Neutral Citation Number: [2023] EWHC 176 (Admin)

Case No: CO/1288/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 January 2023

Before:

JAMES STRACHAN KC
(sitting as a Deputy Judge of the High Court)

- -

Between:

MIKAEL ARMSTRONG	**Claimant**
- and –	
(1) SECRETARY OF STATE FOR LEVELLING-UP, HOUSING AND COMMUNITIES **(2) CORNWALL COUNCIL**	**Defendants**

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- -

Mr Mikael Armstrong (in person)
Ms Ruchi Parekh (instructed by **Government Legal Department**) for the **First Defendant**

Hearing date: 28 October 2022

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 27 January 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr James Strachan KC (sitting as a Deputy Judge of the High Court):

Introduction

1. This is a claim under section 288 of the Town and Country Planning Act 1990 ("the TCPA 1990") by which the Claimant challenges the lawfulness of a decision made by a Planning Inspector given by decision letter ("DL") dated 4 April 2020 (Appeal Reference APP/D0840/W/21/3285697). The Inspector dismissed the Claimant's appeal against a decision by Cornwall Council ("the Council") to refuse his application under section 73 of the TCPA 1990 to vary the plans for construction of a new dwelling under an extant planning permission at a location known as The Beach House, Finnygook Lane, Portwrinkle, PL11 3BP ("the Site")

2. The main issue which arises from this claim is whether the Inspector lawfully concluded that the application would give rise to a fundamental variation to the permission such that the application fell outside the scope of s.73 of the TCPA 1990, in circumstances where the proposed variation of the condition would not give rise to any conflict with the description of the development in that permission. It raises a question as to the correct statutory interpretation of that provision.

3. The Claimant appeared in person. The Defendant was represented by Ms Ruchi Parekh of Counsel. Cornwall Council did not appear and was not represented at the hearing. I am very grateful to Mr Armstrong and Ms Parekh for the clarity of their helpful submissions.

Factual Background

The Planning Permission Originally Granted

4. By notice dated 26 July 2007 Caradon District Council granted full planning permission (reference No. 06/01798/FUL) for the construction of one dwelling on the Site. The permission was expressed in the following terms:

> "The **CARADON DISTRICT COUNCIL** hereby give permission for the development specified in the plan(s) and application submitted by you on 16th December 2006 namely:
>
> **Construction of one dwelling on land situate at (Grid Ref: 235989 53842) The Beach House, Finnygook Lane, Portwrinkle, Torpoint.**"

5. That permission was granted subject to nine conditions. None of the conditions refers to any of the drawings or plans submitted with the application. The notice, however, included an "Informative" in the following terms:

> "**Informative**
>
> For the avoidance of doubt the Drawing to which this decision refers are

> Drawings Nos.05074/L 01-09, 12 and 13 and L.100B received on 15 December 2006 and Drawings Nos. 05074/L.10A & 11A received on 17 May 2007."

6. The Informative appears inappositely worded, as the decision notice does not refer to a "Drawing" or "Drawings", but rather makes reference (in the part already quoted above) to "plan(s)" that had been submitted with the application.

The Non-Material Amendment to the Planning Permission

7. On 1st October 2020 Cornwall Council, the authority which had taken over the planning functions of Caradon District Council, issued a decision letter dated 1st October 2020 dealing with an application from the Claimant dated 19 August 2020 under section 96A of the 1990 Act (reference number PA20/07129). The Claimant applied for a non-material amendment to "E2/06/01798FUL" by way of addition of a condition. The Council granted that application in the following terms:

> "Cornwall Council hereby grants permission for the following non-material amendment:
>
> The following condition is added to decision notice E2/06/01798/FUL.
>
> 10. The development hereby permitted shall be carried out in accordance with the plans listed below.
>
> 5074 L.100B received 15 December 2006
>
> 05074 L.01 received 15 December 2006
>
> 05074 L.02 received 15 December 2006
>
> 05074 L.03 received 15 December 2006
>
> 05074 L.04 received 15 December 2006
>
> 05074 L.05 received 15 December 2006
>
> 05074 L.06 received 15 December 2006
>
> 05074 L.07 received 15 December 2006
>
> Reason: For the avoidance of doubt and in the interests of proper planning."

8. This amendment had the effect of imposing an additional condition to the original permission. This condition incorporated some (but not all) of the drawings referenced in the Informative.

9. Condition 10 requires the development permitted under the planning permission as amended to be carried out in accordance with the 8 plans identified. Condition 10 is

silent as to the effect of the other drawings referred to in the Informative (ie drawings 05074 L.08, 09, 10A, 11A and 12 and 13).

10. Copies of the 8 drawings referred to in Condition 10 were provided in the Claimant's claim bundle. They variously show the location of the Site and the new dwelling proposed. The dwelling is shown as of irregular shape and in a modern architectural style. The other 6 drawings referred to in the "Informative" were not provided to the Court by either party.

The Claimant's S.73 Application

11. On 18 December 2020 the Council received a further application from the Claimant (reference number PA20/11367). It was made under section 73 of the 1990 Act. It sought non-compliance with Condition 10, expressed in the following terms:

> "Construction of one dwelling without compliance of Condition 10 of PA20/07129 dated 1st October 2020 Non material amendment to E2/06/01798/FUL to add condition to decision notice to construct the dwelling without compliance with Condition 10."

12. Drawings were submitted in respect of that application. The subsequent decision notice from the Council identifies them and their date of submission as follows:

> "Existing FLPC-SUR-02-C received 28/01/21
>
> Proposed FLPC-LAY-03-B received 18/12/20
>
> Proposed FLPC-LAY-10-C received 27/01/21
>
> Proposed FLPC-LAY-11-C received 27/01/21
>
> Proposed FLPC-LAY-11-C With previous elevation received 27/01/21
>
> Proposed FLPC-LAY-12-C received 27/01/21
>
> Proposed FLPC-LAY-13-C received 27/01/21
>
> Proposed FLPC-LAY-04-C received 27/01/21
>
> Proposed FLPC-LAY-05-C received 27/01/21
>
> Proposed FLPC-LAY-05-C With previous elevation received 27/01/21
>
> Proposed FLPC-LAY-06-C received 27/01/21
>
> Site/location Plan L100 received 18/12/20".

13. As recorded by the Inspector at DL2, the application sought to substitute these drawings into Condition 10. The drawings are included in the Claimant's claim bundle. They variously show the location of the Site and the new dwelling, but the latter is proposed in a different form and style. The proposed building is of more regular form, with an overhanging dual-pitched roof and detailing in what the Council described as of "alpine lodge style".

14. The application was accompanied by a "Supporting Statement" from the Claimant. In it the Claimant stated that implementation of the 2007 planning permission had commenced within the time required and that this had been confirmed by a lawful development certificate issued on 13 April 2012 under reference number PA12/00133. This lawful development certificate has not been provided in the Claim Bundle. However, no dispute arises about the Claimant's summary of its effect.

15. The Claimant's Supporting Statement went on to explain his desire to change the design of the dwelling to a modern beam and post timber-framed house, but with a similar footprint to the originally approved design. He stated that the proposed new design incorporated "design cues" from an original "Swiss Chalet" style house that had once occupied the Site. A picture of that former house on the Site was provided. It shows a building that could be described as of an "alpine lodge style", with an overhanging, dual, shallow pitched roof. The Supporting Statement contended that the Claimant's proposed design was simpler and more elegant than the more irregular modern building and that it would enable the use of more modern methods of construction to allow the building to be constructed speedily and in a more sustainable manner.

