[HOUSE OF LORDS]

NEWBURY DISTRICT COUNCIL . . . . RESPONDENTS

AND

SECRETARY OF STATE FOR THE ENVIRONMENT APPELLANT

NEWBURY DISTRICT COUNCIL . . . . RESPONDENTS

AND

INTERNATIONAL SYNTHETIC RUBBER CO. LTD. APPELLANTS

[CONJOINED APPEALS]

1980 Jan. 14, 15, 16, 17, 21, 22; Feb. 28

Viscount Dilhorne, Lord Edmund-Davies, Lord Fraser of Tullybelton, Lord Scarman and Lord Lane

Town Planning — Planning permission — Conditions — Aircraft hangars used for storage of vehicles—Planning permission to use for storage of synthetic rubber—Whether necessary—Condition attached that buildings to be demolished by specified date—Whether valid—Whether hangars used as "repository" —Whether grant of planning permission extinguishing existing use rights—Town and Country Planning Act 1971 (*c.* 78), *ss.* 29 (1), 30 (1) [1]*—Town and Country Planning (Use Classes) Order* 1950 (*S.I.* 1950 *No.* 1131), *art.* 3 (1), *Sch.*[2]

In 1941 land in open country was requisitioned by the Crown for use as an airfield. Two large hangars were built. The airfield remained operational until 1947. After 1947 the hangars were used by the Ministry of Agriculture to store food supplies and from 1955 to 1959 they were used for storing civil defence vehicles by the Home Office. The surrounding area was restored to agricultural use and in 1959 family trustees were granted planning permission to use the hangars to store fertilisers and corn on condition that they were removed by the end of 1970. In 1961 the trustees bought the freehold from the Crown and granted a 40-year lease back to the Crown at a nominal rent.

A rubber company, I.S.R., then applied for permission to use the hangars "as warehouses for the storage of synthetic

[1] Town and Country Planning Act 1971, s. 29: "(1) . . . where an application is made to a local planning authority for planning permission, that authority, in dealing with the application, shall have regard to the provisions of the development plan . . . and to any other material considerations, and—(*a*) . . . may grant planning permission, either unconditionally or subject to such conditions as they think fit. . . ."

S. 30: "(1) Without prejudice to the generality of section 29 (1) . . . conditions may be imposed on the grant of planning permission thereunder— . . . (*b*) for requiring the removal of any buildings or works authorised by the permission, or the discontinuance of any use of land so authorised, at the end of a specified period. . . ."

[2] Town and Country Planning (Use Classes) Order 1950, art. 3: "(1) Where a building or other land is used for a purpose of any class specified in the Schedule to this Order, the use of such building or other land for any other purpose of the same class shall not be deemed for the purposes of the Act to involve development of the land."

Sch.: ". . . Class X. Use as a wholesale warehouse or repository for any purpose."

rubber" and on May 31, 1962, I.S.R. were given planning permission for the use of the two hangars as warehouses on condition the buildings were removed "at the expiration of the period ending December 31, 1972." Having obtained planning permission, I.S.R. in July 1962 bought the two hangars and the 40-year lease from the Crown at an auction. The particulars of sale at the auction referred to the development plan and the local planning authority's general policy to secure removal of war-time buildings. In November 1970 I.S.R. applied for a 30-year extension of their permission which was due to expire in December 1972. In January 1971 the extension application was refused as it conflicted with the development plan in "an area of outstanding natural beauty."

I.S.R. continued to use the hangars after the end of 1972 and did not remove them. In November 1973 the local authority served two enforcement notices. I.S.R. appealed to the Secretary of State, who after a public inquiry held that the condition for the hangars' removal was invalid under the Town and Country Planning Act 1971 because it was extraneous to the proposed use. The Divisional Court dismissed the local authority's appeal against the quashing of the enforcement notices. On appeal, the Court of Appeal allowed the appeal.

On appeal by the Secretary of State and I.S.R.:—

Held, allowing the appeals, (1) that I.S.R. did not require the grant of planning permission for their intended use of the hangars in 1962 since the use by the Home Office of the hangars after 1955 for storing civil defence vehicles was use as a "repository" within the meaning of Class X of the Schedule to the Town and Country Planning (Use Classes) Order 1950 and that therefore their use by I.S.R. in and after 1962 as a wholesale warehouse for the storage of synthetic rubber involved no material change of user but was an existing use (post, pp. 597A–D, 602C–E, 605A–C, F–G, 614F—615C, 624C–E).

Dicta of Havers J. in *Horwitz* v. *Rowson* [1960] 1 W.L.R. 803, 810, and of Lord Denning M.R. in *G. Percy Trentham Ltd.* v. *Gloucestershire County Council* [1966] 1 W.L.R. 506, 512, C.A. disapproved.

(2) That where the grant of planning permission, whether it be permission to build or for a change of use, was of such a character that the implementation of the permission led to the creation of a new planning unit existing use rights attaching to the former planning unit were extinguished; but that in the present case the grant of planning permission in May 1962 did not create a new planning unit, and that accordingly, I.S.R. were not precluded from relying on the existing use rights attaching to the site (post, pp. 597E–F, 598H—599C, 603A, 606E—607B, 617G—618D, 626C–F).

Prossor v. *Minister of Housing and Local Government* (1968) 67 L.G.R. 109, D.C. and *Petticoat Lane Rentals Ltd.* v. *Secretary of State for the Environment* [1971] 1 W.L.R. 1112, D.C. considered.

(3) That in any event, even if planning permission had been necessary for the use by I.S.R. of the hangars, in the circumstances of the present case the condition for their removal did not fairly or reasonably relate to the permitted development and was therefore void (post, pp. 601D–E, 602F–G, 609F–G, 621F–G, 628G—629B).

Per curiam. For conditions attached to the grant of a planning permission to be intra vires and valid the conditions

imposed must be for a planning purpose and not for any ulterior one and they must fairly and reasonably relate to the development permitted. Also they must not be so unreasonable that no reasonable planning authority could have imposed them (post, pp. 599H—600A, 607F—608C, 618F—619A, 627A–E).

Pyx Granite Co. Ltd. v. *Ministry of Housing and Local Government* [1960] A.C. 260, H.L.(E.) considered.

Decision of the Court of Appeal [1978] 1 W.L.R. 1241; [1979] 1 All E.R. 243 reversed.

The following cases are referred to in their Lordships' opinions:

Associated Provincial Picture Houses Ltd. v. *Wednesbury Corporation* [1948] 1 K.B. 223; [1947] 2 All E.R. 680, C.A.

City of London Corporation v. *Secretary of State for the Environment* (1971) 23 P. & C.R. 169.

East Barnet Urban District Council v. *British Transport Commission* [1962] 2 Q.B. 484; [1962] 2 W.L.R. 134; [1961] 3 All E.R. 878, D.C.

Fawcett Properties Ltd. v. *Buckingham County Council* [1961] A.C. 636; [1960] 3 W.L.R. 831; [1960] 3 All E.R. 503, H.L.(E.).

Gray v. *Minister of Housing and Local Government* (1969) 68 L.G.R. 15, C.A.

Hall & Co. Ltd. v. *Shoreham-by-Sea Urban District Council* [1964] 1 W.L.R. 240; [1964] 1 All E.R. 1, C.A.

Horwitz v. *Rowson* [1960] 1 W.L.R. 803; [1960] 2 All E.R. 881.

Kingston-upon-Thames Royal London Borough Council v. *Secretary of State for the Environment* [1973] 1 W.L.R. 1549; [1974] 1 All E.R. 193, D.C.

Kingsway Investments (Kent) Ltd. v. *Kent County Council* [1971] A.C. 72; [1970] 2 W.L.R. 397; [1970] 1 All E.R. 70, H.L.(E.).

Leighton and Newman Car Sales Ltd. v. *Secretary of State for the Environment* (1976) 32 P. & C.R. 1, C.A.

Mixnam's Properties Ltd. v. *Chertsey Urban District Council* [1965] A.C. 735; [1964] 2 W.L.R. 1210; [1964] 2 All E.R. 627, H.L.(E.).

Mounsdon v. *Weymouth and Melcombe Regis Borough Council* [1960] 1 Q.B. 645; [1960] 2 W.L.R. 484; [1960] 1 All E.R. 538, D.C.

Petticoat Lane Rentals Ltd. v. *Secretary of State for the Environment* [1971] 1 W.L.R. 1112; [1971] 2 All E.R. 793, D.C.

Prossor v. *Minister of Housing and Local Government* (1968) 67 L.G.R. 109, D.C.

Pyx Granite Co. Ltd. v. *Ministry of Housing and Local Government* [1958] 1 Q.B. 554; [1958] 2 W.L.R. 371; [1958] 1 All E.R. 625, C.A.; [1960] A.C. 260; [1959] 3 W.L.R. 346; [1959] 3 All E.R. 1, H.L.(E.).

Reg. v. *Hillingdon London Borough Council, Ex parte Royco Homes Ltd.* [1974] Q.B. 720; [1974] 2 W.L.R. 805; [1974] 2 All E.R. 643, D.C.

Swallow and Pearson v. *Middlesex County Council* [1953] 1 W.L.R. 422; [1953] 1 All E.R. 580.

Trentham (G. Percy) Ltd. v. *Gloucestershire County Council* [1966] 1 W.L.R. 506; [1966] 1 All E.R. 701, C.A.

The following additional cases were cited in argument:

Bendles Motors Ltd. v. *Bristol Corporation* [1963] 1 W.L.R. 247; [1963] 1 All E.R. 578, D.C.

Brayhead (Ascot) Ltd. v. *Berkshire County Council* [1964] 2 Q.B. 303; [1964] 2 W.L.R. 507; [1964] 1 All E.R. 149, D.C.

Calcaria Construction Co. (York) Ltd. v. *Secretary of State for the Environment* (1974) 72 L.G.R. 398.

Cozens v. *Brutus* [1973] A.C. 854; [1972] 3 W.L.R. 521; [1972] 2 All E.R. 1297, H.L.(E.).

Emma Hotels Ltd. v. *Secretary of State for the Environment* (1979) 250 E.G. 157, D.C.

Essex Construction Co. Ltd. v. *East Ham Borough Council* (1963) 61 L.G.R. 452, D.C.

Halsall v. *Brizell* [1957] Ch. 169; [1957] 2 W.L.R. 123; [1957] 1 All E.R. 371.

Howard v. *Secretary of State for the Environment* [1975] Q.B. 235; [1974] 2 W.L.R. 459; [1974] 1 All E.R. 644, C.A.

Ives (E.R.) Investment Ltd. v. *High* [1967] 2 Q.B. 379; [1967] 2 W.L.R. 789; [1967] 1 All E.R. 504, C.A.

Kruse v. *Johnson* [1898] 2 Q.B. 91, D.C.

Lissenden v. *C.A.V. Bosch Ltd.* [1940] A.C. 412; [1940] 1 All E.R. 425, H.L.(E.).

LTSS Print and Supply Services Ltd. v. *Hackney London Borough Council* [1975] 1 W.L.R. 138; [1975] 1 All E.R. 374, D.C.; [1976] Q.B. 663; [1976] 2 W.L.R. 253; [1976] 1 All E.R. 311, C.A.

Miller-Mead v. *Minister of Housing and Local Government* [1962] 2 Q.B. 555; [1962] 3 W.L.R. 654; [1962] 3 All E.R. 99, D.C.

Slattery v. *Naylor* (1888) 13 App.Cas. 446, P.C.

Slough Estates Ltd v. *Slough Borough Council (No. 2)* [1971] A.C. 958; [1970] 2 W.L.R. 1187; [1970] 2 All E.R. 216, H.L.(E.).

Tessier v. *Secretary of State for the Environment* (1975) 31 P. & C.R. 161, D.C.

Town Investments Ltd. v. *Department of the Environment* [1978] A.C. 359; [1977] 2 W.L.R. 450; [1977] 1 All E.R. 813, H.L.(E.).

Western Fish Products Ltd. v. *Penwith District Council* (1978) 77 L.G.R. 185, C.A.

Young v. *Bristol Aeroplane Co. Ltd.* [1946] A.C. 163; [1946] 1 All E.R. 98, H.L.(E.).

APPEALS from the Court of Appeal.

These were appeals by leave of the House of Lords by the appellants, the Secretary of State for the Environment and the International Synthetic Rubber Co. Ltd., from an order dated July 14, 1978, of the Court of Appeal (Lord Denning M.R., Lawton and Browne L.JJ.) allowing an appeal by the respondents, the Newbury District Council from an order dated February 18, 1977, of the Divisional Court of the Queen's Bench Division (Lord Widgery C.J., Michael Davies and Robert Goff JJ.). By that order the motion of the respondents that a decision of the appellant, the Secretary of State for the Environment dated July 24, 1975, be remitted to the Secretary of State for re-hearing and determining together with the opinion or direction of the Divisional Court was dismissed.

The facts are set out in their Lordships' opinions.

David Widdicombe Q.C. and *Anthony Anderson* for the appellant company. There are three issues in this appeal: (1) The validity of the

condition. (2) Whether planning permission was needed in view of Class X of the Use Classes Order. (3) What has been termed "blowing hot and cold." A

(1) It is not disputed that if the condition is invalid the whole planning permission goes. Then the question arises whether an enforcement notice can be served? The answer is in the negative because of the date when it was served. The Court of Appeal held that the condition was valid. In summary, the appellant's contention is that it is invalid because it does not fairly and reasonably relate to the permitted development. The condition must relate to the use of the hangars as warehouses but this condition goes far beyond that. B

(2) This raises the question whether there was any need for planning permission at all. This involves consideration of the Town and Country Planning (Use Classes) Order 1950, article 3, Schedule, Class X. Class X of the Order of 1950 combined Classes X and XI of the Town and Country Planning (Use Classes) Order 1948. This makes it plain that in the Order of 1950 "wholesale" in the expression "use as a wholesale warehouse or repository" is confined to warehouse. "Repository" does not connote storage of articles exclusively for business purposes. C

(3) Where there are existing use rights and planning permission is not necessary, whether the appellants nevertheless are bound by the maxim: qui sentit commodum sentire debet et onus; he who takes the benefit must also take the burden. It is said that the appellants are precluded from relying on existing use rights in Class X as they had taken up and implemented the permission granted to them in May 1962. This is a false point because there is no way of ascertaining which of the two alternatives the appellants acted under, namely, whether they went by way of relying on their existing use rights or under the permission granted to them. In the case of building operations it is plain whether a person is acting under a planning permission for the physical evidence can be seen, namely, the bricks and mortar. Alternatively, where there are existing use rights and also there is planning permission how can it be said that a person has taken the benefit of that permission when he does not need it? D E F

The following statutory provisions give the necessary background to this appeal: the Town and Country Planning Act 1971, sections 22 (1) (2) (*f*), 23 (1) (5) (6), 24 (1) (2) (*b*) (4), 25, 27, 29 (1), 30 (1) (*a*) (*b*) (2), 33 (1) (2), 36 (1) (3), 51 (1) (4), 52 (1) (2), 53 (1), 87 (1) (2) (3) (4), 88 (1) (*b*) (*d*) (3), 89 (1), 91, 170 (1) (2), 246, 266 (1) (*b*) (2) (3) (7), 290.

(1) For a condition imposed pursuant to section 29 (1) the Act of 1971 to be intra vires a local planning authority and valid it must satisfy three tests: (i) it must fairly and reasonably relate to a planning purpose; (ii) it must fairly and reasonably relate to the permitted development, and (iii) it must not be so unreasonable that no reasonable planning authority could have imposed it (see *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223). G

The first and second tests stem from the statute: see section 29 which is concerned with the determination of applications for planning permission. As to the second test, section 29 is in Part III of the Act relating to control of development and development is defined in section 22. H

A Section 29 is dealing with control of development in particular cases—the development which is the subject of the application in question, for example. The decision is a decision on the application and in this case any conditions imposed must fairly and reasonably relate to the use of the land in question. Section 30 (1) is helpful as being illustrative of what Parliament intended to come within section 29 albeit section 30 commences with the words, "Without prejudice to the generality of section 29 (1) of this Act. B . . ." It is inherent in section 29 that any condition imposed must relate to the permitted development. To impose a condition as in the present case that at the end of the relevant period the buildings must be removed is to impose a condition which is not connected with the permitted development; it is not related to user. It is pertinent to contrast the language of section 29 with that of section 33 (2) where the planning authority can specify the use for which the building may be used.

C The first reported case relating to imposed conditions is *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1958] 1 Q.B. 554, 572, where Lord Denning laid down the proposition that for "conditions, to be valid," they "must fairly and reasonably relate to the permitted development." The actual decision was reversed on appeal [1960] A.C. 260 on the ground that the development in question was allowed D under a private Act but, as Lord Reid stated in *Mixnam's Properties Ltd.* v. *Chertsey Urban District Council* [1965] A.C. 735, 751, Lord Denning's formulation of the law was approved by this House in *Fawcett Properties Ltd.* v. *Buckingham County Council* [1961] A.C. 636.

Reliance is placed on *Hall & Co. Ltd.* v. *Shoreham-by-Sea Urban District Council* [1964] 1 W.L.R. 240 in that it confirms the three tests and E affords a good example of the third test. The language of section 29 (1) would appear to be in the widest terms but that the power to impose conditions is subject to limitations is made manifest in the speech of Lord Reid in *Kingsway Investments (Kent) Ltd.* v. *Kent County Council* [1971] A.C. 72, 86. The condition imposed in *City of London Corporation* v. *Secretary of State for the Environment* (1971) 23 P. & C.R. 169 satisfied all three tests. *Kingston-upon-Thames Royal London Borough* v. *Secretary of* F *State for the Environment* [1973] 1 W.L.R. 1549 supports the three tests. True, the first test is not explicitly mentioned because it was not necessary so to do but the other two are expressly mentioned at p. 1553. In *Reg.* v. *Hillingdon London Borough Council, Ex parte Royco Homes Ltd.* [1974] Q.B. 720 the conditions were held invalid because they could not satisfy the first test.

G (2) The use of the hangars by the Home Office was use as a repository and so was its previous use for the storage of fertilisers and the appellant's use of them is as a wholesale warehouse. All these uses are in the same class—Class X. Therefore there was no change of user involving development requiring planning permission. For the general accepted meaning of "repository," see the *Shorter Oxford English Dictionary*, 3rd ed. (1944), H p. 1707: "A vessel, receptacle, chamber, etc., in which things are, or may be placed, deposited, or stored." Havers J.'s definition in *Horwitz* v. *Rowson* [1960] 1 W.L.R. 803, 810, in confining it to a building used for storage "in the course of a trade or business" was wrong and was un-

necessary for the decision in that case. The appellants have no quarrel with Lord Denning M.R.'s definition in *G. Percy Trentham Ltd.* v. *Gloucestershire County Council* [1966] 1 W.L.R. 506, 512 provided that the concluding words in brackets are omitted: "A repository means a place where goods are stored away, to be kept for the sake of keeping them safe (as part of a storage business)." *Calcaria Construction Co. (York) Ltd.* v. *Secretary of State for the Environment* (1974) 72 L.G.R. 398 does not carry the matter any further. In any event, as *Town Investments Ltd.* v. *Department of the Environment* [1978] A.C. 359 shows, that use by a Government department is a business use.

(3) "Blowing hot and cold." This principle stems from the judgment of Lord Denning M.R. Lawton L.J. held that it was not necessary to decide this question and Browne L.J. disagreed with the Master of the Rolls on this issue. Browne L.J.'s formulation of the principle is correct in that it can only apply in circumstances such as those that pertain in *Prossor* v. *Minister of Housing and Local Government* (1968) 67 L.G.R. 109.

It is a well established principle of planning law that a person who has been granted planning permission is not prevented from subsequently contending that no such permission was necessary by reason of existing use rights: see *Swallow and Pearson* v. *Middlesex County Council* [1953] 1 W.L.R. 422; *Mounsdon* v. *Weymouth and Melcombe Regis Borough Council* [1960] 1 Q.B. 645; *Miller-Mead* v. *Minister of Housing and Local Government* [1962] 2 Q.B. 555; *Essex Construction Co. Ltd.* v. *East Ham Borough Council* (1963) 61 L.G.R. 452; *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1958] 1 Q.B. 554 and *Emma Hotels Ltd.* v. *Secretary of State for the Environment* (1979) 250 E.G. 157.

As to the cases relied on by the respondents, *Prossor* v. *Minister of Housing and Local Government*, 67 L.G.R. 109; *Gray* v. *Minister of Housing and Local Government* (1969) 68 L.G.R. 15 and *Petticoat Lane Rentals Ltd.* v. *Secretary of State for the Environment* [1971] 1 W.L.R. 1112, these are all distinguishable for those cases concern the creation of a new planning unit in that they involved the erection of new buildings. [Reference was also made to *Western Fish Products Ltd.* v. *Penwith District Council* (1978) 77 L.G.R. 185.]

John Newey Q.C. and *Christopher Symons* for the Secretary of State. The role of the Secretary of State in this appeal is: (1) to defend what he understands to be his function in enforcement notice appeals; (2) to justify his conclusions in the present case and (3) to make submissions in relation to the suggestion that equitable estoppel should apply in planning matters.

(1) There is no controversy in relation to this question. Appeals in respect of enforcement notices are governed by section 88 of the Town and Country Planning Act 1971. Before 1960 such appeals lay to magistrates' courts. The magistrates heard the evidence and directed themselves on the law and they reached their conclusions. The Act of 1960 allowed the Minister to give a decision on the merits. In all other respects the position of the Secretary of State is the same as that of magistrates before 1960. Under section 246 appeals lie from the Secretary of State to the High

A Court but only on points of law. If the Secretary of State is wrong on a point of law the High Court pursuant to R.S.C., Ord. 59, will remit the case to the Secretary of State to apply the law correctly to the facts.

On the validity of the condition, there is a slightly different approach from that of the district council. The three tests which must be applied to determine whether the condition is valid are: (i) The condition must come within the wording of section 29 (1) of the Act of 1971 as clarified B and illustrated by section 30: *Kingsway Investments (Kent) Ltd.* v. *Kent County Council* [1971] A.C. 72. This would exclude conditions for non-planning purposes. *Reg.* v. *Hillingdon London Borough Council, Ex parte Royco Homes Ltd.* [1974] Q.B. 720 was rightly decided. (ii) The condition must fairly and reasonably relate to the permitted development. It is conceded that the removal of a building may reasonably relate to the C permitted development. (iii) The condition must be reasonable. In relation to the second and third tests the role of the Secretary of State is the same as that of the court on the question of reasonableness. Reliance is placed on the observations of Lord Denning in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1958] 1 Q.B. 554, 572; *Fawcett Properties Ltd.* v. *Buckingham County Council* [1961] A.C. 636 and *Mixnam's Properties Ltd.* v. *Chertsey Urban District Council* [1965] A.C. 735.

D Section 33 (2) of the Act of 1971 is a useful provision for the planning authority and also for a developer. It is possible under this section for the planning authority to restrict the use of the land. Without this provision a developer who has permission to erect a building would have no permission to use the building without making a further application for planning permission. But it is a subsection of limited application and E cannot be used by converse reasoning to support the proposition that the local authority can attach a condition to a change of use permission requiring the demolition of a building.

The Secretary of State considered that in the circumstances of the present case, where planning permission was sought merely for a change of use of existing substantial buildings, that a condition requiring the removal of those buildings after the expiration of a specified number of F years was not specifically related to the change of use in respect of which the planning permission was granted and was unreasonable. He therefore concluded that the condition was invalid. The Secretary of State directed himself correctly as to the law and having so directed himself he reached the correct conclusion on the facts. The judgment of the Divisional Court (1977) 75 L.G.R. 608 is supported and in particular the observation of G Michael Davies J., at pp. 611–612, that it would be an injustice to the freeholder if the buildings were removed.

The correct method of ridding land of a non-conforming use is to proceed under section 51 of the Act of 1971. Parliament intended that this procedure should be used and the appropriate compensation paid. Compensation may not necessarily be a large amount. It frequently occurs, H as became the position in the present case, that an applicant has only a leasehold interest in the building concerned and thus a condition requiring the demolition of that building may well amount to a requirement that the applicant commits an act of waste as against his landlord.

As to existing use rights, the Secretary of State, as his decision letter makes plain, expressly directed himself in the terms of Lord Denning M.R.'s dictum in *G. Percy Trentham Ltd.* v. *Gloucestershire County Council* [1966] 1 W.L.R. 506, 512. It is conceded that the dictionary definitions of " repository " are against the Secretary of State. But the word has to be seen in its context. The three relevant decisions, *Horwitz* v. *Rowson* [1960] 1 W.L.R. 803; *G. Percy Trentham Ltd.* v. *Gloucestershire County Council* [1966] 1 W.L.R. 506 and *Calcaria Construction Co. (York) Ltd.* v. *Secretary of State for the Environment*, 72 L.G.R. 398, in relation to " repository " all import the concept of business usage. This is correct. In the Town and Country Planning (Use Classes) Order 1950 a wholesale warehouse is in Class X and a repository in Class XI. The 1950 Order does not define either warehouse or repository and both are placed in the same class—Class X. A wholesale warehouse obviously involves business premises to which goods are delivered and from where goods are despatched. According to the dictionary a " repository " is a place where, for example, archives are kept. But the word " repository " in Class X of the 1950 Order is coloured by the words " wholesale warehouse." It is emphasised that this reference to a wholesale warehouse colours the description of a repository. " Wholesale warehouse " covers the genus.

On " blowing hot and cold," the Secretary of State is greatly concerned at the prospect of the importation of this doctrine into planning law: see *Western Fish Products Ltd.* v. *Penwith District Council*, 77 L.G.R. 185, 200. Planning is concerned with the development of land and planning permission enures to the benefit of land and all persons for the time being interested therein: section 33 (1) of the Town and Country Planning Act 1971.

The introduction of equitable estoppel into the planning system will result in rights and obligations varying according to the persons concerned and depending on such factors as to what certain persons knew or did not know at the relevant time. The Secretary of State fears there would be much uncertainty and that it would work to the detriment of the ordinary citizen and would enormously complicate planning administration. It would raise great difficulties for planning officers and planning committees. See the article entitled " Planning Permissions—Blowing Hot and Cold " in [1979] J.P.L. 815. Reliance is placed on the same cases as those relied upon by Mr. Widdicombe Q.C.

Peter Boydell Q.C., *R. M. K. Gray* and *James May* for the district council. The council accept that in order to uphold the judgment of the Court of Appeal they must satisfy the House on two issues: (i) that there was an error of law on the part of the Secretary of State and (ii) that the Secretary of State was correct in determining that the company had no Class X right.

Having received planning permission on May 31, 1962, at a time when the company had no interest in the land several courses were open to them. One was to appeal to the Secretary of State. The company took with their eyes open this permission for two months later in July 1962 they bought a lease of the land at auction and the permission was referred to in the auction particulars. Before the Divisional Court nothing was said

about the position of the freeholder for the condition imposed was in the freeholder's favour. The position of freeholders was first mentioned in the judgment of Michael Davies J. in his reserved judgment.

On validity, section 88 of the Act of 1971 concerns appeals against an enforcement notice. The Secretary of State should have exercised his powers under subsections (5) and (6) of section 88. But the Secretary of State put it out of his power to vary the condition because he had held as a matter of law that it was a void condition. The question at issue here is: what are the functions of the Secretary of State when he is entertaining an enforcement notice appeal of this nature and considering a condition? The Secretary of State has a dual function when he is exercising this appellate jurisdiction, namely (a) he has to consider whether the condition is void in law and if he holds it is not void in law then (b) he goes on to exercise his functions under section 88 (5) and (6) and considers all the circumstances of the case and whether he should substitute another condition. It is vital to keep separate these two functions for the first is a quasi-judicial function. The second function is the exercise of the highest planning function in this country. This is the heart of the respondent's case. In the present case there has been a confusion by the Secretary of State and the Divisional Court between these two functions.

The Secretary of State should have held that the condition was not void in law and then gone on to exercise his powers under section 88 and made a decision. If the judgment of the Court of Appeal is upheld then the case should be remitted to the Secretary of State with the direction that the condition is not void in law and he can then exercise his powers under section 88. There is no evidence whatsoever that the Secretary of State has exercised his powers under subsections (5) and (6).

In determining the validity of a condition there are two tests applicable, not three as suggested by the appellants: (i) Is the condition imposed for a planning purpose? and (ii) is it a condition that no reasonable planning authority could have imposed (the *Wednesbury Corporation* principle [1948] 1 K.B. 223)? Strong reliance is placed on the following example: a local authority has a piece of land not required for fifteen years when it is scheduled to be the site of a public library. The local authority allow a single-storey building to be erected on the land for use as a warehouse with a condition that it must be removed after fifteen years. After ten years there is a change of use to a cash-and-carry store. On the appellant's argument there could not be imposed a condition for demolition of the building because of the change of use!

In *Fawcett Properties Ltd.* v. *Buckingham County Council* [1961] A.C. 636, 678, Lord Denning considered that the principles applicable to planning conditions are analogous to those applicable in the by-law cases. In those circumstances it follows that the present condition cannot be attacked because it cannot be said that the present action of the respondents is "fantastic and capricious": *Slattery* v. *Naylor* (1888) 13 App.Cas. 446, 452. The principle laid down in *Kruse* v. *Johnson* [1898] 2 Q.B. 91 can be applied a fortiori to a planning case, namely, that in determining the validity of by-laws made by public representative bodies the court ought to be slow to hold that a by-law is void for unreasonableness.

