Case Name: *Fiske, R (On the Application Of) v Test Valley Borough Council* [2023] EWHC 2221 (Admin) (06 September 2023)

Full case: Click Here

Commentary: This was a successful claim Mrs Chala Fiske ("the Claimant") against the decision of Test Valley Borough Council ("TVBC") to grant a section 73 permission varying the conditions of an original planning permission granted in relation to a solar farm development.

Background

In 2017, TVBC granted planning permission to the Interested Party for a solar farm ("the Original Permission") in which the development was described as follows:
"Installation of a ground mounted solar park to include ancillary equipment, inverters, substation, perimeter fencing, cctv cameras, access tacks and associated landscaping" (emphasis added)

In 2021, TVBC granted a separate planning permission to the Interested Party ("the 2021 Permission") for the installation of a different type of substation and ground mounted solar panels to be situated within the site of the Original Permission.

In 2022, TVBC granted another permission ("the 2022 Permission") under s.73 of the Town and Country Planning Act 1990 varying a number of conditions imposed under the Original Permission. The substantive effect of the variation was such that there was no longer any reference to a substation in the conditions or the approved plans of the 2022 Permission. The aim of the application for the 2022 Permission was to enable it to be used in tandem with the 2021 Permission i.e. to remove the substation from the Original Permission so the revised substation consented pursuant to the 2021 Permission may be built out in its place.

Grounds

The Claimant challenged the 2022 Permission under two grounds.

Under Ground 1, it was claimed that the 2022 Permission was ultra vires under s.73 since, by removing the substation permitted by the Original Permission, TVBC granted a s.73 permission that conflicted with the operative wording of the Original Permission and/or that fundamentally altered the development permitted under the Original Permission.

Under Ground 2, it was claimed that TVBC failed to have regard to a mandatory material consideration, namely the fact that in granting the 2022 Permission it would be altering the Original Permission by removing the substation.

Judgement

The claim was successful on both grounds.

Ground 1

The Claimant argued that two restrictions exist relating to s.73 permissions. First, that a permission granted under s.73 must not produce a conflict with the operative part/words (i.e. the description of the development) of the original planning permission ("Restriction 1"). Second, that a s.73 permission must not fundamentally alter the development permitted under the original planning permission ("Restriction 2"). TVBC argued that there existed only one restriction, namely Restriction 2, such that so long as the s.73 permission (i.e. the 2022 Permission) did not fundamentally alter the development permitted under the Original Permission, it was valid, even if the varied conditions under that s.73 permission created a conflict with the operative part of the Original Permission.

The Court held that two restrictions existed in granting a s.73 permission as submitted by the Claimant. Therefore, in granting the 2022 Permission, TVBC was acting ultra vires since the conditions in the 2022 Permission removed the substation which formed part of the description of the development of the Original Permission. Further, the Court drew a distinction between a condition which alters a proposed development (i.e. where planning permission has not yet been granted) and one which alters an existing development (i.e. where permission has already been granted). In the former scenario, under s.70, a condition can be used to alter or "cut down" a proposal as the permission has not yet been granted, providing the final conditions appearing on that permission do not alter the nature or extent of the grant. However, in the latter scenario, s.73 cannot be used to impose conditions which change the existing development in the same manner.

Ground 2

The Claimant argued that TVBC did not have regard to the removal of the substation in assessing the application for the 2022 Permission since there was no express mention of the substation being removed in that application or in the officers' reports. The Defendant contended that there was no need to expressly mention the removal of the substation since the whole reason for the 2022 Permission was so that it can operate in tandem with the 2021 Permission, which permits a new substation. Further, the Defendant argued that, even if the Court were to find that the committee was unaware of the removal of the substation, bringing it to their attention would not have made a difference to their decision since they had already granted permission for the 2021 Permission and the application for the 2022 Permission was to vary the Original

Permission so it can operate in tandem with the 2021 Permission. Therefore, the Defendant argued that relief should be refused under s.31(2A) of the Senior Courts Act 1981.

The Court held that it was not obvious from the reports or the application that the substation was being removed from the development as described under the Original Permission. Therefore, it concluded that TVBC did not have regard to the fact that the 2022 Permission removed the substation from the development, as described under the Original Permission. The Court also held that it was not satisfied that it was highly likely that the committee's decision would have been the same had it been made aware of the removal of the substation since there was a possibility that the committee would have then enquired further and the Claimant may have been able to put forward her case as to why the substation described in the Original Permission may still be needed.

For the above reasons, the claim was successful.

<u>Commentary</u>

In Fiske, once again the Court has had to grapple with the question of what can and cannot be done under a s.73 permission. The Court's conclusion that two restrictions exist in the use of s.73 powers contradicts with the judgement in the case of Armstrong v Secretary of State for Levelling-Up Housing and Communities [2023] EWHC 176 (Admin), where James Strachan KC, sitting as a deputy High Court judge, held that only one restriction exists, namely that a s.73 permission cannot be used to vary conditions which conflict with the operative part of the original permission granted. He expressly held that the power under s.73 is not limited to only non-fundamental variations. Following the Armstrong judgement, paragraph 013 of the National Planning Policy Guidance was updated to reflect the conclusion reached in that judgement. Overall, the judgment reinforces the principles set out in Finney v Welsh Ministers [2020] PTSR 455 namely that a s.73 cannot change or conflict with the existing permission's description of development, be that change fundamental or otherwise. However, the conflict with Armstrong and the current wording of the NPPG does create some confusion in relation to the more general "fundamental variation" test where the proposed amendments do not conflict with the description of development under an existing planning permission; this will perhaps require further clarity from the Court of Appeal. This case also provides an interesting example of a developer seeking to create a "slot out" to accommodate a new planning permission, and once again emphasises the care that must be taken when doing so.

Case summary prepared by Chatura Saravanan