16. The Council refused the application by decision notice dated 4 May 2021. The single reason for refusal given was as follows:

> "The proposed development seeks to change the design of the dwelling approved via, E2/06/01798/FUL, from an irregularly-shaped boldly modernist dwelling to a dual-pitched alpine lodge style dwelling. The application site occupies a highly prominent and sensitive coastal plot. The proposed revised design completely alters the nature of the development and would result in a development that would differ materially from the approved permission. As a result this proposal goes beyond the scope of Section 73 of the Town and Country Planning Act 1990 and is contrary to guidance within the National Planning Practice Guidance, specifically paragraph 001 Reference ID: 17a- 001-20140306."

17. The Claimant appealed against the Council's decision under s.78 of the TCPA 1990. In his Appeal Statement the Claimant argued (amongst other things) that:

    a. although an application under section 73 of the 1990 Act is sometimes referred to as an application to make a "minor material amendment", the terms of section 73 of the 1990 Act are not limited in that way and place no restriction on the magnitude of the changes that can be sought;

b. reference had been made by the Courts in the consideration of section 73 of the 1990 Act to not permitting amendments which amount to a fundamental alteration to the terms of a planning consent, but there was nothing of a fundamental nature such as scale, size, massing or footprint and positioning on the Site which would result in any significant change;

c. section 73 applications still receive the same amount of scrutiny as a full planning application and the process does not prejudice the ability for relevant parties to make representations;

d. the Council's reliance on the decision in *Finney v Welsh Ministers* [2019] EWCA Civ 1868 in its report dealing with the Claimant's application was misplaced and did not justify the Council's position.

18. The appeal was determined by the written representations procedure. The Inspector made a site visit on 21 March 2022. The Inspector dismissed the Claimant's appeal by his decision letter dated 4 April 2022 ("the DL").

The Inspector's Decision

19. At DL3, the Inspector identified the main issue on the appeal as being "whether the proposal could be considered as a minor material amendment under section 73 of the TCPA 1990".

20. The Inspector then set out his reasons for dismissing the appeal in the subsequent paragraphs as follows:

> "4. Section 73 of the TCPA 1990 allows for applications to vary or removed conditions associated with a planning permission. The Planning Practice Guidance (the PPG) advises that one of the uses of a section 73 application is to seek a minor material amendment, where there is a relevant condition that can be varied. There is no statutory definition of a 'minor material amendment' but the PPG advises that it is likely to include any amendment where its scale and/or nature results in a development which is not substantially different from the one which has been approved. The magnitude of the changes that can be sought via a section 73 application is not specified by the legislation, but the PPG advises that, where modifications are fundamental or substantial, a new planning application under section 70 of the TCPA 1990 will need to be submitted.
>
> 5. The appellant refers to case law[1] [Footnote 1: John Leslie Finney v Welsh Ministers and others [2019] EWCA Civ 1868] which has established that an application under section 73 may not be used to obtain a permission that would require a variation to the terms of the "operative part" of the planning permission, that is, the description of the development for which the original permission was granted. In this case, the original permission was for the construction of one dwelling. The revised proposal would fall

within this description, so the use of a section 73 application to facilitate the changes would not conflict with the Finney judgment. However, the description of the development is a broad one, which would cover a dwelling of any size or design. Consequently, it allows scope for fundamental or substantial modifications which, despite being within the same description, would be contrary to the PPG advice on what constitutes a minor material amendment.

6. The original planning permission was for a bespoke dwelling in a contemporary architectural style, with the external materials being natural stone and cedar cladding. The approved plans show a multi-faceted building, with an organic form, including curved walls and sedum-covered roofs. By contrast, the proposed plans submitted with the section 73 application show a dwelling with a simple rectilinear form, rendered walls and a pitched slate roof. Consequently, although it is similarly sited, and has a comparable floorspace and volume, it is fundamentally different in its design, bearing virtually no resemblance to the approved building. The modifications are, therefore, substantial.

7. The appellant contends that the term "minor material amendment" infers that material changes are allowable under a section 73 application. However, the word "minor" qualifies the extent to which material changes should be considered via this route. In this case, the wholesale redesign of the house results in a development that would be of a substantially different nature than the one originally approved. In these circumstances, the PPG advises that a new planning application is necessary.

8. I recognise the fact that section 73 applications are subject to public consultation in the same way as are planning applications under section 70. However, the description of the proposal was "*construction of one dwelling without compliance of Condition 10 of PA20/7129* [sic] *dated 1st October 2020 Non material amendment to E2/06/01798/FUL to add condition to decision notice".* Consequently, although interested parties will have had the opportunity to comment, it may not have been clear that the proposal was, in fact, for a fundamentally different development than had already been approved. In any event, the fact that the application was properly publicised does not alter my judgment that the modifications are too fundamental to be considered under a section 73 application.

9. My attention has been drawn to a decision, which the appellant contends is comparable to this case, where a different local planning authority granted approval for a modified dwelling under section 73. In that case, the change in architectural styles was less stark, but there was, nevertheless, a considerable difference between the two sets of plans. As the term "minor amendment" is not defined in the legislation or

guidance, decision-makers must exercise their planning judgment in determining whether a modification is fundamental or substantial. The identified case is not so directly comparable to the circumstances of the appeal that it alters my judgment in this matter. Neither does it alter the guidance in the PPG which leads me to the conclusion that the appeal scheme does not represent a minor material amendment.

10. The Council has drawn my attention to two appeal decisions relating to the refusal of applications under section 73. The parties have divergent views on whether these decisions support the Council's case. Having reviewed them, I find that neither proposal was analogous to the appeal before me, as both involved a variation to the terms of the "operative" part of the planning permission, so conflicted with the Finney judgment. They therefore carry little weight in my determination of the appeal.

11. I therefore conclude that the nature of the development proposed would be substantially different to that allowed by the existing permission. Consequently, it goes beyond the parameters of a minor material amendment and cannot be considered under section 73. In accordance with the advice in the PPG, a planning application under section 70 should be submitted for consideration by the local planning authority in the first instance. In view of this conclusion, it is not necessary for me to consider the planning permits of the modified scheme.

Conclusion

12. For the reasons given above, I concluded that the appeal should be dismissed."

Legal Framework

The Statutory Scheme

21. Section 73 of the TCPA 1990 is in the following terms:

"**73. – Determination of applications to develop land without compliance with conditions previously attached**.

(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 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.
>
> …
>
> (4) This section does not apply if the previous planning permission was granted subject to a condition as to the time which the development to which it related was to be begun and that time has expired without the development having been begun.
>
> (5) Planning permission must not be granted under this section for the development of land in England to the extent that it has effect to change a condition subject to which a previous planning permission was granted by extending the time within which-
>
> (a) a development must be started;
>
> (b) an application for approval of reserved matters (within the meaning of section 92) must be made."

22. Section 96A of the TCPA 1990 provides, so far as material, as follows:

> "**96A Power to make non-material changes to planning permission …"**
>
> (1) A local planning authority may make a change to any planning permission … relating to land in their area if they are satisfied that the change is not material.
>
> (2) In deciding whether a change is material, a local planning authority must have regard to the effect of the change, together with any previous changes made under this section, on the planning permission … as originally granted.

