that, by requiring a developer to seek prior approval limited to restricted planning issues, that did not confer upon the authority a power to grant planning permission for development outside the defined class of permitted development. On an application to an authority for a determination as to whether its "prior approval" is required, then the authority is bound to consider and determine whether the development otherwise falls within the definitional scope of the particular class of permitted development.

ii) I agree that the form or sequence of applications should have no effect on whether development falls within the GPDO; but I do not consider that the interpretation I favour (essentially that adopted by Ouseley J) draws any distinction. If the development includes a structure for the purposes of displaying advertisements, then, subject to section 222, that will require an express grant of planning permission, whether it is included in an application for a development with mixed use or, subsequent to a telephone kiosk being installed as permitted development, in a discrete application for planning permission for the display panel. In this case, section 222 had no possible part to play, because (a) planning permission was sought through the GPDO not through the deeming provision of section 222, (b) even if the relevant electronic display panel could properly be described as a "hoarding", the deeming provision in section 222 could not be used to obtain planning permission for the structure onto which the hoarding was attached; and (iii) in any event, advertising consent was refused so that there was no room for the deeming provision to bite.

iii) Mr Stinchcombe submitted that Ouseley J's "dual purpose" approach to the interpretation of the GPDO is impossible to reconcile with the facility to display non-illuminated advertisement on a telephone kiosk with the benefit of deemed consent under the Advertisement Regulations. However, again I do not agree. Subject to section 222, the Advertisement Regulations only concern the consent to the display of advertisement, not planning permission for the structure upon which the advertisement is displayed. That applies equally to a structure designed for illuminated display and a structure designed for the non-illuminated display of advertisements. Part 1 Class 16 of Schedule 3 to the Advertising Regulations merely allowed the display of a non-illuminated advertisement on the glazed surface of a telephone kiosk, not the construction of a particular structure for the display of such an advertisement.

iv) I do not consider Mr Stinchcombe's criticism of Ouseley J's consideration of "purpose" is warranted. The judge held that "dominant purpose" had no part to play, but it was necessary for the planning decision-maker to consider whether the development was one of "dual purpose" because the GPDO only permitted development that fell within a particular GPDO class and was, to that extent, single purpose. That did not import subjective purpose, but merely requires the planning decision-maker to make an assessment of the purpose of the development. That is a usual planning function.

v) and vi) With regard to Mr Stinchcombe's submission that Ouseley J's approach potentially has widespread adverse implications for many other parts of the GPDO, notably for development in those classes which cover public shelters of one sort or another, I am unconvinced. Part 1 of Schedule 3 to the Advertising Regulations (which sets out the display of advertisements for which there is deemed planning consent: see paragraph 22 above) does not include advertisements (of whatever type) on such shelters (again, of whatever type), so that an application for express consent must always be made. Whether a particular shelter has a mixed use will ultimately be a question of fact and, in the absence of evidence or full argument on shelters, it would be unwise to offer any view; and I decline to do so. However, I do not consider that the position of shelters demonstrates that the construction I favour leads to impractical consequences or is wrong.

vii) and viii) Any concern that the Council has about "the real purpose behind the application for prior approval", i.e. NWP's subjective intention, is not to the point. As a local planning authority, the Council does, however, have a legitimate concern if applications potentially abuse the GPDO scheme as ultimately sanctioned by Parliament through the executive government.

50. I finally turn to the application of the principles to the facts of this case. I can do so briefly.

i) As I have already indicated, the issue in this appeal is whether the proposed development fell within the scope of development permitted by Part 16 Part A.

ii) Whilst there may be cases in which an exercise of planning judgment is required to assess whether proposed development does or does not fall entirely within a

class of permitted development, in my view, this is not such a case: it is not possible properly to conclude that it does.

iii) I have already described the development in terms of a telephone kiosk that would "incorporate an internally illuminated digital advertisement panel on the reverse side thereof" (see paragraphs 27 and 28 above); in other words, the proposed development comprised a structure, part of which (namely a public call box which, by virtue of paragraph A.2 of Part 16 Class A (quoted at paragraph 12 above), is included within the definition of electronic communications apparatus) had the planning use or purpose of being part of an electronic communications network; and a part of which (namely the electronic display panel) had the planning use or purpose of the display of advertisements.

iv) Whilst a public call box was permitted development within Part 16 Class A of Schedule 2 to the GPDO, the electronic display panel was not within any permitted class. The GPDO could not be used to obtain planning permission for a mixed planning use or "dual purpose", because to allow it to be so used would allow permission to be obtained for development that was outside the scope of that permitted by executive (and, ultimately, by Parliament) under the GPDO, which would be an abuse of the GPDO.

v) Whilst, in my view, that was so on general principles, in this case, the general proposition is reinforced by the particular provisions which apply to telephone kiosks, because, as I have described and as Mr Stinchcombe accepts, for the purposes of the definition of "electronic communications apparatus", a telephone kiosk is a "structure" and a "building"; and for these purposes, by virtue of paragraph 5(3) of Schedule 3A to the 2003 Act (the Electronic Communications Code):

> "'structure' includes a building only if the sole purpose of that building is to enclose other electronic communications apparatus."

It is uncontroversial that the proposed telephone kiosk in this case did not have merely the single purpose to enclose electronic communications apparatus, but also an advertising purpose. It therefore very clearly fell outside the scope of the GPDO.

51. For those reasons, in my view, Ouseley J was right to conclude that the proposed development fell outside the scope of the GPDO, and was right to quash the prior approval on that ground.

The Cross Appeal

52. Ouseley J rejected the Council's appeal on the basis that the Inspector was wrong not to take into account the (lack of) need for telephone kiosks. The Council cross-appeal, on the basis that that conclusion was wrong and/or inadequately reasoned.

53. Before us, Ms Sheikh did not press these grounds; and, in my view, she was right not to do so. The express criteria for development to fall within any particular class in Schedule 2 are detailed and comprehensive. Whilst "need" is a well-recognised

planning requirement in other circumstances, it plays no part in the requirements for Part 16 Class A. It is part of the principle of planning consent that is assumed. Ouseley J was right to find as much (at [49] of his judgment).

54. For the same reason, he was also right to reject Ms Sheikh's submission that the condition imposed upon the grant of prior approval, that the telephone kiosk will be removed when no longer required, necessarily imports words into the test for prior approval that the kiosk must be "required for the purpose of" the operator's network, and that that imports a "need" test (see [50] of his judgment). That means, at least theoretically, that if development satisfied all of the criteria for Part 16 Class A and there was in fact no need for the particular kiosk proposed, the electronic network operator could install it, only in due course to be required to remove it as redundant. But, if ever that were more than a theoretical issue, the answer to it lay with the executive which could recognise the factual lack of need by removing the class of development from the GPDO (as Part 16 Class A was removed in May 2019).

Conclusion

55. For those reasons, I would dismiss both the appeal and the cross-appeal, leaving the order of Ouseley J quashing the Inspector's determination and the Council's decision to refuse the prior approval application in place.

Lady Justice Asplin :

56. I agree.

Lord Justice Lewison :

57. I also agree.