The *Wednesbury Corporation* case [1948] 1 K.B. 223 shows that the courts are extremely slow to interfere in by-law cases and it follows that very rarely should the Secretary of State interfere with a condition imposed by a local planning authority. A

Cases such as *Mixnam's Properties Ltd.* v. *Chertsey Urban District Council* [1965] A.C. 735; *Kingsway Investments (Kent) Ltd.* v. *Kent County Council* [1971] A.C. 72 and *Kingston-upon-Thames Royal London Borough Council* v. *Secretary of State for the Environment* [1973] 1 W.L.R. 1549 all suggest that there are but two tests. Further, in the *Kingsway Investments* case [1971] A.C. 72 all their Lordships' speeches equated planning conditions with by-laws and referred to *Kruse* v. *Johnson* [1898] 2 Q.B. 91 as containing the principle to be applied. As to the contention that this condition would lead to a loss of rights under section 23 (5) of the Act of 1971, it is true that requiring the removal of a building at the end of a planning period deprives the applicant of his right to resume the former use of the land. The appellants claimed that the rights in question were those enjoyed between 1955-1959. But that does not avail them for they were illegal rights since all that the Home Office had was immunity from proceedings being taken in respect of the contravention of previous planning control because the Crown never received planning permission. In the circumstances there was an abandonment of use before 1955 and the observations of Bridge J. in *LTSS Print and Supply Services Ltd.* v. *Hackney London Borough Council* [1975] 1 W.L.R. 138, 142F–G are applicable. B C D

As to waste, if a condition is imposed that the recipient cannot carry out then he has a right of appeal against it. This point would equally apply to a question of operations on land or buildings. E

It is further said that the condition was void because if the local planning authority wished to have these hangars removed the correct procedure was for them to have gone under sections 51 or 52 of the Act of 1971. But the fact that the matter could have been dealt with under other provisions is nihil ad rem. It is not a relevant consideration in law that there were other methods available to the local planning authority to achieve the same object but involving the payment of compensation under section 51. Moreover, it is wholly unrealistic in the present case to suggest that because some kind of statutory agreement might have been reached under section 52 it should have been used when no-one considered it relevant and all parties considered the condition to be an acceptable way of achieving the local planning authority's known planning objections. The Court of Appeal were not satisfied that Berkshire County Council might have achieved the objective of the removal of the hangars by proceeding under section 16 of the Berkshire County Council Act 1953. F G

As to the meaning of " repository," it is not every use which fits into a use class. There are many that do not: *Tessier* v. *Secretary of State for the Environment* (1975) 31 P. & C.R. 161. The Home Office user was the same sui generis user as that in the *Tessier* case. The Home Office use was not within Class X of the Order of 1950 at all. The Secretary of State was entitled so to hold. H

If the ambit of Class X is as wide as the appellant company contend

A then a museum would come within Class X, but a museum is specifically included in Class XVII. A burial ground is a good example of a repository that does not come within the ambit of Class X. This shows that the dictionary definition of "repository" cannot be imported as a definition into Class X. The word "repository" has been consistently defined by the courts as being a building where goods are kept or stored in the course of a trade or business: see, for example, *G. Percy Trentham Ltd.* v. B *Gloucestershire County Council* [1966] 1 W.L.R. 506, 513, *per* Diplock L.J. Further, the definition of "repository" contained in the Order of 1958 is irrelevant in construing the Order of 1950: see *Calcaria Construction Co. (York) Ltd.* v. *Secretary of State for the Environment*, 72 L.G.R. 398, 401, *per* O'Connor J.

The Home Office user as storage of civil defence vehicles necessitated C no traffic to the premises save in the event of a national emergency whilst the user by the appellant company necessitated a great deal of traffic to and from the site. This is what impressed the inspector and the Secretary of State. If there is some element on which the Secretary of State could find as he did then the authorities show that the courts will not disturb his decision without his finding was perverse, in the sense that the evidence could not support it: *Bendles Motors Ltd.* v. *Bristol Corporation* [1963] D 1 W.L.R. 247. Reliance is placed on the observations of Lord Reid in *Cozens* v. *Brutus* [1973] A.C. 854, 861, 862, that it is a question of fact what is the meaning in the ordinary use of the English language of, in the present case, the word "repository." Then it has to be considered in its context. It is to be noted that not only the Secretary of State but all members of the courts below found for the definition of "repository" as contended for by the respondents. "Repository" in the present context E has to be construed in a more limited sense than its ordinary natural meaning. Whether or not a given use falls within a particular use class is a matter of fact and the Secretary of State on that matter of fact will not be disturbed by the courts: *LTSS Print and Supply Services Ltd.* v. *Hackney London Borough Council* [1976] Q.B. 663.

The purpose of the Use Classes Order is to relieve the developer from F seeking planning permission for what would otherwise be a material change of use and therefore one would expect to find some similarities between the various uses mentioned in a given class. Thus there is a genus in Class XI: "Use as a boarding or guest house, a residential club, or a hotel providing sleeping accommodation." If Class X was concerned with storage per se it would merely have contained the words "a store for any purpose." The issue on the present appeal on this question comes down G to the meaning of the word "repository" as a question of fact. Was the Secretary of State's decision in the present case untenable or perverse or so unreasonable that no Secretary of State could have reached it? The answer is plainly in the negative.

On "blowing hot and cold," the argument can be put in three ways: (1) as it was adumbrated in *Prossor* v. *Minister of Housing and Local* H *Government*, 67 L.G.R. 109. (2) As an application of the maxim, he who enjoys the benefit must suffer the burden. (3) Election.

(1) Hitherto the *Prossor* principle has only applied to building operations. It has not yet been extended to where there has been a change of

development. This issue can be put in three alternative ways: (a) Where a planning permission is sought, granted and implemented, the planning history starts afresh. (b) Alternatively, and more narrowly, the planning history starts afresh where the acceptance and implementation of the planning permission is inconsistent with reliance on earlier existing use rights. In the present case there is an assumption that there was a lawful condition for removal of the hangars. Earlier existing use rights, namely, as a warehouse or a repository are inconsistent with existing use rights— they are inconsistent with the permission of 1962, because once the hangars had been removed clearly there can be no use of the land as a warehouse. This is akin to a waiver. This second formulation of the argument is more restrictive because some of the cases subsequent to the decision in *Prossor* v. *Minister of Housing and Local Government*, 67 L.G.R. 109, have queried the width of the language used by Lord Parker C.J. in *Prossor*. The key word in both formulations in (a) and (b) is "implemented." (c) This is the narrowest formulation: the planning history starts afresh as under (b) above except where no permission was ever required either because the use was in existence on July 1, 1948, or because there was a deemed permission under the general development order. The respondent relies on formulations (a) and (b).

There are five cases on the principle adumbrated in *Prossor* all of which have been decided within the last ten years whilst the cases relied on to the contrary by the appellants are very much older. Those on which the respondents rely are: *Prossor* v. *Minister of Housing and Local Government*, 67 L.G.R. 109; *Gray* v. *Minister of Housing and Local Government*, 68 L.G.R. 15; *Petticoat Lane Rentals Ltd.* v. *Secretary of State for the Environment* [1971] 1 W.L.R. 1112; *Kingston-upon-Thames Royal London Borough Council* v. *Secretary of State for the Environment* [1973] 1 W.L.R. 1549 and *Leighton and Newman Car Sales Ltd.* v. *Secretary of State for the Environment* (1976) 32 P. & C.R. 1.

True, all the above were cases where some building was permitted by the planning permission. It is also conceded that the principle has not yet been extended to an exclusively change of use case but (i) there seems no reason in principle why the doctrine of *Prossor* should not apply to a change of use case, and (ii) it would make for confusion if one of two kinds of planning act development was subject to the *Prossor* principle whilst the other was not. So many cases are both development by operation and development by change of use. This could lead to complex situations and problems. What was done in the present case was what was contemplated by the Court of Appeal in *Leighton and Newman Car Sales Ltd.* v. *Secretary of State for the Environment*, 32 P. & C.R. 1.

(2) Another way of looking at the quasi-estoppel or election in this case is to see it as an application to planning law of the principle that a benefit cannot be taken without associated burdens. The appellant company, having taken the benefit of the 1962 permission, cannot now allege that permission was unnecessary in order to avoid the obligations attached to the permission. The application of the maxim, qui sentit commodum sentire debet et onus to planning cases was discussed in argument in *Brayhead (Ascot) Ltd.* v. *Berkshire County Council* [1964] 2 Q.B. 303,

A 308, but whether it could be applied in such cases was specifically left undecided (p. 315). The maxim is merely a way of formulating the quasi-estoppel or election which can arise in a wide variety of circumstances of which the present case is one example. Examples of its application, neither of them planning cases, are to be found in *Halsall* v. *Brizell* [1957] Ch. 169 (an obligation to contribute to the maintenance of an easement) and *E. R. Ives Investment Ltd.* v. *High* [1967] 2 Q.B. 379 (another ease-
B ment case), but there is no logical reason why the principle should be inapplicable to planning cases. There was a discussion of the principle (in the very different context of the Workmen's Compensation Acts) in this House in *Lissenden* v. *C.A.V. Bosch Ltd.* [1940] A.C. 412 and in *Young* v. *Bristol Aeroplane Co. Ltd.* [1946] A.C. 163. The question of loss of a planning permission by abandonment (in very different circum-
C stances from the present case) was also discussed in *Slough Estates* v. *Slough Borough Council (No. 2)* [1971] A.C. 958, but the point was left specifically undetermined by Lord Pearson at the end of his speech (p. 971F).

(3) The appellant company's conduct can also be seen as raising a quasi-estoppel or election; the company could have made in 1962 the inquiries which it made in 1972 and the question could then have been
D resolved. The choice between two inconsistent courses, which is a prerequisite of an election, can be based on implied knowledge of the existence of those two courses as well as on actual knowledge. The doctrine is set out in *Spencer Bower and Turner, Estoppel by Representation*, 3rd ed. (1977), p. 313.

In 1962 the appellant company by its actions led the planning auth-
E ority to believe that it was relying on the planning permission granted in 1962 to the exclusion of previous planning permission. If it had been made plain that the company was relying on existing use rights then the local planning authority would have made a discontinuance order with a ten year condition.

As to the argument advanced on behalf of the Secretary of State that
F the principle enunciated by Lord Denning M.R. would cause uncertainty, the contrary was in fact the case, because the 1962 planning permission was a document certain in its terms and available to any purchaser, whereas the rights claimed by the company depended on an examination of uncertain facts said to be established by imprecise evidence, which would have become inevitably more imprecise by the passing of time.

Newey Q.C. in reply. The effect of section 88 (7) of the Town and
G Country Planning Act 1971 is to provide that whenever an appellant has appealed, for example on ground (*b*) of section 88 (1), then the Secretary of State has jurisdiction and the effect is the same as if the appellant has actually lodged an appeal under section 88 (1) (*a*). On the Secretary of State receiving an appeal pursuant to section 88, which includes an appeal under ground (*b*), his first function is to decide whether the appeal under
H ground (*b*) is valid or not. If he decides that the appeal under ground (*b*) should be upheld then he quashes the enforcement notice. The effect of that is to place the appellant in a position which cannot be challenged. In the present case if the Secretary of State correctly decided that the con-

dition was invalid then the company is in a completely unchallengeable position. The company has used these hangars for storage since before 1963. If the Secretary of State decided that the company had existing use rights then the enforcement notice must be quashed since the use existed before 1963 and again the company is in an unchallengeable position.

As to tests of legal validity, the difference with the respondents appears to be one of wording rather than of substance. It is said that the Secretary of State mis-directed himself in law but if one peruses the Inspector's report it will be seen that he does not rely on Circular 5–68. It is plain on the documents that the Secretary of State did not mis-direct himself.

It is not necessary for the House to determine the question of waste. But as a general proposition it is a question of unreasonableness for the Secretary of State to consider.

On "blowing hot and cold," in so far as existing use rights are concerned: see section 94 of the Town and Country Planning Act 1971. *Prossor* v. *Minister of Housing and Local Government,* 67 L.G.R. 109, and that line of cases were correctly decided where as in those cases there are building operations. The principle in *Prossor* has nothing to do with estoppel but with the principle that planning rights exist in rem. The test is a practical one: Has a new planning unit come into existence where building operations are involved? If the physical character of the land has been altered substantially so as to create a new planning unit then a new planning history begins.

A mere permission for change of use does not alter the physical nature of the land and does not create a new planning history. If the *Prossor* principle were extended it would lead to great difficulties: see section 22 (1) of the Act of 1971. A building, engineering or mining operation all affect the physical character of the land to create a new planning unit. On the other hand, a change of use can rarely create a new planning unit in the Crown's submission. It is conceded, however, that there are circumstances where this could happen, for example, where permission is granted to change the use of residential premises in single occupation to a multi-occupation use, such as where a house is divided into flats.

Widdicombe Q.C. in reply. A perusal of the leases in this case shows that the hangars were not chattels but part of the realty. As to section 88, the key subsection containing the powers of the Secretary of State is subsection (5). Subsections (6) and (7) are machinery to implement the provisions of subsection (5).

As to the three tests for validity of the condition, the second test that the condition "must fairly and reasonably relate to the permitted development" is in the statute. It is an advantage in the administration of planning law to have three and not two tests. The appellants would refer once again to section 29 of the Act of 1971 and of the examples contained in section 30. If the second test is to be treated as separate then the third test has still a reasonable life and scope of its own.

As to *Kruse* v. *Johnson* [1898] 2 Q.B. 91, the appellants join issue with the respondents on the question of byelaw cases having any relevance in planning matters.

A It is pertinent to observe that if the language of Class X had read: " wholesale warehouse or store " this would have led to difficulties because it might have been considered to have included a departmental store and therefore the word " repository " was used instead of it. As to *G. Percy Trentham Ltd.* v. *Gloucestershire County Council* [1966] 1 W.L.R. 506 the definition adopted there of " repository " appears to have come from *Horwitz* v. *Rowson* [1960] 1 W.L.R. 803. But in that latter case the B definition of repository there given was not necessary to the decision. It is further to be noted that in the Use Classes Order 1950 the draughtsman uses the word " business " when he deems it necessary so to do.

The argument put forward on behalf of the Secretary of State in relation to the *Prossor* principle is adopted. Many of the earlier cases such as, for example, *Mounsdon* v. *Weymouth and Melcombe Regis Borough* C *Council* [1960] 1 Q.B. 645 were decided by Lord Parker C.J. who decided *Prossor,* 67 L.G.R. 109.

Boydell Q.C. in reply. On an examination of those cases in which Lord Parker was party to the decision it will be seen that in none of them was planning permission acted upon, which is the *Prossor* principle.

Their Lordships took time for consideration.

D

February 28. VISCOUNT DILHORNE. My Lords, on May 7, 1962, the appellants, the International Synthetic Rubber Co. Ltd. (hereafter referred to as " I.S.R.") sent to the Hungerford Rural District Council who were then acting for the Berkshire County Council, then the local planning authority, an application dated May 3, 1962, for permission to E use two hangars on what had been Membury Airfield as warehouses for the storage of synthetic rubber. They said that they were prospective buyers of the hangars from the Air Ministry and that as considerable capital outlay would be involved, " it would be appreciated if the planning authorities could see their way to giving their permission to cover as long a period forward as is possible."

I.S.R. were then occupying one of the hangars under a lease granted F to them by the Secretary of State for Air for nine years commencing on May 8, 1961.

On May 31, 1962, the Hungerford Rural District Council gave that company permission to use the two hangars as warehouses subject to two conditions, one being that " The buildings shall be removed at the expiration of the period ending December 31, 1972."

G The written statement of the Berkshire County Council which accompanied the county map in February 1960, said that:

> " Problems have arisen from time to time regarding the use of buildings on sites relinquished by government departments. These are often suitable in design for industrial or storage use, although frequently their location in open countryside renders them unsuitable H in location as permanent centres of employment, and detrimental to landscape amenities. The local planning authority will normally only permit permanent changes of use in localities appropriate in the

light of their general policy objectives for the distribution of employment; otherwise they will seek to secure the removal of the buildings. Temporary periods of changed use may be permitted in particular circumstances."

On July 26, 1962, I.S.R. bought the two hangars and the Secretary of State's leasehold interest in the land under a lease for 40 years which commenced on November 30, 1961.

I.S.R. did not, as they could have done, appeal against the imposition of the condition that the hangars should be removed. On November 4, 1969, they applied for planning permission to make an extension to an existing office on the airfield. They were given permission to do so subject to the condition that at the expiration of the period ending December 31, 1972, the building should be removed.

On November 5, 1970, I.S.R. applied for an extension of the permission to use the hangars as warehouses for 30 years. On January 4, 1971, this application was refused and on June 25, 1971, I.S.R. appealed against this refusal.

The two hangars and the extension to the office were not removed at the expiration of the period ending December 31, 1972, and on November 12, 1973, the hangars and extension still not having been removed, the Hungerford Rural District Council served two enforcement notices on I.S.R. requiring their removal within three months.

I.S.R. appealed against these notices to the Secretary of State for the Environment. Although the case in respect of the enforcement notice relating to the office extension differed in some respects from that relating to the notice applying to the hangars, it was agreed that the result of the appeal as to the notice in respect of the office extension should depend on and follow the result of the appeal as to the notice about the hangars. No separate argument was therefore advanced in connection with the office extension.

These appeals were brought under section 88 of the Town and Country Planning Act 1971 which provides for an appeal against an enforcement notice on any of seven grounds. In this case only the first two are relevant. They are as follows:

> "(1) . . . (*a*) that planning permission ought to be granted for the development to which the notice relates or, as the case may be, that a condition or limitation alleged in the enforcement notice not to have been complied with ought to be discharged; (*b*) that the matters alleged in the notice do not constitute a breach of planning control."

In the notice of appeal relating to the hangars it was asserted, first, that the condition as to the removal of the hangars was void with the result that the permission granted in 1962 was unconditional, and, secondly, that the authorised use of the hangars on July 1, 1948, the date when the Town and Country Planning Act 1947 came into force, was "warehouse/storage" and that the hangars were used for "warehouse/storage purposes throughout the period 1948/62."

If the authorised use of the hangars on July 1, 1948, was "warehouse/storage" and that use had not been abandoned or if the "existing

A use" of the hangars was for "warehouse/storage purposes," it was not necessary to apply for planning permission to use the hangars for those purposes.

The first question to be considered in this appeal appears to me to be: *Was planning permission necessary for the use by I.S.R. of the hangars as warehouses?*

Before making his decision on these appeals the Secretary of State B directed a local inquiry. The inspector who held the inquiry reported on February 5, 1975. His findings of fact were accepted by the Secretary of State and the relevant findings were as follows: that Membury Airfield ceased to be operational in 1947; that from 1947 to 1953 the hangars were used as a storage depot on behalf of the Ministry of Agriculture, Fisheries and Food; that in 1953 the airfield was transferred to the United States C Air Force and the use then made of the hangars is not known; that in 1954 it became a sub-depot of No. 3 Maintenance Unit at Milton; that from 1955 to 1959 the hangars were used by the Home Office for the storage of Civil Defence vehicles; and that in 1959 an 11 year permission was granted for the use of the hangars for the storage of fertilisers subject to the condition that at the end of that period the hangars would be removed.

D The inspector concluded on the facts that there was a clearly established use of the hangars when in Crown occupation prior to 1959 for storage and that the only gap in their use for storage was when they were used by the United States Air Force and that after that, use for storage was resumed. In his view the application for permission to use them for the storage of fertilisers in 1959 was unnecessary and I.S.R. did not E require planning permission to use them for storage as that was their previous use.

The Secretary of State in his decision letter of July 24, 1975, held that when the hangars were used for storage purposes from 1947 to 1953 and again from 1955 to 1959 the hangars formed an independent planning unit. He held that the Home Office use of them was not use as wholesale warehouses nor was it use as repositories coming within Class X of F the Town and Country Planning (Use Classes) Order.

It was not contended by the appellants that the use by the Home Office was use as wholesale warehouses but it was submitted that the hangars were then used as repositories.

By the Town and Country Planning (Use Classes) Order 1948 (which came into force on the same day as the Town and Country Planning Act G 1947) it was provided by paragraph 3 (1) that:

> "Where a building or other land is used for a purpose of any class specified in the Schedule to this Order, the use of such building or other land . . . shall not be deemed for the purposes of the Act to involve development of the land."

Class X in the Schedule read as follows: "Use as a wholesale warehouse H for any purpose, except storage of offensive or dangerous goods." And Class XI as follows: "Use as a repository for any purpose except storage of offensive or dangerous goods." "Repository" was defined in paragraph 2 (2) of this Order as meaning "a building (excluding any land

occupied therewith) where storage is the principal use and where no business is transacted other than incidentally to such storage." The meaning of " wholesale warehouse " was also defined.

In 1950 this Order was replaced by the Town and Country Planning (Use Classes) Order 1950. The purpose of this Order was to amalgamate certain of the use classes so that a wider range of changes of use might take place without involving development requiring planning permission.

Classes X and XI of the Order of 1948 were amalgamated and Class X in the Order of 1950 read as follows: " Use as a wholesale warehouse or repository for any purpose." In subsequent Use Classes Orders, this has not been altered.

The definitions of " repository " and " wholesale warehouse " were omitted from the 1950 and subsequent Use Classes Orders but, if it had been the intention that these words should bear a different meaning from that they bore from 1948 to 1950, I would have expected that to have been made clear.

In my opinion the definition of " repository " in the Order of 1948 is an excellent definition of the meaning that would ordinarily be given to that word.

The Secretary of State based his decision on a sentence of Lord Denning M.R. in his judgment in *G. Percy Trentham Ltd.* v. *Gloucestershire County Council* [1966] 1 W.L.R. 506. Lord Denning had pointed out that under Class X a building used as a repository for storing furniture could be used as a repository for storing archives without getting planning permission and then went on to say, at p. 512: " A repository means a place where goods are stored away, to be kept for the sake of keeping them safe, *as part of a storage business.*" (my emphasis).

In an earlier case *Horwitz* v. *Rowson* [1960] 1 W.L.R. 803, 810 Havers J. had said: " ' Repository,' I think, means a building wherein goods are kept or stored, and I think it must be in the course of a trade or business."

He did not say why he thought that nor did Lord Denning say why he thought that the storage must be part of a storage business. It may be that the conjunction of " wholesale warehouse " and " repository " in Class X of the Order of 1950 led to the view that as use as a wholesale warehouse would be use for a business purpose, use as a repository must also, to come within Class X, be for a business purpose but if this was so, the history of the Order shows, in my opinion, that it was not well-founded. A place may be used as a repository for archives without being used as part of a business, e.g. a muniment room. The merger of Classes X and XI of the Order of 1948 into Class X of the Order of 1950 was not done with the object of altering the meaning to be given to the word " repository " but to extend the changes of use that might be made without planning permission.

All the members of the Divisional Court (Lord Widgery C.J., Michael Davies and Robert Goff JJ.) and all the members of the Court of Appeal (Lord Denning M.R., Lawton and Browne L.JJ.) agreed that the use of the hangars by the Home Office was not use as a repository.

Despite the unanimity of judicial opinion and despite the strong view

A expressed by Lord Denning M.R. [1978] 1 W.L.R. 1241, 1250, that "no one conversant with the English language would dream of calling these hangars a 'repository' when filled with fire-pumps or synthetic rubber" and that of Lawton L.J., at p. 1253, that

> "As a matter of the ordinary modern usage of the English language, . . . no literate person would say that the use to which the Home Office had put the hangars in the 1950s was, or that the company
B are now, using them as a repository"

I feel compelled to say that to describe the use of the hangars when so filled as use for a repository is, in my opinion, a perfectly accurate and correct use of the English language. They were when used by the Home Office used as repositories for fire-pumps and so to describe them is just as correct as it is to describe a burial place as a repository for the
C dead.

The Secretary of State cannot be blamed for holding that they were not used as repositories coming within Class X in the light of what was said in *G. Percy Trentham Ltd.* v. *Gloucestershire County Council* [1966] 1 W.L.R. 506 but in my view it is wrong to say that to come within that class use as a repository must be use as part of a storage business.

D My conclusion on this part of the case is that the use by the Home Office was use as a repository coming within Class X and that, consequently, unless that use was abandoned—and that was not established—or unless I.S.R. cannot now rely on that use in consequence of "blowing hot and cold," I.S.R. can now, by virtue of Class X, use the hangars as wholesale warehouses without planning permission.

E *Blowing hot and cold*

The respondents contended that the appellant was precluded from relying on existing use rights and Class X as they had taken up and implemented the permission granted to them on May 31, 1962. This contention found favour with Lord Denning M.R. He said, that in 1962 I.S.R. had two inconsistent courses open to them, [1978] 1 W.L.R. 1241,
F 1250–1251:

> "One was to apply for a grant of planning permission; the other was to rely on any existing use rights that might be attached to the site. Once they opted for planning permission—and accepted it without objection—they had made their bed and must lie on it. No doubt they did not know of the past history, but that was only
G because they did not choose to rely on it. They should not be allowed to bring it up again now."

I do not know whether I.S.R. before they applied for planning permission in May 1962 and before they had acquired the hangars could have found out the past history but however that may be, I find this passage from Lord Denning's judgment difficult to reconcile with his
H acceptance of the argument advanced in *Gray* v. *Minister of Housing and Local Government* (1969) 68 L.G.R. 15 that the fact that a man applies for planning permission does not debar him from afterwards alleging that he was entitled to rely on "existing use" rights.

Lawton L.J. did not find it necessary to decide this question and Browne L.J. did not agree with Lord Denning on this.

It was not until the decision in *Prossor* v. *Minister of Housing and Local Government* (1968) 67 L.G.R. 109 that any support can be found for the proposition that application for followed by the grant and use of planning permission prevented reliance on existing use rights. In that case permission was given for the rebuilding of a petrol station subject to the condition that no retail sales other than of motor accessories should take place thereon. After the rebuilding second-hand cars were displayed for sale on the site. An enforcement notice was served. In the course of his judgment, with which the other members of the court agreed, Lord Parker C.J. said, at p. 113:

> "... assuming that there was ... an existing use right running on this land for the display and sale of motor cars, yet by adopting the permission granted in April, 1964, the appellant's predecessor, as it seems to me, gave up any possible existing use rights in that regard which he may have had. The planning history of this site, as it were, seems to me to begin afresh on April 4, 1964, with the grant of this permission, a permission which was taken up and used ..."

The correctness of this decision was doubted by Winn L.J. but not by Lord Denning M.R. in *Gray* v. *Minister of Housing and Local Government*, 68 L.G.R. 15. There the planning permission was to build premises twice the size of premises which had been destroyed by fire. Lord Denning doubted whether, having obtained that permission and having taken advantage of it by building the new premises, the appellants could afterwards rely on existing use rights. Winn L.J. did not think it necessary to decide the case on that ground. He thought that there was no sufficient proof of existing use rights.

These two cases were reviewed in *Petticoat Lane Rentals Ltd.* v. *Secretary of State for the Environment* [1971] 1 W.L.R. 1112. In this case Widgery L.J., with whose judgment Lord Parker C.J. agreed, while thinking that the *Prossor* case, 67 L.G.R. 109, was rightly decided, thought it was a case which should be applied with some little care. In this case planning permission was given for the erection of a building on a clear site and the building was put up. Widgery L.J. said, at p. 1117:

> "Where that happens ... in my judgment one gets an entirely new planning unit created by the new building. The land as such is merged in that new building and a new planning unit with no planning history is achieved. That new planning unit, the new building, starts with a nil use, that is to say, immediately after it was completed it was used for nothing, and thereafter any use to which it is put is a change of use, and if that use is not authorised by the planning permission, it is a use which can be restrained by planning control."

My Lords, there are a number of cases, of which *Mounsdon* v. *Weymouth and Melcombe Regis Borough Council* [1960] 1 Q.B. 645

A is one, in which it has been held that a grant of planning permission does not prevent it being subsequently contended that no such permission was necessary on account of existing use rights and I do not myself think that the decision in the *Prossor* case, 67 L.G.R. 109, is sustainable on the basis that the obtaining and taking up of planning permission in itself prevents reliance on such rights.

If, however, the grant of planning permission, whether it be permission to build or for a change of use, is of such a character that the implementation of the permission leads to the creation of a new planning unit, then I think that it is right to say that existing use rights attaching to the former planning unit are extinguished. It may be that in the *Prossor* case the erection of the new building created a new planning unit. If it did, and it is not very clear from the report, then in my view that case was rightly decided.

It is clear that in this case the grant of the planning permission in May 1962 did not create a new planning unit and so, in my opinion, I.S.R. were not precluded from relying on the existing use rights attaching to the site.

If, contrary to my view, planning permission was necessary for the use of the hangars by I.S.R., the validity of the condition attached to that permission has to be determined.

The validity of the condition

Section 29 (1) of the Town and Country Planning Act 1971 requires a local planning authority when dealing with an application for planning permission to have regard to the provisions of the development plan so far as material "and to any other material considerations," and gives the planning authority power, subject to the provisions of a number of sections (which have no relevance to this case) to grant planning permission, either unconditionally or subject to such conditions as it thinks fit or to refuse permission.

The power to impose conditions is not unlimited. In *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1958] 1 Q.B. 554 Lord Denning said, at p. 572:

> "Although the planning authorities are given very wide powers to impose 'such conditions as they think fit,' nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest."

As Lord Reid said in *Mixnam's Properties Ltd.* v. *Chertsey Urban District Council* [1965] A.C. 735, 751, this statement of law was approved by this House in *Fawcett Properties Ltd.* v. *Buckingham County Council* [1961] A.C. 636.

