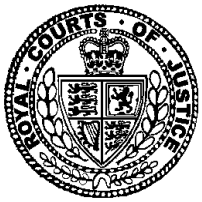

Neutral Citation Number: [2023] EWHC 2221 (Admin)

Case No: CO/2047/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 September 2023

THE HONOURABLE MR JUSTICE MORRIS

- -

Between:

THE KING (on the application of MRS CHALA FISKE)	**Claimant**
- and –	
TEST VALLEY BOROUGH COUNCIL	**Defendant**
- and –	
WOODINGTON SOLAR LIMITED	**Interested Party**

- -
- -

James Burton (instructed by **Lewis Silkin LLP**) for the **Claimant**
Robin Green and Robert Williams (instructed by **Sharpe Pritchard LLP**) for the **Defendant**
The **Interested Party,** represented by Pinsent Masons LLP, did not appear

Hearing dates: 26, 27 and 30 January 2023.
Further written submissions: 8 February 2023

- -

Approved Judgment

.....

Mr Justice Morris:

Introduction

1. By this application for judicial review, Mrs Chala Fiske ("the Claimant") seeks an order quashing the decision dated 27 April 2022 of Test Valley Borough Council ("the Defendant") to grant Woodington Solar Limited ("the Interested Party") planning permission pursuant to section 73 Town and Country Planning Act 1990 ("TCPA") ("the 2022 Permission") "varying" the conditions in respect of an earlier planning permission. That earlier planning permission granted on 4 July 2017 ("the Original Permission") was for the development of a solar farm, including ground mounted solar panels and an electricity substation, a 33kV substation, on approximately 72 hectares of agricultural land at Woodington Farm, Woodington Road, East Wellow ("the Site"). The 2022 Permission removes the 33kV substation.

2. The Claimant contends that the 2022 Permission was unlawful for two reasons, in summary:

   (1) The 2022 Permission was ultra vires section 73 TCPA since, by removing the substation permitted by the Original Permission, the Defendant granted a permission that conflicts with the operative wording of the Original Permission and/or that fundamentally alters the development permitted under the Original Permission.

   (2) The Defendant failed to have regard to a mandatory material consideration, namely the fact that in granting the 2022 Permission it would be granting a permission which altered the Original Permission by removal of the substation.

   Permission to apply on these two grounds was granted by David Elvin QC on 29 July 2022.

The facts in summary

3. The Site is in the countryside, near to the settlement of East Wellow, Test Valley, Hampshire. The Site "red line" extends to a little over 70 hectares of agricultural land, separated by woodland, hedgerows and trees. A 132kV overhead electricity line runs across the Site. The Claimant lives near the Site at Little Woodington, within East Wellow, with her husband, Mr Anthony Fiske. She provided two witness statements. She explains that she is a scientist with an extensive science education and a science based career in industrial network architecture and engineering projects over 30 years. She gives evidence about the nature of the solar park. The Defendant is the local planning authority. The Interested Party is a company, of which Mr Timothy Redpath is a director. Mr Redpath is also a director of Hive Energy Limited ("Hive"), the Interested Party's parent company (referred to in paragraph 7 below). Mr Redpath's witness statement in the 2021 Permission Judicial Review (see paragraphs 21 and 38 below) is also relied upon by the Defendant in these proceedings. Mr Hugh Brennan is also a director or employee of the Interested Party and of Hive.

4. The context for this challenge to the 2022 Permission is a sequence of events since 2017. On 4 July 2017 the Defendant granted planning permission, ref. 15/02591/FULLS, ("the Original Permission") addressed to Mr Brennan for the

development of a solar farm, including ground mounted solar panels and an electricity substation, at the Site.

5. On 24 May 2021 the Defendant granted planning permission, ref. 20/00814/FULLS, ("the 2021 Permission") to the Interested Party for the installation of a different electricity substation, ground mounted solar panels, ancillary equipment, infrastructure and access on 6.78 hectares of land located within an area close to the centre of the scheme covered by the Original Permission.

6. On 27 April 2022 the Council granted planning permission, ref. 21/03722/VARS, ("the 2022 Permission") to the Interested Party for the variation of conditions attached to the Original Permission, the effect of which is to remove development from the area covered by the 2021 Permission, allowing the remainder of the solar farm permitted by the Original Permission to operate in tandem with the 2021 Permission. It is the 2022 Permission which is the subject of this application.

The Detailed Factual Background

(1) The Original Permission 2017

The application

7. In November 2015 Mr Brennan acting for Hive applied for planning permission for installation of a ground mounted solar park at the Site.

The Officer Report: May 2017

8. In the Officer Report dated around May 2017, it was stated, at paragraph 3.5, that a District Network Operator (DNO) substation was proposed in the southern part of the site. Underground cabling would be laid from the solar panel strings to the inverter housings and then routed along the access tracks to the DNO substation. At paragraph 8.33 the Report recorded that an application for grid connection had been made to the DNO with a point of connection proposed to the south of the site on land under the control of the applicant.

The Officer Update Report: June 2017

9. The Officer Update Report dated around 6 June 2017 explained late changes to the application regarding the substation and that the solar farm would be connected to the grid, on site, by the substation. It stated, inter alia as follows:

> "3.0 PLANNING CONSIDERATOINS
>
> ..
>
> 3.6 Proposed Substation
>
> Further clarification has also been received in respect of the substation required in order to connect the proposed solar farm to the National Grid. The supporting information originally submitted with the application made reference to a new substation being provided on

> land to the south of the application site, as referred to in paragraphs 3.5 and 8.33 of the report – however no details regarding this location were provided.
>
> 3.7 The applicant has now confirmed that the substation is to be sited in the eastern half of the middle field of Parcel B, adjacent to the existing tower to connect into the grid. The substation would be positioned as close as practicable to the tower and connected via underground cables – as such, the only structure required would be a single storey building, measuring 5m x 4.5m in footprint … The applicant has stated that the final siting would be determined in discussion with the District Network Operator.
>
> 3.8 The sub-station building would be positioned adjacent to the solar panels proposed in this section of the site, with Smidmore Copse to the north. It is also noted that additional tree planting is proposed in the wildlife conservation area in the easternmost section of this middle field area, supplementing the existing tree belts around the field boundaries. Given the presence of the existing overhead lines and tower and the backdrop of the proposed panels and existing tree belts/woodland, it is not considered that there would be any adverse visual impact arising from the substation in this location. A condition is recommended to ensure the final details in terms of siting, materials and means of enclosure are submitted for approval."
>
> (emphasis added)

The condition referred to at paragraph 3.8 was to become Condition 15 in the Original Permission.

10. The Claimant submits that, in this way, the 33kV substation was presented to, and approved by, the Defendant on the basis that it was essential to allow the solar park to achieve its purpose, namely connection to the grid.

The Original Permission

11. On 4 July 2017 the Defendant granted the Original Permission for

> "Installation of a ground mounted solar park to include ancillary equipment, inverters, substation, perimeter fencing, cctv cameras, access tracks and associated landscaping"
>
> (emphasis added)

I refer to the foregoing as the "operative wording".

12. The Original Permission continued as follows:

> "In pursuance of its powers under the above-mentioned Act the Council… hereby grants full planning permission for the above development in accordance with the approved plans listed below and subject also to due compliance with all conditions and notes specified hereunder:
>
> Approved Plans:
>
> Site Layout – Plan Ref No. H.0357_06-H - 20/01/17
>
> …
>
> Details – Plan Ref no DIS000 – 21/10/15
>
> … "

13. Condition 2 provided that:

> "The development shall not be carried out other than in complete accordance with the approved plans comprising drawings:
>
> …
>
> Site Layout Plan … drwg H.0357_06-H
>
> …
>
> Typical Single 33KV GRP Housing Switchgear – drwg DIS000
>
> …"

Site Layout plan H.0357_06-H at that stage did not indicate a location for the, or any, substation. However drawing DIS000 is a drawing of a 33kV substation and is the substation referred to in the operative wording of the Original Permission.

14. Condition 15 to the Original Permission provided:

> "Prior to the commencement of the development hereby permitted, full details of the proposed siting, external materials, external lighting and means 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.
>
> Reason: To safeguard the visual amenities of the area in accordance with Policy E2 of the Test Valley Borough Revised Local Plan (2016)." (emphasis added)

(2) The first section 73 variation: February 2019 to June 2020

15. On 18 February 2019 the Interested Party applied pursuant to section 73 TCPA to vary Condition 2 to the Original Permission. On 10 July 2019 the Defendant granted planning permission 19/00401/VARS on that application "to allow site levelling to accommodate the DNO substation compound footprint, the installation of a DNO Substation compound with associated equipment and infrastructure and connection to the 132kV overhead line including compound enclosure fencing and additional solar PV panels' ("the Purported s. 73 Permission").

16. The Claimant submits that, in this way, the Interested Party sought to achieve a new planning permission that replaced the 33kV Substation with a 132kV "district network operator" substation compound plus additional solar panels, a proposal very similar to the development which was to be the subject of the 2021 Permission.

17. The Claimant challenged the Purported s.73 Permission, which, in June 2020, was quashed by consent. Ground 3 of the Claimant's challenge was that the grant of permission was ultra vires section 73. This was not accepted by the Defendant. The statement of reasons attached to the consent order records that the development for which the permission was sought under the section 73 application was different from that permitted by the Original Permission in that it was to comprise a large DNO substation with a DNO compound.

(3) Discharge of conditions to the Original Permission and section 96A: January 2020 to January 2021

18. On 10 January 2020, the Interested Party applied to discharge a number of conditions to the Original Permission, including conditions 15 and 16. (Condition 16 related to a scheme of noise mitigation measures.) As regards Condition 15, the information submitted (and accepted by the Defendant in discharging the condition) confirmed the 33kV substation as discussed in the Officer Update Report in 2017. Site Layout plan H.0357-41 Rev was submitted, now showing the location of the 33kV substation, together with re-submission of the original 33kV substation drawing. The substation remained a 33kV substation, but its location was now detailed on the Site Layout plan, positioned in the centre of the Site, just to the east of the 132 kV overhead electricity line, part of the national grid.

19. In June 2020 the Defendant discharged various conditions to the Original Permission including Condition 15 and Condition 16. On 17 July 2020 the Claimant challenged the discharge of conditions, including Conditions 15 and 16. In response, the Defendant then invited the Interested Party to submit a s.96A application for a non-material amendment to the Original Permission to reconcile it with the discharge of Condition 16. On 30 November 2020 the Defendant granted the Interested Party's s.96A application. On 13 January 2021 Mrs Justice Lang refused the Claimant's application for permission for judicial review of decisions discharging the conditions.

(4) The 2021 Permission and the 2021 Permission Judicial Review

The 2021 application

20. In the meantime, on 8 April 2020 the Interested Party had submitted a full application for a 132kV DNO Compound plus solar panels within the site of the Original

Permission. The essence of what was sought was a DNO substation compound in the centre of the Site, together with some additional solar panels, as shown on the layout plan.

21. The covering letter from the Interested Party's planning agent explained that the application was made on the basis that the DNO substation compound it proposed was there to facilitate the connection of the solar park permitted by the Original Permission to the 132kV grid. In his witness statement dated 5 May 2022 for the subsequent judicial review (see paragraph 26 below), Mr Redpath explains that the original 33kV substation was incomplete and was to be incorporated within the DNO substation. The covering letter stated, inter alia, as follows:

> "Please find enclosed an application which seeks Planning Permission for a Distribution Network Operator (DNO) Substation together with ground mounted solar panels, ancillary equipment, infrastructure and access at the above site. … .
>
> …
>
> Officers will be aware of the separate Section 73 application (Test Valley Borough Council reference: 19/00401/VARS) (the 'Section 73 Planning Permission') which was approved on 10th July 2020, that included a 132kV DNO Substation and ground mounted solar panels, which was subsequently challenged by Judicial Review. This Section 73 Decision Notice is expected to be quashed by the Courts as per the Consent Order … drafted and the application returned to Test Valley Borough Council for re-determination.
>
> In order to complete construction of the Woodington Solar Farm during Summer 2020, and release the renewable energy benefits, Woodington Solar Limited have prepared this planning application which seeks full planning permission for development which is very similar the Section 73 amendments which were granted Planning Permission in July 2019.
>
> ….
>
> Application Proposal
>
> …
>
> Officers will recall at the time of considering the original application for Planning Permission, the precise location of the DNO equipment and means of connecting the Solar Farm to the electricity grid were not finalised. A drawing [DIS000] showed the dimensions of the substation building anticipated to be required and was included as an approved plan within Condition 2 of the original Planning Permission while Condition 15 was imposed to enable the precise nature, materials, lighting and location of this building to be agreed at a later date prior to the

> commencement of development. The Section 73 application detailed that an onsite connection to the 132kV local electricity grid was to be made and included full details and drawings of the DNO Substation required in the centre of the site to the south of Smidmore Copse.
>
> This application is very similar to the scheme that was approved within the Section 73 Planning Permission."
>
> (emphasis added)

The Officer Report: April 2021

22. The Officer Report in respect of this application dated around 19 April 2021 stated, inter alia, as follows

> "3.5 The erection of a single inverter/transformer station is proposed (to replace one included within the original Planning Permission). …..
>
> …
>
> 3.7 In respect of the substation area ground levelling is proposed across the footprint of the DNO Substation together with the installation of the required equipment and infrastructure necessary to form the DNO Substation and the connection to the 132kV overhead line include a Gantry (connecting to the replacement overhead line pylon/tower), Circuit Breakers, Insulators, 132kV/33kV Transformers, above ground connections and associated infrastructure within the compound. ….
>
> 8.6 The applicant has worked with technical partners and various specialists including Ethical Power Connections Ltd and the DNO Scottish and Southern Energy (SSE) Power Distribution, to finalise the construction detail of the Solar Farm and the means by which the renewable energy generated will be exported to the local electricity network. It is proposed the renewable energy generated by the Solar Farm will connect to the 132kV overhead line which crosses the Woodington site. Given the principle of siting a solar farm in this location have previously been established by the original grant of planning permission which has already been implemented, and the current proposals ensure the site can function, it is considered that it is essential for these proposals to be located within the countryside and as such the development is considered to accord with Policy COM2 of the RLP."

