



Neutral Citation Number: [2019] EWCA Civ 1868

Case No: C1/2018/2922

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION,
PLANNING COURT
Sir Wyn Williams
CO/1281/2018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5th November 2019

Before :

LORD JUSTICE LEWISON
LORD JUSTICE DAVID RICHARDS
and
LORD JUSTICE ARNOLD

Between :

JOHN LESLIE FINNEY
- and -
(1) WELSH MINISTERS

Appellant

1st
Respondent

(2) CARMARTHENSHIRE COUNTY COUNCIL

2nd
Respondent

(3) ENERGIEKONTOR (UK) LIMITED

3rd
Respondent

MR B FULLBROOK (instructed by **Leigh Day**) for the **Appellant**
MR R TURNEY (instructed by the **Government Legal Department**) for the **1st Respondent**
2nd Respondent did not appear and was not represented
Mr D HARDY (Solicitor Advocate) (instructed by **Energiekontor (UK) Limited**) for the **3rd Respondent**

Hearing date : 29 October 2019

Approved Judgment

Lord Justice Lewison:

1. The issue on this appeal concerns the limits of the power under section 73 of the Town and Country Planning Act 1990 to grant planning permission for development without complying with conditions subject to which a previous planning permission was granted.
2. On 21 January 2016 Energiekontor (UK) Ltd applied to Carmarthenshire CC for planning permission for development described as:

“Installation and 25 year operation of two wind turbines, with a tip height of up to 100m, and associated infrastructure including turbine foundations, new and upgraded tracks, crane hardstandings, substation, upgraded site entrance and temporary construction compound upon a site situated to the north of the village of Rhydcwmerau, Carmarthenshire.”

3. On 8 March 2016 Carmarthenshire granted full planning permission "for the development proposed by you as shown on the application form, plans and supporting documents". The permission granted was conditional; in total there were 22 conditions. Condition 2 provided that the development was to be carried out in accordance with a number of approved plans and documents which were specified. One such was a "figure" described as "3.1 Typical Wind Turbine Elevation 1:500 @A3". It is common ground that this showed a wind turbine with a tip height of 100 metres.
4. A few months later, on 5 August 2016, Energiekontor applied under section 73 of the 1990 Act to Carmarthenshire for the "removal or variation" of condition 2 of the planning permission. In answer to the question "Please state why you wish the condition(s) to be removed or changed", Energiekontor wrote:

“To enable a taller turbine type to be erected.”

5. In answer to the question "If you wish the existing condition to be changed, please state how you wish the permission to be varied", Energiekontor replied:

“To supersede 3.1 with 3.1a”.

6. The application was supported by figure 3.1A. It made it clear that Energiekontor was seeking the variation so as to permit tip heights for the turbines of up to 125 metres.
7. That was, of course, higher than the development described in the original planning permission which granted permission to install and operate a turbine “with a tip height of up to 100m”. Carmarthenshire refused to grant the requested permission. Energiekontor appealed to the Welsh Ministers against that refusal. The inspector appointed to determine the appeal set out her approach to the appeal as follows:

“4. The appeal proposal seeks to increase the height of two consented ("the consented scheme"), but not yet built, turbines from 100m to 125m. As such, my remit is to consider the effect of the additional size of the proposed scheme against that of the consented scheme. Both consented and proposed schemes are submitted by reference to candidate turbines. As such, the

application seeks to carry out the development without complying with a condition which effectively limits the turbine height to 100m by its reference to a plan. It is explicit in the appellant's evidence that permission is sought for an increase in height to 125m by reference to a revised plan and that a condition to secure this should be imposed. I have proceeded to consider this appeal on this basis.”

8. She went on to consider a number of planning objections to the proposed increase in height. In a careful decision letter, she rejected them all. She concluded:

“The appeal is allowed and planning permission is granted for installation and 25 year operation of two wind turbines, and associated infrastructure including turbine foundations, new and upgraded tracks, crane hard standings, substation, upgraded site entrance and temporary construction compound (major development) at land to the north of Esgairliving Farm, Rhydcymerau in accordance with the application Ref W34341 dated 5 August 2016, without compliance with condition number 2 previously imposed on planning permission Ref W/31728 dated 8 March 2016 and subject to the conditions set out in the schedule attached to this decision.”