It follows that the conditions imposed must be for a planning purpose and not for any ulterior one, and that they must fairly and reasonably relate to the development permitted. Also they must not be so unreasonable that no reasonable planning authority could have imposed

them: see *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223; *Hall & Co. Ltd.* v. *Shoreham-by-Sea Urban District Council* [1964] 1 W.L.R. 240, *per* Willmer L.J. at p. 248, *per* Harman L.J. at p. 255, *per* Pearson L.J. at p. 261; *City of London Corporation* v. *Secretary of State for the Environment* (1971) 23 P. & C.R. 169 and *Reg.* v. *Hillingdon London Borough Council, Ex parte Royco Homes Ltd.* [1974] Q.B. 720.

The conditions in this case were clearly imposed for planning purposes. Did they fairly and reasonably relate to the proposed development? If they did not, it is unnecessary to consider whether they were so unreasonable that no planning authority could reasonably have imposed them. The Secretary of State came to the conclusion that the condition that the hangars should be removed at the end of the period during which their use as warehouses was permitted, did not fairly and reasonably relate to their use as warehouses. The Court of Appeal held that he was wrong.

In 1968 the Ministry of Housing and Local Government published a circular entitled " The Use of Conditions in Planning Permissions " as guidance to the use of the power. In the paragraph headed " Is the condition relevant to the development to be permitted? " the following appears:

> " A condition requiring the removal of an existing building, whether on the application site or not, will only be reasonable if the need for that removal springs directly from the fact that a new building is to be erected. It may so spring, for example, if with both buildings on it, the site would be overdeveloped. But the grant of permission for a new building or for a change of use cannot properly be used as a pretext for general tidying-up by means of a condition on the permission."

The attention of the inspector was drawn to this paragraph and it was contended that he and the Secretary of State had reached the conclusion that the condition did not fairly and reasonably relate to the permission granted on the ground that, in view of this statement in the circular, a condition requiring the removal of a building could not be attached to a permission relating to its use. If they had decided this question on this ground, they were in my opinion, wrong. Although it may be that only in exceptional cases could it be held that a condition requiring the removal of buildings fairly and reasonably related to the grant of permission for their use, such cases may occur.

I do not, however, think that the inspector or the Secretary of State decided this question on this ground. The inspector held that:

> ". . . the condition that such substantial and existing buildings as the two hangars should be removed would appear to flow from a general wish to restore the area as a whole rather than from any planning need arising from the actual purpose for which the permission was sought. It was not necessary to that purpose, or to the protection of the environment in the fulfilment of that purpose: it was a condition extraneous to the proposed use."

So he held that the condition was void.

The Secretary of State in his decision letter said:

> "The inspector's conclusions have been considered. It is evident that the local planning authority imposed the condition to remove the hangars to safeguard their long term policy for industrial development in rural areas and to secure the future improvement of the amenity of the area of the appeal site. It is considered however, in the circumstances of this case where planning permission was sought merely for a change of use of existing substantial buildings, that a condition requiring the removal of those buildings after the expiration of a specified number of years was not sufficiently related to the change of use in respect of which the planning permission was granted and was unreasonable."

This appears to me in substance to be a repetition in different language of the inspector's conclusion. The Secretary of State agreed with him as to the object the local planning authority had sought to achieve. They both emphasised the substantial nature of the existing buildings. The contention that the Secretary of State misdirected himself by holding that a condition requiring demolition of a building could not be attached to a use permission does not appear to me established.

If in the circumstances of this case the condition imposed was not, in the Secretary of State's opinion, fairly and reasonably related to the permission granted, the courts cannot interfere with his conclusion unless it is established that he misdirected himself or reached a conclusion to which he could not reasonably have come. That has not been done.

The Secretary of State held that the condition which in his view was invalid, was not severable from the permission granted and that consequently this permission was void. In my opinion he was entitled so to do and I consequently conclude that the enforcement notices were invalid and also that as the use of the hangars by I.S.R. started before January 1, 1964, no enforcement notice can now be served.

I would allow the appeals and restore the order of the Divisional Court. In my opinion the proper order as to costs should be that no order should be made in respect of the Secretary of State's costs and that the Newbury District Council should pay the appellants' costs in this House and in the Court of Appeal.

LORD EDMUND-DAVIES. My Lords, I seek to do no more than add some short comments on the three main issues involved in these appeals, as I share in the common agreement of your Lordships that the appeals must be allowed and the order of the Divisional Court restored, and this for the reasons advanced in the speech of my noble and learned friend, Viscount Dilhorne.

Of the three issues, the first logically calling for consideration is whether, on the true construction of Class X of the Town and Country Planning (Use Classes) Order 1950, the use by the Home Office of the former aircraft hangars between 1955 and 1959 for the long-term storage of civil defence vehicles constituted use as a "repository." A negative answer to that question has hitherto been given throughout by the

Secretary of State, the Divisional Court and the Court of Appeal. But the true answer, as I think, is that there was a Class X user of the hangars right back to 1950, when the Use Classes Order of that year put "wholesale warehouse" and "repository" uses for the first time in the same user class. It is common ground that the I.S.R. user was as a wholesale warehouse, and the sole dispute on this aspect of the case relates to the nature of the Home Office four years' user. If, as I.S.R. assert, it was as a "repository," it follows that the later user by them involved no material change of user and therefore no "development," and, accordingly, no planning permission was necessary. The issue accordingly resolved itself into the proper meaning of the term "repository." Havers J. said in *Horwitz* v. *Rowson* [1960] 1 W.L.R. 803, 810: "'Repository,' I think, means a building wherein goods are kept or stored, and I think it must be in the course of a trade or business." This was followed by the obiter dictum of Lord Denning M.R. in *G. Percy Trentham Ltd.* v. *Gloucestershire County Council* [1966] 1 W.L.R. 506, 512, that: "A repository means a place where goods are stored away, to be kept for the sake of keeping them safe, *as part of a storage business.*" (Emphasis added). But, my Lords, the relevant words of the Use Classes Order itself are "repository for any purpose," and the qualification judicially imposed was, with respect, contrary both to the Order itself and to the generally accepted meaning of "repository." There is, I hold, no material difference (as far as the Use Classes Order is concerned) between a furniture repository or a repository for archives (cited by Lord Denning M.R. as typical uses of the word) and the use of the hangars by I.S.R. as a wholesale warehouse. It follows, accordingly, that no planning permission was required by them in turning the hangars to such use.

My Lords, as to the earlier issue raised, that relating to the interpretation of sections 29 and 30 of the Town and Country Planning Act 1971, I desire to say no more than that, in my judgment, learned counsel for I.S.R. went farther than he need in submitting that a condition for removal of buildings could *never* be attached to a planning permission restricted to change of use. It is true that such was the view expressed in the ministry circular 5/68, issued in 1968 ("The Use of Conditions in Planning Permissions") and followed by the Secretary of State in the present case. But whether a removal condition may properly be imposed in *some* circumstances, wholly different from those of the present case, may on another occasion call for careful consideration. For present purposes it is sufficient to hold, as I do, that, in the circumstances of the instant case, the condition for removal of the hangars did not fairly or reasonably relate to the permitted development.

The third issue ("Blowing hot and cold") was not advanced at the inquiry and was therefore never considered by the Secretary of State. Nor was it raised in the notice of motion to the Divisional Court, though it was adverted to at the hearing, Michael Davies J. restricting himself to saying (1977) 75 L.G.R. 608, 612: "I do not think that there is any comfort for the appellant [Newbury District Council] in it," and Robert Goff J. expressing himself similarly. In the Court of Appeal it was sympathetically received by Lord Denning M.R. alone. Learned counsel for the

Secretary of State expressed alarm in this House at the prospect of the view expressed by Lord Denning M.R. receiving acceptance by your Lordships, envisaging as one of the possible results the destruction even of what had long been regarded as established rights of user. I restrict myself to saying that I am in respectful agreement with all your Lordships in holding that, on the facts of this case, the "hot and cold" doctrine should be regarded as having no application.

LORD FRASER OF TULLYBELTON. My Lords, these appeals, which were heard together, raise questions of planning law as it affects two hangars built by the Royal Air Force on Membury Airfield during the war. The hangars now belong to the International Synthetic Rubber Co. Ltd. ("I.S.R."), who are the appellants in one appeal. The appellant in the other appeal is the Secretary of State for the Environment. The respondent in both appeals is Newbury District Council. After the war the hangars were used for storing various things but it is unnecessary to go further back than 1955. From 1955 to 1959 they were used by the Home Office for the long-term storage of civil defence vehicles, including "Green Goddess" fire engines. In 1959 planning permission was given for the hangars to be used for the storage of agricultural products, subject to a condition that the buildings were to be removed at the expiration of a period ending December 31, 1970. Thereafter one of them was used for a time for storing fertilisers and agricultural goods. On May 31, 1962, planning permission was granted to I.S.R. by the predecessors of the respondents as planning authority, for use of the hangars as "warehouses." The permission was not expressed to be for a limited period, but it was subject to two conditions, one of which was that "The buildings shall be removed at the expiration of the period ending December 31, 1972." In July 1962 I.S.R., having been granted planning permission, bought the hangars and proceeded to use them as warehouses.

In 1970, when the time for demolition was drawing near, they applied for an extension of the planning permission for 30 years, but their application was refused by the respondents. I.S.R. appealed to the Secretary of State against the refusal, and on November 12, 1973, while the appeal was pending, an enforcement notice was served on them requiring them to comply with the condition that the hangars be removed. (A separate enforcement notice was served on I.S.R. at the same time relating to the removal of another small building. This notice was also the subject of an appeal which forms part of the present proceedings, but we heard no separate argument about it and I need not refer to it again.) I.S.R. appealed to the Secretary of State against the enforcement notice, and against the refusal to extend the planning permission for 30 years. After a public inquiry, the Secretary of State upheld I.S.R.'s appeal against the enforcement notice on the ground that the condition attached to the planning permission of 1962 was invalid and was not severable from the rest of the notice. But he rejected an argument for I.S.R. to the effect that no planning permission had been required in 1962 because the hangars had been in use since 1947 for a purpose in the same use class as wholesale warehouse. He dismissed the appeal against the refusal to extend planning permission for 30 years. The Divisional

Court refused an appeal against the Secretary of State's decision. The Court of Appeal allowed an appeal by the respondents and held that the enforcement notice was valid but they again rejected the argument that planning permission had been unnecessary. It will be convenient to consider that argument first.

Was planning permission necessary in 1962 *for use of the hangars as warehouses?*

The Town and Country Planning (Use Classes) Order 1950 provides in paragraph 3 that where a building or other land is used for a purpose specified in the Schedule to the Order, the use of the building or land for any other purpose of the same class shall not be deemed to involve development of the land in the sense of the Town and Country Planning Acts. The result is that planning permission for the change of use within the class is not required. Class X in the Schedule is as follows: "Use as a wholesale warehouse or repository for any purpose." It was common ground that the hangars had been used since 1959 as wholesale warehouses. It was also common ground that if the use of the hangars by the Home Office from 1955 to 1959 had been as "repositories" such use would be within Class X of the Order and that therefore no planning permission would be required to use them as wholesale warehouses. The question in dispute is whether the use by the Home Office for the long-term storage of civil defence vehicles was use as a "repository." The Secretary of State and all the learned judges who have so far considered this question have held that the Home Office did not use the buildings as repositories. It is therefore only with diffidence that I reach the opposite conclusion, as I feel bound to do. In the Court of Appeal, Lord Denning M.R. said that it was a matter of impression depending on the meaning that one gives to the word "repository" in one's own vocabulary: [1978] 1 W.L.R. 1241, 1249. He went on, at p. 1250:

> "My opinion is that no one conversant with the English language would dream of calling these hangars a 'repository' when filled with fire-pumps or synthetic rubber."

The other learned Lords Justices agreed with Lord Denning's view and they also expressed agreement with the statement by Lord Denning in the case of *G. Percy Trentham Ltd.* v. *Gloucestershire County Council* [1966] 1 W.L.R. 506, 512 as follows: "A repository means a place where goods are stored away, to be kept for the sake of keeping them safe, *as part of a storage business.*" (My italics). That statement was quoted by the Secretary of State in his decision letter in the present appeal and he naturally and properly relied upon it in making his decision. But the words in italics were not strictly necessary to the decision in the case of *Trentham.* They seem to have been taken from an earlier statement, which was also obiter, by Havers J. in *Horwitz* v. *Rowson* [1960] 1 W.L.R. 803, 810. In my respectful opinion, for the reason which I am about to explain, the words in italics are not correct.

The question is not simply what the word "repository" means in ordinary speech, but what it means as used in Class X of the Schedule

A to the Order of 1950. The two meanings are not necessarily identical. In ordinary speech the word is seldom used, but when used it is applied mainly to two things, a furniture repository and a repository for documents. In the latter sense it may be applied either to a building such as the Public Record Office or to places such as a safe or a desk in which a person's will or codicils are likely to be found after his death; in neither case is the storage "as part of a storage business." But the *Shorter* B *Oxford English Dictionary*, 3rd ed. (1944), p. 1707, gives the word a much more general meaning. It gives the first meaning of "repository" as "A vessel, receptacle, chamber, etc., in which things are, or may be placed, deposited, or stored." In this Order the meaning is not restricted, because Class X includes repository "for any purpose." It seems to me that buildings used for the long-term storage of vehicles fall clearly within that C description. The reason why the draftsman preferred the word repository to the commoner word "store" may be that "store" is sometimes used to include a retail shop such as a "department store."

If it were permissible to refer to the Use Classes Order of 1948, which was repealed and replaced by the Order of 1950, the matter would, I think, be even clearer because in paragraph 2 (2) of the Order of 1948 "repository" is defined as meaning "a building . . . where storage is D the principal use and where no business is transacted other than incidentally to such storage." In the Schedule to the Order of 1948, use as a wholesale warehouse and use as a repository were in separate Use Classes, numbered X and XI respectively. But in the Schedule to the Order of 1950 those classes were amalgamated and the definition of repository was omitted. Comparison of the two Orders is of course permissible, E but there is no way in which the courts can know for certain what was the purpose of these changes. In any event, what matters is their effect which has to be ascertained by construing the Order of 1950, and not by relying on the explanatory note attached to it which is not part of the Order but is intended merely to indicate its general purport. In these circumstances I do not think it would be legitimate to assume that the meaning of repository was the same in both Orders, or to use the 1948 F definition as an aid to construing the Order of 1950. I shall therefore disregard the Order of 1948.

It follows from what I have said that in my opinion the change of use from repositories to wholesale warehouses was a change between two uses, both of which were within Class X. It was therefore not development and did not require planning permission. So, unless I.S.R. G are precluded from relying upon the Home Office use of the buildings as repositories, it is immaterial whether the enforcement notice was valid or not.

Blowing hot and cold

In the Court of Appeal Lord Denning M.R. held that, even if the H hangars had been used as "repositories" by the Home Office, I.S.R. would not now be entitled to rely upon existing use rights derived from that use, because they had accepted and acted upon the grant of planning permission in 1962, which was subject to the condition of removal, and

they could not turn round now and say they did not need planning permission after all. That would be blowing hot and cold and should not be allowed. He applied the maxim of law and equity: "Qui sentit commodum sentire debet et onus." Mr. Boydell said that the planning authority had been prejudiced by I.S.R.'s apparent acceptance of the planning permission with its attached condition for nearly 10 years, and I was at first attracted by the argument. The principle for which Mr. Boydell contended was stated by him thus: "The planning history of a site starts afresh when the acceptance and implementation of planning permission is inconsistent with reliance on earlier existing use rights." I doubt whether that formulation really applies to the circumstances of the present case, because the implementation of the 1962 planning permission can hardly be said to have been inconsistent with reliance on earlier existing use rights during the period before December 31, 1972. During that period there was nothing to show whether I.S.R.'s use of the hangars was in reliance on the planning permission of 1962 or on earlier existing use rights. But apart from that point which arises on the facts of this appeal, I am of opinion that the principle contended for is unsound. It would introduce an estoppel or bar, personal to the particular party, which is quite inappropriate in this field of law, which is concerned with rights that run with land. To do so would lead to uncertainty and confusion. It would also interfere with the convenient practice whereby prospective vendors or purchasers of land apply for planning permission as a precaution if there is doubt about whether their proposals are already permissible or not. It would, moreover, be inconsistent with a number of decided cases, including *Mounsdon* v. *Weymouth and Melcombe Regis Borough Council* [1960] 1 Q.B. 645.

The only circumstances in which existing use rights are lost by accepting and implementing a later planning permission are, in my opinion, when a new planning unit comes into existence as in *Prossor* v. *Minister of Housing and Local Government*, 67 L.G.R. 109. That was a case where planning permission had been given for the rebuilding of a petrol service station and the rebuilding had been carried out. Lord Parker C.J. said, at p. 113:

> "... by adopting the permission granted in April 1964, the appellant's predecessor, as it seems to me, gave up any possible existing use rights in that regard which he may have had. The planning history of this site, as it were, seems to me to begin afresh on April 4, 1964, with the grant of this permission, a permission which was taken up and used ..."

Prossor's case was approved in *Leighton and Newman Car Sales Ltd.* v. *Secretary of State for the Environment* (1976) 32 P. & C.R. 1, 10, where the facts were very similar, and in *Petticoat Lane Rentals Ltd.* v. *Secretary of State for the Environment* [1971] 1 W.L.R. 1112 where a new building was erected covering the whole of an area of open land. Such physical alteration will normally be made only in implementation of planning permission for erection of new buildings, but it might be made in implementation of planning permission for a change of use in some circumstances. For example, as was suggested in argument, there

A is the case of a single dwelling house being divided into separate flats by purely internal alterations, for which the only planning permission required would be for a change of use. Accordingly I do not think that the principle should be limited to cases of planning permission for rebuilding, although it will only seldom apply to planning permission for change of use.

For these reasons I do not consider that I.S.R. are precluded from B relying upon their existing use rights derived from the Home Office use of the site. It follows that there is nothing to prevent their continuing to use the hangars as warehouses or, if they choose, reverting to using them as repositories.

Validity of the enforcement notice

C Having regard to the opinion which I have already expressed, it is not strictly necessary to consider this matter, but as we were urged by counsel for all the parties to give what guidance we could, I shall express my opinion on the questions that arise.

The power on which the respondents relied to justify the condition attached to the planning permission granted in 1969 was derived from section 17 (1) of the Town and Country Planning Act 1962, but it is D more convenient to refer to section 29 (1) of the Town and Country Planning Act 1971, which does not differ from the earlier enactment in any material respect. Section 29 (1) provides as follows:

> "Subject to the provisions of sections 26 to 28 of this Act, and to the following provisions of this Act, where an application is made to a local planning authority for planning permission, that authority, E in dealing with the application, shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations, and—(*a*) subject to sections 41, 42, 70 and 77 to 80 of this Act, may grant planning permission, either unconditionally or *subject to such conditions as they think fit*; . . ."

F The words that I have italicised would appear on their face to confer an unlimited power, but it is plain that the power is subject to certain limitations. If authority for that proposition is needed it is to be found in the speech of Lord Reid in *Kingsway Investments (Kent) Ltd.* v. *Kent County Council* [1971] A.C. 72, 86. In order to be valid, a condition must satisfy three tests. First, it must have a planning purpose. It may G have other purposes as well as its planning purpose. But if it is imposed solely for some other purpose or purposes, such as furtherance of the housing policy of the local authority, it will not be valid as a planning condition: see *Reg.* v. *Hillingdon London Borough Council, Ex parte Royco Homes Ltd.* [1974] Q.B. 720. Second, it must relate to the permitted development to which it is annexed. The best known state- H ment of these two tests is that by Lord Denning in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1958] 1 Q.B. 554 which has been followed and applied in many later cases. Lord Denning said, at p. 572:

> "Although the planning authorities are given very wide powers to impose 'such conditions as they think fit,' nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest."

One reason, relevant to the instant case, why it would be wrong to secure removal of buildings by the use of a condition unrelated to the permitted development is that it would enable the planning authority to evade its liability to pay compensation for removal under section 51 of the Act of 1971. Thirdly, the condition must be "reasonable" in the rather special sense of *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223, 229. Thus it will be invalid if it is "so clearly unreasonable that no reasonable planning authority could have imposed it" as Lord Widgery C.J. said in *Kingston-upon-Thames Royal London Borough Council* v. *Secretary of State for the Environment* [1973] 1 W.L.R. 1549, 1553.

There was no dispute between the parties that tests substantially in the terms I have set out were those relevant for the present purpose. It may not be strictly necessary to specify the second of these tests separately, as it may be included within the third, but I think it is desirable to set it out as a separate test lest it be overlooked.

It remains to ascertain whether the Secretary of State applied these tests in the present case. Clearly the condition for the removal of the buildings was imposed in furtherance of the authority's planning policy, and it therefore satisfied the first test. I think it also satisfies the third test. The second test raises more difficulty. The reasons for the Secretary of State's decision on this part of the appeal are given in paragraph 8 of his decision letter, which included the following passage:

> "It is evident that the local planning authority imposed the condition to remove the hangars to safeguard their long term policy for industrial development in rural areas and to secure the future improvement of the amenity of the area of the appeal site. It is considered however in the circumstances of this case where planning permission was sought merely for a change of use of existing substantial buildings, that a condition requiring the removal of those buildings after the expiration of a specified number of years was not sufficiently related to the change of use in respect of which the planning permission was granted and was unreasonable. It is therefore concluded that the condition was invalid. The allegation that [I.S.R.] failed to comply with the condition is therefore inappropriate. The appeal succeeds on ground (b) and the enforcement notice is being quashed."

Ground (b) is a reference to section 88 (1) (*b*) of the Act of 1971 which provides that an appeal may be taken to the Secretary of State against an enforcement notice on the ground: "(*b*) that the matters alleged in the notice do not constitute a breach of planning control." I am not sure whether paragraph 8 is intended to mean that a condition for removal

of buildings could never, as a matter of law, be sufficiently related to planning permission which was merely for a change of use (as distinct from permission for the erection of buildings), or that on the facts in this case, it was not related to the permission. On the whole I am inclined to think that the former view is correct, because the only circumstance of the case which is mentioned is that planning permission has been sought "merely for a change of use of existing substantial buildings." I am also influenced by the fact that that appears to be the opinion of the Secretary of State's department as set out in the circular 5/68, dated February 6, 1968, issued by the former Ministry of Housing and Local Government with its accompanying memorandum on "The Use of Conditions in Planning Permissions," paragraph 9 of which includes the following sentence:

> "A condition requiring the removal of an existing building, whether on the application site or not, will only be reasonable if the need for that removal springs directly from the fact that *a new building is to be erected.*" (My italics.)

That statement is, in my opinion, too absolute and the words in italics are not supported by authority. If (as I am inclined to think) it explains the reason on which the Secretary of State's decision was based, then the reason was, in my opinion, erroneous in law. But even if that is so, I am satisfied that, if the Secretary of State had correctly appreciated that a condition for removal of buildings attached to permission for change of use might be valid, he would nevertheless have certainly decided that in the circumstances of this case it was not sufficiently related to the permission and was therefore invalid. There was nothing that I can see about the change of use to a wholesale warehouse which required or justified a condition for removal of the buildings. The reason why the planning authority ordered their removal was to improve or restore the amenity of the neighbourhood by getting rid of ugly buildings. No doubt that was a very proper object, but it had nothing particularly to do with the use of the buildings as warehouses. The fact that the permission was in substance a temporary permission, as the Court of Appeal held, does not seem to me to be relevant to this matter.

Accordingly I am of opinion that, even giving this condition the benevolent treatment to which, like a byelaw, it is entitled, it was invalid. If planning permission had been required for the change of use in 1962, the Secretary of State would have been right in so deciding and also in deciding that, as the condition could not be severed from the permission, the permission itself was invalid, although his reason for doing so was (on my reading of his letter) wrong.

I would allow the appeal by I.S.R. with costs here and below against Newbury District Council. The Secretary of State must bear his own costs throughout.

LORD SCARMAN. My Lords, the House has under consideration two appeals. Both the Secretary of State for the Environment, to whom I shall refer as "the Minister," and the International Synthetic Rubber

Co. Ltd., to whom I shall refer as "the company," appeal against the reversal by the Court of Appeal of the decision of the Divisional Court dismissing the appeal of the Newbury District Council, to whom I shall refer as "the council," from a decision of the Minister allowing the company's appeal against an enforcement notice served on it by the Hungerford Rural District Council as agent for the local planning authority to whose statutory functions and duties the council has succeeded. The council, as local planning authority, seek to uphold a condition imposed by Hungerford Rural District Council upon a planning permission granted to the company on May 31, 1962, to use two ex-R.A.F. hangars as warehouses for the storage of synthetic rubber. The condition was that "The buildings shall be removed at the expiration of the period ending December 31, 1972." The Minister, holding that the condition was invalid quashed the enforcement notice. The Divisional Court agreed. But the Court of Appeal, ruling that the condition was valid, upheld the enforcement notice. This House gave leave to appeal.

The Minister announced his decision by letter dated July 24, 1975. He accepted the facts as found by his inspector after a public inquiry held by him in January 1975. The appeal site comprises two large aerodrome hangars on either side of an unclassified road and enclosed in a perimeter fence at the former Membury airfield some five miles north-west of Hungerford and just south of the M4 motorway. The freehold was vested in the Crown until 1961, when it was returned to the Gilbey family who had owned the land before the war.

The airfield is an area allocated on the county map for service requirements but is surrounded for the most part by land in agricultural use ("white" on the map, indicating that it is not planned to disturb the existing use). The airfield was operational until 1947. From 1947 until 1953 the two hangars were used by the Ministry of Agriculture, Fisheries and Food "as a buffer storage depot." In 1953 the depot was cleared and the airfield transferred to the United States Air Force for their use. The nature of the U.S.A.F. use is not known. In 1954 the Royal Air Force took over the airfield (including the hangars) for use as a sub-depot of No. 3 Maintenance Unit. From 1955 to 1959 the hangars were used by the Home Office for the storage of civil defence vehicles. In 1959 planning permission was granted to Mr. J. S. Gilbey (a member of the family whose land it had been before the war) for use of the hangars for the storage of agricultural products (including fertiliser). Permission was conditional upon the buildings being removed at the expiration of the period ending December 31, 1964—which was later extended to December 31, 1970. A certain Mr. James was allowed to use, and did use, one of the hangars for the storage of agricultural products and fertiliser. In 1961 the company began to use one hangar for the storage of synthetic rubber.

In 1962 there occurred the planning application and permission with which these appeals are directly concerned. On May 3, 1962, the company applied for permission to use the two hangars "as warehouses for the storage of synthetic rubber," declaring (with strict accuracy only so far as one hangar was concerned) that they were already in use for that purpose. On May 31, 1962, planning permission was granted subject to

A conditions. The relevant terms of the permission were that the local planning authority permitted:

> " Use of two hangars on Membury Airfield as warehouses . . . subject to compliance with the conditions specified hereunder: 1. The buildings shall be removed at the expiration of the period ending December 31, 1972. 2. . . . [irrelevant to the two appeals]."

B The reasons for the conditions were stated to be:

> " 1. To accord with the local planning authority's policy regarding industrial development in rural areas. 2. To safeguard the amenities of the area."

The company did not appeal against the conditions. But two months later, in July 1962, it took a long lease of the site, and put both hangars C to use as warehouses.

On November 5, 1970, the company applied for planning permission to use the hangars as warehouses for a further 30 years (i.e. until the expiry of their lease) from December 31, 1972. Clearly the company saw their right of use as based on a temporary permission expiring at the end of 1972. Permission was refused, and on June 25, 1971, the company appealed to the Minister. D

The company did not remove the hangars by December 31, 1972, but continued its use of them. On November 12, 1973, the local planning authority served an enforcement notice requiring the company to remove them. The company appealed to the Minister against the notice.

After stating the facts, the inspector, who took the public inquiry, E concluded:

> " . . . that there was a clearly established use of the appeal hangars when in Crown occupation, prior to 1959, for storage. Foodstuffs were stored from 1947 to 1953, then the hangars were part of a sub-depot for No. 3 Maintenance Unit at Milton, then from 1955 to 1959 they were used for storing civil defence vehicles."

F

He noted that, after a gap in 1953, when the United States Air Force had the use of the airfield, the storage use was resumed and commented that " The application for permission for storage in 1959 [the Gilbey application] appears to have been unnecessary." Though his report contains a very helpful discussion of what he calls " the legal implications " of the facts, he was careful to leave them to the Minister. He G contented himself with two recommendations confined to the planning aspects of the case: the first that, if the Minister decided that there had been a breach of planning control, the condition for removal of the hangars should not be discharged, and the second that the planning appeal should be dismissed.

Three questions arise on these facts. First, was planning permission H required when it was granted in 1962? I shall call this the existing use point. Secondly, if it was not, can the company now rely on an existing use right and so avoid the condition imposed, that the hangars should be removed by the end of 1972? I shall call this the estoppel point.

Thirdly, if planning permission was required, was the condition one which the local planning authority could lawfully impose? The first question turns on the true construction of the Use Classes Order 1950—the effective order in 1962. The second and third questions raise points of great importance in the law of planning control and its enforcement.

Existing use

The Town and Country Planning Act 1971 (the Act) consolidated the statute law relating to town and country planning in England and Wales. Part III (sections 22 to 53) provides for general planning control, and Part V (sections 87 to 111) for the enforcement of planning control. Section 22 (1) (which reproduces the earlier law) defines development as meaning "the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land." Subsection (2) provides that certain operations or uses of land shall not be taken to involve development of the land including

> "(*f*) in the case of buildings or other land which are used for a purpose of any class specified in an order made by the Secretary of State under this section, the use thereof for any other purpose of the same class."