The 2021 Permission: the grant of permission

23. On 24 May 2021 the Defendant granted the 2021 Permission for the

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

24. The "substation" there referred to was a full blown "district network operator" (DNO) substation compound to connect to the 132kV grid running through the site. This is something different from the 33kV substation provided for in the Original Permission.

25. The approved plans listed included "Site Layout - Plan H.0357_06 – Version P – 23/01/21". This plan shows the central areas of the Site, covering the DNO substation and the additional panels. The DNO substation is located in a different location from - to the north and slight east of – the 33kV substation shown on Site Layout plan H.0357-41 Rev referred to in paragraph 18 above.

Judicial review of the 2021 Permission

26. On 2 July 2021, the Claimant challenged by application for judicial review the 2021 Permission ("the 2021 Permission Judicial Review") on three grounds, the first ground concerning incompatibility with the already-implemented Original Permission which the Defendant accepted the 2021 Permission was necessary to make work. The Claimant contended that the Defendant had failed to have regard to the fact that implementation of the 2021 Permission would breach conditions in the Original Permission.

27. On 26 August 2021, the Defendant granted a non-material amendment application concerning Condition 15, rendering one of the Claimant's grounds of challenge to the 2021 Permission academic. On 8 December 2021 HHJ Jarman QC, sitting as a High Court Judge, granted the Claimant permission for ground 1 of her challenge to the 2021 Permission.

(5) The 2022 Permission

The application: December 2021

28. On 21 December 2021 the Interested Party applied "pursuant to section 73 [TCPA] to vary conditions attached to the" Original Permission. The covering letter of that date from the Interested Party's planning agent stated, inter alia, as follows:

> "… By way of background, planning permission was originally granted for the installation of the solar farm and associated works on the 4th July 2017 (15/02591/FULLS). Following the grant of full planning permission, a number of conditions as set out in the original decision notice have been discharged by Test Valley Borough Council.
>
> Subsequently, a further full planning application for the installation of a substation and ground mounted solar panels was approved on the 24th May 2021 (20/00814/FULLS) in respect of the central part of the original site.

This Section 73 application seeks to make a number of design changes to the original solar farm permission (15/02591/FULLS), including amendments to ensure that the original solar farm application can be developed in conjunction with the more recently approved substation and solar array permission (20/00814/FULLS). …"

…

The Proposed Development

Since the grant of permission for the original solar farm, the Applicant has taken the opportunity to review and rationalise the layout of the solar farm. As a result, changes to the layout and design are proposed to ensure full consistency between the originally approved solar farm application (15/02591/FULLS) and the recently approved substation and solar array permission (20/00814/FULLS). The amendments proposed include:

1. General changes to the layout of the solar arrays, to rationalise the total coverage of the solar panels. In some areas, the overall extent and location of arrays has changed, such as in the far north-western corner of the site. However, the overall result is a general reduction in arrays from 97,272 arrays to 79,632.

2. Re-provision and increased provision of Conservation Areas.
…

…

3. Replacement of central inverters with string inverters. … .

4. Alterations to the alignment of security fences and permissive paths.

5. Rationalisation of a number of the internal access tracks …

…

Changes to the Original Consent

To accommodate the aforementioned design changes, a number of amendments are required to the original planning consent (15/02591/FULLS). These changes are as follows:

> To update the list of 'Approved Plans', to make appropriate reference to the amended plans.
>
> Conditions 2, 4, 5, 8, 9, 12, 13, 14, 15, 16 and 17 have been previously discharged by Test Valley Borough Council. To accommodate the design changes, new information is provided for all of the above conditions. As such, it is sought

> to change the wording of each condition to a compliance condition, to make reference to the newly submitted information.
>
> …." (emphasis added)

The Defendant has explained that the string inverters which were to replace the central inverters were to be mounted beneath the solar panels themselves, as could be seen on the Site Layout Plan attached to the application, H.0357_ 06R dated 20 December 2021. That plan also showed the location of a number of "proposed transformer stations".

The objections

29. A number of objections were received referring expressly to the removal of the 33kV substation, including:

(1) the first objection, from Mark House:

> "I see a lot of smoke and mirrors going on here; looking at the plans, I still see gaps, and now the plans don't even show the full extent of the project i.e. NO Substation. Has it just disappeared, or is it not needed now?

(2) the letter of 19 January 2022 from the Claimant's husband, Mr Anthony Fiske:

> "The site: the site layout chart shows several changes but there is no listing of these that would allow suitable scrutiny from a planning perspective. What is clearly shown is removal of the substation previously considered essential in the permission so one can only wonder how this solar farm can ever be built to operational level, and if not what is its purpose at all?'
> (emphasis added)

(3) Donna Savage in her objection of 26 January 2022 stated:

> "2. The site layout chart shows several changes, but there is no listing of these to allow suitable scrutiny from a planning perspective. What is apparent from the site layout is that the substation has been removed…"

The Officer Report 19 April 2022

30. The Officer Report dated around 19 April 2022 stated, inter alia, as follows:

> "3.0 PROPOSAL
>
> 3.1 This Section 73 application seeks to make a number of design changes to the original solar farm permission (15/02591/FULLS), including amendments to ensure that the original solar farm scheme can be developed in

conjunction with the more recently approved substation and solar array permission (20/00814/FULLS).

3.2 The proposed development seeks to vary the following conditions on planning application 15/02591/FULLS described as 'Installation of a ground mounted solar park to include ancillary equipment, inverters, substation, perimeter fencing, CCTV cameras, access tracks, and associated landscaping':

- Condition 2 (Approved plans)
- Condition 4 (Boundary treatment)
- Condition 5 (CEMP)
- Condition 8 (Arboricultural information)
- Condition 9 (Tree protection)
- Condition 12 (CMP)
- Condition 13 (Landscape)
- Condition 14 (Landscape maintenance)
- Condition 15 (External materials)
- Condition 16 (Noise Mitigation)

The proposals broadly consist of:

- Alterations to the layout and design of the site that include a reduction in the number of solar arrays from 97,272 arrays (which included land where the proposed substation was located) to 79,632 on this current application.
- The re-provision and increased provision of Conservation Areas …
- The replacement of central inverter with string inverters. …
- The alterations to the alignment of security fences and permissive paths

- The rationalisation (reduction) of a number of internal access tracks. …" (emphasis added)

The removal of the 33kV substation is not referred to in the foregoing list of proposals. It is common ground that the "proposed substation" referred to above is the DNO substation. The Officer Report, continued, referring to the 2021 Permission:

""

"4.0 HISTORY

4.1 20/00814/FULLS - Installation of substation, ground mounted solar panels, ancillary equipment, infrastructure and access associated with Planning Permission reference: 1 5/02591/FULLS. – Permission subject to conditions and notes – 24.05.2021"

…

4.4 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 – Permission subject to conditions – 04.07.2017

The following condition information has been approved under this permission:

…

• Condition 15 - Details of siting, external materials, external lighting, and means of access/enclosure for the sub-station

…

A Judicial Review Challenge was lodged in respect of the discharge of conditions. The challenge was unsuccessful, permission to proceed to a full hearing having been refused at a renewal hearing on the 13th January 2021.

…

6.0 REPRESENTATIONS

…

6.3 Various addresses – Objection (summarised)

Validity and section 73 application

> • The application is not valid under TCPA Section 73: it includes changes to 13 of the 18 conditions totalling more than "Minor" material changes removing the Solar Farm's 33Kv substation, going further beyond permitted limits by including the totally separate application 20/00814/FULLS
>
> …

….

Procedure

• Since the substation (20/00814/FULLS) remains subject to a Judicial Review, no plan dependent in any way upon it can be evaluated until the result of the Judicial Review is known.

…

Full extent of plans

[*At this point, the Report sets out verbatim the objections Mr House and Mr Fiske referred to at paragraph 29 above*]

…

8.0 **PLANNING CONSIDERATIONS**

…

8.3 **Substation application**

> A number of representations continue to make comments on the substation proposals. To confirm, a separate planning permission (see paragraph 4.1 above) for the substation development was approved in May 2021 (reference:20/00814/FULLS). As such, the principle of a solar farm and substation in this location has been accepted. This application does not seek to vary the substation permission [*i.e the 2021 Permission*]. It only seeks to vary the original solar farm permission ref: 15/02591/FULLS, with the aim that the varied solar farm permission and the substation permission can operate in parallel.

8.4 **Principle of development**

> The principles of the development were considered acceptable under the previous application 15/02591/FULLS, which was determined within the same development plan policy context. Given the principle of siting a solar farm in this location have

previously been established by the original grant of planning permission in July 2017, which has already been begun, and the current proposals are intended to ensure the site can function together with the 2021 permission for a substation (20/00814/FULLS), it is considered that it is essential for these proposals to be located within the countryside and as such the development is considered to accord with Policy COM2 of the RLP.

…

8.6 **Landscape and visual impacts**

An Appraisal of Landscape and Visual Effects accompanied the previous application 15/02591/FULLS. This contained a detailed assessment of the likely effects of the Woodington Solar Farm on the surrounding landscape and visual resources. Within the current submission the solar panels would be of the same design, spacing, height, and finish as those approved, although the area covered by the current application now excludes the area of the substation permission, and other minor alterations are proposed. …

[*paragraphs 8.9, 8.11, 8.13 and 8.19 address in some detail the effect of other changes involved in the 2022 application*]

…

8.23 This application seeks to change the type of inverters from the central inverters to a scheme using smaller string inverters, which would be mounted beneath the solar panels. There would be no change to the plant within the area associated within the DNO substation area (Application No. 20/00814/FULLS). Also proposed are separate stations for transformers. These would sporadically stationed around the solar farm.

…

8.38 Other matters

…

8.39 Plans submitted

Comments have been received in respect of the way in which information has been presented by the applicant in this application. The covering letter provides a basic overview of what the application seeks approval for and any appropriate additional information has been received. Comments also highlighted that the substation permitted previously does not appear on the drawings. As outlined above at para 8.3 this application relates to the variation of conditions under 15/02591/FULLS only. …

8.45 Conditions to be amended

A comment received sets out that the submission for example seeks to change 13 of the conditions (10 explicitly stated and 3 by implication) of 15/02591/FULLS without explaining what it wishes to change. Condition information for several conditions has previously been approved under the 2015 application and in respect of these conditions the applicant simply seeks updated wording to reflect information that has already been approved. This is in addition to any plans and information that has been amended as a result of the proposed changes set out in the covering letter under this application. The draft conditions proposed to be attached to the permission are set out below.

…

10.0 **RECOMMENDATION**

PERMISSION subject to conditions and notes

1. …

2. The development shall not be carried out other than in complete accordance with the approved plans comprising drawings:

…

EP-1253-C-ELV-STS-02 Transformer Elevations"

(emphasis added)

The Officer Update Report

31. The Officer Update Report, dated on around 26 April 2022, stated, inter alia, as follows:

> "3.0 **PLANNING CONSIDERATIONS**
>
> …
>
> 3.6 National Grid Connection
>
> The solar farm would be connected to the grid and the existing pylon network through the permitted substation application - 20/00814/FULLS" [*i.e. the 2021 Permission*]

32. At paragraph 4.0, the Amended Recommendation included "additional Condition 20", in relation to "the transformer"/"the transformer structure", which stated:

> "Prior to the installation of the transformer structure hereby permitted, full details of the transformer including proposed siting, elevations, materials and finished colour shall be submitted to and approved in writing by the Local Planning Authority. Implementation shall be in accordance with the approved details.
>
> Reason: To safeguard the visual amenities of the area in accordance with Policy E2 of the Test Valley Borough Revised Local Plan (2016)." (emphasis added)

Planning Committee Meeting 26 April 2022

33. On 26 April 2022 the application was brought before the Defendant's Planning Committee. This was two days before the final hearing of the 2021 Permission Judicial Review. Consideration of the application took place despite protest from the Claimant and others that the Defendant had scheduled the application for consideration earlier than needed in order to render the 2021 Permission Judicial Review academic.