9. Those conditions included condition 2 which required that the permitted development should be carried out in accordance with plans which included “Figure 3.1A Typical Wind Turbine Elevation 1:500 @A3 dated August 2016”. The turbine shown on those plans was 125 metres high. It will be immediately apparent that in the description of the permitted development the words “with a tip height of up to 100m” contained in the original grant have been excised.
10. There can be no challenge to the inspector’s planning judgment. The sole challenge is that she had no power to allow the appeal and to grant planning permission for development that was not covered by the description of the development in the body of the original planning permission. The only power was to vary the conditions attached to that development as described. Sir Wyn Williams rejected that challenge, noting that the point had not been raised before the inspector.
11. Section 73 of the 1990 Act provides:

“(1) This section applies, subject to subsection (4), to applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted.

(2) On such an application the local planning authority shall consider only the question of the conditions subject to which planning permission should be granted, and

(a) if they decide that planning permission should be granted subject to conditions differing from those subject to which the previous permission was granted, or that it should be granted

unconditionally, they shall grant planning permission accordingly, and

(b) if they decide that planning permission should be granted subject to the same conditions as those subject to which the previous permission was granted, they shall refuse the application.

(3) [Repealed]

(4) This section does not apply if the previous planning permission was granted subject to a condition as to the time within which the development to which it related was to be begun and that time has expired without the development having been begun.”

12. It is common ground that the answer to the question raised by this appeal would be the same in England as it is in Wales.
13. In *Pye v Secretary of State for the Environment* [1998] 3 PLR 72 Sullivan J explained the origin and purpose of section 73. It first entered the planning system as section 31A of the Town and Country Planning Act 1971. Before its introduction, a developer dissatisfied with a condition imposed on the grant of planning permission had no choice but to appeal. That exposed him to the risk of losing the planning permission altogether. Guidance about the policy underlying section 73 was given in circular 19/86 from which the following points emerge:
 - i) Its purpose was to enable an applicant to apply “for relief from any or all of [the] conditions”.
 - ii) The planning authority “may not go back on their original decision to grant permission.”
 - iii) If the planning authority decide that “some variation of the conditions” is acceptable, a new alternative permission will be created. The applicant may then choose between the two permissions.
14. Sullivan J’s description of the origins and purpose of section 73 was approved by this court in *R v Leicester City Council ex p Powergen UK Ltd* (2001) 81 P & CR 5; and by the Supreme Court in *Lambeth LBC v Secretary of State for Housing, Communities and Local Government* [2019] UKSC 33, [2019] 1 WLR 4317. In the latter case Lord Carnwath said at [11]:

“A permission under section 73 can only take effect as an independent permission to carry out *the same development as previously permitted*, but subject to the new or amended conditions. This was explained in the contemporary Circular 19/86, para 13, to which Sullivan J referred. It described the new section as enabling an applicant, in respect of “an extant planning permission granted subject to conditions”, to apply “for relief from all or any of those conditions”. It added: “If the

authority do decide that some variation of conditions is acceptable, a new alternative permission will be created. It is then open to the applicant to choose whether to implement the new permission or the one originally granted.”” (Emphasis added)

15. Some further points are, I think, uncontroversial:

- i) In deciding on its response to an application under section 73, the planning authority must have regard to the development plan and any other material consideration. The material considerations will include the practical consequences of discharging or amending conditions: *Pye* at 85B.
- ii) When granting permission under section 73 a planning authority may, in principle, accede to the discharge of one or more conditions in an existing planning permission; or may replace existing conditions with new conditions. But any new condition must be one which the planning authority could lawfully have imposed on the original grant of planning permission.
- iii) A condition on a planning permission will not be valid if it alters the extent or the nature of the development permitted: *Cadogan v Secretary of State for the Environment* (1992) 65 P & CR 410.

16. In *Pye* Sullivan J said at 85-86:

“The original planning permission comprises not merely the description of the development in the operative part of the planning permission, in this case the erection of a dwelling, but also the conditions subject to which the development was permitted to be carried out.”