This provision has been a feature of the legislation ever since the Town and Country Planning Act of 1947. A Use Classes Order had been made under that Act in 1948. It was revoked and replaced by the Use Classes Order 1950, which is the effective order for the purposes of these appeals. (In its turn it has been replaced by subsequent orders.) Where a building or other land is used for a purpose of any class specified in the Schedule to the order, its use for any other purpose of the same class shall not be deemed to involve development of the land: (article 3 (1)). The Schedule specifies, amongst other classes. "Class X—Use as a wholesale warehouse or repository for any purpose."

The purpose of the Use Classes Order becomes evident when one reaches section 23 (1) of the Act, which provides that subject to the provisions of the section "planning permission is required for the carrying out of any development of land." Since a change of use within a class is not deemed to involve development, planning permission for the change of use is not required. The effect, therefore, of Class X is that premises previously used as a repository for any purpose may be used as a wholesale warehouse; and vice versa. In neither case does the law deem any development to be involved or require the grant of planning permission. A comparison of the Order of 1950 with that of 1948, which it revoked, is, in my judgment, permissible and instructive. The Order of 1950 amalgamated certain use classes to be found in the earlier Order, thus permitting a wider range of changes of use to take place without the requirement of planning permission. The Order of 1948 placed use as a wholesale warehouse in Class X and use as a repository in Class XI: it also included definitions of "wholesale warehouse" and "repository." The Order of 1950 has no definition of either term: but, since the

purpose of the Order is the amalgamation of certain use classes to be found in the Order of 1948, it is legitimate, for the purpose of construing the Order, to note the meaning of these terms in the two use classes which the Order of 1950 has amalgamated into one (the new Class X). The Order of 1948 provided that "wholesale warehouse" means "a building where business, principally of a wholesale nature, is transacted," and that "repository" means "a building . . . where storage is the principal use and where no business is transacted other than incidentally to such storage."

It is common ground that the company uses the hangars as wholesale warehouses. If, therefore, the lawful prior use was that of a "repository for any purpose," planning permission was unnecessary: for there would be an existing use right entitling the company to use them as wholesale warehouses.

It is also common ground (though at one time the council was disposed to deny it) that the Crown use, which began in 1947 and with two "service" breaks continued until 1959, was lawful. The inspector has found and the Minister has accepted that this use was "for storage purposes." In other words, the hangars were buildings in respect of which there had been lawfully established an existing storage use prior to the arrival of the company on site.

The sole issue, therefore, is as to the meaning to be given to the words "repository for any purpose" where they appear in the Order. The company's submission is that "repository" is (as defined in the Order of 1948) a building used for storage, and that Class X includes such use "for any purpose." The Minister and the council submit that the context requires that a limitation be placed on the words "for any purpose," namely a limitation to the purposes of a storage business. This construction found favour with the Divisional Court and the Court of Appeal. Reliance was placed on *G. Percy Trentham Ltd.* v. *Gloucestershire County Council* [1966] 1 W.L.R. 506, a decision of the Court of Appeal. In that case the Court of Appeal reached the unsurprising conclusion that use as a farm shed was not use as a repository; Diplock L.J. commenting that nowhere, except in a court of law, did he think it would be argued "with gravity" that ordinary farm buildings are properly described as "repositories." In his judgment, however, Lord Denning M.R. essayed a definition of repository. He said, at p. 512: "A repository means a place where goods are stored away, to be kept for the sake of keeping them safe, as part of a storage business." The Court of Appeal applied this definition in this case. After hearing Mr. Widdicombe's submissions for the company (no doubt very persuasive, if his argument in this House be any guide), the Master of the Rolls felt that his "one answer" must be "a matter of impression." So far, I agree. But then he added [1978] 1 W.L.R. 1241, 1250: "My opinion is that no one conversant with the English language would dream of calling these hangars a 'repository' when filled with fire-pumps or synthetic rubber." I cannot, with respect, agree. I find that neither the standard English dictionaries nor my experience of the English language as writer and student suggest that the qualification "as part of a storage business" is to be embodied in the ordinary meaning of the

word "repository." The primary and literal meaning of "repository" is what anyone acquainted with its Latin origin would expect—a place or receptacle where things are stored. But there is also an old established secondary meaning "A place where things are kept or offered for sale; a warehouse, store, shop, mart": *Shorter Oxford English Dictionary*, 3rd ed., p. 1707, and repeated in subsequent editions. But this meaning is not limited to use "as part of a storage business." It embraces any business use, as distinct, for example, from a repository used for domestic, museum, or academic purposes. Two questions, therefore, arise. First, is "repository" used in the Order in its primary, or literal, sense? Secondly, if not, is the term "use as a repository" a reference to a general business use or to a use limited to that of a storage business?

The language of the class is wide enough to permit the primary, or literal, meaning. But the context, I think, makes the secondary, but well established, meaning the more likely. In this respect, I note that Havers J. in *Horwitz* v. *Rowson* [1960] 1 W.L.R. 803, 810, defined "repository" as a building wherein goods were kept in the course of trade or business. Although the various classes scheduled to the Order make strange reading and include some oddly assorted bedfellows, they are classes. The Order being part of the apparatus of planning control, I look for a planning link between the several members of each class: and this is not difficult to ascertain, though the linkage is looser in some classes than in others. So far as Class X is concerned, if each of the two specified uses is a business use, the planning link between them is established without doing any violence to the English language. But I cannot go the step further which was taken by Lord Denning M.R. in the *Trentham* case [1966] 1 W.L.R. 506 and construe the business use as limited to that of a storage business. The words "for any purpose," though consistent with a general limitation of the class to business use, negative the possibility of limiting use as a repository to a specific type of business. The express limitation of "wholesale" upon the warehouse use is to be contrasted with the express extension of the repository use to such use "for any purpose."

The question for decision is, therefore, whether the Crown use of the hangars for storage purposes between 1947 and 1959 was a business use. The word "business" is apt to include official or governmental business as well as commercial business. The relevance of business to planning is that it is associated with a certain character of development and a certain level of activity upon and adjacent to the land, e.g., the type of buildings and the level of traffic movement. As such, it matters not whether the Crown is storing goods in the hangars for the purposes of public business or a wholesaler for his private business purposes or any other commercial enterprise for its business purposes. To quote the Order of 1948, "where storage is the principal use and where no business is transacted other than incidentally to such storage," the nature or purpose of the business for which the repository is used is immaterial for planning purposes. The one essential limitation, which is to be compared with the "wholesale" limitation upon warehouse use, is implicit in the word "repository," namely, that the principal use is storage. So

understood, Class X does embrace the Home Office and Ministry of Food use. Mr. Boydell, for the council, sought to avoid this conclusion by submitting—correctly—that not all uses of land are included in the Use Classes Order. He urged upon the House the proposition that the Crown use was sui generis, (in English, a distinct, unique use) and not covered by Class X. I do not accept his proposition. Properly considered, the Crown use was as much a storage use for its business as would be that of any commercial enterprise for its business.

Accordingly, I think the *Trentham* limitation, "as part of a storage business," was erroneous and that Class X is wide enough to include the Crown use in this case. The Crown did, and the company does, use the hangars for storage, each for the purposes of its business: and no business is transacted on the site save that which is incidental to storage. My conclusion is, therefore, that the planning permission obtained by the company in 1962 was unnecessary. There was an existing use right by virtue of Class X of the Use Classes Order.

The estoppel point ("Blowing hot and cold")

The Court of Appeal did not have to decide whether the company by taking up and then exercising the 1962 planning permission had estopped itself from relying on its existing use right; for the court was unanimous that no such right existed. But, as your Lordships are agreed that planning permission was unnecessary, the point does now arise for decision.

In the Court of Appeal, Lawton L.J. found the point attractive, but, since it did not arise, expressed no final opinion. Browne L.J. did not find the point attractive. He said [1978] 1 W.L.R. 1241, 1256:

> "I will only say that as at present advised I am afraid that I do not agree with Lord Denning M.R. on this point, except where the circumstances are as in *Prossor* v. *Minister of Housing and Local Government*, 67 L.G.R. 109 and the cases which have followed and applied that decision—viz. where a new planning unit—and indeed in those cases a new physical unit—has been created."

Lord Denning M.R., however, was prepared to lay down a broad general principle. He said, at p. 1250:

> "*Blowing hot and cold.* In case I am wrong about 'repository' I must turn to the final point, which is this: seeing that I.S.R. accepted the grant of planning permission in 1962 (subject to the condition of removal), can they now turn round and say that they did not need planning permission at all? Being entitled, as they say, to use the hangars for storing rubber without any permission at all. Mr. Widdicombe submitted that they could. He referred to *Mounsdon* v. *Weymouth and Melcombe Regis Borough Council* [1960] 1 Q.B. 645 and *East Barnet Urban District Council* v. *British Transport Commission* [1962] 2 Q.B. 484. But Mr. Boydell on the other side referred to *Brayhead (Ascot) Ltd.* v. *Berkshire County Council* [1964] 2 Q.B. 303, 315; *Prossor* v. *Minister of Housing and Local Government*, 67 L.G.R. 109; *Gray* v. *Minister of Housing and Local Government*, 68 L.G.R. 15; *Petticoat Lane Rentals Ltd.*

v. *Secretary of State for the Environment* [1971] 1 W.L.R. 1112 and *Kingston-upon-Thames Royal London Borough Council* v. *Secretary of State for the Environment* [1973] 1 W.L.R. 1549, 1552. To my mind the maxim of law and equity applies here: Qui sentit commodum sentire debet et onus. He who takes the benefit must accept it with the burdens that go with it. It has been applied recently in *Halsall* v. *Brizell* [1957] Ch. 169 and *E. R. Ives Investment Ltd.* v. *High* [1967] 2 Q.B. 379, 394. It is an instance of the general principle of equity considered in *Crabb* v. *Arun District Council* [1976] Ch. 179, 187–188 and it is, in my view, particularly applicable in planning cases. At any rate in those cases where the grant of planning permission opens a new chapter in the planning history of the site."

His last sentence is an echo of *Prossor's* case, 67 L.G.R. 109, which, I think, was correctly decided. But, as I shall endeavour to show, it does not follow from the correctness of *Prossor's* case that "the general principle" of equitable estoppel is applicable to planning cases.

As every law student who has read the opening chapters of *Snell's Principles of Equity* (now in its 27th ed. (1973)), knows, equity, as a body of law ancillary to the common law, developed so as to provide a protection for interests in property which was more effective than the remedies available at law. The Court of Chancery acted on the conscience of the legal owner of property. Equitable interests were strictly not proprietary in character, but rights in personam. Although they have developed a proprietary character, they are not enforceable against all the world. The purchaser for value without notice is not bound. In the field of property law, equity is a potent protection of private rights, operating upon the conscience of those who have notice of their existence. But this is no reason for extending it into the public law of planning control, which binds everyone.

The case law does not support Lord Denning's view. In *Swallow and Pearson* v. *Middlesex County Council* [1953] 1 W.L.R. 422 Parker J. refused to hold that the plaintiffs, having treated an enforcement notice as a good notice, were estopped from denying its validity. He said, at p. 426: ". . . no person can waive a provision or a requirement of the law which is not solely for his benefit but which is for the public benefit."

In *Mounsdon* v. *Weymouth and Melcombe Regis Borough Council* [1960] 1 Q.B. 645 a Divisional Court, which included Lord Parker C.J., referred to "the principle" applied in *Swallow's* case with approval and held that appellants who had obtained a conditional planning permission were not precluded from arguing that it was unnecessary.

Although the point was not argued, this House in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1960] A.C. 260 implicitly accepted Lord Parker's view: for in that case the appellant company, though it had obtained a conditional planning permission, was granted a declaration that their development was authorised by the Malvern Hills Act 1924 and so did not require permission.

Mr. Widdicombe, for the appellants, referred us to other cases to the same effect; notably *East Barnet Urban District Council* v. *British*

A *Transport Commission* [1962] 2 Q.B. 484, in which Lord Parker C.J. was a member of the court.

My Lords, I agree with the view so consistently expressed by Lord Parker C.J. that it is wrong to introduce into public administrative law concepts such as equitable estoppel which are essentially aids to the doing of justice in private law. I forbear to discuss the cases upon which Lord Denning M.R. founded his view to the contrary because B Mr. Boydell for the respondents did not seek to rely upon them. Indeed Mr. Boydell based his argument on *Prossor's* case, 67 L.G.R. 109, the principle of which is independent of any equitable doctrine. Suffice it to say of the authorities mentioned by Lord Denning in the passage which I have quoted that, if and in so far as they suggest (and I do not think that they do) that equitable estoppel has a place in the C law of planning control, they are incorrect in law and should not be followed.

In *Prossor's* case Lord Parker C.J. enunciated a genuine planning principle. The appellant's predecessor in title had obtained planning permission for the rebuilding of a petrol service station on a by-pass. It was subject to a condition that no retail sales other than the sale of motor accessories should be carried out on the site. The appellant D displayed on the site second-hand cars for sale. Being served with an enforcement notice, he claimed an existing use right. Though it was held that he had not established an existing use right, the Divisional Court also held that, by reason of the exercise of the planning permission to rebuild, the appellant was bound by the condition attached to the permission.

E The case has nothing whatever to do with equitable estoppel. The permission was for a new operational development of the site, i.e. the rebuilding. Lord Parker C.J. put it thus, at p. 113:

> "The planning history of this site, as it were, seems to me to begin afresh on April 4, 1964, with the grant of this permission, a permission which was taken up and used. . . ."

F *Prossor's* case has been followed in a number of cases. Their effect is accurately summarised by Browne L.J. in the passage from his judgment which I have already quoted. *Prossor's* case was approved by the Court of Appeal in *Gray* v. *Minister of Housing and Local Government*, 68 L.G.R. 15 and by the Divisional Court (Lord Parker C.J. presiding) in *Petticoat Lane Rentals Ltd.* v. *Secretary of State for the Environment* [1971] 1 W.L.R. 1112. It has never, however, been applied—so far as G the researches of counsel have been able to ascertain—to a change of use case. In every case the permitted development which has been held to begin a new planning history has been operational in character: i.e., it altered the physical nature of the land by building, mining, or other engineering works.

Mr. Widdicombe for the company submitted at the outset of his H argument—and at that stage he was supported by Mr. Newey for the Minister—that the principle in *Prossor's* case, 67 L.G.R. 109, is not applicable to a "change of use" case, where there is no building or other physical operation covered by the planning permission. Clearly it

will be much more difficult to establish the creation of a new planning unit or the beginning of a new chapter of planning history where the unnecessary permission which has been granted subject to conditions purports to authorise only a change of use. But such cases can exist, as at a later stage in the argument counsel for the Minister was able to show: e.g., where permission is granted to change the use of residential premises in single occupation to a multi-occupation use. There is in such a case a wholly new departure, a new chapter of planning history. It would be a negation of sound planning if the conditions attached to the multi-occupation use could be avoided merely because prior to such use the premises had the benefit of an existing residential use in single occupation. I conclude, therefore, that *Prossor's* principle is of general application where it can be shown that a new planning unit has been brought into existence by the grant and exercise of a new planning permission. But, where *Prossor's* case does not apply, the grant of an unnecessary planning permission does not preclude a landowner from relying on an existing use right.

Upon the facts of this case, it is, however, not possible to apply the *Prossor* principle. Planning-wise, upon the facts as found by the inspector and accepted by the Minister, there was no departure from the previous use substantial enough to justify the inference that a new unit had been created or a new planning history begun. I, therefore, reject the submission to the contrary made on behalf of the council.

The validity of the condition

My Lords, it is strictly unnecessary for me to express a view on the validity of the condition. But the House has heard full argument on the point, and I have reached the clear conclusion that the Minister's decision that the condition was invalid cannot be said to be incorrect in law. I think it right, therefore, to state briefly the reasons for my conclusion.

The Divisional Court agreed with the Minister. But the Court of Appeal upheld the enforcement notice, ruling that the condition for the removal of the hangars was valid. In their view, it fairly and reasonably related to the permitted development, i.e. the temporary use of the hangars as warehouses for the storage of synthetic rubber.

The Court of Appeal was entitled to reverse the Minister only if he could be shown to have made an error in law: section 246 of the Act. The law is, I think, well settled save for one small area of doubt. Mr. Widdicombe, opening the appeal, suggested that the law requires three tests of validity, all of which, he submitted, must be satisfied. Mr. Newey for the Minister agreed with him. Mr. Boydell for the council suggested that there were really only two. The difference between them is semantic not substantial. The three tests suggested are: (1) The condition must fairly and reasonably relate to the provisions of the development plan and to planning considerations affecting the land, (2) it must fairly and reasonably relate to the permitted development, and (3) it must be such as a reasonable planning authority, duly appreciating its statutory duties, could have properly imposed. As Mr. Boydell said, test (3) is almost

A invariably wrapped up in the first two: but it is possible, though unusual, that a condition could in an exceptional case satisfy the first two tests but fail the third.

My Lords, I accept the appellant's submission that there are these three tests. The legal authority for the tests is to be found in the statute and its judicial interpretation. Section 29 (1) of the Act, substantially re-enacting section 14 (1) of the Act of 1947, provides as follows:

B "(1) Subject to the provisions of sections 26 to 28 of this Act, and to the following provisions of this Act, where an application is made to a local planning authority for planning permission, that authority, in dealing with the application, shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations, and—(*a*) subject to sections 41, C 42, 70 and 77 to 80 of this Act, may grant planning permission, either unconditionally or subject to such conditions as they think fit; or (*b*) may refuse planning permission."

Though the subsection speaks of "such conditions as they think fit," its opening words impose a limitation on the powers of the local planning authority including the discretionary power to impose conditions. In D dealing with the application for permission, it shall have regard to the development plan "so far as material to the application, and to any other material considerations." I construe "material considerations" in the context of the subsection as a reference to planning considerations.

The subsection therefore expressly mentions the first two tests. The third test arises from the application to the planning law of the reasonableness test as enunciated by Lord Greene M.R. in *Associated Provincial* E *Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223.

This view of the subsection and its predecessor has been accepted by a line of authoritative judicial decisions, the most notable of which are *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* when in the Court of Appeal [1958] 1 Q.B. 554 and *Fawcett Properties Ltd.* v. *Buckingham County Council* [1961] A.C. 636. In the *Pyx* F *Granite* case at p. 572 Lord Denning said that "conditions . . . must fairly and reasonably relate to the permitted development." In *Fawcett's* case this House, in effect, adopted the three tests. Lord Cohen (pp. 660, 662) considered that the relevant questions which the court must answer were, as Mr. Megarry Q.C. had submitted, whether the scope of the condition was "unrelated to the policy declared in the outline plan or to any other sensible planning policy." Lord Denning G repeated his formula in the *Pyx Granite* case, adding, at p. 678, with a reference to the *Wednesbury* case, that "they [i.e. the local planning authority] must produce a result which does not offend against common sense." Lord Jenkins, at pp. 684–685, quoted Lord Denning's formulation in the *Pyx Granite* case with approval.

Fawcett's case [1961] A.C. 636 renders it unnecessary to cite further H authority, though there is plenty in the books, to establish the three tests. They have been recognised and adopted by the courts and this House.

The small area of doubt which remains is whether a condition for the removal of existing buildings can ever satisfy the tests if the

permitted development is limited to a change of use. The doubt is whether in such a case the condition could *ever* be said fairly and reasonably to relate to the permitted development. Indeed, the Court of Appeal has interpreted the Minister's decision as based on the view that in law no such condition can be imposed upon a "change of use permission." Browne L.J. put their view of the Minister's decision succinctly . . . [1978] 1 W.L.R. 1241, 1253: ". . . it is a holding of law that such a condition can *never* [emphasis supplied] be valid. . . ."

My Lords, if the Minister really did base his decision upon this view of the law, I would agree with the Court of Appeal that he erred in law. The point is not covered by any clear authority. But I would reject such a view of the law as being wrong in principle. First, the acceptance of an inflexible rule would, so far as it extends, preclude the application in change of use cases of the three recognised tests of validity. There would be substituted a rule of thumb for the exercise of the Minister's judgment upon the facts of the appeal.

Secondly, so various are the circumstances and interests affected by a planning permission that I would think it wrong, in the absence of an express statutory prohibition, to assert that, as a matter of law, a condition requiring the removal of buildings already in existence can never fairly or reasonably relate to a permission limited to a change of use. And the statute contains no express prohibition: for section 29 (1) leaves the imposition of conditions to the discretion of the local planning authority (and to the Minister on appeal). The validity of a condition must, therefore, depend in all cases upon the application of the three tests to the particular facts. If the permitted change of use is unlimited in time, it may well be fair and reasonable to require the removal of some existing buildings as a condition of the permission. But, if the permitted change of use should be for a limited period, the reasonableness of the condition may be more difficult to establish. In either case, the planning history, the situation of the land, the circumstances of all those interested in the land, and the existence of other statutory powers to achieve the same planning purpose would be relevant considerations.

In his decision letter the Minister gave the following reasons for holding the condition invalid. He said, in paragraph 8:

> "It is considered however in the circumstances of this case where planning permission was sought merely for a change of use of existing substantial buildings, that a condition requiring the removal of those buildings after the expiration of a specified number of years was not sufficiently related to the change of use in respect of which the planning permission was granted and was unreasonable. It is therefore concluded that the condition was invalid."

These words do not suggest to me that the Minister committed himself to the view of the law which the Court of Appeal has attributed to him. He noted that permission was sought "merely for a change of use of existing substantial buildings": he considered that the removal condition was "not sufficiently related to the change of use" and was unreasonable. With the greatest respect, the Court of Appeal has

misinterpreted the Minister's reasons. He did not hold that a condition for removal of buildings attached to a "change of use permission" could never be valid. He held that in the circumstances of this case the condition was not sufficiently related to the permitted change of use. The condition certainly related to the development plan and to planning considerations and so satisfied the first test. But did it satisfy the second test? Was it fairly and reasonably related to the permitted development, i.e. a temporary change of use? This was for the Minister in the light of all the circumstances to decide; and he decided it. I would comment only that the Minister, being the ultimate authority on planning questions arising in the enforcement of planning control, is the appropriate authority to determine whether a condition "sufficiently," i.e. fairly and reasonably, relates to the permitted development.

The Court of Appeal was led into error by their belief that the Minister based his conclusion upon a statement to be found in the Ministry of Housing and Local Government Circular 5/68. Lord Denning M.R. put it thus [1978] 1 W.L.R. 1241, 1247:

> "The present view of the ministry is contained in a circular which was issued in 1968 and is numbered 5/68, 'The Use of Conditions in Planning Permissions.' It is to the effect that, when an applicant applies for permission to *change the use of an existing building*, the local planning authority, when granting permission, can impose a condition limiting the period of time during which the building may be so used: but cannot impose a condition requiring the building to be *removed* at the end of that time. The crucial sentence in the circular is: 'A condition requiring the removal of an existing building, whether on the application site or not, will only be reasonable if the need for that removal springs directly from the fact that a new building is to be erected.'"

I agree that the circular has no legal effect and that, if in the sentence quoted it purports to lay down a rule of law, it is wrong. But how can it be said, as Lord Denning M.R. said, that this sentence in the circular represents "the present view of the Ministry upon the law"? The answer has to be—only if the Minister's letter of decision is to be read as saying so. But, my Lords, it says nothing of the sort.

I conclude, therefore, that the Minister made no error of law. That being so, his view—that a condition requiring the removal of existing substantial buildings was not sufficiently related to the temporary change of use for which permission was granted in this case—is unappealable: see section 246 of the Act.

My Lords, for all these reasons I would allow the appeals. I agree with the order for costs proposed by my noble and learned friend Viscount Dilhorne.

LORD LANE. My Lords, R.A.F. Station Membury was a wartime airfield built on requisitioned farming land. There were, apart from the usual concrete runways, perimeter tracks, hardstandings and so on, two hangars in which repair and maintenance of aircraft could be

carried out. The last aeroplane left Membury in about 1947. The hangars have since then had a chequered history. They are now (albeit functionally useful) an eyesore in otherwise pleasant countryside and, if aesthetic considerations were the only criterion, ought to be removed. The local planning authority (now Newbury District Council) contend that that is also the position in law, and the Court of Appeal have upheld that contention. They have decided that the present owners, the International Synthetic Rubber Ltd. (I.S.R.) are in law obliged to remove the hangars.

The history of the site, so far as it is known and material, is as follows. From 1947 to 1953 the hangars were used as a food storage depot by the Ministry of Agriculture, Fisheries and Food. For brief periods in 1953 the U.S.A.F. and in 1954 the R.A.F. used the airfield for purposes which are not known. From 1955 to 1959 the Home Office stored civil defence vehicles, fire-pumps and suchlike in the hangars. In 1959 planning permission was given for the use of the hangars for storage of agricultural products, subject to the condition that the hangars should be removed by a date later extended to December 31, 1970. In May 1962 permission was granted to I.S.R. as follows: "Use of two hangars on Membury Airfield as warehouses." That was qualified by two conditions:

> "(1) The buildings shall be removed at the expiration of the period ending December 31, 1972. (2) The use shall be confined to storage and no materials shall be stored which give rise to offence by reason of smell." For this reason: "(1) To accord with the local planning authority's policy regarding industrial development in rural areas. (2) To safeguard the amenities of the area."

The freehold title of the site was vested in the Crown until 1961. On November 30, 1961, the site was sold to the former owner and then leased back to the Crown for a period of 40 years. In July 1962 (i.e. after receipt of the permission) the lease was assigned and the hangars were sold to I.S.R. The terms of the particulars of sale imply, surprisingly, that the hangars were being treated as chattels, distinct from the realty. Nothing now turns on that point because the parties are all agreed that the hangars were and are, as one would expect, part of the realty.

Since then I.S.R. has used the hangars continuously for the storage of synthetic rubber. In November 1970 they applied for a postponement of the removal date to 2002. That was refused. By December 31, 1972, I.S.R. had taken no steps to comply with the condition by removing the hangars. In November 1973, therefore, the local authority served an enforcement notice. I.S.R. appealed under section 88 of the Town and Country Planning Act 1971. An inquiry was held in January 1975. The Minister's decision letter was published in July of that year. He allowed the appeal on the grounds that the condition imposed by the local authority was ultra vires and void. He further decided that the condition could not properly be severed from the permission and that the planning permission as a whole was void. If this conclusion is right, there is nothing at present to stop I.S.R. continuing

A to use the hangars as warehouses. This is because they started to use them as warehouses before 1963, and section 87 (1) of the Act of 1971 provides them in these circumstances with immunity. The Minister's view of the matter was upheld by the Divisional Court. The Court of Appeal, however, held that the condition was not ultra vires, that the enforcement notice was lawful and should be obeyed.

The issues are these. First, was any planning permission necessary B in 1962, that is, was there an existing use which absolved I.S.R. from the need for permission to use the hangars as warehouses? Secondly, if such was the case, are I.S.R. debarred from asserting that that is so? This has been referred to as the "blowing hot and cold" point. Thirdly, was the condition requiring the removal of the hangars outside the proper powers of the local planning authority and therefore void? C If the first two questions are decided in favour of the appellants, the third, although remaining important, would not affect the outcome whichever way it was decided.

Existing use

The use which I.S.R. assert was sufficient to render planning permission unnecessary in 1962 was the Home Office's storage of civil D vehicles from 1955 to 1959. That is the basis on which the case has been fought throughout.

The Town and Country Planning (Use Classes) Order 1950 provides by paragraph 3 (1) as follows:

> "Where a building . . . is used for a purpose of any class specified in the Schedule to this Order, the use of such building . . . for any E other purpose of the same class shall not be deemed for the purposes of the Act to involve development of the land."

Class X of the Schedule is "Use as a wholesale warehouse or repository for any purpose."

The present use is undoubtedly as a wholesale warehouse. If the previous use was as a "repository for any purpose," it follows that no F permission was necessary because permission is only required for development and if the change was only from one Class X use to another there was no development.

All those who have hitherto considered the matter have come to the conclusion that the use by the Home Office as a store for Civil Defence vehicles was not use as a "repository." That being so, one naturally hesitates to differ, but I fear I must. The first meaning of the word G given in the *Shorter Oxford English Dictionary* is "A vessel, receptacle, chamber, etc., in which things are, or may be placed, deposited or stored." The hangars fell plainly within this definition. The Court of Appeal held that a repository means "a place where goods are stored away, to be kept for the sake of keeping them safe, as part of a storage business." If those last six words properly form part of the definition H then the Home Office use did not constitute the building a repository. But are those words justified? Their origin is probably to be found in a judgment of Havers J. in *Horwitz* v. *Rowson* [1960] 1 W.L.R. 803, 810 "'Repository,' I think, means a building wherein goods are kept

or stored, and I think it must be in the course of a trade or business." No reasons are given for this conclusion. The same view was expressed (obiter) by Lord Denning M.R. in *G. Percy Trentham Ltd.* v. *Gloucestershire County Council* [1966] 1 W.L.R. 506, 512 and reiterated by him in the present case. As to the other point of view, exemplified by the *Oxford English Dictionary*, Lord Denning M.R. said this [1978] 1 W.L.R. 1241, 1249–1250:

> "The one answer I can give to this argument is that it is a matter of impression—depending on the meaning one gives to the word 'repository' in one's own vocabulary. My opinion is that no one conversant with the English language would dream of calling these hangars a 'repository' when filled with fire-pumps or synthetic rubber."