The 2022 Permission

34. On 27 April 2022 the Defendant granted the 2022 Permission. The Notice of Full Planning Permission states as follows:

> "Application No: 21/03722/VARS
>
> Proposal:
>
> "Variation of Condition 2 (Approved plans), 4 (Boundary treatment), 5 (CEMP), 8 (Arboricultural information), 9 (Tree protection), 12 (CMP), 13 (Landscape), 14 (Landscape maintenance), 15 (External materials), and 16 (Noise Mitigation) 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, rationalization (reduction) of a number of internal access tracks."
>
> …
>
> In pursuance of its powers under the above mentioned Act the Council … hereby grants full planning permission for the above development in accordance with the approved plans listed below and subject also to due compliance with all conditions and notes specified hereunder:
>
> Approved Plans:
>
> …
>
> Site Layout - Plan Ref no. H.0357_06V - 24/03/22"
>
> (emphasis added)

35. Varied Condition 2 states:

> "The development shall not be carried out other than in complete accordance with the approved plans comprising drawings:
>
> …
>
> H.0357_06 V - Site layout plan"
>
> (emphasis added)
>
> …

36. Condition 20 (relating to the transformer) is in the terms as set out in paragraph 32 above. Whereas Condition 15 of the Original Permission had required details (including siting) of the substation to be provided, this requirement was omitted from the 2022 Permission.

37. The approved revised Site Layout plan H.0357_06V omits development in the central part of the Site: as appears from a comparison with the Original Permission approved site layout plan H.0357_06-H (referred to at paragraph 13 above). In addition, the 2022 Permission did not require the development to comply with Plan H.0357_41 Rev (referred to at paragraph 18 above) which, pursuant to the approval under Condition 15 of the Original Permission, had identified the siting of the original 33kV substation.

(6) Subsequent events concerning the 2021 Permission Judicial Review

38. On 27 April 2022 the Defendant asked the Claimant to withdraw the 2021 Permission Judicial Review on the basis that it was now academic and provided the Court with a

copy of the 2022 Permission (although subsequently it did not pursue this argument). On 28 April 2022, the final hearing of the judicial review of the 2021 Permission took place before HHJ Jarman QC. At that hearing, the judge inquired "whether the Original Permission scheme could be connected to the national grid or to other options". On 5 May 2022 Mr Redpath made his witness statement in response to that question. In that statement he identified the courses of action open to the Interested Party, one of which was for the Interested Party to identify a private customer to take some or all of the energy generated by the solar park by way of a connection via a private wire network. On 13 May 2022 HH Judge Jarman QC handed down judgment dismissing the Claimant's challenge. In summary the judge held the potential incompatibility of the Original Permission and the 2021 Permission was not something which the Defendant had been compelled to take into account. There were a number of options, which were for the developer to consider; in this regard he relied heavily on Mr Redpath's witness statement. In the judgment at §§20 to 23, the judge identified four such options, including the "unlikely, if viable, option" of connection to a private customer (on the basis of the Original Permission alone). Given these options, the assumption that the developer would seek to implement the two permissions so as to give rise to a breach of planning control was not justified on the evidence. It was for the developer to decide how to proceed in a way which did not involve such a breach. On 16 December 2022 Nugee LJ granted the Claimant permission to appeal to the Court of Appeal, on all grounds of appeal.

(7) The Claimant's evidence concerning the DNO Substation and the 2021 and 2022 Permissions

39. In his witness statement for the 2021 Permission Judicial Review, Mr Redpath stated that the solar farm requires two parts to operate, namely the customer's substation (owned by the developer) and the DNO's owned substation. In her second witness statement for these proceedings dated 23 August 2022, the Claimant explains that, rather than those two elements, the solar farm requires three substations to work: (1) a sender/converter substation – which is, as acknowledged by Mr Redpath, the customer owned substation ("the Sender Substation"); this is where the electricity generated by the solar panels is converted to 33kV voltage and sent to the DNO by way of underground cables; (2) a receiver/transformer substation – the 33kV current is "received" by the DNO via its own 33kV substation and this is then stepped-up via the DNO transformer to 132kV ("the Receiver Substation"); and (3) a Main DNO substation - the stepped-up electricity then flows from the transformer to the main DNO Substation to be connected to the 132kV overhead power line/pylon. The electricity must be stepped up to 132kV to match the 132kV voltage in the power line.

40. Further, contrary to Mr Redpath's assertion, the Claimant says that the application for the 2021 Permission included only the Receiver Substation and the Main DNO Substation, and did not include the Sender Substation. She explains, by reference to one of the drawings approved in the 2021 Permission, that the DNO compound comprises the Receiver Substation, the transformer to step up the electricity to 132kV and the DNO Substation. This is only the DNO's equipment and not the developer's Sender Substation. She concludes "The Sender Substation is accordingly missing from both the 2021 Permission and the 2022 Permission and without the Sender Substation the solar farm cannot send electricity to the DNO."

41. On this basis, the Claimant contends that the 33kV substation was, and is, still needed in order get the electricity from the solar panels to the DNO Receiver Substation.

42. In argument in response, Mr Green contends that the DNO substation, the subject of the 2021 Permission, is sufficient to connect the solar farm to the national grid. He says that a solar farm comprises three main elements, although the configuration (and terminology) will vary from installation to installation: (1) photovoltaic cells, which convert sunlight to electricity; (2) inverters, which convert the direct current generated by the cells to alternating current; (3) transformers, which increase the output voltage so that the electricity can be fed into the national grid. Sometimes inverters are combined with transformers. As to the Claimant's claim that the 33kV "Sender Substation" is missing, he observes that in fact at the Woodington Solar Farm the role of the sender substation will be performed by "transformer stations". The Site Layout plan for *the application* for the 2022 Permission (see end of paragraph 28 above) showed the location of "Proposed Transformer Stations", and draft Condition 2 in the initial Officer Report included a drawing showing transformer elevations (see paragraph 30 above). By the time of the Officer Update Report these details had been withdrawn: the approved layout plan (paragraph 37 above) omits the transformer stations and draft Condition 2 in the update report no longer lists transformer elevations. Instead, details of the proposed transformer stations are now to be supplied pursuant to Condition 20 (see paragraph 36 above). This was explained in the Defendant's summary grounds of resistance. He accepts that the drafting of Condition 20 "goes a little awry", referring to "transformer structure" in the singular, but this is a minor error which can (if necessary) be corrected under s 96A.

43. In response, the Claimant submits that the Defendant had never disputed the Claimant's second witness evidence factually, until the oral hearing of the application, when it was asserted, without evidential support, that the transformer would do the job of the Sender Substation. Moreover that assertion is contrary to the explanation the Defendant had given in its summary grounds of resistance, namely that the transformers (or transformer structures) were required because of the switch to string inverters. In any event, the reference to "the transformer" or "the transformer structure" (in the singular) in the 2022 Permission was a mistaken reference to a feature of the 2021 Permission, namely the transformer in the DNO compound.

The Issues

44. In summary, the issues are as follows:

Ground 1

Whether the 2022 Permission is ultra vires section 73 Town and Country Planning Act 1990 because it omits a substation, although the description of development in the Original Permission includes a substation.

Ground 2

(1) Whether the Defendant, when granting the 2022 Permission, had regard to the fact that the proposal omitted a substation (it being agreed this was a "mandatory material consideration").

(2) If the Defendant did not, whether relief should be refused pursuant to section 31(2A) of the Senior Courts Act 1981 ("SCA 1981") on the basis that it is highly likely that the outcome for the Claimant would not have been substantially different.

The Relevant Legal Background

The relevant legislative background

Town and Country Planning Act 1990

45. Section 70 TCPA provides as follows:

> "70.— Determination of applications: general considerations.
>
> (1) Where an application is made to a local planning authority for planning permission—
>
> (a) subject to section 62D(5) and sections 91 and 92, they may grant planning permission, either unconditionally or subject to such conditions as they think fit; or
>
> (b) they may refuse planning permission.
>
> …
>
> (2) In dealing with an application for planning permission or permission in principle the authority shall have regard to—
>
> (a) the provisions of the development plan, so far as material to the application,
>
> …"

46. Section 72 (1) provides that "without prejudice to the generality of section 70 (1), conditions may be imposed on the grant of planning permission under that section".

47. Section 73 TCPA provides, inter alia, as follows:

> "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.
>
> …" (**emphasis** added)

48. Section 96A TCPA provides as follows:

> "96A Power to make non-material changes to planning permission or permission in principle
>
> (1) A local planning authority may make a change to any planning permission, or any permission in principle (granted following an application to the authority), relating to land in their area if they are satisfied that the change is not material.
>
> (2) In deciding whether a change is material, a local planning authority must have regard to the effect of the change, together with any previous changes made under this section, on the planning permission or permission in principle as originally granted.
>
> (3) The power conferred by subsection (1) includes power to make a change to a planning permission —
>
> (a) to impose new conditions;
>
> (b) to remove or alter existing conditions.
>
> …"

Town and Country Planning (Development Management Procedure) (England) Order 2015

49. The Town and Country Planning (Development Management Procedure) (England) Order 2015 makes provision for certain procedural requirements which apply to applications for planning permission, for example, provision for consultation, plans, design and access statements and fire safety statements. However the Order makes clear that, in relation to the specific case of an application under section 73 TCPA, many of these requirements either do not apply or are less onerous: see, for example, Articles 3(2), 7(1)(c), 9(4), 9(6)(d) and 20.

The National Planning Practice Guidance

50. The National Planning Practice Guidance (in its most recently amended form) ("NPPG"), provides, inter alia, at §§013 to 015 as follows:

> "**How are the conditions attached to a planning permission amended?**
>
> In contrast to section 96A, an application made under section 73 of the Town and Country Planning Act 1990 can be used to make a material amendment by varying or removing conditions associated with a planning permission. There is no statutory limit on the degree of change permissible to conditions under s73, but the change must only relate to conditions and not to the operative part of the permission.
>
> Provisions relating to statutory consultation and publicity do not apply. However, local planning authorities have discretion to consider whether the scale or nature of the change warrants consultation, in which case the authority can choose how to inform interested parties.
>
> "**Are there any restrictions on what section 73 can be used for?**
>
> Planning permission cannot be granted under section 73 to extend the time limit within which a development must be started or an application for approval of reserved matters must be made. Section 73 cannot be used to change the description of the development.
>
> …
>
> **What is the effect of a grant of permission under section 73?**
>
> Permission granted under section 73 takes effect as a new, independent permission to carry out the same development as previously permitted subject to new or amended conditions. The new permission sits alongside the original permission, which remains intact and unamended. It is open to the applicant to decide whether to implement the new permission or the one originally granted.
>
> A decision notice describing the new permission should clearly express that it is made under section 73. It should set out all of the conditions imposed on the new permission, and, for the purpose of clarity restate the conditions imposed on earlier permissions that continue to have effect. Further information about conditions can be found in the guidance for use of planning conditions.

> As a section 73 application cannot be used to vary the time limit for implementation, this condition must remain unchanged from the original permission. If the original permission was subject to a planning obligation then this may need to be the subject of a deed of variation."
>
> (emphasis added)

Relevant case law authorities

51. In this section I set out (in chronological order) the relevant case law, both cases dealing specifically with section 73 TCPA and other cases relied upon by the parties as relevant to the section 73 issues in the present case. The key cases on section 73 itself are *Arrowcroft*, *Vue Entertainment* and *Finney*. These have been further discussed in two recent cases: *Reid* and *Armstrong*. (Citations for these cases are set out below).

Kent County Council v Secretary of State for the Environment (1977) 33 P & C R 70

52. An oil company applied for planning permission to construct an oil refinery, which included an access road. The Secretary of State ultimately decided to grant permission for the refinery, whilst refusing permission for construction of the access road, and subject to a condition that no deliveries should be made except by sea, pipeline or rail transport. The local authority applied to quash the decision on the basis that the Secretary of State had acted "ultra vires in purporting to grant planning permission for part only of the development the subject of the application" and further contended that the condition imposed was invalid because it was unworkable and because it "took away a substantial part of the benefit of the planning permission". Sir Douglas Frank QC sitting as a deputy judge dismissed the application.

53. On the first ground, the judge held (p76) that on the true construction of section 29 of the 1971 Act "the determining authority can grant as much of the development applied for as they think should be permitted", subject to the applicant's consent. He added that it is common practice to do this "for example, where permission for 50 houses is applied for and the local authority grants permission for 40" (emphasis added). There should be formal amendment to "the application". The judge continued (at pp 76-77):

> "… I agree with Mr Widdecombe that where an application consists of a number of separate and divisible elements it is lawful for them to be separately dealt with, as was done in this case. It seems to me to matter not in this case whether the decision of the first respondent was on an amended application or whether it was a part refusal, save that in the latter case it is necessary to construe the word "or" conjunctively"

54. The judge addressed the further ground (ground 3) in the following terms (at p79):

> " …. In my judgment there are short answers to these two points. First, if the second respondents carried out deliveries by road (say, as stated in the condition) then they would be liable to enforcement procedure under the Act. … . As to the second point, a conditional permission is almost invariably less

> beneficial than an unconditional permission. It must always be a question of fact and degree whether a particular condition is such as to take away the substance of the permission, in which event that condition may be invalid. In this case, however, the development sought is the construction of an oil refinery and all else is ancillary to that purpose. Of course, if the condition had been such as to render the oil refinery unworkable that would be a different case, but the second respondents' acceptance of the condition is evidence that it is certainly not this case."
>
> (emphasis added)

Bernard Wheatcroft Ltd v Secretary of State for the Environment (1982) 43 P & C R 233

55. An application for planning permission for a housing development comprising approximately 420 dwellings on 35 acres was found unacceptable on appeal, but the inspector found that a reduced number of dwellings on 25 acres (a proposal put forward by the applicant in the course of the appeal) would have been acceptable. The Secretary State however declined to grant planning permission for part of the site or a lesser number of houses because the development was not severable. Forbes J quashed the Secretary of State's decision. At pp236-237, he framed the question in the case as whether the Secretary of State had power to grant planning permission for a smaller development "than [was] indicated on the application form originally submitted" (emphasis added). At p 239 he stated:

> " … the question here is whether it is permissible to grant a planning permission subject to a condition that only what I may call "a reduced development" is carried out. Both counsel, I think, accept that it is permissible to grant planning permission subject to such a condition; both, I think, would seek to limit such conditions to those that do not alter the substance of **the application**; … . The broad proposition therefore… is that *a condition the effect of which is to allow the development but which amounts to a reduction of that proposed in the application can legitimately be imposed so long as it does not alter the substance of the development for which permission was **applied for**…"* (**emphasis** added)

The italicised words above are what has been referred to as "the Wheatcroft principle".

