Case Name: *Armstrong v Secretary of State for Levelling-Up, Housing and Communities & Anor* [2023] EWHC 142 (KB) (27 January 2023)

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Commentary: This was a judgment of James Strachan KC (sitting as a Deputy High Court Judge) following a challenge to an Inspector's appeal decision pursuant to section 288 of the Town and Country Planning Act 1990 ("TCPA"). The applicant for planning permission, who later became the claimant, had applied to vary the approved plans condition of an permission for the construction of a single dwelling on the site. The local planning authority and subsequently the Inspector on behalf of the Secretary of State ("the Defendant") refused to grant permission on the basis that the amended design of the building differed materially from what had previously been approved. The claimant, who addressed the Court in person, brought the challenge on the basis that both of the decision-makers had misunderstood the scope of section 73 ("S73") of the TCPA, and the Court agreed.

The judge found that, whatever the architectural style of the building, the proposal to amend the approved plans condition did not conflict with the operative part of the permission – the permission would remain for a single dwellinghouse.
Six key reasons for the first part of the judgment were set out, in summary as follows:

1. The wording of S73 itself does not limit its application as far as the extent of the change – it provides simply that the only consideration is the conditions subject to which permission should be granted;
2. The requirement that a S73 consideration may be limited only to non-compliance with conditions is restrictive – there is no obvious need to read in any additional restriction;
3. S73 is enabling – if Parliament had intended that the powers under S73 should be restricted to "minor material" or "non-fundamental" changes to a condition, it could have clearly expressed this;
4. The wording of S96A is helpful context, given that Parliament expressly limited its scope to changes judged to be "non-material". That is a more wide-ranging power, given that it can amend the operative part of the permission in contrast to S73, in which only conditions can be considered;
5. Allowing an S73 application which does not affect the operative part of the permission to be submitted does not dictate the outcome of that application. The Inspector had failed to consider whether there was any conflict between what was proposed and the operative part of the permission and because of that error, he had not considered the planning merits of the proposal;
6. The case law referred to on behalf of the Defendant provided no support for its arguments.

It had been submitted on behalf of the Defendant that the relevant test was whether the proposed change would represent a fundamental variation to what had been permitted. The test of “fundamental” had arisen from the judgment in R (Vue Entertainment Ltd) v City of York Council [2017] EWHC 588 (Admin), in which Collins J had contemplated a hypothetical situation in which a change proposed to a condition might be so different as to be a fundamental variation of the permission overall. In that case, though, the judge had not considered it necessary to ponder that possibility further as it had not arisen on the facts in Vue. Accordingly, in the instant case the judge found it an unconvincing authority for the proposition that S73 should be restricted and further indicated that such a situation was “difficult to conceive”.

The judge noted the well-established tests for the imposition of conditions and reasoned that, given those tests, most conditions are fundamental to the grant of permission. A S73 application is therefore likely to involve a significant or fundamental change to the permission. Limiting the consideration of an application only to non-fundamental variations would significantly diminish the scope of S73 in a way that does not make sense, particularly given that the planning merits of the proposal must still be considered.

The judge concluded that, even if he was wrong about all of the foregoing, he would have quashed the Inspector’s decision. This was because if S73 applications are in fact limited to minor material changes to a condition, the Inspector in this case did not properly address what would constitute a fundamental variation – he was preoccupied with the change to the form and architectural style of the building, rather than a fundamental change to the permission itself. Additionally, the Inspector had misdirected himself in relying on the Planning Practice Guidance and its concept of “minor material amendments”, rather than considering whether the proposal was a fundamental change: he had in fact described the key issue in the appeal as whether or not the proposal was a minor material amendment. The judge concluded that the Inspector would not necessarily have made the decision to dismiss the appeal if he had understood that S73 was not limited in scope to minor material amendments.

The judgment includes a comprehensive review and consolidation of the legal thought on section 73 since Pye v Secretary of State for the Environment, Transport and the Regions [1998] 3 PLR 72, which is likely to prove a helpful resource for decision-makers. The judge left open the possibility that a change to the approved plans promoted by way of S73 application may fall outwith the section’s scope if, for example, the operative part of this permission had read “construction of a single bungalow”, rather than “construction of a single dwelling”.

For further discussion see Simonicity.

Case summary prepared by Aline Hyde