No doubt there are few people, however conversant with the English language, who would use the word "repository" at all. The question is, what does it mean in the Order of 1950? The word "store" might perhaps have been employed, but that would have led to confusion because the word is now commonly used to mean retail shop (e.g., "village store"). To my mind repository simply means a storage place. If there were any real doubt about the matter it would, I think, be resolved by the words which follow, namely "for any purpose." It is difficult to see how those words can possibly mean "for any purpose provided it is a business purpose." That is what the contention of the local authority entails. In my opinion I.S.R. had an existing use right under Class X and no planning permission was necessary.

Blowing hot and cold

The local authority contends further that even if the use made of the hangars by the Home Office fell within Class X of the Order of 1950, nevertheless it is not open to I.S.R. to rely on that existing use by reason of their applying for, receiving and using the planning permission of May 1962. In short they cannot now assert that no planning permission was necessary in the face of their 1962 actions.

This contention has been put in a number of different ways. Lord Denning M.R. put it thus [1978] 1 W.L.R. 1241, 1250–1251:

> "The truth is that, back in 1962, they had two inconsistent courses open to them. One was to apply for a grant of planning permission; the other was to rely on any existing use rights that might be attached to the site. Once they opted for planning permission—and accepted it without objection—they had made their bed and must lie on it. No doubt they did not know of the past history, but that was only because they did not choose to rely on it. They should not be allowed to bring it up again now."

Lawton L.J. found it unnecessary to decide the point. Browne L.J. felt unable to agree with the dictum of the Master of the Rolls on this aspect of the case, except insofar as it applies to circumstances where a new planning unit has been created. Nor does Mr. Boydell seek to

argue that the doctrine is of any more than narrow application. He contends, on the strength primarily of the decisions in *Prossor* v. *Minister of Housing and Local Government*, 67 L.G.R. 109 and *Leighton and Newman Car Sales Ltd.* v. *Secretary of State for the Environment*, 32 P. & C.R. 1. that where planning permission is "sought, granted and implemented" (as he puts it) the planning history starts afresh and any previous existing use must be ignored. Alternatively the planning history starts afresh where "the acceptance and implementation" of the planning permission is inconsistent with reliance on earlier existing right. It is inconsistent here, because the permission together with the condition as to removal of the hangars cannot live with the existing use right. In *Prossor's* case, 67 L.G.R. 109, the local planning authority granted permission for the rebuilding of a petrol station with a condition prohibiting any retail sales other than of motor accessories. The appellant nevertheless displayed second-hand motor cars on the site. An enforcement notice was served but the appellant claimed that the site had existing use rights for the sale of second-hand cars. The Minister upheld the enforcement notice. On appeal to the Divisional Court Lord Parker C.J. had this to say, at p. 113:

> "... assuming that there was at all material times prior to April 1964 an existing use right running on this land for the display and sale of motor cars, yet by adopting the permission granted in April 1964 the appellant's predecessor, as it seems to me, gave up any possible existing use rights in that regard which he may have had. The planning history of this site ... seems to me to begin afresh on April 4, 1964 with the grant of this permission, a permission which was taken up and used, and the sole question here is: has there been a breach of that condition?"

The facts in *Leighton and Newman Car Sales Ltd.* v. *Secretary of State for the Environment*, 32 P. & C.R. 1 were very similar to those in *Prossor's* case. Browne L.J. in delivering the judgment of the court said, at p. 10:

> "Mr. Payton made some criticism of *Prossor* v. *Minister of Housing and Local Government* ... but ... there is nothing to throw any doubt on the actual decision in that case, which was that where (as in the present case) there has been an application for a new planning permission and a grant of permission subject to an express condition prohibiting a previous established use, and the new permission has been acted on, the previous use is extinguished."

Taken out of context, those words seem to widen the scope of *Prossor's* case. They must, however, be read against the facts of the case which show that this was an extensive development involving not only the original site but the addition of two adjoining sites and the creation of access to the highway from the two new sites. It was, in short, the classic *Prossor* situation of a new planning unit being born.

The other cases relied on by Mr. Boydell all tell the same story. *Gray* v. *Minister of Housing and Local Government*, 68 L.G.R. 15 was

another rebuilding case. *Petticoat Lane Rentals Ltd.* v. *Secretary of State for the Environment* [1971] 1 W.L.R. 1112 concerned planning permission to erect a building upon an area of open land, a cleared bomb-site. Widgery L.J. in the course of his judgment in the Divisional Court said at p. 1117:

> "For my part I also think that it [*Prossor's* case] was entirely correctly decided, but I think that in extending and applying it we should tread warily and allow our experience to guide us as that experience is obtained . . . but I am quite confident that the principle of *Prossor's* case can be applied where, as here, one has a clear area of land subsequently developed by the erection of a building over the whole of that land. Where that happens . . . one gets an entirely new planning unit created by the new building. The land as such is merged in that new building and a new planning unit with no planning history is achieved."

Those words seem to me to express precisely and accurately the concept underlying *Prossor's* case, 67 L.G.R. 109. The holder of planning permission will not be allowed to rely on any existing use rights if the effect of the permission when acted on has been to bring one phase of the planning history of the site to an end and to start a new one. It may not always be as easy as it was in *Petticoat Lane Rentals* to say whether that has happened. There will no doubt be borderline cases difficult to decide, but that does not affect the principle. We were asked by Mr. Newey to say that the principle can only apply where the permission granted is to build or rebuild or the like and can never apply to cases where the permission is simply to change the use. I do not consider that any such limitation would be proper. It is not the reason for the break in planning history which is important. It is the existence of the break itself, whatever the reasons for it may have been. No doubt it will usually be a case of permission to build which will attract the doctrine, but I myself would not altogether rule out the possibility that in some circumstances the permitted change of use might be so radical as to fulfil the criteria of *Prossor's* case.

In the present case there is no such break in the history. The change of use from repository to wholesale warehouse could not by any stretch of the imagination be said to have started a new planning history or created a new planning unit. Indeed no one has so contended. I.S.R. succeed on this point.

Was the condition void?

The Town and Country Planning Act provides:

> " 29 (1) . . . where an application is made to a local planning authority for planning permission, that authority, in dealing with the application, shall have regard to the provisions of the development plan . . . and to any other material considerations, and—(*a*) . . . may grant planning permission, either unconditionally or subject to such conditions as they think fit. . . .

A "30 (1) Without prejudice to the generality of section 29 (1) . . . conditions may be imposed on the grant of planning permission thereunder—. . . (*b*) for requiring the removal of any buildings or works authorised by the permission, or the discontinuance of any use of land so authorised, at the end of a specified period . . ."

Despite the breadth of the words "subject to such conditions as B they think fit," subsequent decisions have shown that to come within the ambit of the Act and therefore to be intra vires and valid a condition must fulfil the following three conditions: (1) it must be imposed for a planning purpose; (2) it must fairly and reasonably relate to the development for which permission is being given; (3) it must be reasonable; that is to say, it must be a condition which a reasonable local authority properly advised might impose. The first test arises directly C from the wording of the material sections of the Act. The second test comes from the same sections as interpreted by Lord Denning in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1958] 1 Q.B. 554 and approved in this House by Lord Keith of Avonholm and Lord Jenkins in *Fawcett Properties Ltd.* v. *Buckingham County Council* [1961] A.C. 636 and by Lord Reid and Lord Guest in *Mixnam's Properties Ltd.* v. *Chertsey Urban District Council* [1965] A.C. 735. The D third test is probably derived from *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223, and ensures that the Minister, if he is asked to review the actions of a local authority, may, even if tests (1) and (2) are quite satisfied, nevertheless allow an appeal on much broader grounds, if the effect of the condition would be to impose an obviously unreasonable burden upon E the appellant. Decisions of the local planning authority should not, however, lightly be set aside on this ground. As Lord Guest said in *Mixnam's Properties Ltd.* v. *Chertsey Urban District Council* [1965] A.C. 735, 760–761:

"There should, however, in my view be a benevolent interpretation given to the discretion exercised by a public representative body F such as the appellants in carrying out the functions entrusted to them by Parliament. Courts should not be astute to find they have acted outside the scope of their powers."

In the present case there is no doubt that the removal of these hangars by 1972 together with their use meantime as a wholesale warehouse was the fulfilment of a planning purpose. The idea was in G accordance with the development plan and amply fulfilled the first test.

It is on the second test, whether one treats it as part of test (3) (as Mr. Boydell suggests one should) or as a matter to be considered separately, that difficulty arises. The Court of Appeal has, unlike the Divisional Court, found that the obligation to demolish the hangars after 10 years did truly relate to the permitted development. Since H the permitted development consisted not in permission to build but in a change of use of the hangar to the purpose of a warehouse, it is at first sight hard to see how the conclusions of the Divisional Court can be faulted. As Robert Goff J. said in his judgment, 75 L.G.R. 608, 616:

"I cannot see how a condition that the buildings be removed related to the permitted development in the present case, which was the use of the building as a warehouse for synthetic rubber."

The Court of Appeal took the view that the application by I.S.R. should be interpreted as an application for temporary use of the two hangars as warehouses; and that the permission should be read as permission for temporary use. So interpreted, it is said, a condition which specified a period of temporary use and a condition which required removal of the hangars at the end of that period both related to the permitted development. Assuming that those glosses upon both the application and permission are legitimate, it still seems to me, with respect to the reasoning of the Court of Appeal, that a condition requiring the hangars to be demolished cannot fairly be said to relate to the use of the hangars as warehouses. The fact that the use is to be temporary does not bring the requirement to demolish into any closer relationship with the permitted development. In my opinion the Minister arrived at the correct conclusion, namely that the condition did not relate to the permitted development, was void and therefore failed, taking with it the permission to which it was annexed.

It is not altogether clear on what precise basis the Minister reached his decision. We have been shown a circular emanating from the Ministry in 1968 containing certain guidelines which it suggests should be observed by local planning authorities when considering applications for planning permission. Paragraph 9 of that document states as follows:

"*Is the condition relevant to the development to be permitted?* Unless it can be shown that the requirements of the condition are directly related to the development to be permitted, the condition is probably ultra vires. . . . The condition must be expedient having regard to the development which is being permitted; and where the condition requires the carrying out of works, or regulates the use of land, its requirements must be connected with the development permitted on the land which forms the subject of the planning application."

So far there can be no criticism. These suggestions are simply an amplification of the second test. At the end of paragraph 9, however, come the following words:

"A condition requiring the removal of an existing building, whether on the application site or not, will only be reasonable if the need for that removal springs directly from the fact that a new building is to be erected."

That is too sweeping a proposition. No doubt a condition requiring the removal of a building will usually relate to the permission only if the permission has been to erect a new building. There may however be exceptional cases, and some possibilities were suggested in argument, where a requirement to remove could properly be said to

relate to a mere permission to change the use. In short, the test is, does the condition fairly relate to the permission?; not, does the condition spring directly from the fact that a new building is to be erected? It is not clear which test the Minister applied here. The decision at which he arrived was correct whichever test he applied.

Since the decision was correct, the provisions of R.S.C., Ord. 94, r. 12 (5) do not require this House to remit the matter to the Minister for rehearing.

I would allow the appeal and restore the order of the Minister.

I agree with the order for costs proposed by my noble and learned friend, Viscount Dilhorne.

Appeals allowed.

Solicitors: *Treasury Solicitor; Herbert Smith & Co.; Sharpe, Pritchard & Co.*

J. A. G.

[HOUSE OF LORDS]

RANK XEROX LTD. . . . . RESPONDENTS

AND

LANE (INSPECTOR OF TAXES) . . . . . APPELLANT

1979 July 10, 11; Oct. 25

Lord Wilberforce, Viscount Dilhorne, Lord Salmon, Lord Russell of Killowen and Lord Keith of Kinkel

Revenue — Corporation tax — Allowance of charges on income — Company's rights to payments from overseas company pursuant to agreements executed under seal — Disposal by distribution to shareholders—Whether payments "due under a covenant"—Whether "annual payments"—Whether company relieved from liability on notional gain arising from distribution of its rights to payments—Finance Act 1965 (*c.* 25), *Sch.* 7, *para.* 12 (*c*)

Paragraph 12 of Schedule 7 to the Finance Act 1965 provides:

> "No chargeable gain shall accrue to any person on the disposal of a right to . . . (*c*) annual payments which are due under a covenant made by any person and which are not secured on any property."

In 1956 an English company and one of its subsidiaries agreed with an American corporation, X, to engage in a joint venture for the world wide exploitation, outside the United States of America and Canada, of a reproduction process called xerography. Pursuant to the agreement the taxpayer company was formed and X transferred to it all patents, patent applications and licence rights relating to the process. Following two further agreements under seal in 1964 and 1967, in

*233 Bernard Wheatcroft Ltd. v Secretary of State for the Environment and Another

Mixed Judicial Consideration

Court
Queen's Bench Division

Judgment Date
24 October 1980

Report Citation
(1982) 43 P. & C.R. 233

Queen's Bench Division

Forbes J.

October 21 and 24, 1980

Town and country planning—Planning permission—Whether power in local planning authority or Secretary of State to grant planning permission for smaller development than that for which permission applied for—Whether proper test whether development proposed in application for planning permission severable or whether to allow development subject to condition that size of development should be reduced would be to allow development in substance not that for which planning permission applied for—Planning judgment—Matters to be taken into account—Whether those who should have been consulted on changed development deprived of opportunity of consultation

The applicants applied to the local planning authority for planning permission for a housing development comprising approximately 420 dwellings on 35 acres. The local planning authority refused permission, and the applicants appealed to the Secretary of State. Prior to the opening of the inquiry, the applicants indicated to the local planning authority that they were proposing to put forward at the inquiry an alternative proposal for 250 dwellings on 25 acres, that alternative proposal to be considered only if the issue of scale of development was deemed to be critical to the determination of the appeal. That alternative proposal was duly put forward at the inquiry. The local planning authority contended that the Secretary of State could not legitimately reduce the area of the appeal site by 10 acres and only had power to deal with the application as submitted. The inspector in his report concluded that if the appeal was restricted to consideration of 420 dwellings on 35 acres it should, on the planning merits, be dismissed but that if it was permissible to reduce the area to 25 acres and for the number of dwellings to be reduced such development would not be objectionable and planning permission should be granted accordingly. The Secretary of State in his decision letter said:

> Having regard to the inspector's conclusions concerning a smaller site than that proposed in the application under appeal, whilst it is accepted that there are circumstances where a split decision would be appropriate, the opinion is held that where an appeal results from an application for permission to erect a specified number of dwellings without any indication at all of their sizes or of the individual plots, the proposed development is not severable and it would be improper to purport to grant permission in respect of part of the site or for a lesser number of houses.

He accordingly dismissed the appeal. The applicants applied under section 245 of the Town and Country Planning Act 1971 for his decision to be quashed.

Held , allowing the application, that there was no principle of law that prevented the imposition on a planning permission of conditions that would have the effect of reducing the permitted development below that for which permission had been applied for except where the application was severable; that the true test was not whether the development proposed in the application was severable but whether the effect of the conditional planning permission would be to allow development that was in substance not that for which ***234** permission had been applied for; and that, accordingly, the Secretary of State having misdirected himself in law, his decision must be quashed.

Kent County Council v. Secretary of State for the Environment (1976) 33 P. & C.R. 70 considered .

Per curiam . The main, but not the only, criterion on which the judgment of the local planning authority or the Secretary of State should be exercised on the question whether the effect of such a conditional planning permission would be to allow development that is in substance not that for which permission has been applied for is whether the development is so changed thereby that to grant it would be to deprive those who should have been consulted on the changed development of the opportunity of such consultation, those words being used to cover all the matters of the kind with which Part III of the Act of 1971 deals. Where a proposed development has been the subject of such consultation and has produced a root-and-branch opposition to any development at all, it is difficult to believe that it should be necessary to go again through the process of consultation about a smaller development.

MOTION.

The facts are stated by Forbes J.

Representation

Joseph Harper for the applicants, Bernard Wheatcroft Ltd.
The first respondent, the Secretary of State, was not represented.
Jeremy Sullivan for the second respondents, the Harborough District Council.

Cur. adv. vult.

Forbes J.

October 24. In this case Mr. Harper moves to quash an order of the Secretary of State for the Environment whereby he dismissed an appeal against refusal of planning permission by the second respondents, the Harborough District Council. Despite the fact that it is concerned solely with the extent of his powers, the Secretary of State is not represented.

The facts may be set out briefly as follows. The applicants own a large area of agricultural land at Bitterswell Road, Lutterworth, in the district of Harborough. The site with which we are concerned is a 35-acre portion of that land lying to the north of Lutterworth and immediately adjacent to a developed area of that town, a large portion of which in fact is a previously developed estate of the applicants. The applicants also own a still further area of seven acres of land that was not included in the application. In 1972, despite objection by the local planning authority, the Secretary of State decided that 25 acres of the 35 for which planning permission was now applied for were suitable for development if two problems could

be overcome. The first was surface water disposal, and the second was access to Bitterswell Road. The Secretary of State said, as I understand it, that the access problem alone would not have been sufficient to prevent planning permission being granted. After that appeal, and encouraged by the Secretary of State's decision, the applicants purchased some further land that enabled, in their view, the access problem to be overcome, and that land was included in the current application. The 35 acres included, however, further land, beyond **235* the original 25 and not included in the access land, that extended into open meadow with no particular natural boundaries. The application was made on the appropriate form on April 3, 1978. After giving the address of the site and identifying the 35 acres on a plan, the applicants went on to answer an invitation on the form to state the number of dwelling units proposed by filling in "approximately 420 dwellings." It is pointed out that that is the mathematical result of taking a density of 12 houses to the acre over the whole of the 35 acre site. That application was refused by the local planning authority on July 12, 1978, for a variety of reasons, including amenity, population, access, traffic and surface water disposal. The applicants appealed to the Secretary of State on December 22, 1978, and a public inquiry was held on January 22 to 24, 1980. On January 4, that is, less than three weeks before the inquiry was due to be held, the applicants wrote to the local planning authority indicating that they were proposing to put forward another proposal and submitted what they described as a schematic layout showing about 250 dwellings on a reduced area of 25 acres. The letter emphasised that the applicants "would wish the schematic lay-out to be considered as a viable alternative proposal to the application as originally submitted only if the issue of scale of development is deemed to be critical to the determination of the appeal and without prejudice to the proposals contained in the original application."

On January 11, 1980, the local planning authority wrote back: "My council is of the opinion that this is a new application and should be considered in the normal way, that is, determined by the council after consultation with interested parties," etc. At the inquiry, the applicants called a planning consultant who said that he could not support the development of 420 units on the 35-acre site, and he produced three alternative plans. Two of them provided for 250 dwellings on 25 acres and differed only in their proposals for access and internal roads. The third included another six acres, making 31 in all, and provided for 330 to 350 dwellings. The local planning authority's case was almost wholly concerned to argue that any development on this site would have undesirable consequences, although it is clear that the impact of the development reduced to 250 houses had been examined by the traffic experts of the county council, who appear to have given evidence that even this reduced number was unacceptable on traffic grounds. The local planning authority maintained at the inquiry that the Secretary of State could not legally reduce the area of the appeal site by 10 acres and that he only had power to deal with the application as submitted. It was accepted that the surface water objection could be adequately resolved by using a balancing reservoir scheme, and that reason for refusal was abandoned.

Various other parties appeared at the inquiry. A fair reading of their evidence and arguments recorded in the inspector's report is that they objected to any development on the site. One of them **236* clearly stated that even 250 houses would be objectionable. The inspector reported on March 6, 1980. It is unnecessary to refer to his report other than to summarise his conclusions and recommendations. His conclusions were, first, that it was a legal matter for the Secretary of State to determine whether it was possible to restrict any planning permission granted on that appeal to an area smaller than 35 acres and to fewer than 420 dwellings, secondly, that if the appeal was restricted to consideration of 420 dwellings on 35 acres he felt that it should be dismissed, thirdly, that, if it was permissible to restrict the area to 25 acres and for the number of dwellings to be reduced, then such development would not be objectionable. He recommended that, on the assumption that there was no legal bar to such action, permission should be granted for the erection of dwellings on 25 acres at a density of 10 to the acre.

The Secretary of State gave his decision by a letter dated April 24, 1980. After setting out the inspector's conclusions and recommendations, he went on in paragraphs 4 and 5:

> 4. Having regard to the inspector's conclusions concerning a smaller site than that proposed in the application under appeal, whilst it is accepted that there are circumstances where a split decision would be appropriate, the opinion is held that where an appeal results from an application for permission to erect a specified number of dwellings without any indication at all of their sizes or of the individual plots, the proposed development is not severable and it would be improper to purport to grant permission in respect of part of the site or for a lesser number of houses. In this particular

> case it must be noted that although plans D, E and F illustrate a possible lay-out and a reduced approximately 25-acre area of the appeal site for about 250 dwellings which your clients agree would be an acceptable alternative development, it was clearly indicated at the inquiry that these plans, which were submitted after the appeal had been made, were not provided as replacements for the original appeal proposals. Consequently the view is held that it would not be appropriate for the appeal proposal to be severed or reduced, and the Secretary of State has therefore considered the appeal on the basis of the original application before him. 5. The Secretary of State agrees with the inspector's conclusions regarding the proposal on this appeal and concurs with his opinion that the appeal should be dismissed. Any proposal for a smaller development would have to be the subject of a further application which would lead to consideration by the local planning authority in the first instance. In the circumstances the Secretary of State does not propose to comment on any of the inspector's conclusions regarding a reduced development. For the reasons given he does not accept the inspector's recommendations and thereby dismisses the appeal.

The real question in this case is whether the Secretary of State was right in considering that he had no power to grant planning permission for development on a smaller site and with houses at a lower ***237** density than were indicated on the application form originally submitted to the local planning authority.

Mr. Sullivan, however, had an argument that, on a true reading of the decision, the Secretary of State was in fact exercising his planning discretion. It will be convenient to deal with this argument first. The inspector in his conclusions and recommendations clearly poses a legal question. I have no doubt that in paragraph 4 the Secretary of State was attempting to answer it. When he uses the term “improper” in the first sentence of this paragraph, he refers, it seems to me, to an improper —that is, an illegal—use of powers. This first sentence sets out in general terms the legal proposition to which the Secretary of State commits himself. One can expand it in the context of the appeal in this way. If the application indicates a number of sites for development, each with a single house, then it can be severed by, as it were, lopping off individual sites. In such a way, permission can be granted for a reduced area or for a lesser number of houses. If, however, all that one has is an area covered by the application and a number of houses proposed to be built on it, such severance is impossible and therefore reduction in the area or the number of houses is improper, because no power is given to achieve a reduction by this means. Put simply, the Secretary of State is saying: “The only way in which I can properly exercise my powers and achieve a reduction in the area or the number of houses is if the application can be regarded as severable. If it cannot be so regarded, I have no power to achieve this end.” The second sentence in paragraph 4 does no more than set out those circumstances in the current appeal that led the Secretary of State to say that, despite the other proposals put forward, what he was dealing with was a non-severable application. The last sentence is the conclusion to the other two. The three sentences of this paragraph, properly read, amount to my mind to a logically unimpeachable syllogism: only severable applications can result in planning permission for a reduced area; this is not a severable application; therefore it cannot result in planning permission for a reduced area. As with all syllogisms, the conclusion is only valid if the premises are sound. It remains to be seen whether the major premise here is a valid statement of the law.

The powers of the Secretary of State are derived from section 36(3) of the Town and Country Planning Act 1971 . They are well-known, but I should refer to them:

> Where an appeal is brought under this section from a decision of a local planning authority, the Secretary of State, subject to the following provisions of this section, may allow or dismiss the appeal, or may reverse or vary any part of the decision of the local planning authority, whether the appeal relates to that part thereof or not, and may deal with the application as if it had been made to him in the first instance.

What can be done when the application is made in the first instance is to be found in section 29(1) : ***238**

> Subject to the provisions of sections 26 and 28 of this Act, and to the following provisions of this Act, where an application is made to a local planning authority for planning permission, that authority, in dealing with the application, shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations, and—
>
> (a) [subject to certain sections of the Act] may grant planning permission, either unconditionally or subject to such conditions as they think fit; …

At this point, I can, I think, go straight to the judgment of Lord Widgery C.J. in *Kingston-upon-Thames Royal London Borough Council v. Secretary of State for the Environment* [1] :

> … one has got to look at the learning on the question of what conditions can properly be attached to planning permissions. The attachment of conditions to planning permissions is as old as the planning legislation itself and is now to be found in section 30(1) of the Town and Country Planning Act 1971 : "Without prejudice to the generality of section 29 (1) of this Act, conditions may be imposed on the grant of planning permission thereunder— (a) for regulating the development or use of any land under the control of the applicant (whether or not it is land in respect of which the application was made) or requiring the carrying out of of works on any such land, so far as appears to the local planning authority to be expedient for the purposes of or in connection with the development authorised by the permission; …" Those are wide words; they clearly on their face entitle the local planning authority to impose conditions which affect land not the subject of the application itself, and which go to the restriction of the past user or the removal of existing works. Although they are wide it has been recognised for a very long time that they are subject to certain restrictions. The two principal restrictions which the courts have placed on those words are first that a condition is invalid as being contrary to law unless it is reasonably related to the development in the planning permission which has been granted. It must not be used for an ulterior purpose, and must, in the well-known words of Lord Denning M.R. in *Pyx Granite Co. Ltd. v. Minister of Housing and Local Government* , [2] "fairly and reasonably relate to the permitted development." The second restriction on those words which the courts have adopted in recent years is that a condition which is so clearly unreasonable that no reasonable planning authority could have imposed it may be regarded as *ultra vires* and contrary to law and treated as such in proceedings in this court. But as far as I know those are the only two general limitations on the wide powers in section 30 of the Town and Country Planning Act 1971 , …

Mr. Sullivan initially argued that the Secretary of State was right ***239** and that severability was the only test. In his subsequent submissions, however, he seemed to have abandoned that stance, because they proceeded on the basis that the

proper test was whether the development permitted was in substance different from that applied for. The extent to which this latter formulation is incompatible with the former I shall deal with in a moment. Although, therefore, Mr. Harper and Mr. Sullivan put forward a number of propositions, in the end I do not think that they differ markedly from each other on the essential principles governing the question of when conditions can be regarded as *intra vires* . Both, I think, accept as a starting point the passage in Lord Widgery C.J.'s judgment that I have just quoted. In the context of that passage, the question here is whether it is permissible to grant a planning permission subject to a condition that only what I may call a "reduced development" is carried out. Both counsel, I think, accept that it is permissible to grant planning permission subject to such a condition; both, I think, would seek to limit such conditions to those that do not alter the substance of the application; and both agree that in considering whether it is right to grant planning permission subject to such a condition the planning authority should, among other things, have regard to one of the underlying purposes of Part III of the Act of 1971, which is to ensure that before planning permission is granted there should be adequate consultation with the appropriate authorities and a proper opportunity for public comment and participation. The broad proposition, therefore, as I see it, to which both counsel would give assent is that a condition the effect of which is to allow the development but which amounts to a reduction on that proposed in the application can legit-mately be imposed so long as it does not alter the substance of the development for which permission was applied for. If it does alter the substance, the argument goes on, it cannot legitimately be imposed, because there has been no opportunity for consultation and so on about what would be a substantially different proposal. Parliament cannot have intended conditional planning permission to be used to circumvent the provisions for consultation and public participation contained in this Part of the Act.

Now, the test of substantial difference is not at all the same thing as the test of severability. It is possible to imagine an application for two related developments on the same piece of land, say a major and a minor development, that is clearly severable into these two portions. To give planning permission subject to a condition that the minor development was not carried out might well not alter the substance of the application. On the other hand, if the condition prevented the major development being carried out, that might well amount to a permission substantially different from the application. Thus, the application of the severability test alone could result in planning permission being given for development that was substantially different from that applied for. The proposition that conditions can only be used to reduce the development below that proposed in the ***240*** application where the application is severable is derived from a decision of Sir Douglas Frank, Q.C., sitting as a deputy *High Court judge, in Kent County Council v. Secretary of State for the Environment* . [3] That decision itself clearly arose from the argument put forward by counsel for the Secretary of State, which was in these terms, as recorded in Sir Douglas Frank's judgment [4] :

> …(1) where an application contained a number of separate and divisible elements it was lawful for them to be separately dealt with, (2), alternatively, that if the elements were not divisible there was power to modify the application providing that (a) the scope of the development was not enlarged; (b) the essential nature of the development was not altered; and (c) any persons affected were given a chance to make representations.

It can be seen that the second alternative formulation looks remarkably like the proposition to which I have just referred and to which both counsel would assent. In giving judgment, Sir Douglas Frank acceded to the first part of this argument and presumably thought it in consequence unnecessary to deal with the second. The Secretary of State, in the case with which I am dealing, has clearly directed himself that it is only if the application is severable that he can by condition reduce the ambit of the planning permission granted. He has had no regard to the question whether the planning permission, if granted subject to a condition, would be substantially different from that applied for.