56. Forbes J went on to state his view that this test of substantial difference is not the same thing as the test of severability, adding that "the proposition that conditions can only be used to reduce the development below that proposed in the application where the application is severable is derived from [the] decision … in *Kent County Council*…." (emphasis added). After setting out part of the judgment in *Kent,* he continued:

> "For my part, I cannot accept that the proper test is whether the development proposed in the application was severable or not. Unless coupled with a requirement that the result must not be

> substantially different from the development applied for, it would be possible, as I have just indicated, for local planning authorities to grant planning permission for developments that were in fact substantially different and thus defeat the consultative objects of Part III of the Act of 1971. The severability test, therefore, could only be a proper one if combined with a test of substantial difference. I can, however, see no justification for the severability test at all. … Why should it be impossible for the local planning authority to say, on an application for outline planning permission: " we think 35 acres is too much but 25 will be all right," and similarly with a reduction in density? So long as the reduction passes the test of not altering the substance of the application, what vice is there in that? … " (emphasis added)

57. After rejecting a test of severability in favour of a test of substantial difference, Forbes J continued:

> "I conclude, for my part, that there is no principle of law that prevents the Secretary of State from imposing conditions that have the effect of reducing the permitted development below the development applied for except where the application is severable. The Secretary of State clearly directed himself that there was such a principle and thus fell into error, and his decision must be quashed.
>
> I should add a rider. The true test is, I feel sure, that accepted by both counsel: is the effect of the conditional planning permission to allow development that is in substance not that which was applied for? Of course, in deciding whether or not there is a substantial difference the local planning authority or the Secretary of State will be exercising a judgment, and a judgment with which the courts will not ordinarily interfere unless it is manifestly unreasonably exercised. The main, but not the only, criterion on which that judgment should be exercised is whether the development is so changed that to grant it would be to deprive those who should have been consulted on the changed development of the opportunity of such consultation, and I use these words to cover all the matters of this kind with which Part III of the Act of 1971 deals."
>
> (emphasis added)

58. Throughout the rest of the judgment, Forbes J makes clear that he was considering the effect of any condition upon the development *applied for* (or proposed); he was not considering the relationship between a condition and the development for which permission has been granted.

Cadogan v Secretary of State for the Environment (1992) 65 P & CR 410 CA

59. Pioneer Aggregates applied for planning permission to extract sand and gravel from 90.5 ha of land. The application described the proposal for restoration of the land as

"Agriculture/nature reserve. Progressive restoration using on-site materials" (emphasis added) and provided for the creation of two lakes. A guidance note required the applicant to demonstrate that the site could be reclaimed satisfactorily. On appeal, the Secretary of State granted permission subject to conditions, one of which provided that "if the sufficiency of the water supply for the proposed lakes cannot be demonstrated to the satisfaction of the mineral planning authority, then an alternative restoration scheme shall be submitted to and agreed by the mineral planning authority." The judge at first instance dismissed the tenant farmer's application to quash the Secretary of State's decision. The Court of Appeal allowed a further appeal. However it rejected the farmer's first contention that the Secretary of State had no power to impose the condition in relation to the restoration after use of the land because it offended against the principle that a condition on a planning permission would not be valid if it altered the extent or nature of the development permitted.

60. Glidewell LJ, after setting out the terms of the condition, stated (at p413):

> "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 permission granted by the Secretary of State in his letter specifically said that it was granted "in accordance with the application… Dated December 11, 1987… And the attached plan." …"
>
> Mr Taylor [for the appellant] submits that [the condition]… offends against the first principle to which I have referred above. The suggestion is that if, after Pioneer Aggregates had carried out the tests referred to in the condition, they could not demonstrate that the supply of water would be sufficient to enable the lakes to be restored and used as intended, then the condition left it open for an alternative scheme of restoration to be proposed and agreed by the county council. Such a scheme might well not be in accordance with the detailed provisions of the application and the accompanying plan, and thus might well alter the extent or nature of the development permitted. In particular, such a scheme of restoration might involve the importation of material from outside the site, which would be wholly contrary to the provisions of the application."
>
> (emphasis added)

61. This argument was rejected at first instance and Glidewell LJ in turn rejected the appellant's criticism of the first instance judge's reasoning, stating:

> "The condition is part of a clearly worded permission, which specifically refers to the application and the attached plan. If an alternative restoration scheme were submitted which was not within **the ambit of the application and the attached plan**, then I agree with the judge that it would not be a scheme which fell within the meaning of [the] condition…. In particular, … the application specifically said that the scheme of restoration would be carried out "using on-site materials". It must follow that any scheme of restoration which involve the importation of material

> from outside the site would be outside the scope of the application and thus of the permission and would not be a scheme to which the mineral planning authority could validly agree as being within [the] condition… (even if they so wished)".
>
> (**emphasis** added)

R v Coventry City Council ex parte Arrowcroft Group Plc [2001] PLCR 7

62. This case directly concerns the power under section 73. The local authority granted outline planning consent for a 40,000 seat arena, food superstore, variety superstore and associated small retail service and community uses. Under the description of development, the notice of permission stated, so far as relevant:

> "40,000 seat multipurpose arena, 1 food superstore & 1 variety superstore with associated small retail, service and community units …." (emphasis added)

63. The identity of the operator of the proposed food superstore changed and the operator wished to sell a higher than usual proportion of non-food goods. Further changes were also proposed including the replacement of the variety superstore with up to 6 non-food comparison goods stores. The developer applied under section 73 to vary the conditions in the planning permission such that, inter alia, there was to be up to six non-food variety stores, in place of the one variety superstore. The authority granted the permission under section 73 subject to a section 106 agreement. On application for judicial review, Sullivan J declared the decision to be ultra vires. Section 73 did not enable the authority to grant permission for "one variety superstore" subject to a condition that the building erected should in fact comprise "non-food variety stores… not exceeding six in number". The local authority had no power under section 73 to vary the conditions in that way.

64. At §§27 and 28, Sullivan J set out the argument of the interested parties:

> "27. Mr Katkowski submits that on the facts here it is the conditions which fix the details of what is permitted and that in the event of any conflict with the "operative" part of the planning permission those conditions should prevail. The council is entitled to alter the conditions under section 73 even if that results in an altered planning permission for more than one variety store. The purpose of section 73 is to enable a materially different planning permission to be granted by the imposition of different conditions.
>
> 28. He submits that the approach which is set out in paragraph 72.06 of the Encyclopaedia of Planning Law is not applicable. It deals with conditions which seek to alter the character of the development applied for. Here there is no doubt that the section 73 application sought permission for a number of comparison retail units in substitution for the one variety store that had been permitted in 1999." (emphasis added)

65. From §29 onwards, Sullivan J then set out his conclusions:

> "29. Notwithstanding Mr Katkowski's submissions, I consider the approach in paragraph 72.06 of the Encyclopaedia is a useful starting point. It is as follows, so far as material:
>
> > A condition may have the effect of modifying the development proposed by the application provided that it does not constitute a fundamental alteration in the proposal."
>
> 30. A number of cases are then cited in which it was decided that various conditions requiring, for example, off-street car parking, suitable visibility displays or deleting a proposed means of access, had not constituted fundamental alterations in the proposals that were being placed before the planning authority. The passage continues:
>
> > "Similarly, a condition may scale down the applicant's proposals and permission may be granted in a suitable case for part only of the development for which approval is sought or in respect of part only of the land to which the application relates."
>
> 31. Authorities are cited for those propositions.
>
> 32. Thus, in response to the application in 1998 it was entirely proper for the local planning authority to impose conditions, for example, limiting the size of the variety store, providing that it should not open until the unit shops had been substantially completed and preventing its later subdivision. It would not, in my judgment, have been lawful for the local planning authority to have imposed in response to an application for planning permission for, inter alia, "one variety store" a condition which said:
>
> > "The buildings to be erected shall comprise up to six non-food variety stores comprising a range of non-food Al retail units."
>
> 33. Faced with the imposition of such a condition there can be little doubt 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 section 73. It is true that the outcome of a successful application under section 73 is a fresh planning permission, but in deciding

> whether or not to grant that fresh planning permission the local planning authority,
>
> > " ... shall consider only the question of the conditions subject to which planning permission should be granted." (See section 73(1) and *Powergen* above.)
>
> Thus the council is able to impose different conditions upon a new planning permission, but only if they are conditions which the council could lawfully have imposed upon the original planning permission in the sense that they do not amount to a fundamental alteration of the proposal put forward in the original application. I bear in mind that the variety superstore was but one element of a very large mixed use scheme, nevertheless it is plain on the evidence that it was an important element in the mix and this is reflected in the retail implications of its removal.
>
> …
>
> 35. Whatever the planning merits of this new proposal, which can, of course, be incorporated into a new "full" application, I am satisfied that the council had no power under section 73 to vary the conditions in the manner set out above. The variation has the effect that the "operative" part of the new planning permission gives permission for one variety super-store on the one hand, but the new planning permission by the revised conditions takes away that consent with the other."
>
> (emphasis added)

66. As set out further below, the parties place different interpretations on the foregoing passages. In the present case, the Claimant submits that these passages establish two distinct restrictions on the power in section 73: §35 is "restriction 1", and §33 is "restriction 2" (see paragraph 106 below). The Defendant submits that *Arrowcroft* establishes only one single restriction, namely restriction 2 ("fundamental alteration") (see paragraphs 113(4) and 115 below).

Kevin Stevens v Blaenau Gwent County Borough Council [2015] EWHC 1606 (Admin)

67. The defendant local authority granted planning permission for a solar park. The planning permission was granted in the following terms:

> "The provision of photovoltaic solar park (14 M W) comprising of 53,955 photovoltaic solar panels over 28.6 HE of agricultural land and ancillary infrastructure to include, 1 substation, 11 inverter stations, pole mounted security cameras, security fencing, creation of an all-weather access route for maintenance, excavation of a cable trench to the south for grid connection and landscaping at Hafod Y Dafal Farm, Aberbeeg …"
>
> (emphasis added).

68. However Condition 20 to the permission stated that "the southern cabling route from the main site to Aberbeeg does not form part of this planning permission". The claimant had an interest in adjoining land and alleged that the decision was unlawful, contending, inter alia, that the planning permission was unclear and *Wednesbury* unreasonable on its face, as it did not grant planning permission for the excavation of the cabling trench route to the south.

69. In her judgment, at §§23 and following, Patterson J set out a number of legal principles; including (1) a condition may remove an element of the *proposed* development such as a proposed means of access (citing *Kent County Council*, supra) and (2) it is well established that planning permission may be granted for a smaller development or for less development than was *applied for* (citing *Wheatcroft*, supra). At §36 she summarised the claimant's argument as follows

> "36. The claimant contends that the planning permission is confusing because it recites as part of the development permitted: "excavation of a cable trench to the south for grid connection and landscaping at Hafod Y Dafal Farm, Aberbeeg." However, condition 20 removes all reference to the excavation of a cable trench to the south. Although the defendant refers to the existence of the existing forestry track it is not encompassed by the words of the planning permission. On the one hand, planning permission is to be read as granting planning permission for grid excavation operational works but then that is taken away as a result of condition 20. The effect of that could be to prevent the planning permission from being implemented."