> (3) The power conferred by subsection (1) includes power to make a change to a planning permission –
>
> (a) to impose new conditions;
>
> (b) to remove or alter existing conditions.
>
> …
>
> (8) A local planning authority in England must comply with such requirements as may be prescribed by development order as to consultation and publicity in relation to the exercise of the power conferred by subsection (1).
>
> …"

Government Guidance

23. The Government's online Planning Practice Guidance ("PPG") contains some commentary on sections 73 and 96A of the 1990 Act under the heading: "**Flexible options for planning permission. Options for amending proposals that have planning permission**"

24. The guidance states (at paragraph 001):

> "**How can a proposal that has planning permission be amended?**
>
> When planning permission is granted, development must take place in accordance with the permission and conditions attached to it, and with any associated legal agreements.
>
> New issues may arise after planning permission has been granted, which require modification of the approved proposals. Where these modifications are fundamental or substantial, a new planning application under section 70 of the Town and Country Planning Act 1990 … will need to be submitted. Where less substantial changes are proposed, there are the following options for amending a proposal that has planning permission:
>
> Making a non-material amendment
>
> Amending the conditions attached to the planning permission, including seeking to make minor material amendments"

25. The PPG therefore states that if any modification of approval proposals are "fundamental or substantial" a new planning application is required. As discussed further below, it also implies that only "non-material" or "minor material" amendments can be made to an existing planning permission.

26. As to the former (non-material amendments) this is a reference to the power under section 96A set out above. The guidance states in this respect (at paragraph 002):

> "**Making a non-material amendment to a planning permission**
>
> **Is there a definition of a non-material amendment**
>
> There is no statutory definition of 'non-material'. This is because it will be dependent on the context of the overall scheme – an amendment that is non-material in one context may be material in another. The local planning authority must be satisfied that the amendment sought is non-material in order to grant an application under section 96A of the Town and Country Planning Act 1990 …"

27. As to the latter ("minor material amendments"), this is intended to be a reference to the power under section 73 of the TCPA 1990 and the guidance states (at paragraphs 13, 14, 17 and 18):

> ""
>
> "**Amending the conditions attached to a permission including seeking minor material amendments (application under Section 73 TCPA 1990)**
>
> **How are the conditions attached to a planning permission amended?**
>
> An application can be made under section 73 of the Town and Country Planning Act 1990 … to vary or remove conditions associated with a planning permission. One of the uses of a section 73 application is to seek a minor material amendment, where there is a relevant condition that can be varied.
>
> **Are there any restrictions on what section 73 can be used for**?
>
> Planning permission cannot be granted under section 73 to extend the time limit within which a development must be started or an application for approval of reserved matters must be made. Section 73 cannot be used to change the description of the development.
>
> …
>
> **Is there a definition of 'minor material amendment'**?
>
> There is no statutory definition of a 'minor material amendment' but it is likely to include any amendment where its scale and/or nature results in a development which is not substantially

> different from the one which has been approved. Pre-application discussions will be useful to judge the appropriateness of this route in advance of an application being submitted.
>
> **Can section 73 be used to make minor material amendments if there is no relevant condition in the permission listing approved plans**?
>
> Section 73 cannot be used to make minor material amendments if there is no relevant condition in the permission listing the originally approved plans. It is possible to seek the addition of a condition listing plans using an application under section 96A of the Town and Country Planning Act 1990. This would then enable the use of a section 73 application to make minor material amendments."

Caselaw

28. The power under section 73 of the TCPA 1990 was considered in *R v Coventry City Council ex p Arrowcroft Group Plc* [2001] PLCR 7 by Sullivan J. The local planning authority had granted conditional outline planning permission for development described as: "40,000 seat multi-purpose arena, 1 food superstore and 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 and ride facilities, coach park and carparking with associated landscaping, highways, pedestrian and cycle routes and canalside walk. Closure of public highway."

29. The planning application form for that development had identified floorspace allocated to each use as follows: "40,000 seat arena, 1 food superstore and 1 variety superstore totalling 18,580 sq m (200,000 sq ft), associated small retail service and community uses totalling 1,858 sq m …". Condition 5 stated that: "The development hereby shall be in accordance with the following requirements: (i) the buildings to be erected shall comprise: (a) … (b) a food superstore and a variety superstore; (c) no less than ten units (referred to in these conditions as unit shop(s)') to be used for any purpose within Class A1, A2 and D1 of the Schedule to the Town and Country Planning Use Classes Order 1987 … (iv) the area shall have a capacity of 40,000 public seats and no development shall take place which exceeds the following limitations (in which references to square metres means square metres gross external floor space): (a) neither the food superstore nor the variety superstore shall exceed 9,290 square meters; (b) no unit shop to be used for a purpose within Class A1 of the 1987 Order … shall exceed 300 square metres."

30. Condition 15 prevented the opening of the food store and variety store until at least ten unit shops had been substantially completed. Condition 16 prevented the sub-division of the foodstore into separate units and required it to be used predominantly for the sale of convenience good. Condition 17 prevented the variety store from being sub-divided into separate units. Condition 36 set an overall limitation on the aggregate size of the buildings with the maximum size of the food and variety stores set at 18,580 square metres.

31. As a result of proposed changes to the identity of the operator, the applicant made an application under section 73 of the TCPA 1990 seeking to vary conditions 5, 15 and 17 to provide for up to six non-food stores in place of the one variety superstore. The local planning authority granted the application, but the lawfulness of that grant was challenged by the claimant. It was common ground in that case that the grant of the application had resulted in the issue of a new planning permission.

32. In upholding the challenge, Sullivan J referred to commentary in the *Encylopedia of Planning Law* as being a useful starting point and continued:

> "29. It is as follows, so far as material:
>
> "A condition may have the effect of modifying the development proposed by the application provided that it does not constitute a fundamental alteration in the proposal"
>
> 30. A number of cases are then cited in which it was decided that various conditions requiring, for example, off-street car parking, suitable visibility displays or deleting a proposed means of access, had not constituted fundamental alterations in the proposals that were being placed before the planning authority. The passage continues:
>
> "Similarly, a condition may scale down the applicant's proposals and permission may be granted in a suitable case for part only of the development for which approval is sought or in respect of part only of the land to which the application relates."

33. The Judge then considered the approach to imposition of conditions as follows:

> "32. Thus, in response to the application in 1998 it was entirely proper for the local planning authority to impose conditions, for example, limiting the size of the variety store, providing that it should not open until the unit shops had been substantially completed and preventing its later subdivision. It would not, in my judgment, have been lawful for the local planning authority to have imposed in response to an application for planning permission for, inter alia, "one variety store" a condition which said:
>
> "The buildings to be erected shall comprise up to six non-food variety stores comprising a range of non-food Al retail units."
>
> 33. Faced with the imposition of such a condition there can be little doubt [the operator] would have replied to the local

> planning authority: "Whilst you have purported to grant planning permission for one variety store the condition negates the effect of that permission. You may not lawfully grant planning permission with one hand and effectively refuse planning permission for that development with the other by imposing such an inconsistent condition." If that was the extent of the council's powers in response to the application in 1998, as in my judgment it was, I do not see how the council can claim to be entitled to impose such a fundamentally inconsistent condition under section 73. It is true that the outcome of a successful application under section 73 is a fresh planning permission, but in deciding whether or not to grant that fresh planning permission the local planning authority,
>
> " ... shall consider only the question of the conditions subject to which planning permission should be granted." (See section 73(1) and Powergen above.)
>
> Thus 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. I bear in mind that the variety superstore was but one element of a very large mixed use scheme, nevertheless it is plain on the evidence that it was an important element in the mix and this is reflected in the retail implications of its removal."

34. Sullivan J then continued as follows:

> "34. … It is true that if a variety store was constructed and thereafter used as such it could subsequently be subdivided into a number of units, absent any condition to the contrary. But the relevant building which was proposed to be constructed in the application was a one variety superstore, that is fundamentally different from a proposal to construct a range of up to six non-food retail units, which what the condition, as varied, requires to be constructed.
>
> 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."

