Section 73 permissions, planning conditions and planning obligations

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Four recent decision have not only decided important points regarding planning conditions, section 73 permissions and section 106 planning obligations but have also provided helpfully a more general consideration of the operation of these two statutory provisions which provided the building blocks leading to the decisions reached. This is significant not only in the context of planning law but will indirectly have consequences with regard to CIL. The focus of this paper is on that general consideration and the building blocks providing the routes to the decisions.

The four decisions are:

Lambeth LBC v SSHCLG [2019] UKSC 33 ("Lambeth case") – conditions attached to the original planning permission can apply to a section 73 permission even though not expressly referred to;

Finney v Welsh Ministers [2019] EWCA Civ 1868 ("Finney case") - section 73 permission cannot vary the description of the development in the parent permission. Leave to appeal to the Supreme Court was refused on 18th May 2020 on the ground that there was no arguable point of law;

Norfolk Homes Limited v North Norfolk DC [2020] EWHC 2265 (QB) ("North Norfolk Homes case") – section 106 planning agreement relating to development authorised by original planning permission did not automatically apply also to development authorised by section 73 permission; and

DB Symmetry v Swindon BC [2020] EWCA Civ 1331 ("DB Symmetry case")– unlawful for planning condition to require dedication of land owned by developer as public highway without compensation.

1. Grant of planning permission –

(i) composition of planning permission - the important starting point for each of these decisions is the very basic one regarding the composition of a planning permission. In the Lambeth case Lord Carnwath approved a passage in the judgment of Sullivan J in Pye v SSETR [1998] 3 PLR 72 (which had earlier been approved by Schiemann LJ in Powergen United Kingdom v Leicester City Council [2000] JPL 1037) which stated that the "original planning permission comprises not merely the description in the operative part of the planning permission …but also the conditions subject to which the description was permitted to be carried out..". These two separate elements perform different but important roles and are a key basic building block.

(ii) different roles of description and planning condition - this distinction in planning permissions between the description of the development and the conditions was highlighted by Lewison LJ in the Finney case (paragraphs 15 to 20). He cited the dicta of Hickinbottom J. in Cotswold Grange County Park LLP [2014] EWHC 1138 (approved by the Court of Appeal in Winchester City Council v SSCLG [2015] EWCA Civ 563) in which the judge stated that "the grant identifies what can be done – what is permitted" whilst in contrast "conditions identify what cannot be done – what is forbidden." This distinction played an important role in reaching the decision in the Finney case.

(iii) ascertaining description of development - the task of ascertaining the description of the development in a planning permission is not always limited to just the actual words used in the grant. It is possible also to take into account the planning application and accompanying plans in two sets of circumstances. The first is if there is wording in the permission incorporating the application or plans in a manner that indicates that these are to be referred to for that purpose (Willmer LJ at pages 776/777 in Wilson v West Sussex CC [1963] 2 QB 764). The second is if the wording in the permission is ambiguous (Lord Pearson at page 968 in Slough Estates v Slough BC [1971] AC 958 and the summary of the applicable rules set out by Keene J. in R v Ashford BC ex p Shepway DC [1999] PLCR 12 at page 19C). The planning application in the Lambeth case played a significant role in the outcome.

(iv) limits on planning conditions – in Cadogan v SSE (1992) 65 P & CR 410 Glidewell LJ stated that it "is established law that a condition on a planning permission will not be valid if it alters the extent or indeed the nature of the development permitted." This was the point at the heart of the Finney case.

2. Planning conditions and planning obligations – the recent cases have highlighted two important differences between the imposition of a planning condition and the requirement of a planning obligation.

(i) Separateness of planning obligations - in the context of the recent decisions an important difference between a planning condition and a section 106 planning obligation is that the latter is in the words of Holgate J. in the Norfolk Homes case "a freestanding legal instrument" (paragraphs 5, 49 and 86) and "does not form an intrinsic part of a grant of planning permission under section 70" (para. 86). The planning obligation may be required so that a planning permission satisfies the requirements of regulation 122 Community Infrastructure Levy Regulations 2010 ("2010 Regulations"). However, making a grant of planning permission conditional on the execution of a section 106 planning agreement does not cause the planning agreement to be part of the planning permission.

It was emphasised by Holgate J. that there was no means of compelling the execution of a section 106 agreement. As Lewison LJ emphasised in the DB Symmetry case a planning obligation cannot be imposed by a local planning authority (para. 50). There must be agreement or a unilateral undertaking. Once the relevant planning permission has been granted it is too late so the grant has to be made conditional on the execution of a planning

agreement if the planning agreement is essential to justify the grant. This had relevance for the interpretation issue in both the Norfolk Homes case and the DB Symmetry case.