17. That sentence was part of the passage approved by the Supreme Court in *Lambeth*.

18. Mr Fullbrook, for Professor Finney, stresses the distinction between the “operative part” or grant of the planning permission on the one hand, and the conditions to which the operative part or grant is subject. The distinction between these two parts of a planning permission is reflected in other provisions of the 1990 Act. Thus, in principle “planning permission” is required for the carrying out of any development: section 57 (1). The local planning authority may “grant planning permission, either unconditionally or subject to ... conditions”: section 70 (1). Section 96A gives a planning authority power to “make a change to any planning permission” if the change is not material. Section 171A (1) distinguishes between two types of breach of planning control;

“(a) carrying out development without the required planning permission; or (b) failing to comply with any condition or limitation subject to which planning permission has been granted...”

19. The distinction between the operative part or grant, on the one hand, and conditions on the other has been drawn in other cases decided under the Act. In *Cotswold Grange*

County Park LLP v Secretary of State for Communities and Local Government [2014] EWHC 1138 (Admin), [2014] JPL 981 Hickinbottom J said at [15]:

“... the grant identifies what can be done—what is permitted—so far as use of land is concerned; whereas conditions identify what cannot be done—what is forbidden.”

20. That passage was said by this court to be an accurate summary of the position in *Winchester City Council v Secretary of State for Communities and Local Government* [2015] EWCA Civ 563, [2015] JPL 1184.
21. The question in this appeal is whether, on an application under section 73, it is open to the local planning authority (or on appeal the Welsh Ministers) to alter the description of the development contained in the operative part of the planning permission.
22. There are three cases that bear on that question. All are decisions of the High Court; and it is naturally common ground that none of them binds this court. In *R v Coventry CC ex p Arrowcroft Group plc* [2001] PLCR 7 the City Council granted planning permission for development described as:

“40,000 seat multi purpose arena, 1 food superstore & 1 variety superstore with associated small retail, service and community units, petrol filling station, multi leisure complex including restaurants, new railway and bus stations including park & ride facilities, coach park and carparking with associated landscaping, highways, pedestrian and cycle routes and canalside walk. Closure of public highway.”
23. Condition 5 provided that the permitted development “shall be in accordance with the following requirements”. One of the requirements was that the buildings to be erected “shall comprise”:

“a food superstore and a variety superstore”
24. An application was subsequently made under section 73 for the substitution of a different condition to read that the buildings to be erected should comprise:

“a food superstore and non-food variety store(s) (comprising a range of non-food A1 retail units)”
25. A further proposed condition stated that:

“The non-food variety store(s) shall at no time exceed six in number”
26. Thus, instead of a single non-food variety store, the revised conditions would have allowed up to six non-food stores, in place of the single one permitted under the original planning permission. The revised conditions were challenged on the ground that they introduced:

“... a fundamental inconsistency between the conditions and the description of the development contained in the notice of permission.”

27. Sullivan J upheld the challenge. At [33] he said:

“... the council is able to impose different conditions upon a new planning permission, but only if they are conditions which the council could lawfully have imposed upon the original planning permission in the sense that they do not amount to a fundamental alteration of the proposal put forward in the original application.”

28. He added at [35]:

“Whatever the planning merits of this new proposal, which can, of course, be incorporated into a new “full” application, I am satisfied that the council had no power under section 73 to vary the conditions in the manner set out above. The variation has the effect that the “operative” part of the new planning permission gives permission for one variety superstore on the one hand, but the new planning permission by the revised conditions takes away that consent with the other.”

29. It is clear that what Sullivan J meant by the “operative” part of the planning permission was the description of the development, rather than the conditions. These two passages are, in my judgment, dealing with different things. The first deals with the imposition of conditions on the grant of planning permission. The second deals with a conflict between the operative part of the planning permission and conditions attached to it.

30. *Arrowcroft* was considered by Collins J in *R (Vue Entertainment Ltd) v City of York Council* [2017] EWHC 588 (Admin). The City Council had granted planning permission for development described as:

“The demolition of existing structures and the erection of an 8,000 seat community stadium, leisure centre, multi-screen cinema, retail units, outdoor football pitches, community facilities and other ancillary uses, together with associated vehicular access, car parking, public realm, and hard and soft landscaping.”