70. Patterson J rejected this argument in the following terms:

> "41. 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"

71. It appears that neither *Cadogan* nor *Arrowcroft* were cited.

R (Holborn Studios) v Hackney London Borough Council [2017] EWHC 2823 (Admin) [2018] PTSR 997

72. The issue in this case was procedural fairness and the circumstances in which it is necessary to re-consult where there is a substantial alteration to the proposed development. Nevertheless in the course of his judgment, John Howell QC sitting as a

deputy High Court Judge made observations on the substantive constraints on the part of a local planning authority to grant planning permission for a development other than that for which an application was originally made. The judge held that the question whether reconsultation was required in the event of a change to a proposal consulted on depended on what fairness required. At §§63 to 85, the judge addressed the circumstances in which planning permission may be granted for a development other than that for which an application was initially made and the test which the court should apply when reviewing the legality of the grant of such a permission. At §64, he identified three ways in which a planning permission may be granted for such a development: first, the initial application may itself be amended; secondly, permission may be granted only for part of the development applied for; and thirdly, permission may be granted subject to a condition that modifies the development applied for. Addressing the second and third of those possibilities, the judge stated as follows:

> "66. A planning authority also has power to grant planning permission for part of the development applied for under section 70(1)(a) of the 1990 Act and to refuse permission for another part under section 70(1)(b) where such parts are separate and divisible: see section 70(1) …; and *Kent County Council* … . In such a case the development for which permission is granted is the same as that in part of the application but there remains a question (apart from one about consultation about such a partial grant) whether the permission would be for a development that would be substantially or significantly different in its context from that which the application envisaged: cf *Bernard Wheatcroft Ltd* … at 240; and *Johnson v Secretary of State for Communities and Local Government* [2007] EWHC 1839(Admin) at [25].
>
> 67. A local planning authority also has power to grant planning permission on an application subject to conditions: see section 70(1)(a) of the 1990 Act …. Such a condition may have the effect of modifying the development applied for, whether by limiting or enlarging it or by changing its nature to some extent. The so-called Wheatcroft principle is that the result of imposing such a condition must not be a development which in substance is not that which was applied for: see … *Wheatcroft* … 240-241. Thus on an application for planning permission without complying with conditions subject to which a previous planning permission is granted under section 73 of the 1990 Act, the authority may impose different conditions but only if they are conditions which could lawfully have been imposed on 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: see … *Arrowcroft Group* … paras 29 and 33, per Sullivan LJ; and *R (Wet Finishing Works Ltd) v Taunton Deane District Council* [2018] PTSR 26, paras 42 and 45-48, per Singh J.
>
> 68. These cases on section 73 of the 1990 Act illustrate the substantive limitation on the extent to which planning

> permission may be granted other than for the development for which the application for planning permission was initially made. The limitation applies even though applications for planning permission under that section require notification and publicity: see paras 10, 15 and 16 above."
>
> (emphasis added)

73. I note that, at §67, (1) the judge appears to suggest that the decision on section 73 in *Arrowcroft* is an application of the *Wheatcroft* principle and (2) he cites, with approval, the decision of Singh J in *Wet Finishing Works* (to which reference is made in the next case).

Finney v Welsh Ministers [2020] PTSR 455 [2019] EWCA Civ 1868

74. This decision is at the heart of the present case. The local planning authority granted planning permission for development described as the "installation and 25-year operation of two wind turbines, with a tip height of up to 100 m and associated infrastructure" (emphasis added). One of the conditions of the permission was that the development be carried out in accordance with certain plans and documents, one of which specified a wind turbine with a tip height of 100 m.

75. The developer applied under section 73 to vary that condition so as to permit tip heights for the turbines of up to 125 m. On appeal the inspector granted planning permission for "installation and 25-year operation of two wind turbines and associated infrastructure", subject to new conditions including that the wind turbine have a tip height of 125 m. In the inspector's description of the permitted development the words "with a tip height of up to 100 m" contained in the original grant had been excised (as expressly pointed out by Lewison LJ in his judgment at §9).

76. The claimant sought to quash the decision, contending that the inspector had no power to grant planning permission for development which was not covered by the description of the development in the body of the original planning permission; the only power under section 73 being to vary *the conditions* attached to the development as described. At first instance the judge refused the application. The Court of Appeal allowed the claimant's appeal. Lewison LJ gave the leading judgment.

77. At §§13 and 14, Lewison LJ referred to the case law on the origin and purpose of section 73, and in particular *Pye v, the Secretary of State for the Environment, Transport and the Regions* [1998] 3 PLR 72, as subsequently approved in *Ex parte PowerGen* (2001) P & CR 5 and by the Supreme Court in *Lambeth London Borough Council v Secretary of State for Housing, Communities and Local Government* [2019] UKSC 33, [2019] 1 WLR 4317. He expressly cited §11 of the latter case as follows:

> "A permission under section 73 can only take effect as an independent permission to carry out *the same development as previously permitted*, but subject to the new or amended conditions. This was explained in the contemporary Circular 19/86, para 13, to which Sullivan J referred. It described the new section as enabling an applicant, in respect of "an extant planning permission granted subject to conditions", to apply "for relief

> from all or any of those conditions". It added: "If the authority do decide that some variation of conditions is acceptable, a new alternative permission will be created. It is then open to the applicant to choose whether to implement the new permission or the one originally granted.""
>
> (Lewison LJ's *emphasis*)

78. Lewison LJ continued:

> "15. Some further points are, I think, uncontroversial: (i) In deciding on its response to an application under section 73, the planning authority must have regard to the development plan and any other material consideration. The material considerations will include the practical consequences of discharging or amending conditions: *Pye* at 85B. (ii) When granting permission under section 73 a planning authority may, in principle, accede to the discharge of one or more conditions in an existing planning permission; or may replace existing conditions with new conditions. But any new condition must be one which the planning authority could lawfully have imposed on the original grant of planning permission. (iii) A condition on a planning permission will not be valid if it **alters the extent or the nature** of the development **permitted**: *Cadogan v Secretary of State for the Environment* (1992) 65 P & CR 410."
>
> (**emphasis** added)

79. At §§16 and 17 Lewison LJ cited with approval the following passages of Sullivan J in *Pye*:

> "The original planning permission comprises not merely the description of the development in the operative part of the planning permission, in this case the erection of a dwelling, but also the conditions subject to which the development was permitted to be carried out." (emphasis added)

80. At §§18 to 20, Lewison LJ referred to the distinction between the "operative part" or grant of the planning permission on the one hand, and the conditions to which the operative part or grant is subject, on the other. He approved the following passage from the judgment of Hickinbottom J in *Cotswold Grange County Park LLP v Secretary of State for Communities and Local Government* [2014] EWHC 1138 (Admin), [2014] JPL 981 "… the grant identifies what can be done - what is permitted - so far as use of land is concerned; whereas conditions identify what cannot be done - what is forbidden."

81. Lewison LJ continued:

> "21. The question in this appeal is whether, on an application under section 73, it is open to the local planning authority (or on appeal the Welsh Ministers) to alter the description of the

> development contained in the operative part of the planning permission.
>
> 22. There are three cases that bear on that question. All are decisions of the High Court; and it is naturally common ground that none of them binds this court. …"
>
> (emphasis added).

82. Then from §§22 to 38 Lewison LJ analysed those three cases, namely *Arrowcroft* supra, *R (Vue Entertainment Ltd) v City of York Council* [2017] EWHC 588 (Admin) and *R (Wet Finishing Works Ltd) v Taunton Deane BC* [2017] EWHC 1837 (Admin) [2018] PTSR 26. In summary he applied *Arrowcroft*, approved of *Vue Entertainment* but considered *Wet Finishing Works* to be wrong.

83. First, as to *Arrowcroft*, after setting out the facts at §§22 to 26, he continued:

> "26. ….The revised conditions were challenged on the ground that they introduced, at para 23: "a fundamental inconsistency between the conditions and the description of the development contained in the notice of permission."
>
> 27. Sullivan J upheld the challenge. At [33] he said:
>
> > "… 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."
>
> 28. He added 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 section 73 to vary the conditions in the manner set out above. The variation has the effect that the "operative" part of the new planning permission gives permission for one variety superstore on the one hand, but the new planning permission by the revised conditions takes away that consent with the other."
>
> 29. It is clear that what Sullivan J meant by the **"operative"** part of the planning permission was the description of the development, rather than the conditions. **These two passages** are, in my judgment, dealing with **different things**. The first deals with the imposition of conditions on the grant of planning permission. The second deals with a conflict between the operative part of the planning permission and conditions attached to it." (**emphasis** added).

§29 is central to the Claimant's case; the Defendant takes issue with it. I further point out that, as regards *Arrowcroft*, Lewison LJ did not cite §33 in its entirety, nor refer to §§29 to 32, of Sullivan J's judgment.

84. Lewison LJ then turned, at §§30 to 33, to consider *Vue Entertainment*. In that case, planning permission had been granted for, inter alia "the erection of an 8,000 seat community stadium, leisure centre, multi-screen cinema, …" (emphasis added). A condition required the development to be constructed in accordance with specified plans, which showed a 12 screen multi-screen cinema with a capacity of 2,000. The section 73 application sought to amend that condition so as to increase the number of screens to 13, with a capacity of 2,400. The amendment was challenged on the ground that it represented a "fundamental change" to the effect of the planning permission. Lewison LJ continued:

> "31. …. Collins J referred to *Arrowcroft* and said at [11] that the effect of the change in that case did amend "the permission itself". He said at [15]:
>
> > "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."
>
> 32. I understand him to have equated "the grant" with what Sullivan J had called the "operative part" of the planning permission; i.e. the description of the development itself. Collins J continued:
>
> > "[16] In this case, the amendments sought do not vary the permission. It is as I have already cited and there is nothing in the permission itself which limits the size of either the amount of floor space or the number of screens and thus the capacity of the multi-screen cinema. The only limitation on capacity is the stadium itself, which has to be 8,000 seats.
> >
> > [17] It seems to me obvious that if the application had been to amend the condition to increase the capacity of the stadium that would [not] have been likely to have fallen foul of the *Arrowcroft* principle because it would have been a variation to the grant of permission itself but as I say, that is not the case here."
>
> 33. It is agreed that "not" in paragraph [17] line 2 is an error and should be ignored"
>
> (emphasis added).

85. Further potentially important parts of the judgment of Collins J were not cited by Lewison LJ, but are cited in *Armstrong* as set out in paragraph 98 below.

86. At §§34 to 38 Lewison LJ addressed the third case, *Wet Finishing Works Ltd*. In that case the planning authority had granted planning permission for the erection of 84 dwellings. An application was made (and granted) to vary the permission by increasing the number of permitted dwellings from 84 to 90. Although it was not clear to Lewison LJ, it seemed that the limitation to 84 dwellings might well have been contained in the description of the development itself, rather than in a condition. The claimant's first argument was that, as the original permission was for 84 dwellings, whereas the later permission was for 90 dwellings, "there was a fundamental inconsistency between the operative part of the decision notice and the conditions in accordance with which the development must be constructed." Lewison LJ continued as follows

> "35. The argument was elaborated, at [42], as follows:
>
> > ".. although it may be possible for a condition to restrict what is permitted by a planning permission, for example perhaps to reduce the number of houses that can be built under it, what section 73 does not enable a planning authority to do is to increase what was applied for by way of a condition attached to a planning permission."
>
> 36. Singh J does not appear to have been referred to the decision of Collins J in *Vue* …; but he did consider *Arrowcroft*. He took *Arrowcroft* as authority for the propositions that: (i) A planning authority may impose different conditions on an application under section 73 provided that they do not amount to a fundamental alteration of the proposal put forward in the original application; and (ii) an alteration will be fundamental if it gives with one hand and takes away with the other.
>
> 37. Singh J also decided that whether an alteration was or was not fundamental was question of fact and degree, which involved a planning judgment. That judgment was for the decision-maker to make and would only be questioned by the court if it was irrational. It should be noted that the argument put to Singh J had its foundation in the proposition that the inconsistency between the operative part and the condition was "fundamental"; and it was that proposition that Singh J addressed.
>
> 38. The judge in the present case followed the approach of Singh J in *Wet Finishing Works*."
>
> (emphasis added)

87. At §§39 and 40, Lewison LJ referred to the submissions of the authority and the developer that *the only* limitation on the power of the planning authority on an application under section 73 was that it could not introduce a condition that made "a "fundamental alteration"" to the permitted development. Whether a change was or was not fundamental was a question of fact and degree for the planning authority to address. The operative part of a planning permission may be the subject of an amendment, which is consequential on a change in the conditions; provided that the change is not a fundamental one. At §41, after referring to the fact that these submissions were said to

be supported by *Wheatcroft*, Lewison LJ rejected the relevance of *Wheatcroft* (and the change in substance test there stated) in the following terms:

> "… . Forbes J held that there was no principle of law which prevented the Secretary of State from imposing conditions that have the effect of reducing the permitted development below the development applied for. He added, however, that the power could not be exercised where the conditional planning permission would allow development that was not "in substance" that which was applied for. The main criterion was whether the development is so changed as to deprive those who should have been consulted the opportunity of being consulted. There are four points to be made about that decision. First, it was not concerned with a statutory provision such as section 73 which expressly restricts that which a planning authority may consider. Second, it was concerned with an ongoing application, rather than with a granted planning permission which gave rise to legal rights to carry out development. Third, it was concerned with a reduction in the permitted development; not an increase in the permitted development. He did not decide that the planning authority or the Secretary of State could grant planning permission for more than the developer had asked for. If the planning authority purported to do that, one can well imagine that potential consultees would have real cause for complaint. Fourth, to ask whether something is "in substance" the same as something else is a different test from whether something is a "fundamental alteration". I do not consider that the so-called Wheatcroft test is the right criterion to apply to section 73."
>
> (emphasis added)

88. Lewison LJ then stated his conclusions at §§42 to 43 as follows:

> "42. The question is one of statutory interpretation. Section 73 (1) is on its face limited to permission for the development of land "without complying with conditions" subject to which a previous planning permission has been granted. In other words the purpose of such an application is to avoid committing a breach of planning control of the second type referred to in section 171A. …. On receipt of such an application section 73 (2) says that the planning authority must "consider only the question of conditions". It must not, therefore, consider the description of the development to which the conditions are attached. The natural inference from that imperative is that the planning authority cannot use section 73 to change the description of the development. That coincides with Lord Carnwath's description of the section as permitting "the same development" subject to different conditions. Mr Hardy suggested that developers could apply to change an innocuous condition in order to open the gate to section 73 …,

> …
>
> 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." (emphasis added)

89. Finally, at §46, Lewison concluded by expressly supporting the analysis of Collins J in *Vue Entertainment* and stating that to the extent that Singh J held otherwise in *Wet Finishing Works*, he was wrong.