35. The analysis in paragraph 35 reflects the fact that a successful application under s.73 results in the grant of a new planning permission subject to the variation sought. The resulting new permission granted by the local planning authority in that case on the one hand therefore continued to describe the development permitted as (amongst other things) being for "1 variety superstore", yet the revised condition was fundamentally inconsistent with that description in requiring up to six non-food retail units to be constructed rather than 1 variety superstore.

36. The scope of the power under section 73 and the decision in *Arrowcroft* were revisited in *R(Vue Entertainment Ltd) v City of York Council* [2017] EWHC 588 (Admin). Conditional planning permission had been granted for 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". Condition 2 required that the permission should be implemented on the basis of a number of identified plans. One of the plans showed the provision of a 12-screen cinema with a capacity of 2,000 people. The applicant made an application under section 73 of the 1990 Act to amend the plan to provide for an increase in the number of screens to 13, with a capacity of 2,400 people. The application was granted by the local planning authority. The claimant challenged that decision on the basis that the application involved a very significant increase in the numbers who could attend the multi-screen cinema, with a greater impact on the Claimant's city centre operation, and contended that the granted amounted to an unlawful "fundamental change".

37. Collins J dismissed the challenge. Having referred to the terms of section 73 of the 1990 Act, the Judge stated:

> "8. It is to be noted that section 73(2) does not limit in any way the nature of the condition, other than as to time, which can be amended under that section. There is guidance which has been produced in the form of a PPG, and so far as material, that reads:
>
> "There is no statutory definition of minor material amendment but it is likely to include any amendment where its scale and/or nature results in a development which is not substantially different from the one which had been approved."
>
> That is in the context of the guidance using the word "minor" in relation to the exercise of the section 73 power. There is nothing in the section itself which limits it to what are called "minor amendments".
>
> 9. However, in this case the council in considering its powers did say it was applying the guidance and did therefore

> use the word "minor". Of course, [Counsel for the Claimant] relies on that in submitting that this could hardly be described properly as a "minor amendment".”

38. Collins J then noted that much reliance had been placed on the *Arrowcroft* decision which he then summarised and addressed as follows:

> “12. The argument in that case which was accepted by Sullivan J was that it was not permissible for a condition to seek to vary the permission which had been granted and therefore it was a misuse of section 73 to seek to achieve that.
>
> 13. The ratio of Sullivan J’s decision seems to me to be contained in paragraph 33 of his judgment … . Thus the variation had the effect that the operative part of the new planning permission gave their permission for one variety superstore but the new planning permission by the revised conditions would take away that consent.
>
> 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.
>
> 15. 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.
>
> 16. 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.
>
> 17. Mr Walton's submission that it is a fundamental change is a reflection of part of the permission only, that is to say, the part that deals with the multi-screen cinema. When one is concerned with fundamental variations, one must look, as it seems to me, to the permission as a whole in order to see whether there is in reality a fundamental change, or whether any specific part of the permission as granted is sought to be varied by the change of condition.

> 18. It is to be noted that section 73 itself, as I have said, does not in terms limit the extent to which an amendment of conditions can be made. It does not have, on the face of it, to be within the adjective "minor", whatever that may mean in the context.
>
> 19. It is, I suppose, possible that there might be a case where a change of condition, albeit it did not seek to vary the permission itself on its face, was so different as to be what could properly be described as a fundamental variation of the effect of the permission overall. But it is not necessary for me to go into the possibility of that in the circumstances of this case because I am entirely satisfied that that does not apply in this particular case."

39. It is recognised in *Finney* [2019] EWCA Civ 1868; [2020] PTSR 455 (see below), and is clear in any event, that the word "not" in paragraph 16 of Collins J's judgment has been inadvertently included.

40. The Defendant places particular reliance on the observations in paragraph 19 as to the possibility of a change of condition being so different as to be what could properly be described as a "fundamental variation" of the effect of the permission overall.

41. Both these authorities and section 73 have been more recently analysed by the Court of Appeal in *Finney.* Full conditional planning permission had been granted for development described as: "Installation and 25-year operation of two wind turbines, with a tip height of up to 100 metres, and associated infrastructure …". Condition 2 provided that the development was to be carried out in accordance with a number of approved plans and documents which were specified. Of these, figure 3.1 showed a wind turbine with a tip height of 100 metres.

42. The applicant applied under section 73 of the TCPA 1990 for the "removal or variation" of condition 2 of the planning permission: "To enable a taller turbine type to be erected" and sought to supersede figure 3.1 with figure 3.1A so as to permit tip heights for the turbines of up to 125 metres. The local planning authority refused the application. The applicant's appeal was allowed by an Inspector who also excised the words "with a tip height of up to 100 metres" from the description of the permitted development.

43. The Court of Appeal reviewed a number of the authorities relating to section 73, beginning with *Pye v Secretary of State for the Environment, Transport and the Regions* [1998] 3 PLR in which Sullivan J had explained its origin and purpose of enabling a developer dissatisfied with a condition imposed on the grant of planning permission to make an application for variation, rather than appeal against the grant of planning permission as granted. Lewison LJ stated:

> "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* (2000) 81 P&CR 5; and by the

> Supreme Court in *Lambeth London Borough Council v Secretary of State for Housing, Communities and Local Government* [2019] PTSR 1388. In the latter case Lord Carnwath JSC said at para. 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.'"

44. Lewison LJ went on to set out what were described as uncontroversial points as follows:

> "15. …: (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* [1998] 3 P LR 72, 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.
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> 16. In Pye Sullivan J said at pp 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 that development was permitted to be carried out."
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> 17. That sentence was part of the passage approved by the Supreme Court in *Lambeth* [2019] PTSR 1388."

45. Lewison LJ then went on to confirm the importance of 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, by reference to the statutory scheme and a number of cases before then identifying:

> "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."

46. Lewison LJ stated that there were three cases that bore on that question: *Arrowcroft, Vue Entertainment Ltd* and *R(Wet Finishing Works Ltd) v Taunton Dean Borough Council* [2018] PTSR 26. In relation to *Arrowcroft* Lewison LJ cited the analysis of Sullivan J at paragraphs 33 and 35 and stated:

> "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."

47. In relation to *Vue Entertainment Ltd*, Lewison LJ quoted from paragraphs 15 -17 and stated that he understood Collins J in paragraph 15 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. Lewison LJ noted that it was agreed that the word "not" in what is paragraph 16, line 2 of the judgment Collins J was an error and should be ignored.

48. As *Wet Finishing Works*, Lewison LJ noted the judgment did not set out the precise terms of the description of the permitted development for the erection of 84 dwellings nor the terms of the application, seeking an increase to 90 dwellings and stated:

> "34 …. 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."

49. Lewison LJ continued as follows:

> "36. Singh J does not appear to have been referred to the decision of Collins J in *Vue* [2017] EWHC 588; but he did consider *Arrowcroft* [2001] PLCR 7. 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 a 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."

50. Lewison LJ recorded that the Judge below in *Finney* had followed the approach of Singh J in *Wet Finishing Works* and accepted arguments for the Welsh Ministers and developer that: (1) the only limitation on the power under section 73 was that it could not introduce a condition that made a "fundamental alteration" to the permitted development; (2) this was a question of fact and degree for the planning authority to address; (3) the operative part of the planning permission may be the subject of amendment consequential on a change in the conditions provided that the change was not a fundamental one. Reliance was placed on *Bernard Wheatcroft Ltd v Secretary of State for the Environment* (1980) 43 P&CR 233 to the effect that there was no principle of law preventing the imposition of conditions reducing development below that which had been applied for.

