

Case Name: *Test Valley Borough Council v Fiske* [2024] EWCA Civ 1541 (10 December 2024)

Full case: [Click Here](#)

Commentary: The Court of Appeal has clarified the scope of variations that can be made by an application under section 73 of the Town and Country Planning Act 1990. Lord Justice Holgate's leading judgment also contains guidance on the *Wheatcroft* principle as well as the scope of section 96A.

In the High Court¹, Morris J had held that the use of section 73 was subject to two restrictions and that conditions imposed under section 73 would be unlawful 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**").

This was in contrast to the case of *Armstrong v Secretary of State for Levelling Up, Housing and Communities* [2023] EWHC 176 (Admin) decided earlier that year which had concluded that the only restriction on the use of section 73 was restriction 1 and that there was no "fundamental alteration" test.

The Court of Appeal has confirmed that restriction 1 does apply to section 73 permissions and restriction 1 is the correct test (paragraph 121) and that restriction 2 does not apply (paragraph 126).

Restriction 1

In respect of the scope of restriction 1, paragraph 130 explains that "*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.*"

It was accepted that *Finney v Welsh Ministers* [2019] EWCA Civ 1868; [2020] PTSR 455 had decided that the operative part of a planning permission granted under s.73 cannot differ from the operative part of an extant permission. The planning permission that was the subject of this case stated in the operative part that original 2017 full planning

¹ [2023] EWHC 2221 (Admin)

permission was granted for *"for the above development in accordance with the approved plans listed below"* and the section 73 planning permission also used this formulation. The *"above development"* included reference to a substation and the effect of the plans approved pursuant to the section 73 permission was to exclude the substation from the development authorised by the permission. This therefore breached restriction 1 because this exclusion of the substation means that the conditions of the section 73 permission are inconsistent with the operative part of that consent (paragraph 36).

Extent of the operative part of the permission

However, in terms of what is to be considered the extent of the operative part of the permission, the judgment also notes (at paragraph 37), that there were various other changes made to the plans that had been referred to in the operative part of the permission which would *"At first sight ... appear to infringe the [Finney] principle"*. The court did not hear argument on this point so this was not elaborated on. However, this suggests that where plans are listed or directly referred to in the description of development, such plans would be included in the scope of the operative part of the permission and therefore, it would not be possible to amend them by way of a section 73 application.

Wheatcroft

The judgment also addressed the relevance of the *Wheatcroft* principle that had been cited in many of the relevant cases. The judgment explains *"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."*

Restriction 2

In respect of restriction 2, paragraph 126 states that *"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."* The reasoning (paragraph 129) explains that:

(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

This is also helpful in confirming that s96A allows for non-material amendments to both the description of development and the conditions attached to a permission. Points 4 and 5 are also a helpful reminder that the LPA does have discretion in deciding whether a section 73 application is acceptable in planning terms.

Conclusions

A section 73 permission cannot be granted if it would conflict with the operative part of the permission in a way that is more than *de minimis* (restriction 1).

There is no test of "*fundamental alteration*" applicable to section 73, and therefore, provided that the conditions are not in conflict with the operative part of the permission, a section 73 permission may include conditions that allow for a

development that would otherwise be considered a fundamental alteration to the original permission.

The operative part of a planning permission may be considered to include plans referred to in that part of the permission which may reduce the scope of potential section 73 applications depending on the specific wording of the permission.

It is also important to note that section 73 applications are still subject to consultation and they should be decided in accordance with the development plan and any material considerations.

The government has not confirmed a timetable for bringing section 73B into force. This would allow local planning authorities to grant permission under this section if they are satisfied that its effect will not be "*substantially different*" from that of the existing permission. Section 73B will allow for amendments to both the operative part of the permission and the conditions which should allow for a more straightforward process in many cases, but subject to the "*not substantially different*" limitation.

*Case summary prepared by Susannah
Herbert*