Reid v Secretary of State for Levelling Up, Housing and Communities **[**2022] EWHC 3116 (Admin)

90. A developer was granted planning permission in 2015 for "34 self-catering holiday units, a 25-bed inn building, watersports building, storehouse and outfitters along with a commercial and educational unit, nature trails, cycle trails, pathways and family facilities. Re-routing a public right of way at Kilvington" (emphasis added). That permission was subject to conditions including condition 19 restricting use to holiday accommodation only, condition 20 maintaining a register of occupiers and condition 21 restricting occupation to short-term only. The effect of condition 19 was to remove the benefit of the "Use Classes Order"; absent condition 19, the site could have been used for residential accommodation. In 2020 a further permission was granted, removing condition 21 and renumbering conditions 19 and 20 as 17 and 18. The claimant then applied under section 73 for removal of conditions 19 and 20 under the 2015 permission and conditions 17 and 18 under the 2020 permission. On appeal, the inspector decided, as a matter of law, she could not make the change as the removal of the conditions would cause conflict with the original description of the development which specifies use as self-catering holiday units. On a section 288 application, Farbey J quashed the inspector's decision. In support of the inspector's decision, the Secretary of State contended that the removal of the conditions brought about a fundamental alteration to the permitted development, applying *Arrowcrof*t, and contending that *Finney* and *Arrowcroft* dealt with different points of law: The former was concerned with changing the description of the permitted development, whereas the latter was concerned with "fundamental alteration to the permitted development".

91. In her judgment, Farbey J set out the legal framework, citing Hickinbottom J in *Cotswold Grange Park*, Sullivan J in *Pye* and *Finney* at §§19 and 29. At §§38 to 42 Farbey J addressed section 73. At §40 she summarised the effect of *Arrowcroft* in the following terms:

> "40. Sullivan J held that a section 73 determination involves only the question of conditions subject to which planning permission should be granted. It does not and cannot alter the nature of the planning permission. Consequently, any conditions imposed under section 73 cannot be inconsistent with the nature of the

> planning permission. A planning authority is able to impose different conditions under a fresh planning permission under section 73 but only if they are conditions which could lawfully have been 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." A planning authority would otherwise be granting planning permission for a development with one hand and effectively refusing planning permission for that development with the other hand by imposing an inconsistent condition (Arrowcroft, para 33)."

92. At §41 she turned to *Finney*, setting out §§13 to 15. She then continued at §42:

> "42. The court in *Finney* observed that, by virtue of section 73(2), a planning authority must consider "only the question of conditions" and must not consider the description of the development to which the conditions are attached (*Finney*, para 42). A condition altering the nature of what was permitted by the operative part of the permission would be unlawful (*Finney*, para 43)." (emphasis added)

93. At §§50 to 54 she set out her analysis of section 73:

> "50. Section 73 is concerned only with changes of conditions. The operational part of the planning permission (the description of what is permitted) endures and cannot be changed. It is plain from the case law that the imposition of a condition altering the nature of what was permitted is unlawful.
>
> 51. The rationale for such a conclusion is not hard to discern. A public decision-maker cannot adhere to a description of permitted development while at the same time deciding to impose a condition that is inconsistent with that description. Such a decision would be irrational. To echo the words of Sullivan J in *Arrowcroft*, it is irrational to give with one hand and take away with the other.
>
> 52. There was some discussion before me about whether *Finney* and *Arrowcroft* only prohibit conditions that are logically inconsistent with the permitted development, reflecting Sullivan J's reference to "an inconsistent condition" in para 33 of his judgment. If *Arrowcroft* refers to logic, the court is as well-placed as a planning inspector to assess the conditions: there is no scope for an inspector's planning judgment. If, on the other hand, the question is whether the conditions amount to a "fundamental alteration" of the permitted development (to which Sullivan J also refers in para 33 of *Arrowcroft*), the question for the inspector may be one of fact and degree involving planning judgment exercisable by the inspector (subject to public law grounds of intervention). *Finney* refers at para 43 to a "conflict" between the description and a condition which "alters the nature"

> of what was permitted. I do not need to determine the precise delineation between logic and judgment in the present case: it does not matter.
>
> 53. Both *Finney* and *Arrowcroft* concerned the adding of conditions. That was not the issue before the inspector who had to consider the removal of conditions. It is not inevitable or even clear that the removal of conditions gives rise to the same considerations as their addition. In adding conditions, a decision-maker is not permitted to intrude upon the operative part of the permission. It is difficult to see how the removal of a condition could give rise to such intrusion. When a condition is removed, the operative part of the permission remains intact, albeit in an unconditioned way. In the present case, the removal of the relevant conditions would and could have had no effect on the description."
>
> (emphasis added)

94. Applying these principles to the facts at §§55 to 58, she concluded that even if the reasoning of *Finney* and *Arrowcroft* applied to the removal of conditions, in this case there was nothing in the description that was inconsistent with development permitted by the Order. If the section 73 application were allowed, the way in which the development would change was not because anything in the description would be changed but because the conditions denying the benefit of the Order would be removed. Removing the conditions would not be giving with one hand and taking with the other in the sense indicated by *Arrowcroft*. The removal of the bar (i.e. the conditions removing the benefit of the Order) could not lead to any alteration of the operational part of the permission (the description) because the operational part of the permission would remain identical.

Armstrong v Secretary of State for Levelling-Up, Housing and Communities **[**2023] EWHC 176 (Admin)

95. In 2007 the claimant was granted planning permission for "the development specified in the plan(s) and application submitted… namely: "construction of one dwelling on land situate at… The Beach House, Finney Cook Lane, Portwrinkle, Torpoint". This was the operative wording. In 2020 the planning authority granted a non-material amendment pursuant to section 96A by way of addition of a condition, stating, that "the development hereby permitted shall be carried out in accordance with the plans listed below". In December 2020, the claimant applied under section 73 seeking non-compliance with that condition. New drawings were submitted, which the claimant sought to substitute into the condition. They proposed a new dwelling in a different form and style. On appeal, the inspector refused the application under section 73, on the grounds that the nature of the development proposed would be "substantially different to" that allowed by the existing permission.

96. On section 288 application by the developer, James Strachan KC sitting as a deputy High Court judge quashed the inspector's decision. In summary, he held (1) that it was common ground in the present case that there was no inconsistency between the new condition and the *operative wording* of the original permission, and (2) that the power in section 73 is not limited to a non-fundamental variation to the permission

overall. There is no principle that section 73 cannot be used to make a fundamental alteration to the overall effect of the permission. The cases of *Arrowcroft* and *Finney* were, on their facts, cases concerning conflict with the operative *wording*. Moreover the case of *Vue Entertainment* did not establish the existence of a wider restriction on section 73.

97. Mr Strachan KC conducted a detailed analysis of the case law and in particular *Arrowcroft* (at §§ 28 to 35) *Vue Entertainment* (at §§36 to 40) and *Finney* (at §§41 to 51). As regards *Vue Entertainment* Mr Strachan KC set out more of the judgment of Collins J than had been set out in *Finney*. At §38 he quoted the following additional passages from *Vue Entertainment* as follows:

> "12. The argument in that case [i.e. *Arrowcroft]* which was accepted by Sullivan J was that it was not permissible for a condition to seek to vary the permission which had been granted and therefore it was a misuse of section 73 to seek to achieve that.
>
> 13. The ratio of Sullivan J's decision seems to me to be contained in paragraph 33 of his judgment … . Thus the variation had the effect that the operative part of the new planning permission gave their permission for one variety superstore but the new planning permission by the revised conditions would take away that consent." (emphasis added)

98. He then set out the three paragraphs from the judgment in *Vue Entertainment* cited by Lewison LJ at §§31 and 32 of *Finney*, (set out in paragraph 84 above) and continued by citing the following further paragraphs from Collins J's judgment (albeit with different paragraph numbering):

> "17. Mr Walton's submission that it is a fundamental change is a reflection of part of the permission only, that is to say, the part that deals with the multi-screen cinema. When one is concerned with fundamental variations, one must look, as it seems to me, to the permission as a whole in order to see whether there is in reality a fundamental change, or whether any specific part of the permission as granted is sought to be varied by the change of condition.
>
> 18. It is to be noted that section 73 itself, as I have said, does not in terms limit the extent to which an amendment of conditions can be made. It does not have, on the face of it, to be within the adjective "minor", whatever that may mean in the context.
>
> 19. It is, I suppose, possible that there might be a case where a change of condition, albeit it did not seek to vary the permission itself on its face, was so different as to be what could properly be described as a fundamental variation of the effect of the permission overall. But it is not necessary for me to go into the possibility of that in the circumstances of this case because I am

> entirely satisfied that that does not apply in this particular case."
> (emphasis added)

99. The judge pointed out that the defendant placed particular reliance on §19 of *Vue Entertainment* as to the possibility of a change of condition being so different such as to be a "fundamental variation" of the effect of the permission overall.

100. As regards *Finney*, the judge cited large portions of the judgment, including §29 where Lewison LJ had analysed *Arrowcroft* at §§33 and 35 and confirming that Lewison LJ had rejected reliance upon the *Wheatcroft* test for an application under section 73.

101. At §§54 to 64, the judge set out the respective arguments of the parties. The claimant contended that the only restriction to the scope of section 73 is that the modified proposals must not conflict with *the operative part* of the planning permission and in that case no such conflict arose. The defendants submitted that the question was whether an application under section 73 can be used *to obtain a "fundamental variation" of the effect of a permission where there is no conflict with the description of the development*, contending that this interpretation is supported by both *Arrowcroft* and *Vue Entertainment*.

102. In his analysis at §§65 to 89, the judge accepted the claimant's position. At §71, he said that it was common ground that in that case the substitution of the plans proposed by the section 73 application did not involve any conflict with the operative *part* or grant of planning permission as amended. The case therefore fell to be determined on the basis that no such conflict arose. At §73 he identified the specific issue raised and gave his answer, as follows:

> "..did the Inspector lawfully reject the claimant's section 73 application as "a fundamental variation" of the permission even though it would not involve any conflict with the description of the development permitted". In my judgment he did not act lawfully in doing so for any or all of the following reasons."

103. At §§74 to 89, the judge gave six reasons for concluding that section 73 did not preclude a fundamental variation of the permission as a whole. First, there is nothing in the words of section 73 which limits its application to amendments which do not involve a substantial or fundamental variation. Secondly (at §75) the requirement that a section 73 application be confined to applications for non-compliance with a condition is significantly restrictive in and of itself. There is no obvious need or purpose for reading in additional restrictions. The case of *Finney* confirms that section 73 cannot be used to vary the operative part. He continued:

> "one therefore cannot use s.73 to vary or impose a condition where the resulting condition would be inherently inconsistent with the operative part of the planning permission; that would also involve effective variation of the operative part of the planning permission as well …" (emphasis added)

He continued that if a section 73 application does not lead to any conflict or inconsistency with the *operative part* of the permission, it was difficult to see why it is objectionable in light of the statutory purpose of section 73 and the Act itself.

104. Thirdly, the judge concluded that section 73 is clearly intended to be a provision which enables a developer to make an application to remove or vary a condition, provided of course that the application does not conflict with the *operative part*. Fourthly, the wording of section 96A is informative as part of the statutory context. Section 96A was introduced to amend planning permission generally but its scope is constrained to non-material amendments. If Parliament had wished to limit the Section 73 power to "minor material amendments" or to prevent "fundamental variations" it would have done so expressly. Fifthly, to allow an application to be made for non-compliance which is not in conflict with the *operative part* of the permission does not dictate the outcome of the application. The application would fall to be determined on its planning merits.

105. Sixthly, the judge considered that the case law did not materially support the defendant's attempt to restrict the scope of section 73 to non-fundamental variations where there is no conflict with the *operative part* of the wording. *Arrowcroft* and *Finney* were both cases which involved direct conflict with the *operative part* of the planning permission originally granted. In *Vue Entertainment* Collins J contemplated that there might be a case where a change of condition, albeit not seeking to vary the permission itself, was so different as to be what could properly be described as a fundamental variation of the permission overall. However Collins J expressly did not decide the issue. *Vue Entertainment* is not authority for the proposition that a section 73 application which is consistent with the *operative part* is nonetheless outside the scope of section 73 if it is considered to involve a "fundamental variation". *Finney* was another case where the conflict was between what was proposed in the section 73 application and the *operative part* of the planning permission. However in the present case it was common ground that no such conflict arose. There was no need for any alteration to the description of the permission for construction of one dwelling. Finally I note that the updated §013 of the NPPG (paragraph 50 above) is consistent with the judge's conclusions.