(ii) Different approaches on lawfulness - the DB Symmetry case highlights the different approaches to the lawfulness of planning conditions and planning obligations. Lewison LJ confirmed the continued application of the Newbury criteria (Newbury DC v SSE [1981] AC 578) requiring that any planning conditions imposed must

(a) be for a planning purpose and not an ulterior purpose;
(b) fairly and reasonably relate to the development; and
(c) not be so unreasonable that no planning authority could have imposed them.

In contrast the ability to require planning obligations is wider in scope and not subject to the same limitations applicable to a planning condition. Planning obligations can be used to require the transfer of land or the making of payments (Lord Hoffman in the Tesco stores case at page 776 applied by Lewison LJ in DB Symmetry case at para. 47) although those which constitute a reason for granting planning permission must comply with regulation 122 of the 2010 Regulations.

In consequence a planning condition obliging a developer to dedicate land owned by it as a public highway without any compensation was held in the DB Symmetry case to be unlawful for a number of different reasons (para. 52). Lewison LJ considered it did not matter whether such a condition was characterised as outside the scope of the statutory power because it requires the grant of rights rather than just regulating use or alternatively is a misuse of the power or is irrational in a public law sense or disproportionate. This applied the long standing decision in Hall & Co. Ltd v Shoreham by Sea Urban DC [1964] 1 WLR 240 which Lewison LJ stated had not been overruled by the House of Lords in Tesco Stores Limited v SSE [1995] 1 LWR 759 (para. 42).

3. Section 73 permissions -

(i) statutory power - this permits a fresh planning permission to be granted with the same description of development as in an earlier planning permission but removing or varying one or more planning conditions attached to an earlier permission or adding one or more new planning conditions or any combination of such steps. Lord Carnwath in the Lambeth case stated (para. 11) that 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."

The scope of the power is limited to the planning conditions and does not extend to the description of the development in the earlier permission. Lewison LJ stated at paragraph 42 in the Finney case that "the purpose of such an application is to avoid committing a breach of planning control of the second type referred to in section 171A" which covers a failure "to comply with any condition or limitation subject to which planning permission has been

granted". This applies whether or not the breach constitutes development. In the Lambeth case the proposed extension of the range of goods sold was a change of use which did not constitute development because it was a change within the same use class (section 55(2)). The section cannot be used to avoid the first type of breach of planning control in section 171A which involves development without a required planning permission. This was an important point in determining the outcome of the Lambeth Case in the Supreme Court.

(ii) origin – prior to the introduction of this statutory power by section 31A TCPA 1971 there was no ability to challenge planning conditions on a grant of planning permission and so the whole planning permission had to be appealed. This ran the risk that on the appeal the permission could be lost altogether. The statutory power which is now in section 73 TCPA 1990 permits an application to be made varying the planning conditions attaching to the earlier permission resulting in a fresh permission being granted subject to varied conditions whilst leaving the earlier permission intact. In the Finney case this explanation of the origin of section 73 by Sullivan J. in Pye v SSE [1998] 3 PLR 72 was cited as was its approval in the Lambeth case.

(iii) independent permission – the statement of Lord Carnwath quoted in (i) above served to emphasise a basic but important point that an exercise of the statutory power in section 73 did not vary the existing planning permission but produced a new planning permission with the choice as to which was implemented. It does not result in a single varied permission but two separate permissions. This has had important and complicating consequences for CIL and contrasts sharply with the consequences flowing from the exercise of the statutory power in section 96A.

(iv) retrospective effect – it was accepted that the section 73 statutory power could be exercised retrospectively (para. 12 Lambeth case). In that case the original permission had been granted in 1985 and the new store had been running for many years. Again this is an aspect which has implications for CIL and in particular self-builders. This does not permit it to be exercised so as to extend an expired time limit (section 73(4)) or time limits as for the approval of reserved matters or for the commencement of development (section 73(5).

(v) limit on exercise of power – any new condition imposed must be one which could lawfully have been imposed on the grant of the original planning permission (para. 15(ii) Finney). Lewison LJ emphasised in Finney that section 73 cannot be used to change the description of the development in the original planning permission (para. 42). In that case the original planning permission had described the development as the installation and operation for 25 years of two wind turbines with a height up to 100 metres. A section 73 application was made with the objective of allowing the wind turbines to be up to 120 metres. On appeal the application was allowed by authorising wind turbines in accordance with the section 73 application which showed the wind turbines with a height of 120 metres. Condition 2 of the original planning permission which required the development to be carried out in accordance with plans which showed wind turbines with a height of 100 metres was deleted. This change

in the description of the authorised development was outside the scope of section 73 and so unlawful.