For my part, I cannot accept that the proper test is whether the development proposed in the application was severable or not. Unless coupled with a requirement that the result must not be substantially different from the development applied for, it would be possible, as I have just indicated, for local planning authorities to grant planning permission for developments that were in fact substantially different and thus defeat the consultative objects of Part III of the Act of 1971. The severability test, therefore, could only be a proper one if combined with a test of substantial difference. I can, however, see no justification for

the severability test at all. It should be remembered that we are dealing here with applications for outline planning permission. Many of these applications are, no doubt, for multiple purposes, some of them severable, some of them perhaps not. Many applications, however, as here, are for single purposes, for instance, residential development. Why should it be impossible for the local planning authority to say, on an application for outline planning permission: "we think 35 acres is too much but 25 will be all right," and similarly with a reduction in density? So long as the reduction passes the test of not altering the substance of the application, what vice is there in that? It is clearly a condition fairly and reasonably related to the permitted development (see *Pyx Granite Co. Ltd. v. Minister of Housing and Local Goverment* [5]), and it is not unreasonable under the *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [6] doctrine. To give permission for a substantially different development would, on the other hand, be unreasonable as that word is understood in these cases (see, for instance, a passage from the judgment of Diplock L.J. in *Mixnam's Properties v. Chertsey Urban District Council* [7]), because it would not be what Parliament intended a consultation process to comprehend. The test of substantial difference is thus firmly based on the broad principles of *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [8] . The severability test, on the other hand, seems to me to have no particular validity. To grant a planning permission for part only of an application that is not severable does not appear, merely by that fact, to run counter to either of the two general limitations referred to by Lord Widgery C.J. in *Kingston-upon-Thames Royal London Borough Council v. Secretary of State for the Environment* . [9] Perhaps the argument on severability put forward by the Secretary of State in *Kent County Council v. Secretary of State for the Environment* [10] and accepted by Sir Douglas Frank had its origin in the fact that the application in that case clearly was severable. That does not, however, seem to me to justify its elevation into a matter of general principle.

I conclude, for my part, that there is no principle of law that prevents the Secretary of State from imposing conditions that have the effect of reducing the permitted development below the development applied for except where the application is severable. The Secretary of State clearly directed himself that there was such a principle and thus fell into error, and his decision must be quashed.

I should add a rider. The true test is, I feel sure, that accepted by both counsel: is the effect of the conditional planning permission to allow development that is in substance not that which was applied for? Of course, in deciding whether or not there is a substantial difference the local planning authority or the Secretary of State will be exercising a judgment, and a judgment with which the courts will not ordinarily interfere unless it is manifestly unreasonably exercised. The main, but not the only, criterion on which that judgment should be exercised is whether the development is so changed that to grant it would be to deprive those who should have been consulted on the changed development of the opportunity of such consultation, and I use these words to cover all the matters of this kind with which Part III of the Act of 1971 deals.

There may, of course, be, in addition, purely planning reasons for concluding that a change makes a substantial difference, but I find it ***242** difficult to believe that, where a proposed development has been the subject of such consultation and has produced a root-and-branch opposition to any development at all, whether larger or smaller, it should be necessary in all cases to go again through the process of consultation about the smaller development. It is clear that, in this case, the processes of consultation had resulted in such root-and-branch opposition that further consultation could not have resulted in more opposition but only, if there was any change in public attitudes, in less. In those circumstances, Mr. Harper invites me to say that only an unreasonable Secretary of State could have concluded that the course recommended by the inspector would result in a development substantially different from that contained in the application. In consequence, he says, I should make an order the effect of which would be to substitute for the dismissal of his client's appeal planning permission as recommended by the inspector. As I understand it, however, all that I have power to do under section 245 of the Act of 1971 is to quash the order, and that is all, in fact, that Mr. Harper's notice of motion asks me to do. The court cannot grant planning permission. I must decline his invitation and merely order that the Secretary of State's decision should be quashed.

I might add that I have come to my general conclusion with a certain feeling of satisfaction, as it seems to me to permit a welcome degree of flexibility in the conduct of planning applications and appeals while at the same time maintaining adequate safeguards for the interests of those in whose favour the provisions for consultation were enacted.

Representation

Solicitors— R. G. Frisby & Small, Leicester ; Solicitor, Harborough District Council .

Order

[Reported by Michael Gardner, Barrister.]

Application allowed. Decision of Secretary of State quashed. Secretary of State to pay such costs of applicants as would have been incurred by them if Secretary of State had submitted to judgment. Additional costs to be borne by second respondents.

***243**

Footnotes

1 *[1973] 1 W.L.R. 1549* , 1552–1553; *[1974] 1 All E.R. 193* ; *26 P. & C.R. 480* , 483–484; *72 L.G.R. 206, D.C.*

2 *[1958] 1 Q.B. 554* , 572; *[1958] 2 W.L.R. 371* ; *[1958] 1 All E.R. 625* ; *9 P. & C.R. 204* , 217; *56 L.G.R. 171, C.A.*

3 *(1976) 33 P. & C.R. 70* .

4 *Ibid.* at p. 75.

5 *[1958] 1 Q.B. 554* ; *9 P. & C.R. 204* .

6 *[1948] 1 K.B. 223* ; *[1947] 2 All E.R. 680, C.A.*

7 *[1965] A.C. 735* ; *[1964] 2 W.L.R. 1210* ; *[1964] 2 All E.R. 627* ; *15 P. & C.R. 331* ; *62 L.G.R. 528, H.L.*

8 *[1948] 1 K.B. 223* .

9 *[1973] 1 W.L.R. 1549* , 1553; *26 P. & C.R. 480* , 483–484.

10 *(1976) 33 P. & C.R. 70* , 75.

*427 Walker v City of Aberdeen Council

No Substantial Judicial Treatment

Court
Court of Session (Outer House)

Judgment Date
20 December 1996

Report Citation
1998 S.L.T. 427

Outer House

Lord Macfadyen

20 December 1996

Town and country planning—Planning permission—Application for outline permission—Original application revised to reduce scale of proposed development—Failure to notify amended application—Whether decision on amended application open to reduction—Requirement to show prejudice.

An individual sought judicial review of a decision of a local authority granting outline planning permission to a university for a development. The university had applied for permission to develop a university campus. The application involved a proposal which did not accord with the development plan and, following advertisement, a considerable number of objections were lodged, including one from the petitioner who held a notifiable interest in neighbouring land. The regional council were consulted as roads authority and recommended the application be refused because of the impact on the existing road network. On 14 September 1995 a public meeting was held by the district council at which the petitioner appeared and spoke against the application. After the district council resolved that it was minded to approve the application subject to conditions, the regional council called in the application. The university's solicitors then wrote to the regional council to revise the application by substantially reducing in scale the proposed development. On 8 March 1996 the regional council granted outline planning permission, subject to certain conditions and an agreement under s 69 of the Local Government (Scotland) Act 1973 . The petitioner averred that prior to 8 March he had not been advised of the revised application and was unaware that it was to be determined on 8 March; had he known about it he would have sought the advice of a planning consultant and would have raised further points of objection with the regional council. The petitioner sought declarator that the revised application was not in substance that for which outline planning permission had originally been sought; declarator that in granting it the regional council misdirected itself in law and acted ultra vires; and reduction of the regional council decision dated 8 March and the resulting notice, arguing (1) that the revised application could not be granted without steps first being taken to secure an adequate opportunity for representations thereon; and (2) that the council had materially misunderstood the nature of the revised application, in failing to appreciate that it was now for a single building rather than a campus development, and had accordingly misdirected themselves and acted ultra vires.

Held:

(1) that the proper test for the validity of a decision on an amended application without re-notification thereof was whether the amended application was for a development which was in substance different from that to which the original application related, and it could not be said that no reasonable authority would have failed to regard the revisal as altering the substance of the proposal (pp 431D-G and H-I and 432B-C);

(2) that the petitioner had in any event to show that he had been prejudicially affected by any failure, in order to establish an interest to challenge the decision, and as the substance of the petitioner's intended objection had been before the council he had failed to show such prejudice (p 432C-D and G-H);

(3) that the council had not been shown to have been under any misapprehension as to the nature of the development for which they granted planning permission (p 433C-D and F-G); and petition *dismissed.*

Petition for judicial review

Keith Pirie Walker petitioned for judicial review to challenge the validity of an outline planning permission granted by Grampian Regional Council on the application of the Robert Gordon University for a development on a site at Garthdee, Aberdeen. The petitioner sought inter alia reduction of the decision of the regional council dated 8 March and of the subsequent notice dated 29 March 1996. Answers were lodged by the City of Aberdeen Council, as statutory successors of the regional council, as first respondents, and by the university as second respondents.

The petition came before the Lord Ordinary (Macfadyen) for a first hearing.

Cases referred to

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223 .
Breckland District Council v Secretary of State for the Environment (1992) 65 P & CR 34 .
Care Link v Secretary of State for the Environment [1989] 2 PLR 47 .
Wheatcroft (Bernard) Ltd v Secretary of State for the Environment (1980) 43 P & CR 233 .
Wordie Property Co Ltd v Secretary of State for Scotland, 1984 SLT 345 .

On 20 December 1996 the Lord Ordinary *dismissed* the petition.

LORD MACFADYEN.

In this petition for judicial review the petitioner seeks primarily to challenge the validity of an outline planning permission granted by Grampian Regional Council (“the regional council”) on the application of the Robert Gordon University (“the university”) for a development on a site at Garthdee, Aberdeen. The petitioner's title and interest to bring this petition derive from the fact that he was entitled in terms of s 23 of the Town and Country Planning (Scotland) Act 1972 (“the 1972 Act”) to notification of the application for planning permission. The petition was served on Aberdeen City Council (“the city council”), the ***428** present planning authority, as first respondents, and on the university as second respondents. Both respondents lodged answers.

The circumstances in which the petition was brought may be summarised as follows. By application dated 10 June 1994 the university applied to the City of Aberdeen District Council (“the district council”), at that time the local planning authority for the City of Aberdeen, for a grant of outline planning permission for the development of a university campus at Garthdee, comprising academic and other buildings related to the purpose of the university, student residential buildings, internal roads, pathways, surface car parks and landscaping works. The application site extended to some 33 hectares. The petitioner avers that the purpose of the proposed development was to relocate the university, currently situated at a number of locations in Aberdeen, at a single campus; that the proposals submitted were for a range of buildings with a total gross floor area of 85,000 square metres; and that it was proposed to phase the development over 15 years between 1997 and 2012, with an eventual student population of 10,000 by 2015. On 10 June 1994 notice of that application was given in accordance with s 23 (1) of the 1972 Act to inter alios the petitioner as a person holding a notifiable interest in neighbouring land. I was informed that the petitioner's property lies to the north of the west end of the application site. The application was recognised as one which involved a proposal which did not accord with the development plan, and was on 22 June 1994 advertised as such. A considerable number of objections to the proposal were lodged, including one by the petitioner. He avers that the principal grounds of his objection related to traffic in respect of road safety, green belt policy and overdevelopment of the Garthdee area. The regional council, as roads authority, were consulted about the proposal, and on 8 August 1995 recommended that it be refused because of the

overall impact on the existing road network in the area. On 14 September 1995 the planning committee of the district council held a public meeting in connection with the proposal. At that meeting the petitioner made representations against the proposal.

On 30 October the district council resolved that it was minded to approve the application subject to conditions. On 21 November 1995 the economic development and planning committee of the regional council resolved to call in the application. An appeal by the district council against that decision was refused and the application was duly received by the regional council in February 1996. At that stage, by letter dated 23 February 1996, solicitors acting for the university wrote to the regional council intimating revisions to the application, which they stated amounted to a substantial reduction in the scale of the proposed development, but did not otherwise change it. The revisions were expressed as follows:

> "(1) In terms of the accommodation, the application seeks planning permission only for the Faculty of Management and Design Library. (2) As a consequence, the reference in Section B4 of the application form to 85,000 metres square gross floor area should now read 15,000 metres square. (3) These revisions are shown on Drawing Reference: 3882/BO1A which accompany [sic] this letter. Drawings ref: 3882/BO1-BO4 are withdrawn".

The letter went on to indicate that the university was willing to enter into an agreement dealing with traffic management and other matters. On 8 March the economic development and planning committee of the regional council resolved to grant outline planning permission in respect of the revised application, subject to (i) certain conditions, and (ii) an agreement under s 69 of the Local Government (Scotland) Act 1973 . On 29 March 1996 the regional council issued a decision notice purporting to give effect to the decision of 8 March. The petitioner avers that he had not, prior to that decision, been advised of the revised application, and was unaware that it was to be determined on 8 March. He avers that, had he been notified, he would have sought the advice of a planning consultant and would in any event have raised with the regional council issues as to the need for a green belt location for the reduced development.

In the petition the following remedies are sought: (a) declarator that the revised application by the university was for a development which was in substance not that for which outline planning permission had been sought in the original application; (b) declarator that in determining to grant the revised application the regional council misdirected itself in law and acted ultra vires; and (c) reduction of the decision of the regional council taken on 8 March 1996 and the relative decision notice dated 29 March 1996.

[His Lordship then dealt with an opposed minute of amendment tendered by the petitioner, with which this report is not concerned, and continued:]

I turn therefore to the arguments which counsel advanced in support of the merits of the petition. They were two in number. The first was that the revised application was for development which was not in substance that for which the original application had sought permission, and that no reasonable planning authority would have determined the revised application without giving those with a notifiable interest an opportunity to make further representations in light of the revisals. The second was that in taking their decision on 8 March 1996 the economic development and planning committee of the regional council proceeded under a material misunderstanding as to the nature of the revised application, and thus misdirected themselves in law and acted ultra vires.

In setting out his submissions on the first of the two arguments, counsel began by reminding me of the statutory background. He pointed out that s 20 (1) of the 1972 Act made it necessary to obtain planning permission for the carrying out of any development of ***429** land. The form of application for planning permission was regulated by s 22 (1) and regulations made

thereunder, which inter alia required a description of the development and a plan sufficient to identify the land to which the application related. Section 23 was the provision which gave rise to the right of the petitioner to receive notification of the university's application. Section 26 regulated the determination of applications. Section 39 made the special provisions applicable to applications for outline permission. Section 27 regulated the power of the planning authority to attach conditions to a grant of planning permission. Against that statutory background, counsel for the petitioner posed the question: how should the planning authority deal with a revisal to a planning application such as that made by the university by their solicitors' letter of 23 February 1996? Under reference to *Wordie Property Co Ltd v Secretary of State for Scotland, per Lord President Emslie at 1984 SLT, pp 347–348* , he made the uncontroversial submission that the actings of the planning authority would be open to challenge as ultra vires if they involved a material error of law going to the root of the question for determination, or if the decision was so unreasonable that no reasonable authority could have reached it.

Turning to authority more directly concerned with the problem of revisals to applications for planning permission, counsel for the petitioner referred to *Bernard Wheatcroft Ltd v Secretary of State for the Environment* . In that case the original application was for planning permission for a development of 420 houses on 35 acres. An alternative proposal for a development of 250 houses on 25 acres was put forward before and at a public inquiry. The inspector concluded that the original application should be refused, but that if it were permissible to have regard to the reduced alternative proposal, it should be granted planning permission. The Secretary of State decided that the proposed development was not severable, and that it would therefore be improper to grant permission for the reduced alternative proposal. On appeal to the High Court it was held that there was no principle of law that prevented the imposition of conditions which had the effect of granting permission for a reduced development except where it was severable, and that the true test was whether the effect of the conditional permission would be to allow development which was not in substance that in respect of which the application had been made. In adopting that test, Forbes J said (at *(1980) 43 P & CR, p 239*):

> "[The] question here is whether it is permissible to grant a planning permission subject to a condition that only what I may call a 'reduced development' is carried out. Both counsel, I think, accept that it is permissible to grant planning permission subject to such a condition; both, I think, would seek to limit such conditions to those that do not alter the substance of the application; and both agree that in considering whether it is right to grant planning permission subject to such a condition the planning authority should, among other things, have regard to one of the underlying purposes of Part III of the Act of 1971, which is to ensure that before planning permission is granted there should be adequate consultation with the appropriate authorities and a proper opportunity for public comment and participation. The broad proposition, therefore, as I see it, to which both counsel would give assent is that a condition the effect of which is to allow the development but which amounts to a reduction of that proposed in the application can legitimately be imposed so long as it does not alter the substance of the development for which permission was applied for. If it does alter the substance, the argument goes on, it cannot legitimately be imposed, because there has been no opportunity for consultation and so on about what would be a substantially different proposal. Parliament cannot have intended conditional planning permission to be used to circumvent the provisions for consultation and public participation contained in this Part of the Act."

He went on (at p 241) after reference to certain cases including *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* , to say:

> "To give permission for a substantially different development would … be unreasonable as that word is understood in these cases … because it would not be what Parliament intended a consultation process to comprehend. The test of substantial difference is thus firmly based on the broad principles of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* … .

> "Of course, in deciding whether or not there is a substantial difference the local planning authority or the Secretary of State will be exercising a judgment, and a judgment with which the courts will not ordinarily interfere unless it is manifestly unreasonably exercised. The main, but not the only, criterion on which that judgment should be exercised is whether the development is so changed that to grant it would deprive those who should have been consulted on the changed development of the opportunity of such consultation… .
>
> "There may, of course, be, in addition, purely planning reasons for concluding that a change makes a substantial difference, but I find it difficult to believe that, where a proposed development has been the subject of such consultation and has produced a root-and-branch opposition to any development at all, whether larger or smaller, it should be necessary in all cases to go again through the process of consultation about the smaller development."

Counsel for the petitioner went on to submit that the university's revised proposal was radically different from that to which the original application had related. The original proposal was for an entire university campus occupying a 33 hectare site and involving a total gross floor area of 85,000 square metres. The revised proposal was no longer for a campus at all. Although the application site was not altered, only 15,000 square metres of gross floor area was now proposed, confined to one part of the site. ***430** The greatly reduced floor area introduced a new question as to the need for a green belt site, since a development of that size might more readily than the original campus proposal be accommodated elsewhere. The revised application was thus substantially different from the original one, and therefore could not be granted without further steps first being taken to secure an adequate opportunity for representations to be made about it to the regional council. It was accepted that it was for the planning authority to decide what additional steps should be taken before the revised application was determined. Some objectors (e g the Aberdeen Garthdee Action Group (AbGAG) and the Auchinyell Community Council) had been given the opportunity of making further representations in light of the revisal of the application, but the petitioner, despite being a person entitled to notification under s 23 (1), had not. If it was reasonable to consult some, why not all? No reasonable planning authority would have failed to deal with the revised application by re-notifying all those entitled to notification of the original application. It followed that in failing to notify the petitioner of the revised proposal before granting planning permission for it, the regional council had acted unreasonably and thus ultra vires.

In response to that submission, counsel for the university formulated four propositions. First, he submitted that what is meant by the test of substantial difference between a revised application and the original application is not simply that there are differences in fact between the two proposals, but that the differences are such as to be calculated to provoke different objections (*Bernard Wheatcroft Ltd* at pp 239 and 241). The rationale for the test lies in the need to give a fair opportunity to objectors to express their objections to the application in its revised form. The only real question raised by the test is therefore whether the revised application was calculated to provoke different objections to those expressed against the original proposal. Secondly, he emphasised that the way in which that question is resolved is a matter of judgment for the planning authority, whose decision upon it can only be overturned by the court if it is unreasonable (*Bernard Wheatcroft Ltd* at p 241). Thirdly, he submitted that it is a strong indication that the planning authority's decision on that question is not unreasonable, if the original application provoked root-and-branch opposition (*Bernard Wheatcroft Ltd* at p 242). Fourthly, he submitted that it was important to bear in mind that it is almost always open to a planning authority to grant an application in part without re-consultation (*Care Link v Secretary of State for the Environment*).

Counsel for the university submitted that it was plain from a comparison of the planning officers' reports on the original and revised applications that both versions had attracted root-and-branch opposition. The objections had covered five main subjects: (i) traffic and road safety; (ii) loss of amenity and green belt issues; (iii) wildlife; (iv) trees; and (v) residential amenity. That, he submitted, was enough to show that this aspect of the petitioner's case was ill founded. In particular, opposition on the ground that the development ought not to take place in the green belt had all along been to the forefront. At p 6 of [the planning officer's report on the revised application] the significance of the reduced size of the revised proposal was discussed.

Further, counsel submitted that it was clear from the phased nature of the original application that the development might proceed in part. There was no commitment on the part of the university that it would, if granted planning permission in accordance with the original application, proceed with all the phases of the development. There was no means available to the planning authority to secure that all phases were completed. The petitioner had himself recognised that consideration in a letter which he wrote in September 1994 to a Mr Wyness, a member of the district council. In the first numbered paragraph of that letter the petitioner expressed the view that the green belt area must not be sacrificed. He referred to the fact that the university had explained that the full site was unlikely to be developed, and identified the risk that, if the green belt status of the land were lost and it was not developed by the university, it would be used for other even less desirable development. The restriction of the actual development to relatively small size compared to the total development proposed was thus as much a possible outcome of the original application as it was of the revised application, and was recognised by the petitioner as such. The petitioner therefore could not point to the restriction in size introduced by the revisal of the application as rendering the revised application different in substance from the original one.

Counsel drew attention to the fact that following the revisal of the application the regional council had further informal consultations with AbGAG and the community council. AbGAG maintained that the reduction in size of the development made no difference to their green belt objections. The community council took the slightly different point that the reduced development might be accommodated on non-green-belt land. Those representations were before the economic development and planning committee on 8 March 1996 when it decided to grant planning permission. The decision not to undertake a complete re-consultation process should therefore be seen in light of the results of the informal limited re-consultation process. There was no question of the failure to re-consult having caused the petitioner any prejudice, since the only representation he would have made had been made (i) by him in September 1994, and (ii) by the bodies with whom the regional council re-consulted informally.

For the city council, counsel adopted the submissions made by counsel for the university. He identified as the critical issue the question whether the revisal to the original application transformed it into a ***431** substantially different application. He referred to *Breckland District Council v Secretary of State for the Environment and Hill* , in which the “substantially different” test was applied in a case where the amendment increased rather than reduced the size of the proposed development. Forbes J's view that the court could only interfere with the discretionary decision of the planning authority to entertain the amended application if the result was perverse or unreasonable, was endorsed (at *(1992) 65 P & CR, p 41*). Counsel then went on to develop the argument that it was not sufficient for the petitioner to show that the regional council had acted unreasonably in determining the revised application without giving him an opportunity to make further representations; he also had to show that the failure to give him that opportunity had prejudiced him. Otherwise he could not be said to have an interest to pursue the point. Of the four points made by the petitioner in his representations against the original application, three related to matters in respect of which the reduced development would be less objectionable. The fourth was the green belt point. That was elaborated on in the petitioner's letter of September 1994 in the way already mentioned. The petitioner also spoke to the point at a meeting of the planning committee of the district council on 14 September 1995 (see p 1089 of the minutes in process). The point was also elaborated upon by AbGAG and the community council in response to the revised application in the ways already mentioned. The regional council thus had before it when it decided to grant planning permission the substance of the representation which the petitioner wished to have the opportunity of making against the revised application. He had thus suffered no prejudice through not being given the opportunity of making further representations after the application was amended.

In my opinion, when a planning authority accepts an amendment or revisal to an application for planning permission, and determines the amended or revised application without undertaking in respect of the amended or revised application the processes of consultation, notification or advertisement that would have been required by statute if the amendment or revisal had been a fresh application, the test by which the validity of the resulting decision falls to be judged is that formulated by Forbes J in *Bernard Wheatcroft Ltd* and followed in *Care Link* and *Breckland District Council* . That test is whether the amended or revised application is for a development which is in substance different from that to which the original application related. I prefer the phrase “in substance different” to the phrase “substantially different” , because the latter tends to suggest that all that is in issue is the size of the development. Remembering that the context is the statutory system of town and country planning, it is in my view clear that while size may be a relevant consideration (particularly if the amendment increases the size of the proposed development — see *Breckland District Council* at p 39), the main consideration is the nature and extent of the difference in planning terms between the original and the amended proposal. If the amendment has the effect that substantial new planning issues not raised by the original application are raised, or that the proposal is open to substantial new grounds of planning

objection which were not available against the original application, the amended application may, in my opinion, be said to be in substance different from the original one.

As was said in *Bernard Wheatcroft Ltd* and reiterated in *Breckland District Council* , whether an amendment changes the substance of an application is a matter for the judgment of the planning authority, and the court will interfere only if it can be said that the planning authority's decision on the matter is perverse or unreasonable in the administrative law sense.

I am not persuaded that the reduction in the scale of the proposed development effected by the revisal intimated in February 1996 was such as to amount inevitably to an alteration of the substance of the proposal. Counsel for the petitioner laid some stress on the fact that the original proposal was for a comprehensive campus, and argued that the label “campus” could not reasonably be regarded as appropriate to the revised proposal. It seemed to me, however, that counsel may well have been wrong in his understanding that the revised proposal involved a single building. The plan attached to the decision notice seems to me to show a group of five buildings to which is attached the label “Faculty of Management and Design Library” , which is the description also used in the letter intimating the revisal. In any event the application site was not reduced. In these circumstances, I do not consider that any inevitable conclusion as to whether the revisal effected an alteration of substance can be drawn from a consideration of whether it remained appropriate to regard the revised development as a development of a campus. It seemed to me that there was at first sight more force in the petitioner's submission that the revised application raised a new and different issue as to the use of green belt land. The green belt objection to the original proposal could have attracted the counter argument that the original proposal to develop a unitary campus for the whole university could not be accommodated elsewhere than in the green belt. When the scope of the development was reduced to 15,000 square metres gross floorspace for the Faculty of Management and Design Library, that counter argument could be met by the response that the reduced development could be accommodated elsewhere without the need to occupy green belt land. If it could be said that by virtue of the revisal the petitioner was deprived of the opportunity of addressing that new aspect of the green belt issue, that would in my view perhaps have been capable of being regarded as a change in the substance of the application. I do not consider that that line of argument would have been precluded by the root-and-branch nature of the objections elicited by the original application. I am persuaded, however, that there is a satisfactory ***432** answer to the point. It lies in the phased nature of the original proposal. Although that proposal involved a total gross floor area of 85,000 square metres, that total was to be built up over a number of phases and a number of years. There was no guarantee that all of the phases would ultimately be developed. Indeed the matter went further than that — it was known to be the university's position that it would not necessarily complete all phases. Given that that was the case, the possibility of the actual development turning out to be much less extensive than the total development for which permission was sought was implicit in the original application, and the implications of that factor in the context of green belt policy was an issue raised by, and a possible ground for objection to, the original application. As I understood the petitioner's pleadings and counsel for the petitioner's argument, the altered aspect of the green belt issue was the only additional issue which it was claimed the revised application raised. In these circumstances I am not persuaded that it can be said that no reasonable planning authority, properly addressing the question of the effect of the revisal of February 1996, would have failed to regard it as altering the substance of the proposal, and would accordingly have failed to repeat the consultation process, including re-notification of those with a notifiable interest in neighbouring land.

There is, in my view, an additional reason for rejecting the petitioner's first argument. Counsel for the city council was, in my opinion, correct in submitting that it was not enough for the petitioner simply to show that the planning authority had acted unreasonably in not treating the revisal as altering the substance of the proposal, and that it was necessary for the petitioner also to show that he had been prejudicially affected by that unreasonable act. That is so, in my view, because unless the petitioner has been prejudiced by the unreasonable decision, he has no interest to challenge it. In the present case it seems to me that one aspect of the argument put forward by counsel for the respondents, to the effect that the petitioner suffered no prejudice by the regional council's failure to re-consult, is well founded. There are two aspects to the point. In the first place, the petitioner himself addressed the implications for green belt policy in the event of a reduced development being carried out, in his letter of 9 September 1994. That, however, was in a letter to a member of the district council, and it is not clear to me whether it can be said that that material was before the regional council. Moreover, the point made in that letter was not precisely the one which the petitioner says he would have made if he had been given an opportunity of making representations against the revised application. The second point, on the other hand, seems to me to have more force. Although the petitioner was not re-consulted, AbGAG and the community council were, and both took the opportunity to put forward additional points in light of the revisal. In particular, the point made by the community council in the third paragraph of their letter of 4 March 1996 seems to me to be in substance the point which the petitioner says he would have wished to make if he had had the opportunity. It therefore seems to

me that on that basis there is much force in the contention that the point which the petitioner would have wished to make against the revised proposal was before the committee of the regional council, and must be taken to have been considered by them. I appreciate that if the petitioner had been re-consulted he might have made the point in a more sophisticated or more persuasive way, but I consider that the matter must be viewed broadly. I am not persuaded that the petitioner has demonstrated that he suffered prejudice by reason of the failure on the part of the regional council to notify him of the revisal to the application.

I therefore reject the petitioner's first argument, primarily on the ground that it has not been shown that the regional council acted unreasonably in treating the revisal as not altering the substance of the application, and in not re-notifying the petitioner. Had I taken a different view on that matter, I would still have rejected the first argument, on the ground that the petitioner had not shown that he was prejudiced by the failure to re-notify him, and had therefore not shown an interest to challenge the resulting decision.

I turn now to counsel's second argument on the petitioner's behalf. That was to the effect that the committee of the regional council had materially misunderstood the nature of the revised application, and had therefore misdirected themselves and acted ultra vires. Counsel began by acknowledging that the nature of the revised development was accurately set out for the members of the committee in the report placed before them. He submitted, however, that the misunderstanding could be seen reflected in other documents. The minute of the meeting of the committee narrated that the application had been revised and was now “for the development of a university campus comprising academic and related buildings, student residential buildings, and roads, pathways, car parking and landscaping works” .

The minute of agreement between the regional council and the university narrated:

> “The Developer [the university] has made an application for planning permission to the [district council] for the erection of a Faculty of Management and Design Library extending to 85,000m² gross floor space on an area of land extending to 33 ha at Garthdee.”