51. In rejecting those submission and allowing the appeal, Lewison LJ rejected reliance on the *Wheatcroft* test for an application under section 73 and stated:

> "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 JSC'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.
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> 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.
>
> …
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> 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)."

52. Since the hearing of the claim, the Supreme Court has given judgment in *Hillside Parks Ltd v Snowdonia National Park Authority* [2022] UKSC 30. That concerned a different question about the relationship between successive grants of planning permission for development on the same land and, in particular, about the effect of implementing one planning permission on another planning permission relating to the same site. However, I note that in the course of the judgment, Lord Sales and Lord Leggatt (with whom the other Justices agreed) referred to the statutory powers under section 96A and

section 73 of the 1990 Act to vary a planning permission as "limited" (see paragraph 22 of the Judgment) and later in the same judgment as "very limited" (see paragraph 74 of the Judgment).

53. The Judgment also refers to the principles of interpretation of planning permission at paragraph 26 as follows:

> "26. The scope of a planning permission depends on the terms of the document recording the grant. As with any legal document, its interpretation is a matter of law for the court. Recent decisions of this court have made it clear that planning permissions are to be interpreted according to the same general principles that apply in English law to the interpretation of any other document that has legal effect. The exercise is an objective one, concerned not with what the maker of the document subjectively intended or wanted to convey but with what a reasonable reader would understand the words used, considered in their particular context, to mean: see *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2016] 1 WLR 85, paras 33-34 (Lord Hodge) and para 53 (Lord Carnwath); *Lambeth London Borough Council v Secretary of State for Housing, Communities and Local Government* [2019] 1 WLR 4317, paras 15-19.
>
> 27. Differences in the nature of legal documents do, however, affect the scope of the contextual material to which regard may be had in interpreting the text. Because a planning permission is not personal to the applicant and enures for the benefit of the land, it cannot be assumed that the holder of the permission will be aware of all the background facts known to the person who applied for it. Furthermore, a planning permission is a public document on which third parties are entitled to rely. These characteristics dictate that the meaning of the document should be ascertainable from the document itself, other public documents to which it refers such as the planning application and plans and drawings submitted with the application, and physical inspection of the land to which it relates. The reasonable reader of the permission cannot be expected to have regard to other material such as correspondence passing between the parties. See eg *Slough Estates v Slough Borough Council (No 2)* [1971] AC 959, 962 (Lord Reid); *Trump International Golf Club*, para 33 (Lord Hodge). In this case, we are concerned with grants of full planning permission, in relation to which it is to be expected that a reasonable reader would understand that the detailed plans submitted with the application have particular significance: *Barnett v Secretary of State for Communities and Local Government* [2008] EWHC 1601 (Admin), 2009 JPL 243, para 24 (Sullivan J); affirmed [2009] EWCA Civ 476, [2009]

JPL 1597, paras 17-22 (Keene LJ); R Harwood, *Planning Permission* (2016), para 28.9."

The Claim and the Defendant's Response

54. The Claimant submits that the Inspector's decision was flawed on the basis that:
    a. the decision was not within the powers of the TCPA 1990;
    b. the Inspector failed to consider that the Government's PPG does not have the force of law;
    c. the Inspector failed to apply the legislation and case law in reaching his decision;
    d. the Inspector used the PPG to over-ride legislation and case law.
    e. the Inspector restricted the powers of section 73 without having the legal authority to do so.

55. He submitted (amongst other things) that: (1) the application was within the scope of section 73 of the TCPA 1990 and should therefore have been considered on its merits by the Inspector; (2) there are no criteria set out in the statutory provisions that determine the magnitude of changes that can be sought for any planning condition; (3) the term "minor material amendment" used in the PPG is not one from the legislation and has no force of law; (4) the cases of *Arrowcroft*, *Vue* and *Finney* conclude that the only restriction to the scope of section 73 is that the modified proposals must not conflict with the original description of the planning permission, otherwise referred to as the "operative part" of the planning permission and no such conflict arose here; (5) the approved plans referenced by a condition cannot form part of the permission itself, but are part of a restriction imposed by a condition; if it were otherwise, the process of applying for "minor material amendment" using section 73 of the TCPA 1990 would fail and could never be used for any amendments as an amendment to a set of plans referenced by condition would never just be a question of a condition, but also one relating to the permission itself and they could then never be considered under section 73 which only allows the question of conditions to be considered; (6) the operative permission here was for the "construction of one dwelling", with a condition then affecting that construction by reference to a set of approved plans which determined the aesthetic design, where any limitation to be imposed on the operative permission had to be done by condition as it was in this case.

56. In response, the Defendant submits that the question that arises is whether an application under section 73 can be used to obtain a "fundamental variation" of the effect of a permission in circumstances where (as the Defendant put it) there is no conflict with the description of the development in what is proposed. The Defendant submits section 73 of the TCPA 1990 does not extend to such cases, and consequently there was no error in the Inspector's decision in dismissing the appeal.

57. The Defendant does not dispute the Claimant's position that the permission as granted, was not subject to any conditions relating to the plans for such a dwelling. The Defendant also accepts that the concept of a 'minor material amendment' (expressed in the PPG and to which reference was made by the Inspector) is not to be found in the TCPA 1990. However, the Defendant argues that this was explicitly considered by Collins J in *Vue* at paragraphs 8, 18 and 19. The Defendant relies on principles of

interpretation of statutory provisions expressed by the Supreme Court in *R (Fylde Coast Farms Ltd) v Fylde BC* [2021] 1 WLR at [6] (drawing on *R(Quintavalle) v Secretary of State for Health* [2003] UKHL 13; [2003] 2 AC 687, per Lord Bingham of Cornhill at [8]) to the effect that even where particular words used in a statute appear at first to have an apparently clear and unambiguous meaning, it is always necessary to resolve differences of interpretation by setting the particular provision in its context as part of the relevant statutory framework, by having due regard to the historical context in which the relevant enactment came to be made, and to the extent that is purpose can be identified, to arrive at an interpretation which serves rather than frustrates its purpose.

58. Adopting this approach, the Defendant accepts as a starting point that there is nothing on the face of s.73 of the TCPA 1990 that limits the extent to which an amendment of conditions can be made; and he also accepts that the plain words of the provision are concerned solely with the "*question of conditions*" with no further gloss as to the extent or type of conditions that might be amended. However, the Defendant contends that it is evident that there are in fact restrictions on how s.73 of the TCPA 1990 may be used in light of *Finney.* He submits that *Finney* and *Vue* were concerned with an entirely distinct issue from that raised in this appeal, namely the question of whether the proposed development, if permitted, would have the effect of conflicting with the operative part of the existing permission. He submits those cases are therefore authority for the proposition that a s.73 application cannot be used to change the description of development; nothing more; they do not establish any broader principle that section 73 can be used to modify a permission "*to any degree*" provided the proposals do not conflict with the original description, as that question was not before the Court of Appeal in *Finney*, nor did it reach such a conclusion.

59. Properly interpreted, submits the Defendant, s.73 of the TCPA 1990 does not extend to cases involving fundamental alterations to a permission, even where there is no conflict with the description of development itself; the purpose of the provision, as set out in Circular 19/86, is to enable an applicant to obtain relief from one or more conditions. He submits this statutory purpose does not extend to, nor does it permit, a wholesale and fundamental alteration of the original permission. In such cases, one would no longer be concerned solely with the question of conditions, but rather be dealing with a fundamental variation of the overall effect of the permission itself beyond the scope of the statutory provision.

