Neutral Citation Number: [2024] EWCA Civ 1541

Case No: CA-2023-001910

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
Mr Justice Morris
[2023] EWHC 2221 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/12/2024

Before :

LORD JUSTICE DINGEMANS
LORD JUSTICE WILLIAM DAVIS
and
LORD JUSTICE HOLGATE

- -

Between :

TEST VALLEY BOROUGH COUNCIL	**Appellant**
- and –	
CHALA FISKE	**Respondent**

- -
- -

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

Hearing date : 10 October 2024

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Approved Judgment

This judgment was handed down remotely at 2pm on 10 December by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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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.