In the decision notice, counsel identified as errors, (i) the references to “buildings” in conditions 1 and 2, and (ii) the references to “campus” in conditions 2 and 9. The broad proposition was that these errors showed that the committee had failed to realise that the revisal had altered the application from one for a campus development to one for a single building, and had thus granted permission for something which was not sought. That error, it was contended, was so material as to render the decision ultra vires. The error, it was said, was compounded in the documents relating to the application for approval of reserved ***433** matters. The notice served on neighbours referred to the work as “part of Phase 1 development” , despite the fact that the revised application had not been phased. The same error was to be seen in the planning and strategic development department report which described the proposal as “Approval of reserved matters … for Phase 1 of the extended University campus” .

I do not consider that the petitioner's second argument is sound. There is, no doubt, some looseness of expression in some of the documents. It seems to me to be legitimate, however, given the fact that the application area of 33 hectares remained unaltered by the revisal, to continue to refer to the revised proposal as one for development of a campus. I am not clear whether it is correct to say that the reference to “buildings” (in the plural) is an error in the context of the revised proposal. Conflicting information was put before me. The plan attached to [the decision notice of 29 March 1996] may be interpreted as showing five buildings. But even if the documents are wrong in referring to “buildings” rather than “building” , that seems to me to be a rather flimsy basis for an argument that the committee was labouring under so fundamental an error as to the nature of the application as to render its decision ultra vires. Although there may be inaccuracy in the way the revised proposal is described in the minute of the meeting of 8 March, the minute makes it clear that the report was before the meeting, and its terms are accurate. The plain error in the minute of agreement as to the gross floor area (being a different error from those identified in other documents) does

not seem to me to support the conclusion that the committee must have been in error as to the nature of the revised proposal, when the report, the minute and the decision notice are all accurate as to gross floor area.

Finally, the references to phase 1 in the documents relating to the approval of reserved matters seem to me to be innocuous. The fact that in February the university departed from its original application for a phased development, and confined the revised application to the Faculty of Management and Design Library, and thus obtained an outline planning permission which made no reference to phasing, does not seem to me to yield the inference that the university has given up all hope of proceeding with further phases of its original scheme in due course. All it means is that it gave up the attempt to get outline planning permission for all phases at once. There is therefore a perfectly understandable sense in which the development for which outline permission has been granted can still be seen as phase 1 of the university's long term aims. The use of language reflecting that situation does not in my view support the conclusion that in March 1996 the committee was under any misapprehension as to the nature of the development for which it granted outline planning permission. For these reasons, I am of opinion that there is no substance in the contention that the committee committed any error of law rendering its decision ultra vires.

Accordingly, I shall sustain the first pleas in law for the city council and the university, repel the pleas in law for the petitioner, and dismiss the petition.

Representation

Counsel for Petitioner, S L Stuart ; Solicitors, Hasties, SSC —Counsel for First Respondents (Aberdeen Council), Gale, QC ; Solicitors, Bennett & Robertson, WS —Counsel for Second Respondents (University), Currie, QC ; Solicitors, Paull & Williamsons .

J P D

Test Valley Borough Council v Chala Fiske

No Substantial Judicial Treatment

Court
Court of Appeal (Civil Division)

Judgment Date
10 December 2024

Case No: CA-2023-001910

Court of Appeal (Civil Division)

[2024] EWCA Civ 1541, 2024 WL 05056044

Before: Lord Justice Dingemans Lord Justice William Davis and Lord Justice Holgate

Date: 10/12/2024

On Appeal from the High Court of Justice King's Bench Division Planning Court

Mr Justice Morris

[2023] EWHC 2221 (Admin)

Hearing date: 10 October 2024

Representation

Robin Green and Robert Williams (instructed by Sharpe Pritchard LLP) for the Appellant.
James Burton (instructed by Blake Morgan LLP) for the Respondent.
The Interested Party did not appear.

Approved Judgment

Lord Justice Holgate:

Introduction

1. Section 73 of the Town and County Planning Act 1990 ("TCPA 1990") enables a person to make an application to a local planning authority ("LPA") in respect of an extant planning permission granted subject to conditions, for the grant of a new permission with different or no conditions.

2. A planning permission comprises both the part which operates to grant consent for the development it describes ("the operative part") and the conditions subject to which that permission is granted (*Lambeth London Borough Council v Secretary of State for Housing, Communities and Local Government [2019] UKSC 33; [2019] 1 WLR 4317 at [9]*).

3. The appellant, Test Valley Borough Council, is a local planning authority ("LPA"). It accepts that this court decided in *Finney v Welsh Ministers [2019] EWCA Civ 1868; [2020] PTSR 455* that the operative part of a planning permission granted under s.73 cannot differ from the operative part of an extant permission.

4. This case is about the ambit of the power under s.73 to impose conditions on the new permission. The central issue is whether such conditions fall outside the scope of that power (i.e. they are *ultra vires*) if:

(1) they are inconsistent in a material way with the operative part of the original permission ("restriction 1");
(2) if they make a "fundamental alteration" of the development permitted by the original permission, reading that permission as a whole ("restriction 2").

5. The appellant contends that the power to impose conditions under s.73 is subject only to restriction (2) and not to restriction (1). In other words, although the operative parts of the extant permission and the s.73 permission must be the same, the conditions of the new permission may alter that grant, so long as that alteration is not "fundamental". During the course of the hearing in this court, the appellant broadened its formulation of restriction (2) so that it applies to either a "substantial alteration" or a "fundamental alteration" of the development permitted by the original permission.

6. The respondent, Mrs Chala Fiske, who is a local resident, submits that s.73 is subject to restriction (1) and also to restriction (2), even where restriction (1) is not infringed (i.e the operative part remains unaltered). Morris J agreed with the respondent (*[2023] EWHC 2221 (Admin)* ; *[2024] PTSR 3282*).

Statutory framework

7. Generally, planning permission is required for the carrying out of any development of land (s.57(1) of the TCPA 1990). Section 55 defines "development" as the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.

8. There are a number of different methods by which planning permission may be granted, including a grant by a LPA on an application made to that authority (s.58(1)(b)).

9. By s.70(1) , where an application is made to a LPA for planning permission, the authority may grant permission either unconditionally or "subject to such conditions as they think fit."

10. Section 72 contains further provisions on the conditional grant of planning permission. By s.72(1)(a) , without prejudice to the generality of s.70(1) , conditions may be imposed on the grant of planning permission under s.70 :

> "for regulating the development or use of any land under the control of the applicant (whether or not it is land in respect of which the application was made) or requiring the carrying out of works on any such land, so far as appears to the local planning authority to be expedient for the purposes of or in connection with the development authorised by the permission"

This provision extends the power to impose conditions in respect of the site the subject of an application for planning permission (the "application site" conventionally shown on an application plan edged in red) to other land outside the application site but within the applicant's control (conventionally shown edged in blue).

11. Despite the broad language of s.70(1), the power to impose conditions is not unlimited. To be valid a condition must (1) be for a planning purpose, (2) be fairly and reasonably related to the permitted development and (3) not be so unreasonable that no reasonable planning authority could have imposed it (*Newbury District Council v Secretary of State for the Environment [1981] AC 578* ; *R (Wright) v Forest of Dean District Council [2019] UKSC 53 [2019]* ; 1WLR 6562; *DB Symmetry Limited v Swindon Borough Council [2022] UKSC 33* ; [2023] 1WLR 198).

12. So far as is material, s.73 provides:

> **"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 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."

13. Section 96A enables a person with an interest in the land to which a planning permission relates to apply to the LPA to alter that *existing* permission, provided that the authority considers that alteration to be non-material. Unlike s.73 , where the authority allows an application under s.96A, (1) the change is made by amending the existing planning permission, rather than granting a new permission, and (2) the change may relate to the operative part as well as to the conditions of that permission.

14. The Levelling-up and Regeneration Act 2023 inserted s.73B into the TCPA 1990 . When in force, this provision will enable a LPA to consider an application for a new permission which differs from an existing permission, provided that the authority is satisfied that the effect of the new consent will not be "substantially different" from that of the existing consent. The effect of a planning permission is to be assessed by reference to both the development authorised and the conditions imposed.

15. Where a developer wishes to revise a permitted scheme but is unable to rely upon s.73 or s.96A , or in due course s.73B , he will need to make an application for a fresh permission under s.70 .

Factual background

16. Morris J set out the factual background in detail at [7] to [38]. I will provide a summary.

17. On 4 July 2017, the appellant granted a full or detailed planning permission ("the 2017 permission") on 72ha of land for a solar farm at Woodington Farm, Woodington Road, East Wellow, Hampshire to Woodington Solar Limited ("WSL"), the developer and interested party (ref. 15/02591/FULLS).

18. A full or detailed grant of planning permission should be read together with the plans and drawings thereby approved. In the absence of any indication to the contrary, the approved plans and drawings will be those listed in the planning application. Alternatively, the LPA may indicate in the decision notice which plans are approved by the permission (*Barnett v Secretary of State for Communities and Local Government [2009] EWCA Civ 476; [2010] 1 P & CR 8*).

19. The operative part of the 2017 decision notice grants full planning permission "for the above development in accordance with the approved plans listed below" and subject to the conditions which follow. The written description of the "above development" reads:

> "Installation of a ground mounted solar park to include ancillary equipment, inverters, *substation* , perimeter fencing, CCTV cameras, access tracks and associated landscaping Woodington Farm, Woodington Road, East Wellow" (emphasis added)

and the "approved plans" include:

> Site location plans – Ref. nos. H.0357_01-D and H.0357_24-C Site layout – Ref. No. H.0357_06-H ("site layout version H") Drawing DIS000 "Typical Single 33kV GRP Housing Switchgear"

20. Condition 2 of the 2017 permission provides that "the development shall not be carried out other than in complete accordance with the approved plans", which include those referred to in [19] above. It is common ground that the development approved by the operative part of the 2017 planning permission includes a 33kV substation as shown on drawing DIS000.

21. Site layout version H does not show the location of the "substation" referred to in the grant of permission. Consequently, condition 15 required the developer to obtain subsequent approval of the relevant details:

> "Prior to the commencement of the development hereby permitted, full details of the proposed siting, external materials, external lighting and mean of access/enclosure for the sub-station, as shown on drawing DIS000, shall be submitted to and approved in writing by the Local Planning Authority. Implementation shall be in accordance with the approved details."

22. On 4 June 2020, the appellant approved the details of the 33kV substation submitted under condition 15 (site layout plan H.0357_41 Rev). A 132kV overhead line runs north/south roughly through the middle of the site. The approved details show the 33kV substation located just to the east of this overhead line towards the centre of the overall site.

23. Meanwhile, on 10 July 2019, the appellant purported to grant a s.73 permission to vary condition 2 of the 2017 permission to accommodate a 132kV substation for a district network operator ("DNO") with a connection to the 132kV overhead line. The respondent challenged the legality of this permission, arguing that it was *ultra vires* s.73 . In June 2020, this first s.73 planning permission was quashed by consent in the High Court. Neither party suggests that that order is relevant to the issues which fall to be determined on this appeal.

24. On 24 May 2021, the appellant granted a full planning permission (20/00814/FULLS) ("the 2021 permission") for a 132kV DNO substation and a number of solar panels on 6.8ha of land in the centre of the site of the 2017 permission. WSL said that the application was made to facilitate the connection of the solar park permitted by the 2017 permission to the 132kV grid. The proposal was similar to that which had been the subject of the s.73 permission granted in July 2019 and subsequently quashed.

25. The operative part of the 2021 decision notice grants full planning permission "for the above development in accordance with the approved plans listed below" and subject to the conditions which follow. The written description of the "above development" reads:

> "Installation of substation, ground mounted solar panels, ancillary equipment, infrastructure and access associated with Planning Permission reference: 15/02591/FULLS."

and the "approved plans" include:

> Site location plan – H.035_Rev A Site layout – Plan Ref No. H.0357_06 – Version P ("site layout version P") Block Plan Ref. No. H.0357_45 – Version C

26. Condition 2 of the 2021 permission provides that the development authorised by that permission "shall not be carried out other than in complete accordance with the approved plans", which include those referred to in [25] above.

27. Site layout version P shows the access route running across farmland to Woodington Road, as in the 2017 permission. The bulk of the site of 6.8ha comprises fields lying to the west and east of the 132kV overhead line. The field to the west shows the location for the 132kV substation and a re-arrangement of the solar panels previously shown on layout version H in the 2017 permission to accommodate that substation. On layout version P, the field to the east is used for additional solar panels, none of which were shown in layout version H in the 2017 permission.

28. On 21 December 2021, WSL made a second application under s.73 of the TCPA 1990 to vary conditions of the 2017 permission so that a new s.73 permission would be fully consistent, and could be carried out in conjunction, with the "more recently approved substation and solar array permission (20/00814/FULLS)" (the 2021 permission). It is common ground that the more recently approved "substation" referred to the 132kV DNO substation. But the proposals in the s.73 application did not discuss the 33kV substation approved by the 2017 permission.

29. In response to that application, on 27 April 2022, the appellant granted the s.73 permission (21/03722/VARS) which was the subject of the respondent's challenge in the High Court. The operative part of the 2022 decision notice grants full planning permission "for the above development in accordance with the approved plans listed below" and subject to the conditions which follow. The written description of the "above development" includes:

> "Variation of condition 2 (Approved Plans)… of Planning permission 15/02591/FULLS (installation of a ground mounted solar park to include ancillary equipment, inverters, substation, perimeter fencing, CCTV cameras, access tracks, and associated landscaping) to allow alterations to layout and design of the site that include a reduction in the number of solar arrays, re-provision and increased provision of conservation areas, replacement of central inverter with string inverters, alterations to alignment of security fences and permissive paths, rationalisation (reduction) of a number of internal access tracks."

and the approved plans include:

> Site location plans – Ref. nos. H.0357_01-G and H.0357_24-F Site layout plan – Ref. No. H.0357_06V ("site layout version V").

30. Condition 2 of the 2022 permission provides that the development authorised by that permission "shall not be carried out other than in complete accordance with the approved plans", which include those referred to in [29] above.

31. The operative part of the 2022 permission lists the conditions which are varied and then refers to development approved by the 2017 permission, including "substation". It was common ground that this was a reference to the 33kV substation approved in 2017.

32. But there are also a number of changes in the 2022 permission from the development approved by the operative part of the 2017 permission:

(1) The site layout plan for the 2022 permission (the subject of condition 2) does not show any development within the central site of about 6ha the subject of the 2021 permission;
(2) Accordingly, the 2022 permission does not grant planning consent for any development authorised by the 2017 permission within that central site, in particular the solar arrays to the west of the 132kV overhead line, the 132 kV DNO substation and the 33kV substation;
(3) The number of solar arrays is reduced;
(4) The provision of "conservation areas" is increased;
(5) The central inverter is replaced by string inverters;
(6) The number of internal access tracks is reduced.

33. The red lines on the site location plans referred to in [19], [25] and [29] above show the areas covered by the 2017, 2021 and 2022 permissions respectively. The 2017 permission relates to the original development site of 72 ha. The 2021 permission relates to a site of 6.8 ha, the main area of which lay at the centre of the 2017 permission site. The 2022 permission covers the entire area of the 2017 permission.

34. In these proceedings the parties have focused on how the 2022 permission treats the 33kV substation which, it is agreed, forms part of the development approved by the 2017 permission. Paragraph 51 of the appellant's skeleton says:

> "The primary purpose of the s 73 permission under challenge (the 2022 Permission) was to remove any physical inconsistency between the solar park permitted in 2017 and the 2021 Permission. It did so by removing development from the area covered by the 2021 Permission; by amending the approved plans under condition 2 so they did not include a 33kV substation; and by omitting a condition which had originally been attached requiring details (including siting) of the substation to be provided. The intended effect of the 2022 Permission was to allow the solar park and the 2021 substation to be built out, and operate, in tandem."

35. Consistent with WSL's deliberate decision to omit the 33kV substation from the s.73 application, the 2022 permission does not replicate condition 15 of the 2017 permission requiring details to be approved of a 33kV substation. Nor does the 2022 permission require the development to be carried out in accordance with plan H.0357_41 Rev, the details of the 33kV substation approved under condition 15 on 4 June 2020 (see [22] above). Instead, condition 2 requires the development permitted by the 2022 permission to be carried out in accordance with plans which exclude the 33kV substation.

36. The appellant says that the operative part of the 2022 permission meets the test set out in [3] above because it continues to refer to the "substation", that is the 33kV substation approved in the operative part of the 2017 permission. But, as explained in its skeleton, the appellant has used the mechanism of the *conditions* imposed on the s.73 permission to exclude that substation from the development authorised by that permission. It is therefore essential for the appellant to argue that the only restriction

specific to the power under s.73 is restriction (2) and not (1) (see [4]-[5] above), because it is apparent that the conditions of the 2022 permission are materially inconsistent with the operative part of that consent.

37. The way in which the parties came to define the legal issues in these proceedings reveals that they left to one side changes made by the operative part of the 2022 permission to the development authorised by the grant in the 2017 permission (see [32] above). At first sight they would appear to infringe the principle in [3] above, not least the approval of a layout plan which excluded the development authorised by the 2017 permission in the central area. But the court heard no argument on this point and therefore I say no more about it.

The judgment in the High Court

38. In the High Court, the respondent applied to quash the 2022 planning permission on two grounds [44]. First, she contended that the 2022 permission was *ultra vires* s.73 of the TCPA 1990 because, unlike the 2017 permission, it did not include a 33kV substation. Second, she contended that in granting the 2022 permission, the appellant had failed to have regard to a mandatory material consideration, namely the fact that the proposal omitted the 33 kV substation.

39. Having set out the factual background and the statutory framework, the judge carried out a detailed analysis of the case law at [51] to [105]. He summarised the submissions of the parties at [106] to [119], which in large measure are maintained before us.

40. At [121] to [125], the judge concluded that s.73 is subject to restriction (1), basing himself largely upon the analysis by the Court of Appeal in *Finney* . At [126], the judge concluded that s.73 is also subject to restriction (2).

41. At [128] to [133], the judge applied these principles to the facts of the case. He concluded at [128] to [130] that because condition 2 of the 2022 permission prohibited the carrying out of the development with a 33kV substation, that permission was inconsistent with the operative part of the 2017 permission and so infringed restriction (1).

42. The judge also concluded at [132] that the omission of the 33kV substation from the 2022 permission represented a fundamental alteration of the development approved by the 2017 permission. Accordingly, the 2022 permission infringed restriction (2).

43. If, contrary to his conclusion under ground 1, the omission of the 33kV substation from the 2022 permission was not *ultra vires* s.73 , the appellant accepted under ground 2 that that omission was nevertheless a mandatory material consideration to which the authority had been bound to have regard when deciding whether or not to grant that permission (*[2024] PTSR at [140]*). The judge decided that the appellant did not have regard to that factor and so upheld ground 2 [142] to [144].

44. The judge went on to reject the appellant's reliance upon s.31(2A) of the Senior Courts Act 1981 in relation to ground 2. He was not satisfied that if the members of the planning committee had been aware of the omission of the 33kV substation from the s.73 application before them, it was highly likely that they would still have granted the 2022 permission [145].

The grounds of appeal

45. In summary, the grounds of appeal are as follows:

(1) The judge was wrong to decide that any conflict between the conditions of a s.73 permission and the operative part of the permission it amends is *ultra vires* s.73 ;
(2) The judge was wrong to conclude that the omission of the 33kV substation from the s.73 permission in 2022 was a "fundamental" alteration of the development authorised by the 2017 permission. Furthermore, that omission could not even be treated as a "substantial" alteration of that development;
(3) The judge was wrong to conclude that the appellant failed to have regard to the omission of the substation when it decided to grant the 2022 permission;
(4) Assuming that (3) is established, the judge was wrong to conclude under s.31(2A) of the 1981 Act that if the appellant had taken the omission of the substation into account, it was not highly likely that it would still have granted the planning permission.

46. Mr Robin Green on behalf of the appellant accepted that if, as a matter of law, s.73 is subject to restriction (1), then the appeal must fail. He also said that for the appeal to succeed, the appellant has to succeed on grounds (1) and (2) and either (3) or (4).

Grounds (1) and (2)

47. It is convenient to take grounds (1) and (2) together.

The appellant's submissions

48. Although the appellant accepts that the operative part of a s.73 permission cannot alter the operative part of an extant permission, it maintains that the conditions of a s.73 permission can have that effect. How can that be?

49. The appellant relies upon the line of authority which includes *Bernard Wheatcroft Limited v Secretary of State for the Environment (1982) P & CR 233, 239-241* . This holds that a condition may be imposed on a planning permission to reduce the development the subject of the *application for permission* , provided that this would not allow development that *in substance* was not that which had been applied for (the "substantial alteration" test).

50. In *R v Coventry City Council ex parte Arrowcroft Group Plc [2001] PLCR 7 at [29]* , Sullivan J (as he then was) took that principle as a starting point for his analysis of the ambit of s.73 . In effect, the appellant submits that the "substantial alteration" test in *Wheatcroft* (or the "fundamental alteration" test in *Arrowcroft*) was also the end point of that analysis.

51. The appellant seeks to draw support from the decision of Patterson J in *Kevin Stevens t/a KCS Asset Management v Blaenau Gwent County Council [2015] EWHC 1606* .

52. The appellant recognises that in *Finney* , this court stated that the *Wheatcroft* test does not apply to s.73 applications. But it submits that the reasons given by Lewison LJ in [41] were *obiter* and insufficient to justify the conclusion he reached (see para. 43 of skeleton). However, the appellant does not address the reasoning in [42] of his judgment.

53. The appellant submits that, in any event, *Finney* endorsed a "fundamental alteration" test, said to have been taken from *Arrowcroft* , as determining the ambit of the power to impose conditions under s.73 .

54. The appellant criticises the conclusions reached by Morris J in this case for additional reasons (para. 51 of skeleton), notably:

(1) The statutory scheme does not prevent a condition from cutting down the scope of a permission, provided that it satisfies the criteria for the validity of a condition stated in *Newbury* ;
(2) There is no dichotomy between the "operative part" of a planning permission and its conditions. What is permitted is defined not just by the words of grant but also by those conditions;

(3) If *Finney* does suggest that *any* conflict between a condition and the description of development in the grant is impermissible, "it goes too far". Neither authority, nor the reasons in the judgment of Lewison LJ at [41], support that proposition;
(4) Likewise, *Cadogan v Secretary of State for the Environment (1992) 65 P & CR 410* , does not support that proposition. Although Glidewell LJ stated at p.413 that:

> "It is established law that a condition on a planning permission will not be valid if it alters the extent or indeed the nature of the development permitted"

the appellant says that no supporting authority was cited, the meaning of this test is unclear and it should not be applied literally.

55. For completeness I should mention that the appellant says that the approval of the 132kV DNO compound by the 2021 permission made it unnecessary for a separate 33kV substation to be provided; the DNO facility includes a 33kV substation. The respondent says that this is incorrect; a separate "sender" 33kV substation is still required. It is neither possible nor necessary for the court to resolve this issue.

Analysis of the legislation

56. Parliament has provided a comprehensive statutory code for planning control (*Pioneer Aggregates Limited v Secretary of State for the Environment [1985] AC 132, 140-141*). As far as possible, the intention of the legislature is to be ascertained from the normal and natural meaning of the words used in the statute.

57. There has been a tendency for legal argument on the scope of s.73 to focus on the meaning of phrases used in judgments, rather than the statute. Indeed, there has been a good deal of disagreement in a number of High Court cases about the meaning of one paragraph in one particular decision of the High Court, *Arrowcroft* at [33]. Judicial exegesis of legislation is not a substitute for the language used by Parliament (see e.g. Craies on Legislation (12th ed.) para. 16.1.3). Similarly, in *Lambeth* Lord Carnwath JSC warned against "the risk of over-complication" in this area of the law [28]. We should return to the legislation itself and to first principles. When that is done, the TCPA 1990 supplies a clear answer to the main issues raised by this appeal.

58. Before the Housing and Planning Act 1986 inserted s.31A into the Town and Country Planning Act 1971 ("TCPA 1971") , the forerunner of s.73 , a developer dissatisfied with a condition imposed by a LPA on a planning permission had only one remedy, namely to appeal to the Secretary of State against that decision. However, because the Secretary of State can deal with a planning appeal as if an application had been made to him in the first instance (s.79(1) of the TCPA 1990), this carried the risk of him refusing to grant planning permission at all, whether in response to a change of opinion on the LPA's part or representations from third parties. The developer might end up without a planning permission.

59. Section 31A of the TCPA 1971 addressed this issue by restricting the LPA to considering solely "the question of the conditions subject to which planning permission should be granted". If the authority decides that there should be no change in the conditions already imposed, the application is refused, but the extant planning permission remains intact. If, however, the authority decides that planning permission should be granted either subject to different conditions, or unconditionally, then it must grant an additional permission on those terms. Again, the original permission remains intact. The developer may choose which permission to implement. The purpose of s.73 is to enable an applicant to apply "for relief from any or all of [the] conditions (Circular 19/86), but the planning authority may not go back on their original decision to grant permission" (Sullivan J in *Pye v Secretary of State for the Environment, Transport and the Regions [1998] 3 PLR 72* ; *R v Leicester City Council ex parte Powergen UK Limited (2000) 81 P&CR 5* ; *Lambeth* at [9]; *Finney* at [13]).

60. Accordingly, in *Lambeth* , the Supreme Court stated at [11] that

> "A permission under s.73 can only take effect as an independent permission to carry out *the same development as previously permitted* , but subject to new or amended conditions" (emphasis added)

61. It is not surprising, therefore, to find that in practice practitioners refer to a s.73 application as a proposal to amend the conditions of a permission, although, if successful, the original permission remains unaltered. In *Lambeth* at [10] Lord Carnwath pointed out that s.49 and Part 1 of sched.11 of the Housing and Planning Act 1986 (which introduced s.31A of the TCPA 1971) referred to "applications to vary or revoke conditions attached to planning permission".

62. The appellant also places great emphasis upon statements in a number of authorities that a planning permission comprises both the operative part and its conditions, in an attempt to justify a restriction which looks at the effect of an altered condition on the existing permission as a whole, rather than just the operative part (i.e. restriction (2) instead of restriction (1)). But it is necessary to pay attention to the context in which such statements have been made. For example, in *Barton Park Estates Limited v Secretary of State for Housing, Communities and Local Government [2022] EWCA Civ 833; [2022] PTSR 1699* , Sir Keith Lindblom SPT said a planning permission must be *interpreted* as a whole, that is not only the grant, but also the conditions and the reasons given for their imposition [21(2)]. Plainly, one part of a permission may assist in the interpretation of another. *Barton Park* was not considering the ambit of s.73 .

63. It does not follow that the distinction between the operative part and the conditions of a permission plays no part in determining the limits of the power under s.73 to grant a new permission. Given that s.73(2) only allows a LPA to consider the conditions which were imposed on a previous permission and impose different conditions from those contained in that decision, the principle that the LPA must not go back on "the original permission", must in this context refer to the operative part of that permission. The dichotomy between the operative part of the original permission and the conditions is inherent in the power conferred by s.73 .

64. Accordingly, the appellant's suggestion that the conditions of a s.73 permission can have the effect of altering the operative part of an earlier permission, although the operative part of a s.73 permission cannot do that, is contrary to the statutory scheme. Indeed, if the conditions in a s.73 permission could lawfully have that effect, there would have been no point in Parliament restricting the planning authority to considering the issue of conditions. It might just as well have allowed a determination under s.73 to alter the operative part of the earlier permission directly. But the appellant accepts that *Finney* has decided that s.73 does not confer that power. This straightforward interpretation of the legislation provides a short answer as to why the appeal must fail.

65. The way in which WSL applied for, and the appellant approved, amendments under s.73 (see [30] - [36] above) reinforces that last point. On its own case, the appellant accepts that if the operative part of the 2022 permission had omitted any reference to the substation (i.e. the 33kV substation), and had therefore differed from the operative part of the 2017 permission, the 2022 permission would have been *ultra vires* s.73 . Yet the appellant argues that a condition, for example condition 2 of the 2022 permission, could lawfully have the effect of excluding that substation from the development authorised by the s.73 permission. By using this drafting technique to alter merely the form of the s.73 permission, the principle accepted by the appellant (see [3] above) could easily be circumvented. That cannot be right. Furthermore, the appellant's argument would apply not only in cases where the developer seeks or agrees with the imposition of such a condition by the planning authority, but also in cases where he does not.

66. It also follows from this analysis of the legislation that it is incorrect for the appellant to say that the power to impose conditions in s.73 is as broad as the powers to impose conditions under ss.70 and 72 . Plainly, the latter powers are not subject to any requirement for the authority to consider the terms of an existing permission and, in particular, that the fresh permission should not alter the operative part of that earlier permission.

67. No doubt a LPA may not impose under s.73 a condition which fails to satisfy the *Newbury* tests. But that is only a necessary, rather than a sufficient, condition for the exercise of the power under s.73 to grant a new permission.

68. I therefore consider the correct interpretation of the legislation to be clear on its face. But in view of the arguments we have heard, I accept that it is necessary to revisit below the more pertinent cases which have been cited.

Analysis of the case law

69. The operative part of a planning permission cannot give consent for a development in one hand, only for a condition to take that consent away in the other (see Sullivan J in *Arrowcroft at [35]*). Accordingly, the appellant is wrong to suggest

that under ss.70 and 72 it would be lawful to impose a condition which does not merely limit or regulate the development consented by the operative part, but removes or alters the whole or part of that grant.

70. As Glidewell LJ pointed out in *Cadogan* , a condition cannot alter the extent or nature of the development consented by a planning permission (see [54(4)] above). In that case, the permission approved mineral extraction in accordance with application documents which included a restoration scheme using only materials found on site. The Court of Appeal held that a condition allowing for details of an alternative restoration scheme to be submitted for the LPA's approval should be interpreted by reference to the operative grant of the consent. Accordingly, the condition would not allow an alternative scheme to be approved outside the ambit of that grant, for example by importing material from offsite.