60. The Defendant contends that this interpretation is supported by *Arrowcroft* and *Vue.* In relation to *Arrowcroft*, he contends that Sullivan J's restatement of the principles governing the imposition of conditions is of direct relevance, namely that a local planning authority is only able to impose different conditions if they are conditions which could lawfully have been imposed upon the original permission "*in the sense that they do not amount to a fundamental alteration*" of the original proposals. The Defendant submits that *Arrowcroft* therefore acknowledges the general limits on the imposition of conditions, which similarly apply in the context of s.73 applications.

61. As to *Vue*, the Defendant submits that Collins J mooted the possibility that s.73 may not extend to cases where the change in condition, although it does not vary the description of development would be "*so different as to what could properly be described as a fundamental variation of the effect of the permission overall*". The Defendant accepts that Collins J reached no conclusion on that point as the issue was

not raised by the facts of the *Vue* case, but the Defendant contends that the *Finney* principle is not the only limit on the proper scope of s.73 of the TCPA 1990.

62. On this basis, the Defendant's position is that that the Inspector was entitled to dismiss the appeal on the basis that the s.73 application involved a fundamental variation of the Permission. To the extent that the Inspector also used the language of "minor material amendment" derived from the PPG, the Defendant submits:

    a. regardless of the terminology used in the PPG and in the DL, it is clear from his reasons that the Inspector understood the correct legal test to be applied i.e. he focussed at all times on whether the modifications were too fundamental to fall within the scope of s.73 and the Inspector correctly understood the "minor material amendment" guidance only to apply in cases involving fundamental or substantial modifications of the original planning permission, such that there was therefore no error in this regard;

    b. however, and to the extent that the Court determines that the Inspector was wrong to define the main issue by reference to the question of "minor material amendment", then it is plain that even in the absence of such error (which the Defendant denies occurred), the Inspector would have necessarily reached the same conclusion; applying *Simplex GE (Holdings) Ltd v SSE* (1986) 57 P & CR 306, the Defendant invites the Court to exercise its discretion not to quash the Inspector's decision;

    c. it was a matter of pure planning judgment for the Inspector alone as to whether the changes proposed by the s.73 Application amounted to fundamental changes and the Inspector provided full and cogent reasons as to why he considers that to be the case which are not countered by the Claimant; he argues that the fact that there is no conflict with the description of development (which is not disputed) does not provide an answer to this case.

63. The Defendant states that he does not understand the Claimant's contention that a condition "*cannot form part of the permission itself*" and submits that:

    a. as a matter of law, it is well established that in order to construe a planning permission, one must have regard to the permission itself, including the conditions on it and the express reasons for those conditions: see eg *UBB Waste Essex Ltd v Essex CC* [2019] EWHC 1924 (Admin) at §26;

    b. that process of interpretation, whereby regard must also be had to the conditions attached to a permission, was applied in *R (Parkview Ltd) v Chichester DC* [2021] JPL 1075; that also concerned a s.73 application where the Judge held that, in applying *Finney*, one must first ascertain the proper interpretation of the operative part of the original permission which involved looking to the original conditions imposed; it is wrong in law to maintain that conditions do not form part of the planning permission or are irrelevant to the proper interpretation of the permission.

64. As to the PPG, the Defendant submits: (1) the Inspector recognised the role of the PPG as guidance (by reference to the language used by the Inspector); (2) at no stage did

the Inspector suggest the PPG had statutory force, nor that it was akin to case law; (3) the Inspector's decision should be construed in a reasonably flexible way, where Inspectors are well versed in the differing status of legislation, case law, policy and guidance; (3) the Inspector applied the relevant legislation and case law in reaching his decision, having referred to the statutory provision and the case law cited to him; (4) the Inspector properly accepted that the s.73 application would not fall foul of the *Finney* principle, but he recognised that there was a distinct issue on the facts before him which needs to be resolved, namely, whether the s.73 application amounted fundamental modification of the Permission; (5) the Inspector did not use the PPG to override legislation or case law, but rather applied it in a manner that was entirely consistent with the proper scope of s.73 of the TCPA 1990.

Analysis

65. By way of preliminary clarification, at the outset of the hearing I sought confirmation from the parties as to the specific issue which they considered to arise on the facts of this case. In responding to the claim originally, and in both her written and oral submissions to the Court, Ms Parekh confirmed that the Defendant and Inspector accepted that what was being proposed in the section 73 application did not conflict with the description of the development permitted by the planning permission. It was said that the absence of any such conflict had been the basis upon which the Inspector had approached the determination of the appeal before him.

66. For this reason the Defendant contended that the question raised by this claim was different to that on the facts in *Finney*. In that case there was a conflict between the description of the development and the proposed variation of condition. In this case, there is not. The issue here is whether section 73 of the TCPA 1990 permits the proposed change to a condition permitting what the Inspector treated as involving fundamental variation to the design of the single dwelling on the Site that is otherwise permitted by the operative part of the planning permission.

67. It is important to distinguish between, on the one hand, the interpretation of the planning permission and, interpretation of the scope of the power under section 73 of the TCPA 1990 as it applies to any particular planning permission.

68. As recently confirmed by the Supreme Court in *Hillside*, the interpretation of a planning permission depends upon the terms of the document recording the grant of that planning permission. It is a matter of law, applying the same general principles that apply to the interpretation of any document that has legal effect. It is an objective exercise that focuses on what a reasonable reader would understand the words used, considering in their particular context, to mean. The meaning of a planning permission should be ascertainable from the document itself, other public documents to which it refers such as the planning application and plans and drawings submitted with the application and physical inspection of the land to which it relates. In the case of a full planning permission, a reasonable reader would understand that detailed plans submitted with the application would have particular significance.

69. The planning permission originally granted in this case on 26 July 2007 was expressed to be permission "for the development specified in the plan(s) and application submitted … on 16th December 2006 namely: Construction of one dwelling [on the Site". As I have already noted, somewhat confusingly the "Informative" on this decision notice

attempts to define "the Drawing to which this decision refers" in circumstances where the decision notice does not expressly refer to any "Drawing" at all, but rather reference to "plan(s)". The "Informative" then refers to a number of drawings submitted with the application. The planning permission was subsequently amended by the application made under section 96A so as to include Condition 10. This condition required the development to be carried out in accordance with 8 of the drawings to which the Informative had previously referred (not all of them).

70. There could potentially have been an interpretative issue as to the overall effect of the resulting amended planning permission, given: (1) the remaining reference on the face of the notice to permission being granted for the "development specified in the plan(s) and application submitted"; (2) yet the word "namely" introducing the description of development as a single dwelling; and (3) the terms of the "Informative" which remain on the face of the notice; and (4) Condition 10 as inserted which now specifically requires the development to be carried out in accordance with specific plans.

71. However any such interpretative issue does not arise in light of the agreed position and the materials before the Court. The Defendant has confirmed that it is accepted, and the Inspector concluded, that substitution of the plans by the proposed s.73 application would not involve any conflict with the operative part, or grant, of planning permission as amended itself and the Court is being asked to determine the claim on that basis; and the Court does not have documents such as all the "plan(s)" or the "application" originally submitted in any event. This claim therefore falls to be determined on the basis that no such conflict arises as agreed by the parties and concluded by the Inspector.

72. In addition, I note that in the written arguments the Defendant took issue with the Claimant's submissions on the extent to which a condition forms part of a permission. In the event, it seems to me that this boiled down to a difference in the use of terminology rather than a difference of substance. I understood the Claimant's submission to be directed to the distinction between, on the one hand, what the Court of Appeal in *Finney* referred to as the "operative part" or "grant" of planning permission and, on the other hand, conditions imposed on that grant of planning permission, rather than suggesting that conditions form no part of a planning permission as a whole. The distinction made in *Finney* is of relevance to the scope of s.73 of the TCPA 1990 because s.73 is specifically directed at conditions and does not permit variation of the "operative part" or "grant" of a planning permission (as considered further below). If there is any difference of substance between the parties, I consider that it is clear from the authorities that a planning permission as a whole includes any conditions attached to it and such conditions are relevant to its overall interpretation (as identified in *UBB Waste* and *Parkview*).