Ground 1: *ultra vires* section 73

The Parties' submissions

The Claimant's case

106. The Claimant submits, as regards the law, that there are two distinct restrictions on the exercise of the power under section 73 (as made clear by Lewison LJ in *Finney* §29):

(1) A permission under section 73 must not produce a conflict between the operative part/words of the existing planning permission and the new condition or conditions: *Finney* §29 last sentence, §§42-43, *Arrowcroft* §35. I refer to this restriction as "restriction 1"

(2) A permission under s.73 must not fundamentally alter the development permitted by the original permission: *Finney* §29 penultimate sentence, *Arrowcroft* §33. I refer to this restriction as "restriction 2"

107. In relation to restriction 1, "conflict" encompasses "altering the nature or extent" of the grant. Put another way, a condition cannot purport to alter or vary the operative wording of the previous planning permission (*Finney* §43). Restriction 1 is self-standing. It is based not just on *Arrowcroft* and *Finney* but also on *Cadogan*. *Finney*

§43 sets out restriction 1 and in turn refers back to §15 (iii) and to *Cadogan*. *Finney* §29 correctly interprets *Arrowcroft* (at §35 and §33) in its identification of restriction 1 as separate from fundamental alteration because *Finney* itself is founded upon the principle in *Cadogan* that a condition must not alter the extent or nature of the grant. "Grant" is a reference to the operative wording: see *Finney* §§16 to 20. *Cadogan* is a clear and binding authority, which is endorsed by *Finney* and is consistent with *Arrowcroft* as explained by *Finney*. §43 of *Finney* is clearly the application of restriction 1. The reference there to "altering the nature" is not a reference to the "fundamental alteration" test. It is concerned with restriction 1 and *Cadogan*. There is nothing in *Cadogan* which qualifies the principle there stated that the "alteration" needs to be fundamental or substantial. If Glidewell LJ had omitted the word "extent" and the word "nature" had been qualified then there would have been a basis for the Defendant's submissions that this is one and the same as the "fundamental alteration" test. Collins J in *Vue Entertainment* is consistent with *Cadogan* i.e. restriction 1. Moreover it is clear from *Finney* §§36 to 39 that Lewison LJ is criticising the *Wet Finishing* case because Singh J identified only a fundamental alteration test and failed to identify a conflict test.

108. Secondly, a distinction is to be drawn between a condition which alters or modifies a *proposed* development and a condition which alters an *existing* development for which permission has been granted. Conditions added or removed under section 73 are a different thing from conditions imposed at the time of the original grant of planning permission. A planning authority faced with a full application for planning permission that is in progress does have some scope to grant permission for part only of what is *sought*, even if that conflicts with the description of the development *sought* and which wording it can change on the grant of permission. By contrast, section 73 is concerned only with conditions: see *Lambeth* §11 and *Finney* §§13, 14, 42. Section 73 requires the operative wording of the existing planning permission to be taken as fixed. The cases of *Kent, Wheatcroft, Holborn* and *Kevin Stevens* are not relevant to section 73. *Kent* and *Wheatcroft* were not concerned with a conflict between the operative wording and a condition and do not support the proposition that section 73 can be used to grant a part only permission, if that clashes with the operative wording of the permission which has previously been *granted*. Rather they stand for the proposition that the planning authority can cut down the development *sought*. It is permissible to have a condition which reduces or is inconsistent with the permission *applied for*. *Arrowcroft* §§29 to 32 address *an application* and do not establish that there can be a condition which reduces or is inconsistent with the permission *as granted***.**

109. Thirdly, the Defendant's criticism of Lewison's rejection of *Wheatcroft* is unwarranted. Under section 73 the authority cannot consider whether to cut down the permission which has been granted in the operative wording; it can only consider the conditions. Until granted, the operative wording is not set in stone and can be cut down, but under section 73 "it is, and it cannot be".

110. Finally, the two most recent cases, *Reid* and *Armstrong* support restriction 1. *Reid* at §§50 to 53 supports the existence of restriction 1. Farbey J cites *Finney* §43 with approval. As to *Armstrong*, Mr Burton submits that the judgment is correct and supports restriction 1, but is wrong on restriction 2, as the judge does not deal with §§15 (iii) or 29 of *Finney* nor with *Arrowcroft*. In any event, the Defendant here accepts the existence of restriction 2.

111. Applying those principles to the facts of the present case, the 2022 Permission unlawfully breaches each of these restrictions and is thus ultra vires

(1) There is a conflict between the operative wording of the Original Permission (and indeed the 2022 Permission) (both of which specify "a substation"), and the effect of the Condition 2 to the 2022 Permission which both removes the 33kV substation from the plans and effectively prevents the building of that substation. The 2022 Permission purports to "alter and vary the original grant".

(2) Even if there is no conflict between the operative wording and the new conditions, the removal of the 33kV substation is a fundamental alteration of the Original Permission. The 33kV substation was the part of the development permitted by the Original Permission which was to allow the export of electricity generated by the solar park, which is the very purpose of the development. This is clear from paragraphs 3.6 to 3.8 of the Officer Update Report in 2017 and from Condition 15. Moreover, at the same time as it was granting the 2022 Permission, the Defendant was positively contending in the 2021 Permission Judicial Review that the 33kV substation allowed the Original Permission solar farm to operate, without the need for the DNO compound permitted by the 2021 Permission**.**

112. The fact of the grant of the 2021 Permission, approving a different substation did not allow the Defendant to grant the 2022 Permission; the 2022 Permission, in relation to the Original Permission which it was amending, was in breach of the restrictions 1 and 2. The Defendant cannot lawfully conflate the 2022 Permission with the 2021 Permission – the focus has to be on the 2022 application before the Defendant, as it is a stand alone permission. But even if one were to look at the situation now, the Defendant is still relying heavily on this substation. The Original Permission on its own can be implemented. Nothing requires the 2022 Permission to be built out in conjunction with the 2021 Permission. The 33 kV substation is still needed whether the 2022 Permission is taken in isolation or it is taken with the 2021 Permission.

The Defendant's case

113. As to the law, Mr Green, in oral argument, refined the Defendant's position as follows:

(1) The power to impose conditions pursuant to an application under section 73 is as extensive as the power to impose conditions on an "original" permission under section 70.

(2) It is lawful to impose a condition under section 70 or section 73 modifying or cutting down development described in the operative wording of a permission provided there is no *fundamental* alteration of the proposed development.

(3) The Claimant's first "restriction" - that in granting permission under section 73 a local planning authority cannot create a "conflict" between the operative words of the permission and its conditions – is not supported by the authorities, properly understood.

(4) The Claimant's second "restriction" - that in granting permission under section 73 a local planning authority cannot fundamentally alter the development permitted by the original permission – is accepted.

114. Essentially the Defendant contends that there is only one relevant restriction on the power under section 73. If it were to be expressed in terms of restriction 1 (conflict with operative wording) then it is only where the conflict between the operative wording and the condition is fundamental that section 73 cannot be used.

115. Mr Green expands on these submissions as follows. All conditions qualify or limit what would otherwise be unconstrained permission. When granting permission, it is permissible to impose a condition reducing the scope of the scheme as long as it does not take away or alter the substance of the development for which permission was applied: *Kent* and *Wheatcroft.* As regards *Arrowcroft*, it is essentially a case based on "fundamental alteration" i.e. it is a restriction 2 case. As is clear from §§29 to 32, Sullivan J based his analysis on the principles concerning conditions imposed on an original planning permission and relied heavily on the "fundamental alteration test" stated in the Encyclopaedia set out at §29. *Arrowcroft* at §33 (restriction 2) is thus founded upon the established principle that a condition can cut down a permitted development. If any conflict between a condition and the operative part of the permission were illegitimate, there would have been no need for the fundamental alteration test, on the facts of that case, and no need to consider the importance of the variety superstore in the scheme; and *Kent* and *Wheatcroft* would have been decided differently.

116. As to *Finney*, the issue was very narrow; namely whether it is open to the authority to alter the description of the development contained in the operative part. The rest of Lewison LJ's judgment was *obiter dicta*. His analysis, at §29, of *Arrowcroft* as identifying two "restrictions" is wrong. The reference at *Arrowcroft* §35 to the operative words was no more than part of the application of the "fundamental alteration test"; as is *Finney* §43, when properly analysed. The reference there to "alters the nature of what is permitted" is a reference to the fundamental alteration test. As to Lewison LJ's rejection of *Wheatcroft* (at §41), he did not appreciate that *Arrowcroft* is based on *Wheatcroft*. The "fundamental alteration test" is Sullivan J's phrasing of the *Wheatcroft* test ("different in substance"). Lewison LJ's criticisms of *Wheatcroft* are misplaced.

117. Mr Green submits that *Armstrong* does not assist, as it does not deal with the issue of whether "any" inconsistency with the operative part is sufficient or whether it has to be a fundamental alteration (and whether you can reduce the scope). The Defendant's case is that "inconsistency with operative part" is impermissible but only if it is a fundamental inconsistency, relying on §33 *Arrowcroft*, which paragraph the judge in *Armstrong* did not address.

118. Finally, the case of *Kevin Stevens* is an example of a condition which lawfully cut down permitted development.

119. As to the facts, whilst Mr Green accepts that the effect of Condition 2 is to prohibit the 33kV substation and to reduce the scope of the permission granted, the removal of the 33kV substation was not a fundamental alteration. The 33kV substation was an ancillary element to a much larger solar farm scheme. Physically it was a tiny element

and there were no significant planning consequences arising from its removal. Its removal followed the grant of permission for a working substation under the 2021 Permission which will provide a connection to the national grid. Applying the various tests from *Kent, Wheatcroft, Arrowcroft* and *Cadogan* the substation was a severable element of the solar farm development; the substance of the proposed development remained the same; no fundamental alteration was proposed; and there was no change in the nature of the permitted development.

Ground 1: Discussion and Analysis

The law

120. The starting point is that section 73 produces a fresh planning permission and the previous planning permission remains intact. Secondly, section 73 permits only a change to the conditions of the previous planning permission and not to the grant of permission itself.

121. As to the limits on the scope of the power in section 73 and in particular whether there is one, or more than one, such limit, and if so, what that limit is, the decided cases do not present an entirely clear picture and are not always easy to reconcile. *Finney* is the only Court of Appeal authority which directly addresses section 73 (*Cadogan* is the only other Court of Appeal authority cited).

122. At the heart of the dispute between the parties is §29 of Lewison LJ's judgment in *Finney* and his analysis of §§33 and 35 of *Arrowcroft* as identifying two distinct restrictions on the power. The question is whether, as the Claimant submits, there are two restrictions – restriction 1 (conflict with operative part) and restriction 2 (fundamental alteration of the permission as a whole) - or, as the Defendant submits, a single restriction, namely restriction 2.

123. There is some force in Mr Green's submissions. I accept that much of Lewison LJ's judgment in *Finney* is strictly *obiter dicta* (perhaps including §29). The *ratio* was that it is ultra vires section 73 to *change* the wording of the operative part. Secondly, detailed analysis of *Arrowcroft* suggests that Sullivan J's "fundamental alteration" approach in §33 is derived from the context of the preceding paragraphs, §§29 to 32 (which paragraphs are not referred to by Lewison LJ in *Finney).* Those paragraphs address the effect of conditions on development *proposals* and include express reliance (as a "starting point" at least) upon paragraph 72.06 of the Encyclopaedia of Planning Law, directly rejecting the submission of counsel that it did not apply to section 73. This might lead to the conclusion that Sullivan J had in mind only a single restriction i.e. restriction 2 and that he did not identify a distinct restriction in §35. Thirdly, support for this single restriction approach is provided by *Holborn* §67 which suggests that *Arrowcroft* is in turn based on the *Wheatcroft* principle. Fourthly, a variety of different expressions are used in the cases, sometimes interchangeably, to express the nature of the restriction or restrictions, including the following: "inconsistent", "conflict", "alter the extent or nature of", "fundamentally alter", "fundamentally inconsistent", (and see also the varying references to "operative part", "operative wording", "description", "grant", "development permitted"). Fifthly, as regards the two cases since *Finney, Reid* at §52 raises the question of the meaning of the term "inconsistent" and seems to identify (but not resolve) a choice between something akin to restriction 1 and restriction 2. Moreover *Reid* seems to ignore the second strand and

"fundamental alteration", nor does it refer to *Arrowcroft* §35. Finally *Armstrong* goes the other way and suggests that restriction 2 does not exist at all; the judge pays little attention to §33 of *Arrowcroft*.

124. However I have concluded that the balance of the case authorities, and in particular Court of Appeal authority, establishes the following:

(1) Under section 73 there is no power to introduce a condition which creates a conflict or is inconsistent with the *operative wording* of the existing original planning permission. This is "restriction 1".

(2) Restriction 1 is distinct from any wider "fundamental alteration" restriction i.e. restriction 2.

(3) It follows that I do not accept the Defendant's submission that there is only a single restriction, namely the "fundamental alteration" test – restriction 2.

(4) Restriction 1 is not limited to a case where the conflict or inconsistency with the operative wording is fundamental; it suffices that there is *any* conflict; it encompasses the position where the condition alters the nature and extent of the grant i.e as found in the operative wording.

(5) The fact that restriction 1 covers *any* conflict does not render restriction 2 nugatory, because restriction 2 (if it exists) covers cases where there is no conflict with the operative wording itself e.g. as in *Armstrong*.