71. I do not accept the appellant's criticism that *Cadogan* was not based upon any established principle. By that stage the *Newbury* principles had already become trite law and did not need to be mentioned in the judgment. To be lawful, a condition must *inter alia* "fairly and reasonably relate to the permitted development".

72. It is helpful to go back to the factual context considered in *Newbury* . The House of Lords accepted that in an appropriate case a condition in a permission for the erection of a building (in contrast to a permission for a *change in the use* of an *existing* building) might justifiably require the demolition and removal of that building if the permission was only granted for a temporary period. But no one would suggest that it would be lawful to impose in a permission for a permanent building a condition requiring its demolition, for example, as soon as it was erected. Indeed, such a condition would be irrational.

73. Contrary to the appellant's submission, it would be unlawful in a decision notice granting planning permission expressly for 10 houses to impose a condition prohibiting the erection of any more than 9, or just 1 house. Such a condition would derogate from or negate the consent granted by the operative part of the decision notice. It would not reasonably relate to the planning permission granted. I note that in *R (Suliman) v Bournemouth, Christchurch and Poole Council [2022] EWHC 1196 (Admin); [2022] JPL 1281* , Lang J decided that it would have been unlawful for the LPA to impose a condition which conflicted with the description of the permitted development in the operative part of the consent. She concluded that that particular condition would have been unreasonable and thus in breach of the third of the *Newbury* principles.

74. Mr Green even went so far as to suggest that in the event of a conflict between the conditions and the operative part of a permission, the former would override the latter. But he cited no authority where the court has expressly accepted that proposition.

75. Instead, he sought to rely upon the decision in *Stevens* . In that case, the LPA granted planning permission for a solar park. The operative part of the consent included "the excavation of a cable trench to the south for grid connection…". But consultees pointed out that this route had not been the subject of a necessary ecological survey. An objector wrote to the LPA contending that it would be unlawful for planning permission to be granted which included the cable route without the authority having assessed an appropriate survey carried out by the developer. To overcome this risk of legal challenge, the LPA decided to impose a condition which read "the southern cabling route… does not form part of this planning permission." The officer's report described this as "vetoing its use as part of the planning permission" [21].

76. A neighbouring landowner challenged the grant of planning permission on a number of grounds, the first of which was:

> "the planning permission is unclear and *Wednesbury* unreasonable on its face as it does not grant planning permission for the excavation of the cabling trench route to the south."

77. Patterson J summarised this issue as being whether the planning permission was unclear on its face (see [36]). She referred to the *Wheatcroft* principle as authorising the grant of a permission for less development than the applicant has applied for (and to similar effect *Kent County Council v Secretary of State for the Environment (1976) 33 P & CR 70*). At [41], the judge rejected this part of the claimant's challenge in the following terms:

> "In my judgment, there is nothing unusual or unlawful about the defendant's way of proceeding or its grant of planning permission. The wording of the permission is clear, but it has to be read in

> conjunction with the conditions attached to it. Condition 20 expressly removes the southern cabling route from the main site to Aberbeeg. There is nothing ambiguous in the language used. It is clear and not confusing. Using conventional principles of construing a planning permission a planning consent was granted for the photovoltaic park, as applied for, but without the southern track which was removed from the planning permission. The reason why that was done is clearly set out in the reason for condition 20 so that a reasonable reader is left in no doubt as to what has happened and why."

78. Thus, the judge dealt with the ground of challenge essentially as an issue to do with the interpretation of the planning permission. According to the language used, the permission was granted for the solar park as applied for, but with the southern cable route "removed" by a condition. It appears that the developer accepted that permission should not be granted for that route. In those circumstances, the LPA could have considered wording the operative part of the consent so that it did not include the southern cable route. But it did not do so.

79. Having treated this as essentially a linguistic exercise, the judge's decision depended upon an unstated assumption that there is a legal power by which a condition may take away in one hand what has been granted by the operative part of the permission in the other. No reasoning was given as to how a condition could lawfully do that and the court did not decide that point. *Wheatcroft* had not addressed the matter either. Finally, *Stevens* did not refer to the passage in *Arrowcroft* (see [69] above) which has since been approved by this court in *Finney* . Therefore, I respectfully do not accept that the decision in *Stevens* is authority for the proposition that a condition can negate the whole or part of the operative part of a planning permission.

80. In any event, *Stevens* was a decision on the lawfulness of a s.70 planning permission. By implication, the judge treated the reference in the operative part of the consent to the southern cable route as being of no legal effect. Those words were mere surplusage. But that approach would cause an insoluble problem for the appellant's argument when applied to a s.73 permission. Taking as an example the 2022 permission in the present case, the result of applying *Stevens* would be that, by virtue of condition 2, the express reference to "substation" in the grant of consent would be of no legal effect. That would breach a legal principle in *Finney* which the appellant does accept (see [3] above). The appellant's case would instantly collapse. This only serves to underscore the inherent problem in its case under ground 1.

81. It is convenient next to address *Wheatcroft* , which has led to some confusion in the discussion of the law on s.73 . *Wheatcroft* was not a decision about s.73 at all. Instead it was concerned with granting a s.70 permission (or its equivalent on appeal) for less development than had been applied for in the planning application.

82. The developer's appeal against the LPA's refusal of an application for 420 houses on a 35 acre site went to a public inquiry. Just before the inquiry began, the developer said that if it should be decided that the overall scale of the scheme was unacceptable, then it would ask the Secretary of State to consider an alternative for 250 houses on a smaller part of the appeal site occupying 25 acres. The Inspector recommended that permission should be refused for the larger scheme, but granted for the smaller scheme, if it were legally permissible for that alternative to be considered and approved. The Secretary of State agreed that the larger scheme was unacceptable. He then decided that he could not consider the merits of the smaller scheme, because a planning authority does not have the power to grant permission for less development than that which has been applied for, unless the proposal is severable, which this was not.

83. The developer succeeded in having that decision quashed in the High Court so that the appeal had to be redetermined. The court held that severability was irrelevant. A planning authority does have the power to grant permission for a smaller scheme than that applied for, which can be exercised by imposing a condition reducing the development proposed, so long as that alteration is not "substantial".

84. The court explained that a major factor in the planning authority's judgment as to whether such an alteration is "substantial" is whether it would deprive parties entitled to be consulted on the application of a proper opportunity to be consulted on the alternative proposal. Furthermore, there might be planning considerations as to why an alteration is substantial and therefore cannot be properly be considered in relation to the application before the decision-maker.

85. This judicial solution was not based upon any statutory provision dealing with alternatives to the development proposed in a planning application. Likewise, there is no statutory provision for making a formal amendment to a planning application

to alter the development being proposed. In practice, the considerations referred to in the *Wheatcroft* line of authorities have also been applied to decide whether an amendment can be considered (*Bramley Solar Farm Residents Group v Secretary of State for Levelling up, Housing and Communities [2023] EWHC 2842 (Admin); [2024] JPL 576*).

86. The important point here is that the *Wheatcroft* principle is concerned with the effects of altering a development proposal on the *process* for assessing and determining the merits of a planning application (or appeal), including *procedural* effects on parties participating in that process. By contrast, the limits of the power conferred by s.73 are concerned with the relationship between the alteration of conditions in an existing planning permission and the protection of *substantive* development rights granted by that permission. This is a completely different matter, which is subject to the express language of s.73 .

87. *Wheatcroft* did not involve any challenge to an actual grant of planning permission or to the terms of such a permission. Accordingly, *Wheatcroft* did not consider (1) whether it is legally permissible to impose a condition reducing the scale of development proposed (or changing the development) if that conflicts with the operative part of the permission granted, or (2) whether that problem can be avoided by wording the operative part so that it grants permission for a reduced scale of development. Sullivan J addressed the first of those two issues in *Arrowcroft* .

88. I turn to the three High Court decisions to which the Court of Appeal referred in *Finney* [21]-[22] as addressing the question whether, on a s.73 application, a LPA can alter the description of the development contained in the operative part of an extant permission.

89. The first case is *Arrowcroft* . The LPA granted planning permission for a large mixed-use development. The operative part included "one variety superstore". Condition 5 required that the buildings to be constructed should comprise *inter alia* "a variety superstore". That condition was therefore consistent with the operative part. Originally, it was intended that Marks & Spencer should occupy that store. Subsequently, they pulled out of the project. The developer then decided to promote a number of smaller variety stores in place of the single variety superstore.

90. A s.73 application was subsequently made to amend condition 5, so as to require the construction of "non-food variety stores" not exceeding six in number. The LPA resolved to grant a s.73 permission subject to the prior execution of a planning obligation under s.106 of the TCPA 1990 . The High Court was asked to decide whether it would be unlawful for the permission to be granted. The case proceeded on the basis that the operative part of the s.73 permission to be granted would still refer to a single variety store [23] and [26], but would be subject to the amended condition. The claimant submitted that there would be a "fundamental inconsistency" between that condition and the description of the development permitted [23].

91. Sullivan J allowed the legal challenge. His reasoning needs to be read carefully, as it has given rise to much discussion and disagreement in the case law and in this appeal, particularly in relation to [33].

92. The appellant and others have suggested that the decision in *Arrowcroft* only involved the application of the *Wheatcroft* principle and nothing more. That is incorrect. The operative part of the original s.70 permission granted planning permission for the development for which the developer applied and the conditions were consistent with that application. Accordingly, at that stage, the *Wheatcroft* principle was not engaged.

93. In the subsequent application made under s.73 , the developer was only entitled to apply for planning permission for the same development as had been granted by the operative part of the original permission, including the single variety superstore. The judgment indicates that the application and the resolution to grant permission accorded with that statutory restriction. In addition, the amended condition 5 was to be imposed in the same terms as had been sought in the application. There is no suggestion that the s.73 permission was to differ from the terms of the application. It therefore follows that the *Wheatcroft* principle was not engaged. That was the very point made in the High Court on behalf of the developer [28]. The real vice of the LPA's resolution to approve the s.73 application was that there would be an inconsistency between the new grant of permission for the development and the altered condition 5.

94. In *Arrowcroft* Sullivan J did not suggest that his decision rested on the *Wheatcroft* principle. Instead, at [29] of *Arrowcroft* the judge treated that principle as a "useful *starting* point". He summarised it in the following terms:

> "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."

I note in passing that for no apparent reason (but perhaps echoing the submission of the claimant's counsel) the judge referred to "fundamental alteration" instead of "substantial alteration".

95. The judge then said at [32] that it would have been unlawful if the LPA had responded to the original planning application for one variety superstore by granting a s.70 permission subject to a condition requiring up to six non-food variety stores. Plainly if the facts were changed in that way, the *Wheatcroft* principle would have been engaged, raising the issue whether the condition involved a permissible alteration of, or departure from, the *planning application* .

96. This hypothetical situation was then discussed further in [33]:

> "Faced with the imposition of such a condition there can be little doubt that Marks & Spencer 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* s.73 . It is true that the outcome of a successful application under s.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 s.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." (emphasis added)

97. The judge's discussion of this hypothetical scenario in the first part of [33] was based upon a more fundamental principle than *Wheatcroft* . Irrespective of whether a condition would or would not involve a permissible alteration of the planning application (the *Wheatcroft* principle *)* , a condition cannot remove or negate the whole or part of the operative part in the decision notice. A condition cannot take away in one hand what has been given by the operative part in the other. The actual permission which the LPA had resolved to grant on the s.73 application breached that principle. The proposed condition would be inconsistent with the operative part of the permission and so the decision would be unlawful.

98. This fundamental principle was taken up by the judge again 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 s.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."

99. From the above analysis it follows that it was unnecessary in *Arrowcroft* for the judge to have introduced at [32] and [33] the hypothetical scenario discussed in [95]-[97] above. The judge's reasoning did not depend upon the *Wheatcroft* principle or its application to that scenario. The principle set out in *Arrowcroft at [35]* stands on its own two feet.

100. For all these reasons, *Arrowcroft* at [33] and [35] directly supports the respondent's contention that s.73 is subject to restriction (1). The *ratio* of *Arrowcroft* was not based upon *Wheatcroft* , but was based upon the principle at [35], which was also set out in the first part of [33].

101. I do not accept that restriction (1) does not apply to an inconsistency between a condition and the operative part which is less than "fundamental". The reference to "fundamental inconsistency" in [33] appears to have been based simply upon the submissions of the claimant's counsel in *Arrowcroft* (see [29). Understandably, counsel chose to place emphasis upon that degree of inconsistency for good forensic reasons on the facts of that case. It does not appear to have been based upon any legal principle. It was not suggested in *Arrowcroft* that an inconsistency between a condition and the operative part of a permission which is less than "fundamental" (or "substantial") would be lawful.

102. Accordingly, Sullivan J resolved the first of the issues raised in [87] above. Even where *Wheatcroft* is engaged and it could lawfully be permissible to grant a planning permission for development different from that applied for in the planning application, it would be unlawful to impose a condition which conflicts with the operative part of that permission in the sense of negating the whole or part of that grant. I would add that an inconsistent condition of that kind may render the decision unlawful, unless that condition can properly be severed (*Kent County Council v Kingsway Investments (Kent) Limited [1971] AC 72*).

103. The decision in the second case, *R (Vue Entertainment Limited) v City of York Council [2017] EWHC 588 (Admin)* , is consistent with a proper reading of *Arrowcroft* . In *Vue* , the LPA granted a s.70 permission for mixed-use development, the operative part of which referred to *inter alia* a "multi-screen cinema". Condition 2 required the development to be carried out in accordance with approved plans which showed a 12-screen cinema able to accommodate 2,000 people. The LPA granted a s.73 permission with an amended condition so as to allow for a cinema with 13 screens and capacity for 2,400 people.

104. Collins J held that the s.73 permission was lawful. Plainly, there was no conflict between the operative part of the consent referring in broad terms to a "multi-screen cinema" and the more detailed descriptions in either the original or altered form of condition 2. The grant did not limit the number of screens or the capacity of the cinema.

105. At [13] of his judgment, Collins J referred to *Arrowcroft* at [33] and then said this:

> "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."

106. The third case is a decision of Singh J (as he then was) in *R (Wet Finishing Works Limited) v Taunton Deane Borough Council [2017] EWHC 1837 (Admin); [2018] PTSR 26* . The LPA granted planning permission for the erection of 84 dwellings. Subsequently, the developer obtained a s.73 permission allowing the construction of 90 dwellings. It is not clear from the judgment or the report how the decision notices defined the development or controlled the number of dwellings, although [38] would suggest that the original grant was for 84 dwellings rather than simply residential development.

107. The judge said that the true principle governing s.73 cases was to be found in *Arrowcroft at [33]* , namely that different conditions may be imposed in a s.73 permission if they could lawfully have been imposed in the original permission without amounting to a fundamental alteration of the proposal in the original planning application [45]. The judge added at [47] that the "substantial alteration" test in *Wheatcroft* was consistent with the "governing principle" he had taken from *Arrowcroft* . He then decided that the LPA had been entitled to treat the increase to 90 dwellings as not being a fundamental alteration [48].

108. Turning to *Finney* , it is necessary first to identify the issues determined by the High Court *[2018] EWHC 3073 (Admin); [2019] JPL 402* . The LPA granted planning permission for two wind turbines. They were described in the operative part of the decision notice as having "a tip height of up to 100m". Condition 2 required the development to be carried out in accordance with approved plans, one of which showed the same height. Subsequently, the developer applied under s.73 to vary condition 2 by substituting a drawing showing taller turbines with a tip height of 125m.

109. The Inspector in a planning appeal granted a s.73 permission for the installation and operation of two wind turbines, but the operative part made no reference to their height. Condition 2 required the development to be carried out in accordance with plans which showed the increased height of 125m.

110. Counsel for the claimant submitted that the case law laid down three principles:

(1) A s.73 permission cannot vary the operative part of an earlier permission;
(2) A condition cannot be imposed on a s.73 permission which is directly contrary to the operative part of that earlier permission;
(3) Even if a proposed variation of a condition does not infringe (1) or (2), that variation must not make a fundamental alteration to the proposal for which the earlier permission was granted.

111. The defendant and interested party disagreed with that analysis. They advanced a principle said to have been drawn from *Arrowcroft* at [33]: a s.73 permission cannot include a condition which could not lawfully have been imposed on the earlier permission, in that the condition must not bring about a fundamental alteration of the original proposal for which that earlier permission was granted. Thus, the rival positions were similar to those of the parties in this appeal.

112. The judge, Sir Wyn Williams, decided at [36]-[40] that:

(1) The ratio of *Arrowcroft* was in [33], which was followed by Collins J in *Vue* and by Singh J in *Wet Finishing Works;*.
(2) However, *Arrowcroft* is not authority for the proposition in *Vue* at [14] (i.e. restriction (1) in the present case). Paragraph [14] did not form part of the ratio of *Vue* ;
(3) The proposition in *Vue* at [14] is inconsistent with the ratio of *Wet Finishing Works* . The latter should be followed.

These differences of view in the High Court all arose because of unfortunate disagreements about the meaning of [33] of the judgment in *Arrowcroft.* It follows from the analysis I have set out above, that Collins J in *Vue* was correct and the judgments in *Wet Finishing Works* and *Finney* in the High Court were, with respect, incorrect, as previously confirmed by the Court of Appeal in *Finney* .

113. At all events, Sir Wyn Williams determined the challenge in *Finney* solely on the basis that the condition 2 would be unlawful if it involved a fundamental alteration of the original planning proposal [40] and [42]. The judge's primary conclusion was that the Inspector had been entitled to decide that condition 2 did not fail that test and so was lawful [45]. In the Court of Appeal, the appellant, the unsuccessful claimant, challenged that line of reasoning. The appellant succeeded.

114. In the present case, the appellant submits that *Finney* in the Court of Appeal merely decided that the operative part of a s.73 permission cannot differ from the operative part of the earlier permission. On that basis, it is said that a number of important passages in the judgment of Lewison LJ were merely *obiter dicta* (notably [29], [41], [43] and [46]). I disagree. The reasoning in his judgment was expressly or impliedly treated by the judge as being necessary to deal with the claimant's challenge to the judgment in the High Court and, indeed, the defence of that position in the Court of Appeal. In any event, I respectfully agree with that reasoning, with which my analysis of the legislation and case law accords.

115. In *Finney* at [27]-[28] Lewison LJ cited from *Arrowcroft* a part of [33] and the whole of [35]. He said that these passages were dealing with two different "things". The former was concerned with "the imposition of conditions on the grant of planning permission" and the latter with a *conflict* between the *operative part* of a planning permission and *conditions*

attached to it. As we have seen, [33] of *Arrowcroft* , read as a whole, introduced the fundamental principle which was taken up in [35].

116. Lewison LJ dealt with *Vue* at [30] to [33] and *Wet Finishing Works* at [34] to [37]. In relation to *Vue* , at [31] he cited the judgment of Collins J at [14]. In relation to *Wet Finishing Works* , at [36]-[37] he noted that Singh J was not referred to *Vue* and that his judgment had only applied the "fundamental alteration" test. At [38] he said that Sir Wyn Williams had followed the approach of Singh J.

117. In the Court of Appeal, both the defendant and the interested party argued that "the only limitation on the power of the planning authority on an application under s.73 was that it could not introduce a condition that made a 'fundamental alteration' to the permitted development" [39]. Lewison LJ decided at [46] that the analysis of Collins J in *Vue* on the scope of s.73 was correct and to the extent that Singh J decided otherwise in *Wet Finishing Works* , that was incorrect. Accordingly, the High Court in *Finney* had been wrong to follow the decision in *Wet Finishing Works* . It is therefore plain that the Court of Appeal decided that a condition imposed in a s.73 permission cannot vary the operative part or grant of consent.

118. The respondents in *Finney* also relied upon *Wheatcroft* in support of their submissions. At [41], Lewison LJ explained why the *Wheatcroft* test is irrelevant for determining the *vires* of a permission granted under s.73 . I respectfully agree with that conclusion. *Wheatcroft* and s.73 are concerned with different things. *Wheatcroft* deals with alterations to the scope of a development proposal during the process leading up to the determination of a planning application. The ambit of s.73 is to do with the relationship between the alteration of conditions in an existing planning permission and the protection of *substantive* development rights granted by that permission (see [86] above). It also follows that what the Court of Appeal said in *Finney* about *Arrowcroft* has to be understood in the context of the judgment of Lewison LJ at [41].

119. At [42], Lewison LJ said:

> "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 s.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 s.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* s.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 s.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 s.73(2)(b) to refuse the application. That requirement emphasises the underlying philosophy of s.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 s.73 ." (emphasis added)

120. It is important to note the statement of Lewison LJ that " section 73 " cannot be used to change the description of the development in an earlier permission. This means what it says. Section 73 cannot be used for that purpose at all, whether by the way in which the operative part of the new permission is expressed, or by the imposition of a condition or conditions on that permission. This is also made clear by [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 ."

121. Accordingly, the appellant's contention that *Finney* only decided that the operative part of a s.73 permission cannot differ from that of an earlier permission is unsustainable. True enough, the operative part of the s.73 permission in that case omitted any reference to the permitted height in the original consent, which was in itself impermissible. But the Court of Appeal did not proceed on the basis that that was sufficient to decide the case. The main part of the reasoning, and of the *ratio* , explained why the court rejected the respondent's contention, repeated by the appellant in this appeal, that the *Wheatcroft* test forms part of the legal limits of the power to impose conditions under s.73 . It does not. Restriction (1) is the correct test.

122. There remains the question whether, as a matter of law, the power to impose conditions under s.73 is limited not only by restriction (1), but also by restriction (2). The appellant's arguments in the High Court and on appeal have mainly been concerned to demonstrate that that power is not subject to restriction (1). It has accepted that restriction (2) applies. Accordingly, little attention has been given to justifying the proposition that s.73 is subject to restriction (2) in addition to restriction (1) (see Morris J at [110] and [126]). Given that the judge accepted that both restrictions apply to s.73 , albeit tentatively, and that in this appeal the respondent maintains that that is correct, the issue should be addressed by this court.

123. Restriction (1) accords with the language and purpose of s.73 , as explained in *Finney* at [42]. It is also consistent with the principle that the operative part of a s.73 permission may not differ from the operative part of the extant permission which is to be varied.

124. Where both the operative part and the conditions of a s.73 permission are consistent with the operative part of the earlier permission, what is the legal justification for treating a s.73 permission as *ultra vires* because its conditions would make a substantial or even a fundamental alteration to the development authorised by the permission read as a whole? The legislation does not contain any language to that effect.

125. Morris J dealt with restriction (2) briefly at [126]-[127] of his judgment. He said that *Finney* at [29] "suggests" that restriction (2) does apply and that this was based on *Arrowcroft* at [33].

126. For the reasons already set out above in the analysis of *Arrowcroft* and *Finney* I respectfully disagree with the judge's reasoning in [126]. *Finney* at [29] does not suggest that there are two tests governing the lawfulness of conditions imposed on a s.73 permission. Lewison LJ simply stated that the two passages he had quoted in [27]–[28] from *Arrowcroft* were "dealing with different things". The first of the passages cited was to do with the *Wheatcroft* principle, which is concerned with alterations to the proposal put forward in a planning application, not the ambit of the power to impose conditions under s.73 . At [41] Lewison LJ held that the *Wheatcroft* test is irrelevant to s.73 . Provided that a s.73 permission does not alter the operative part of an extant permission, there is nothing in *Finney* to suggest that conditions imposed under s. 73 may not have the effect of substantially or fundamentally altering the earlier planning permission.

127. Morris J sought to illustrate restriction (2) by the examples in [127]. But those examples do not help to justify that restriction. Example (1) relates to *Wheatcroft* and examples (2) and (3) fall foul of restriction (1) in any event.

128. The issue concerning restriction (2) was helpfully examined in some detail by Mr James Strachan KC in *Armstrong v Secretary of State for Levelling Up, Housing and Communities [2023] EWHC 176 (Admin); [2023] PTSR 1148 at [73] to [89]* .

129. In my judgment, the following points, read together with those set out above, sufficiently explain why s.73 is not subject to restriction (2):

(1) Section 73 is limited to applications to develop land without complying with conditions attached to a permission previously granted (s.73(1)). Parliament has empowered a LPA to grant a s.73 permission without *any* of the conditions to which the original permission was subject. What the planning authority may consider is limited by s.73(2) . Parliament has expressly provided for specific situations where the power may not be used (s.73(4) and (5)). But it has not restricted the power to vary or remove conditions previously imposed to non-substantial or non-fundamental alterations;
(2) Parliament has inserted s.96A into the TCPA 1990 , allowing for an application to be made to alter both a grant of planning permission and the conditions imposed, subject to a restriction to non-material amendments. In addition, the new s.73B will allow for the grant of a new permission "not substantially different" from an existing permission. If Parliament

had wished to prohibit the imposition under s.73 of conditions which make a "fundamental" or "substantial" alteration to a permission without changing the operative part, it would have said so in the legislation;
(3) The power in s.73 is subject to the restriction that it may not result in a permission, the operative part and/or the conditions of which are inconsistent with the operative part of the earlier permission, either in terms of the language used or its effect. No justification has been identified for imposing restriction (2) as an additional limitation on the power of s.73 , in the light of the statutory purpose of that provision;
(4) Parliament has provided what it considers to be adequate procedural protections for the consideration of s.73 applications, including consultation and an opportunity for representations to be made;
(5) Although a substantial or fundamental alteration may be sought under s.73 , that does not dictate the outcome of the application. The planning authority has ample jurisdiction to determine the planning merits of any such application.

130. For these reasons, I would reject grounds 1 and 2 of the appeal. The limitations upon a planning authority's power to grant permission for development different from that applied for are a separate matter from the scope of s.73 . Instead, the restrictions upon the power to impose conditions in a s.73 permission are those set out in s. 73 itself, the *Newbury* tests and the requirement that those conditions must not be inconsistent with the operative part of the earlier planning permission. The power to impose conditions under s.73 is subject to restriction (1), but not to restriction (2). Restriction (1) is not limited to conditions which fundamentally or substantially alter the operative part of the earlier planning permission. Whilst a *de minimis* alteration of an operative part may not be *ultra vires* s.73 (see Lane J in *R (Atwill) v New Forest National Park Authority [2023] EWHC 625 (Admin); [2023] PTSR 1471 at [64]*), that concept only refers to trifling matters which are ignored by the law. It would not apply, for example, to the alteration of that part of a grant which relates to incidental or ancillary development.

Grounds 3 and 4

131. It follows that grounds 3 and 4 do not arise for determination. However, if it had been necessary to reach a decision, I would have allowed ground 3, but if wrong about that, I would have rejected ground 4.

132. Properly understood, ground 3 is essentially a complaint about whether the officer's report to the planning committee on the s.73 application made the members sufficiently aware of the removal of the 33kV substation from the 2022 application. The principles on which the court will act when dealing with criticisms of an officer's report were summarised by Lindblom LJ in *R (Mansell) v Tonbridge and Malling Borough Council [2017] EWCA Civ 1314; [2019] PTSR 1452 at [42]* . In *R v Selby District Council ex parte Oxton Farms [2017] PTSR 1103* , Judge LJ (as he then was) said at p.1111 that criticisms of an officer's report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the members about a material matter and that remains uncorrected at the committee's meeting.

133. Morris J decided that the officer's report was not sufficiently clear about the 33kV substation. I respectfully disagree.

134. In my judgment, it was made clear to members that the 2022 s.73 permission, if granted, would differ from the 2017 permission so as to dovetail with the 2021 permission for the DNO compound, which included a 33kV substation. The site layout plan excluded any development from the central area the subject of the 2021 permission. A number of objectors showed their appreciation that the original 33kV substation was omitted from the s.73 application. An updated report from the officer responding to a number of representations stated that the solar farm would be connected to the national grid through the substation permitted in 2021, that is not the 33kV substation permitted in 2017.

135. Accordingly, the officer's report did not mislead, let alone substantially mislead, the members of the planning committee on this subject. In addition, the members would have had access to the application documents and drawings which, taken as a whole, made the position sufficiently clear.

136. However, if I am wrong about ground 3, and the effect of the officer's report was that the committee did not take into account the removal from the s.73 application of the 33kV substation permitted in 2017, I see no basis for disagreeing with the judge that the decision to grant the s.73 permission is not saved by s.31(2A) of the Senior Courts Act 1981 .

137. An issue was raised before the LPA and in witness statements before the High Court as to whether, as the respondent maintains, there was a technical requirement to retain the original 33kV substation in addition to the DNO facility. Applying the principles in *R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs [2020] EWCA Civ 1010; [2021] 1 WLR 472 at [166] to [167]* , I am unable to say that the conclusions of Morris J at [143] and [145] were wrong. I would therefore reject ground 4.

138. For the reasons set out above, I would dismiss the appeal.

Lord Justice William Davis

139. I agree.

Lord Justice Dingemans

140. I also agree.

Mikael Armstrong v Secretary of State for Levelling- UP, Housing and Communities, Cornwall Council

Positive/Neutral Judicial Consideration

Court
King's Bench Division

Judgment Date
27 January 2023

Case No: CO/1288/2022

High Court of Justice King's Bench Division Planning Court

[2023] EWHC 176 (Admin), 2023 WL 01071583

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

Date: 27 January 2023

Hearing date: 28 October 2022

Representation

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

Approved Judgment

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 law1 [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* .

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."

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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> …
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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.
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> 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.