73. I therefore turn to the specific issue raised: did the Inspector lawfully reject the Claimant's section 73 application as "a fundamental variation" of the permission even thought it would not involve any conflict with the description of development permitted? In my judgment he did not act lawfully in doing so, for any or all of the following reasons.

74. First, I consider the correct starting point must be the words of section 73 of the TCPA 1990 itself. As the Defendant accepts, there is nothing in section 73, or in the TCPA 1990, that limits its application to "minor material amendments", or to amendments

which do not involve a "substantial" or "fundamental" variation. On the face of the words used, s.73 applies to any application for planning permission for development of land "without complying with conditions subject to which a previous planning permission was granted" (see s.73(1)). It limits the local planning authority's consideration to the "question of conditions subject to which planning permission should be granted (see s.73(2)). There are other limitations as to its scope such as those in ss73(4) and (5), but they are not engaged here. There is nothing in the language used that restricts an application to vary or remove a condition to "minor material amendments", or to what a decision-maker considers to be a "non-fundamental variation". I accept that the absence of such a limitation on the face of the statute does not automatically mean that such limitations cannot arise as a matter of statutory interpretation, in accordance with well-established principles requiring one to consider the meaning of a statute and its statutory purpose. However it is an important starting point that, on the face of the statute, provided the application is limited to non-compliance with a condition (rather than any other part of the permission) it falls within the stated scope of s.73 of the TCPA 1990.

75. Second, as now properly understood in light of *Finney*, the requirement that a s.73 application be confined to applications for non-compliance with a condition is significantly restrictive in and of itself. There is no obvious need, justification or statutory purpose for reading in additional restrictions which are not expressed on the face of the statute. *Finney* confirms that section 73 cannot be used to vary the operative part of a planning permission. It is a section concerned with non-compliance with condition, rather than the operative part of a permission. One therefore cannot use s.73 to vary or impose a condition where the resulting condition would be inherently inconsistent with the operative part of the planning permission; that would also involve effective variation of the operative part of the planning permission as well. That point was exposed clearly in *Finney* where the resulting varied condition caused the Inspector to omit the conflicting words in the description of development in her decision. The power under s.73 is therefore a limited one (as briefly observed in *Hillside).* But in such circumstances, it is difficult to see why it is necessary to introduce or read in further limits on its scope which are not otherwise expressed in the section itself. If, as accepted to be the case here, an application for non-compliance with a condition does not lead to any conflict or inconsistency with the operative part of the permission, it is difficult to see why it is objectionable in light of the statutory purpose of section 73 and the TCPA 1990 itself.

76. Third, section 73 is clearly intended to be a provision which enables a developer to make a section 73 application to remove or vary a condition, provided of course that the application does not conflict with the operative part of the planning permission. Any such variation application will be subject to the necessary procedural requirements for its consideration which, for example, enable representations to be received. If Parliament had intended the power to restrict its application further (for example to limit it to "minor material" amendments to a condition, or non-fundamental variations to a condition) one would have expected that to be expressed in the language used and it could readily have done so.

77. Fourth, and linked to the preceding point, the wording of section 96A of the 1990 Act is informative as part of the statutory context. Unlike section 73 which limits its application to conditions, section 96A was introduced as a power to amend a planning

permission generally (including the operative part of the permission). But in introducing that power that is applicable to any part of a permission, Parliament expressly constrained its scope to "non-material amendments". By contrast, no such limitation has been imposed on the scope of s.73 where it is applicable, but with the fundamental difference that s.73 is confined in scope to applications for non-compliance with conditions (rather than non-compliance with the operative part of a permission). From the perspective of statutory interpretation taking account of the statutory context, this is yet a further indication that if Parliament had wished to limit the power under s.73 to "minor material amendments" or so prevent "fundamental variations" to conditions, it would have done so expressly.

78. Fifth, the effect of giving the words used in s.73 their plain and ordinary meaning so as to allow an application to be made for non-compliance with any planning condition which is not in conflict with the operative part of permission does not, of course, dictate the outcome of that application. It simply means that the application can be entertained. Any such application would then fall to be determined on its planning merits. In this case, for example, the Inspector considered there to be a fundamental difference in the proposed aesthetics of the design shown in the drawings identified in Condition 10 and the proposed plans. That may well be the inevitable result of an application made under s.73. But provided there is no inherent conflict or inconsistency with the "operative part" of the planning permission - in this case the construction of a single dwelling - the planning merits of that proposed change can be assessed on its merits. No such assessment has occurred. As part of that assessment, the decision-maker will be able to consider whether the proposed change (fundamental or otherwise) is acceptable or not in planning terms, taking account of any representations received.

79. In this respect, I recognise that in *Finney,* arguments as to the ability to consider the merits of s.73 application in this way (with attendant publicity) was not seen as a factor justifying giving s.73 the more expanded interpretation that the developer and Welsh Ministers had advocated in that case. There is an important difference. There, such arguments were advanced to try and justify giving s.73 a more extended interpretation than its words supported so as to permit effective changes to the operative part of a planning permission. Here, the situation is reversed. The ability to consider the merits of any change to a condition that falls within the ordinary and natural scope of the language used in s.73 points away from the need to read in additional restrictions to the scope of the statutory provision.

80. Sixth, I do not consider that any of the caselaw materially supports the Defendant's attempt to restricting the scope of s.73 to "minor material amendments" or non-fundamental variations where there is no conflict with the operative part of the permission. To the contrary, it is more consistent with giving the words of s.73 their plain and ordinary meaning.

81. *Arrowcroft* was a case like *Finney* where the s.73 application involved a direct conflict with the operative part of the planning permission originally granted. The description of the development permitted included a requirement for "1 food superstore and 1 variety superstore". The s.73 application involved substituting the requirement for 1 variety superstore in that description with up to six non-food stores. That was the context in which Sullivan J referred at paragraph 29 of his judgment to the commentary in the Planning Encylopaedia on a condition being able to modify the development

proposed by a planning application, but not so as to constitute a "fundamental alteration". The Judge concluded that imposition of a condition of the type being promoted in the s.73 application would have been unlawful at the time when planning permission was originally granted because of a fundamental inconsistency with the operative part of the planning permission. The variation proposed in the s.73 application had the effect that the operative part of the new planning permission would continue to give permission for one variety superstore on the one hand, whereas the proposed revised condition would take away that consent with the other. The Judge was therefore not dealing with a situation where there is no such inconsistency, and so not interpreting the scope of s.73 in respect of such an application.

82. On the agreed position as to the operative part of the amended permission in this case no such inconsistency or contradiction arises. The operative part of the planning permission is for the construction of a single dwelling on the Site. The proposed revision to the architectural style of the dwelling (however different in nature) does not conflict with that. It will remain a permission for the construction of a single dwelling on the Site.

83. In *Vue* the High Court was faced with a s.73 application where the operative part of the planning permission permitted erection of a "multi-screen cinema" without stipulating the number of screens. A limit of 12 screens arose in consequence of the condition requiring the permission to be implemented on the basis of identified plans. One of those plans showed a 12 screen cinema with a capacity limit of 2,000 people. The claimant contended that an increase to 13 screens and 2,400 people was very significant and a "fundamental change". Having analysed *Arrowcroft*, Collins J concluded that the amendments proposed did not vary the permission (contrasting the position if an application had been made to amend the 8,000 seat capacity of the stadium itself which was stipulated in the operative part of the permission).