31. Condition 2 required the development to be constructed in accordance with specified plans. The plans showed a 12 screen multi-screen cinema with a capacity of 2,000. The application under section 73 was an application to amend that condition so as to increase the number of screens to 13, with a capacity of 2,400. The amendment was challenged on the ground that it represented a “fundamental change” to the effect of the planning permission. Collins J referred to *Arrowcroft* and said at [11] that the effect of the change in that case did amend “the permission itself”. He said at [14]:

“Thus, *Arrowcroft* (supra) in my judgment does no more than make the clear point that it is not open to the council to vary

conditions if the variation means that the grant (and one has therefore to look at the precise terms of grant) are themselves varied.”

32. I understand him to have equated “the grant” with what Sullivan J had called the “operative part” of the planning permission; i.e. the description of the development itself. Collins J continued:

“[16] In this case, the amendments sought do not vary the permission. It is as I have already cited and there is nothing in the permission itself which limits the size of either the amount of floor space or the number of screens and thus the capacity of the multi-screen cinema. The only limitation on capacity is the stadium itself, which has to be 8,000 seats.

[17] It seems to me obvious that if the application had been to amend the condition to increase the capacity of the stadium that would [not] have been likely to have fallen foul of the *Arrowcroft* principle because it would have been a variation to the grant of permission itself but as I say, that is not the case here.”

33. It is agreed that “not” in paragraph [17] line 3 is an error and should be ignored.
34. The third case is the decision of Singh J in *R (Wet Finishing Works Ltd) v Taunton Deane BC* [2017] EWHC 1837 (Admin), [2018] PTSR 26. On 22 August 2011 the planning authority granted planning permission for the erection of 84 dwellings on a site close to a Grade II listed building. Singh J did not set out the precise terms of the description of the permitted development. On 6 October 2015 an application was made to vary the planning permission by increasing the number of permitted dwellings from 84 to 90. Again Singh J did not set out the terms of the application. I cannot tell from the report whether the number of dwellings was part of the description of the development, or whether the permission granted general permission to erect dwellings but limited their number by way of condition. It seems that the limitation to 84 dwellings may well have been contained in the description of the development itself, rather than in a condition. The planning authority’s decision was challenged on two grounds of which only the first is relevant. The argument was that:

“... the 2012 permission was for 84 dwellings, whereas the 2016 permission was for 90 dwellings. Therefore... there was a fundamental inconsistency between the operative part of the decision notice and the conditions in accordance with which the development must be constructed.”

35. The argument was elaborated as follows:

“.. although it may be possible for a condition to restrict what is permitted by a planning permission, for example perhaps to reduce the number of houses that can be built under it, what section 73 does not enable a planning authority to do is to

increase what was applied for by way of a condition attached to a planning permission.”

36. Singh J does not appear to have been referred to the decision of Collins J in *Vue*; but he did consider *Arrowcroft*. He took *Arrowcroft* as authority for the propositions that:
- i) A planning authority may impose different conditions on an application under section 73 provided that they do not amount to a fundamental alteration of the proposal put forward in the original application; and
 - ii) An alteration will be fundamental if it gives with one hand and takes away with the other.
37. Singh J also decided that whether an alteration was or was not fundamental was question of fact and degree, which involved a planning judgment. That judgment was for the decision-maker to make and would only be questioned by the court if it was irrational. It should be noted that the argument put to Singh J had its foundation in the proposition that the inconsistency between the operative part and the condition was “fundamental”; and it was that proposition that Singh J addressed.
38. The judge in the present case followed the approach of Singh J in *Wet Finishing Works*.
39. Mr Turney for the Welsh Ministers, supported by Mr Hardy for the developer, submitted that the only limitation on the power of the planning authority on an application under section 73 was that it could not introduce a condition that made “a “fundamental alteration”” to the permitted development. Whether a change was or was not fundamental was a question of fact and degree for the planning authority to address. The operative part of a planning permission may be the subject of an amendment, which is consequential on a change in the conditions; provided that the change is not a fundamental one.
40. Mr Hardy emphasised the practical importance of section 73 for developers. It enabled them to refine schemes as more information came to light about what might be financially viable or physically deliverable. If section 73 were to be interpreted in the manner for which Mr Fullbrook contended, developers would be at the mercy of local planning authorities up and down the country who might have differing practices about the level of detail to be specified in the description of permitted development; and who might be encouraged to make such descriptions as detailed as possible to avoid the possibility of applications under section 73. Mr Hardy accepted, however, that if a developer had no objection to any of the conditions imposed on the grant of planning permission but wished to change the description of the development, then section 73 could not apply.
41. Both Mr Turney and Mr Hardy supported their submission by reference to *Bernard Wheatcroft Ltd v Secretary of State for the Environment* (1982) 43 P & CR 233. That case concerned an appeal against the refusal of planning permission on an application to develop 420 dwellings on 35 acres. During the course of the appeal, the developer submitted an alternative scheme for the development of 250 dwellings on a reduced area of 25 acres. The issue was whether the Secretary of State should consider the reduced scheme. The Secretary of State decided that he had no power to grant planning permission for development on a smaller site and at a lower density than that which had