(6) The "condition on *proposed* development" cases (in particular *Kent* and *Wheatcroft*) do not assist and can properly be distinguished. There is a difference in principle between modifying *a proposal* (before permission is granted) by a condition imposed under section 70 (by cutting down or altering, as long as the change is not fundamental) and changing a condition to an *existing grant* under section 73.

125. I base these conclusions on the following. Even if strictly *obiter*, the analysis of Lewison LJ in *Finney* (the only direct Court of Appeal decision) is highly persuasive authority. First, at §29 *Finney*, Lewison LJ clearly identifies two restrictions; restriction 1 being based on *Arrowcroft* §35. Secondly §42 clearly supports restriction 1 and at §43 first sentence, Lewison LJ identifies restriction 1 based on "conflict" with the grant. In the second sentence, he explains this by reference to the test in *Cadogan* of "altering the nature" (effectively referring back to §15(iii) of his own judgment). The test in *Cadogan* applies to any alteration (in nature or extent) and is not confined to a "fundamental" alteration. Thirdly, as to *Cadogan* itself, Glidewell LJ was referring to a conflict between the condition and "the grant"; (his reference to altering the extent or nature of "the development permitted" was a reference to permission "granted": see paragraph 60 above). Fourthly, despite what is said in *Holborn* §67, and despite a possible analysis of *Arrowcroft* at §§29 and 33, Lewison LJ (at §41) expressly rejected the application of the *Wheatcroft* principle to section 73 cases. Fifthly, *Vue Entertainment* (at §§15 to 17) as adopted in *Finney* §§46 provides clear support for the existence of restriction 1. Sixthly, in *Wet Finishing Works*, Singh J (as he then was) adopted a position similar to that of the Defendant here i.e. there is only restriction 2 and seemed to suggest that any inconsistency with the operative wording must be

fundamental. This position was expressly disapproved of by Lewison LJ in *Finney* §46. Seventhly, the two first instance decisions since *Finney* strongly support the existence of restriction 1. *Reid* §§50, 51 and 53 confirms the restriction on conflict with operative wording and the fact that "altering the nature" is a reference to that wording. *Armstrong* §75 similarly identifies restriction 1 as a distinct limit on the power. Finally, some further support for restriction 1 is provided by the terms of the NPPG §§ 013 and 014 (see paragraph 50 above). In these circumstances, I do not accept that *Arrowcroft* and *Finney* are both cases based on a single wider fundamental alteration test – both are cases where there was a direct conflict between the new condition and the operative wording of the existing permission.

126. As to whether restriction 2 also exists i.e. a second, wider, restriction i.e. no fundamental alteration to the permission as a whole (even absent a conflict with the operative wording), *Finney* §29 suggests that there is such a restriction, based on *Arrowcroft* §33. Moreover, the parties in this case agree that there is such a restriction. In these circumstances, I proceed on the basis that there is a restriction 2, despite the doubts cast on that in *Armstrong* (and §013 NPPG) and *Vue Entertainment* and the fact that *Reid* does not seem to support it.

127. By way of illustration, I refer to the example given in *Kent County Council* of a reduction in the number of houses specified in a development, from, say, 50 houses to 40 houses. The position is as follows:

(1) If the original proposed development *applied fo*r is for 50 houses, it is permissible to grant planning permission for 40 houses i.e. the grant specifies 40 houses only, subject to the applicant's consent. This is the principle in *Kent* and *Wheatcroft*.

(2) If the original proposed development applied for is for 50 houses, and the permission *granted* is in terms for 50 houses, it is not permissible to specify in a condition to that initial grant that only 40 houses should be built: this is the principle in *Cadogan* - altering the nature or extent of the grant.

(3) If the original permission grants by the operative wording permission for 50 houses, it is not permissible by section 73 variation to impose a condition that only 40 houses should be built.

Applying the law to the facts

128. The operative wording of the Original Permission gives permission for a solar farm and, within that, a substation. That substation is subsequently identified in the plans as a 33kV substation. On the other hand, Condition 2 of the 2022 Permission provides that the development shall not be carried out other than in complete accordance with the approved plans. Those approved plans do not include any substation or the 33kV substation. Thus Condition 2 prohibits the carrying out of the development with a 33kV substation. This was not substantially disputed by the Defendant. In my judgment, if at the time of the Original Permission in 2017, a condition had been imposed which prohibited a 33kV substation, whilst retaining the same operative wording, this would have infringed the principle in *Cadogan*.

129. In my judgment, applying restriction 1, in the present case Condition 2 of the 2022 Permission is inconsistent with and in conflict with the operative wording of the

Original Permission which the 2022 Permission sought to vary. If, upon grant of the 2022 Permission, the word "substation" had been excised from the operative wording (as happened in *Finney*), then, as in that case, the 2022 Permission would have clearly been unlawful. The mere fact that it has not been excised does not lead to any different conclusion (see *Finney* §43).

130. I therefore conclude that there is a conflict between what was permitted in the Original Permission and what Condition 2 in the 2022 Permission required. For this reason, the 2022 Permission was outside the power conferred by section 73 TCPA and was thus unlawful.

131. In these circumstances it is not necessary to consider the separate question of whether the 2022 Permission constituted a fundamental alteration of the permission granted in the Original Permission. Nevertheless, I consider the position, if my conclusions on the law above are wrong, and there is only a single restriction – restriction 2 – or if restriction 1 is limited to a "fundamental" conflict or inconsistency with the operative wording.

132. In this regard, in considering the lawfulness of the exercise of the section 73 power, it is necessary to compare only the new or varied condition and the existing planning permission i.e. in the present case to compare only the Original Permission and the 2022 Permission. The existence of the 2021 Permission is not directly relevant to the lawfulness of the exercise of the section 73 power. As at the date of the Original Permission, the existence of the 33kV substation was a central part of the development. In my judgment, removing that central element (as the 2022 Permission does) amounts to a fundamental alteration of that development. A solar farm with a 33kV substation is fundamentally different from a solar farm without a 33kV substation. Moreover, I accept the submission that, on the facts, the 33kV substation remains an important part of the Original Permission. As positively asserted by Mr Redpath and confirmed by the judgment of HH Judge Jarman QC, it remains a possibility that the Original Permission could be fully implemented on its own, and if so, the need for a 33kV substation remains. I therefore further conclude that the removal of the 33kV substation, and the prohibition upon its construction, in the 2022 Permission, constitutes a fundamental alteration of the development permitted by the Original Permission.

133. For these reasons ground 1 succeeds. In these circumstances, because I have found that the 2022 Permission is ultra vires, Ground 2 does not arise. Nevertheless I go on to consider Ground 2 in any event.

Ground 2: mandatory material consideration

The Parties' Submissions

The Claimant's case

134. The Claimant submits that the Defendant failed to have regard to the removal of the 33kV substation, that being a mandatory material consideration.

135. The Claimant submits that, when granting the 2022 Permission, the Defendant did not appreciate that it was granting a permission that removed the 33kV Substation. There was nothing in the covering letter for the application that explained expressly that the

proposal included removal of the substation from the original permission. On the contrary, that letter might have implied that the substation was not affected. It was not included in the non-exhaustive list of changes. The reference to Condition 15 being changed to a compliance condition implied that the requirement for the 33kV substation was still there. Further there is nothing in the two Officer Reports which recognises that the proposal was, amongst other things, to remove the 33kV substation, despite its importance back in 2017 and despite what the Defendant had been saying to the Court in the 2021 Permission Judicial Review. The Officer Reports misunderstood the objectors' reference to removal of the Original Permission substation (the 33kV substation) as referring to the 2021 Permission substation i.e the DNO substation. Further, there is nothing in the operative wording of the 2022 Permission that recognised the removal of the substation. In fact, to the contrary, the operative wording retained in the 2022 Permission the reference to the "substation" in the description of the Original Permission and then, when that wording then sets out the long list of alterations effected by the 2022 Permission, the removal of the substation is not included in that list.

136. Contrary to the Defendant's submissions, the 33kV substation was and is still needed (as explained in paragraphs 39 to 41 above). This is established by the Claimant's witness statement evidence.

137. Finally, as to section 31(2A) SCA 1981, it is not obvious that the members would have agreed to removal, had they been aware of it. The Claimant would have pointed out that the development would not work because there was no Sender Substation and, on its own, with no Sender Substation, it would not be possible to get the electricity to a private operator.

The Defendant's case

138. The Defendant submits that there was no failure to take account of the removal of the 33kV substation. The whole reason for the 2022 Permission was to modify the layout of the solar farm to allow it to operate in conjunction with the 2021 Permission. It would have been pointless to retain the incomplete 33kV substation and for that reason it was obviously removed. There was no reason to spell out that the redundant proposal for the 33kV substation was to be discarded; this was plain from the plans submitted with the 2022 application and the omission of Condition 15; and the comments of the objectors and as responded to by the Officer Report. It was obvious from all this that the Defendant knew and took account of the removal of the 33kV substation.

139. Further the Defendant submits that, if contrary to these submissions, the Court were to find that it was unaware that the 33kV substation was to be omitted, this made no difference to the Defendant's decision. If the members of the Committee had been aware that the substation was to be omitted, there is no reason to suppose that they would have been concerned by this, given that they had approved the 2021 substation permission and that the purpose of the 2022 Permission was to allow the remainder of the solar farm to operate in tandem with the 2021 Permission. Section 31(2A) SCA 1981 applies and relief must be refused.

Discussion and Analysis

Issue 1

140. If, contrary to my conclusion on Ground 1, the removal of the 33kV substation was not ultra vires section 73 and was otherwise a permissible exercise of that power, the Defendant accepts, nonetheless, that its removal was a mandatory material consideration to which it was bound to have regard in deciding whether to grant the 2022 Permission. Issue 1 under Ground 2 is whether the Defendant did in fact have regard to the fact that the 2022 Permission removed the 33kV substation from the development.

141. On the one hand, it is clear that the primary purpose of the 2022 Permission was to enable the solar farm to work in conjunction with the 2021 Permission which included the DNO substation. Moreover the plans submitted with the application for the 2022 Permission omitted the 33kV substation which had been previously included on the plans submitted with Condition 15.

142. However, it is not clear either from the application for the 2022 Permission itself or from the Officer Reports that the 33kV Substation was intended to be removed from the development. Both the application letter and the Reports go into considerable detail about the changes which the 2022 Permission sought to make to the Original Permission (see paragraphs 28 and 30 above). The removal of the 33kV substation is not referred to amongst these changes. Secondly, some of the objections to the application refer to the omission of the 33kV substation. Yet, there is, at the very least, some considerable confusion in the Officer Report(s) as to the officer's understanding of these objections. It does appear at points in the Reports (in particular paragraphs 8.3 and 8.39 of the Officer Report) that the officer dismissed these concerns because she understood them to be directed towards the DNO substation comprised within the 2021 Permission (rather than the 33kV substation).

143. As to the Defendant's contention that there was no need to spell out in detail the fact that it was being removed from the development, I am not satisfied that the premise for this submission is well founded. It is not clear that there was no possible reason to retain the 33kV substation. First, at the same time, the Defendant was suggesting, in the course of the 2021 Permission Judicial Review that one possible option open to the Interested Party was connection to a private operator using the Original Permission on its own - and in that event, the 33kV substation would be required. Secondly, on the basis of the evidence before me, it appears that the 33kV substation might still be needed as the Sender Substation even where the solar park is connected to the national grid. Whilst this is not accepted by the Defendant and is a factual dispute which I cannot definitively decide, the Defendant's explanations in relation to the elements of a substation, its reliance on inverters and transformers are confusing, not fully evidenced and at times inconsistent (see paragraphs 42 and 43 above). In particular, I find the Defendant's explanation of the change from transformers (in the plural) in the 2022 application to transformer (in the singular) in Condition 20 not convincing; and the Claimant's explanation more persuasive. Overall I am not satisfied that, given the terms of the application letter and the Officers Reports, it was or must have been obvious to the Members of the Committee that the 33kV substation was being removed as a result of the application for the 2022 Permission.

144. In these circumstances, I find that the Defendant did not have regard to the fact that the 2022 Permission removed from the development the 33kV substation, in breach of its obligation to have regard to a mandatory material consideration.

Issue 2

145. As regards section 31(2A) SCA 1981, this is a point raised only at the hearing by the Defendant. Thus there was no evidence as to what did happen or might have happened at the meeting of the Development committee on 26 April 2022. In these circumstances, if the Members of the Committee had been aware that the 2022 Permission removed the 33kV substation from the development, I am not satisfied that it is *highly likely* that they would have reached the same conclusion and granted the 2022 Permission. If they had been aware, then they might have enquired further and the Claimant herself would have been in a position to point to the possible continuing need for the 33kV substation (as she explains in her second witness statement). Moreover Mr Redpath's evidence also suggests such a continuing need. For these reasons, had I been required to reach a conclusion on Ground 2, I would not have refused relief pursuant to section 31(2A) SCA 1981.

Conclusion

146. In the light of the conclusions at paragraphs 130, 132 and 133 above, the Claimant's claim for judicial review succeeds. The 2022 Permission was ultra vires section 73 TCPA. I will hear the parties on the appropriate form of order and any consequential matters.

147. Finally I am grateful to counsel for their assistance and for the detail and quality of the argument placed before the Court.