84. As to whether any fundamental change was being proposed, Collins J concluded that it was necessary to consider the permission as a whole, rather than just the multi-screen cinema. He noted what he had said earlier in his judgment that s.73 itself does not, in terms, limit the extent to which an amendment of conditions can be made and the changes did not have, on the face of it, to be within the adjective "minor" (whatever that might mean in that context). This part of his reasoning supports the approach I have adopted above.

85. The Judge went on to contemplate the possibility that there might be a case where a change of condition, albeit not seeking to vary the permission itself on its face, was so different as to be what could properly be described as a fundamental variation of the permission overall. He made it clear, however, that he considered it unnecessary to go into "the possibility of that" in the circumstances of the case before him because he was entirely satisfied that it did not apply to the particular case. I find the Defendant's reliance on this observation unconvincing as a basis for reading in a significant restriction to the scope of s.73 which is not expressed in the statute itself and I respectfully doubt that the observation was intended to be treated in that way. Amongst other things, it was expressed as nothing more than a possibility, rather than a reality. No examples were given as to how the possibility might manifest itself in reality. The Judge made it clear that he was not going further into the possibility because no such "fundamental variation" arose on the facts of the case anyway. And the other material

part of the reasoning by the Judge were directed at the absence of words of restriction in the statutory provision itself (ie the absence of a restriction of "minor material amendment").

86. On any basis *Vue* is therefore not authority for the proposition that a s.73 application which is consistent with the "operative part" of a planning permission is nonetheless outside the scope of s.73 if it is considered to involve a "fundamental variation." Even if it is possible that such a fundamental variation might arise in reality, I find it difficult to conceive if it involves no conflict with the operative part of the permission itself.

87. In accordance with well-established principles, a condition should only generally be imposed on a planning permission where (amongst other things) it is necessary for the development in question to be acceptable in planning terms. In that sense, most conditions could be seen as "fundamental" to the planning permission. A section 73 application that is seeking to vary or remove such a condition may well therefore be of a nature that involves a significant, or fundamental, change to the planning permission as a whole in that sense. A test that limited the scope of section 73 to what a decision-maker considered to be a non-fundamental variation would potentially make a significant inroad into that scope which is difficult to understand, particularly given that the merits of any proposed variation would still need to be considered.

88. *Finney* is another case like *Arrowcroft* where there was a conflict between what was being proposed in the s.73 application and the "operative part" of the planning permission. *Finney* concerned the prescribed height of the permitted turbines. The Court of Appeal's analysis reinforces the importance of the distinction between the "operative part" (which s.73 does not permit to be varied) and conditions. That distinction was articulated and reflected in *Arrowcoft* itself. The Court of Appeal's reasoning in that case turned on statutory interpretation of s.73 of the TCPA 1990 and the underlying philosophy of the section that it is only the conditions that matter. As noted above, what was being proposed by way of altered condition went beyond the condition. It led to conflict with the operative part of the permission itself. This led the Inspector to delete the prescribed height from the description of development itself.

89. On the agreed position of the Claimant and Defendant, no such conflict arises in the present case. There is no need for any alteration to the description of the permission for construction of one dwelling. The plans currently specified in condition 10 and the plans proposed to be substituted provide for the construction of one dwelling. The difference is in its form and architectural style; but that form is or architectural style is not specified in that description of development. One can see that the situation may well be different if the operative part of the permission uses words which are inherently more prescriptive of the form of the building permitted (eg permitting "construction of a single bungalow" rather "construction of one dwelling") but that is not the case here.

90. Seventh, if I am wrong and section 73 is implicitly qualified so as to preclude applications which do not involve any conflict with the operative part of a permission, but do involve what the decision maker considered to be a fundamental variation, I am not convinced that the Inspector has properly addressed the question of what would constitute a fundamental variation in this context.

91. Neither the Inspector nor the Defendant contend that the Claimant's application involved any conflict with the operative part of the permission that permits construction of one dwelling on the Site. As I have already noted, there is no suggestion that this operative part of the amended permission (properly construed) was materially affected by the reference to the "plan(s)" or the "application" and it is accepted that the limitations on form and style arose only from the plans governed by condition 10. I can see that a decision maker might lawfully conclude that the proposed variation of condition 10 by substituting plans with a different form and architectural style could be described as a "fundamental variation" of that form and style. But there has been no change in the basic principle of what was being permitted on the Site, namely the construction of a single dwelling. I am not convinced that the Inspector has properly grappled with why it is that what he saw as a fundamental variation in the form and style of the dwelling in fact amounts to a fundamental variation to the permission itself (as opposed to the conditions affecting that permission).

92. Eighth, even if a test of fundamental variation is a lawful one to apply, I am not persuaded that the Inspector applied such a test in this case. In my judgment there is more than sufficient doubt about that to justify quashing the decision on the basis that he misdirected himself by reference to the PPG and its concept of "minor material amendments".

93. In that respect, it is notable that the Defendant did not attempt to defend the lawfulness of restricting the scope of s.73 to "minor material amendments" or to defend the PPG insofar as it may be suggesting that s.73 is limited in scope to "minor material amendments". It is fair to observe that the PPG does not specifically claim that s.73 is limited in this way. It refers to s.73 as allowing amendment of conditions "including seeking to make minor material amendments". It then goes on to provide commentary on the absence of a definition of what constitutes a "minor material amendment". In my judgment the wording of the guidance is liable to confuse, as evidenced by the Inspector's decision itself. The PPG introduces a concept of "minor material amendment" where no such expression exists in the statutory scheme, nor is otherwise supported by the most recent authorities. It is unsurprising that any reader of the PPG might infer that the reference to "minor material amendment" is advice that it is only minor material amendments that fall within the scope of s.73. In my judgment, that is exactly how the Inspector expressed his own understanding of it in DL7, along with the other references to the concept throughout the DL. Indeed, he expressed the main issue on the appeal to be whether or not what was proposed was a minor material amendment (see DL3).

94. As Colins J identified in *Vue*, no such limitation exists in the statute. The Defendant did not seek to defend the existence of any such qualification in this claim. In my judgment this terminology in the PPG introduces an impermissible gloss on the scope of s.73 which has the propensity to misdirect the reader, as it did the Inspector in this case.

95. The Defendant submits that reading the Inspector's DL as a whole, any error in this regard is of no consequence because the Inspector concluded that what was proposed was in fact a fundamental variation, not simply more than a minor material amendment. The Defendant argues that the decision would have been bound to have been the same (applying the *Simplex* test above). This submission is only relevant if I am wrong that

the Inspector was wrong to apply a test of fundamental variation and, in any event, was rationally entitled to conclude that there was a fundamental variation on the facts. Even in that circumstance, I am not persuaded that the Inspector's decision would necessarily have been the same if he had not misdirected himself that the word "minor" qualifies the extent to which material changes under s.73 of the TCPA are permitted. There are clear indications from the other parts of his DL that he may well have approached it on the basis that an amendment which was not "minor" would consequently be "substantial" or "fundamental". If s.73 is not restricted in scope to "minor" amendments (as the Defendant now appears to accept), then it does not follow that an amendment which is more than "minor" is necessarily "fundamental". I am therefore not persuaded that the Inspector would necessarily have concluded that the amendments being proposed were "fundamental" if he had appreciated that s.73 was not limited in scope to "minor material amendments".

96. Accordingly, I consider that the Inspector erred in law in his approach to this appeal and his decision should be quashed.