been originally applied for. Forbes J held that there was no principle of law which prevented the Secretary of State from imposing conditions that have the effect of reducing the permitted development below the development applied for. He added, however, that the power could not be exercised where the conditional planning permission would allow development that was not “in substance” that which was applied for. The main criterion was whether the development is so changed as to deprive those who should have been consulted the opportunity of being consulted. There are four points to be made about that decision. First, it was not concerned with a statutory provision such as section 73 which expressly restricts that which a planning authority may consider. Second, it was concerned with an ongoing application, rather than with a granted planning permission which gave rise to legal rights to carry out development. Third, it was concerned with a reduction in the permitted development; not an increase in the permitted development. He did not decide that the planning authority or the Secretary of State could grant planning permission for more than the developer had asked for. If the planning authority purported to do that, one can well imagine that potential consultees would have real cause for complaint. Fourth, to ask whether something is “in substance” the same as something else is a different test from whether something is a “fundamental alteration”. I do not consider that the so-called *Wheatcroft* test is the right criterion to apply to section 73.

42. The question is one of statutory interpretation. Section 73 (1) is on its face limited to permission for the development of land “without complying with conditions” subject to which a previous planning permission has been granted. In other words the purpose of such an application is to avoid committing a breach of planning control of the second type referred to in section 171A. As circular 19/86 explained, its purpose is to give the developer “relief” against one or more conditions. On receipt of such an application section 73 (2) says that the planning authority must “consider only the question of conditions”. It must not, therefore, consider the description of the development to which the conditions are attached. The natural inference from that imperative is that the planning authority cannot use section 73 to change the description of the development. That coincides with Lord Carnwath’s description of the section as permitting “the same development” subject to different conditions. Mr Hardy suggested that developers could apply to change an innocuous condition in order to open the gate to section 73, and then use that application to change the description of the permitted development. It is notable, however, that if the planning authority considers that the conditions should not be altered, it may not grant permission with an altered description but subject to the same conditions. On the contrary it is required by section 73 (2) (b) to refuse the application. That requirement emphasises the underlying philosophy of section 73 (2) that it is only the conditions that matter. It also means, in my judgment, that Mr Hardy’s suggestion is a misuse of section 73.
43. If the inspector had left the description of the permitted development intact, there would in my judgment have been a conflict between what was permitted (a 100 metre turbine) and what the new condition required (a 125 metre turbine). A condition altering the nature of what was permitted would have been unlawful. That, no doubt, was why the inspector changed the description of the permitted development. But in my judgment that change was outside the power conferred by section 73.
44. Mr Turney quite rightly said that one of the purposes of section 73 is to safeguard the original grant of planning permission. But that purpose is achieved because a successful

application under section 73 results in a new planning permission. Even an unsuccessful application does not result in the revocation of the original permission. I do not consider that Mr Fullbrook's argument undermines that purpose.

45. Nor do I consider that the predicament for developers is as dire as Mr Hardy suggested. If a proposed change to permitted development is not a material one, then section 96A provides an available route. If, on the other hand, the proposed change is a material one, I do not see the objection to a fresh application being required.
46. In short, I consider that in *Vue Collins J* was correct in his analysis of the scope of section 73. To the extent that Singh J held otherwise in *Wet Finishing Works*, I consider that he was wrong. It follows, in my judgment, that the judge was also wrong in following Singh J (although conformably with the rules of precedent it is quite understandable why he did so).
47. I would allow the appeal; and quash the inspector's decision because it was beyond her powers.

Lord Justice David Richards:

48. I agree.

Lord Justice Arnold:

49. I also agree.