(vi) alternatives to section 73 applications – the decision in Finney will pose a problem for developers. A section 73 application is a convenient method of addressing changes in a proposed or ongoing development which also has CIL advantages due to the special provisions introduced. There are special reliefs in the CIL regime to cater for changes by a section 73 permission. Lewison LJ did not consider that the decision would pose a problem because if a change is not material he considered that it can be dealt with by an application under section 96A and if it is a material change then a fresh application can be made for a new full permission. The former route is not expressly dealt with in the CIL regime and this can give rise to complications but should not increase the developer's CIL bill save to the extent that the GIA of the development is increased. In contrast a new independent planning permission will be a separate chargeable development for the purposes of CIL thereby triggering a separate CIL liability. If the development authorised by the first planning permission has already started that could lead to a second CIL liability which may not necessarily be abated by the first CIL liability. The need for a fresh application may, therefore, result in a significantly increased financial burden.

4. Interpretation – the three decisions emphasised that the modern approach with the principles of interpretation is to remove the divisions between private and public documents acknowledging the importance of the Supreme Court decision of Trump International Golf Club Limited v Scottish Ministers [2015] UKSC 74 (Lord Carnwath in the Lambeth case paragraphs 15 to 19). In the Lambeth case Lord Carnwath summarised the approach (para. 19) that "whatever the legal character of the document in question, the starting-point - and usually the end-point - is to find "the natural and ordinary meaning" of the words there used, viewed in their particular context (statutory or otherwise) and in the light of common sense."

This approach was followed by Holgate J. in the Norfolk Homes case (paragraphs 61 to 66) who ended by stating that there is no reason why the statements in Tump and Lambeth should not also apply to section 106 obligations (para. 67).

In the DB Symmetry case Lewison LJ summarised the test to be adopted by saying (para. 60):

"The court asks itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense."

In the context of interpretation the principle of validation played a significant role in the DB Symmetry case (para. 69) under which there is a preference for a lawful construction

if there are two possible readings of a document and one is lawful and one is unlawful. Lewison LJ could see no reason why the principle should not apply to a planning permission (para. 71). This encouraged an interpretation of the relevant planning condition so as to avoid infringing the principle illustrated by Hall v Shoreham v Sea Urban DC supra.

5. Implication - in the Lambeth case Lord Carnwath did not find it necessary to consider the implication argument but remarked (at para. 27) that it is difficult to envisage circumstances in which it would be appropriate to use implication for the purpose of supplying a wholly new condition rather than interpretating an existing condition. Lewison LJ stated in the DB Symmetry case (para. 61) that "there is no absolute bar on the implication of words although the court will be cautious in doing so."

In the Norfolk Homes case it was common ground that the principles on implication were applicable following the approach of Lord Hodge and Lord Carnwath in the Trump case. This led to a full consideration by Holgate J of the more important decisions on implication and contractual documents. He started from the statement of the preconditions which have to be satisfied before a term is implied set out in the Privy Council case of BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings (1977) 52 ALJR 20, 26, by Lord Simon (speaking for the majority, which included Viscount Dilhorne and Lord Keith) who said that:

"[F]or a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

6. Applications for certificate of lawfulness - sections 191 and 192 TCPA 1990 allow applications to be made to ascertain whether existing or future uses or development are lawful with in the case of a refusal a right of appeal under section 195 to the Secretary of State. This is a useful means of testing a point. Two of the cases illustrate their usefulness and one the limitation on their scope.

In the Lambeth case an application was made under section 192 for a certificate that the store could be used for the sale of an unrestricted range of goods on the basis that no condition restricting the retail use had been imposed on the second section 73 permission. This certificate was refused by Lambeth LBC then granted on appeal to the Secretary of State. Lambeth LBC applied under section 288 to quash the appeal decision but failed before Lang J. and the Court of Appeal before succeeding in the Supreme Court. Similarly in the DB Symmetry case the developer applied for a certificate under section 192 that the formation and use of private access roads would be lawful. This was refused by Swindon BC but allowed on appeal which was then quashed on a statutory review by Andrews J. before being reinstated by the Court of Appeal.

Similarly in the Norfolk Homes case the process had been initiated by a section 192 application seeking a certificate that the development authorised by the second section 73 permission could be carried out without complying with the planning agreement made in 2011 in relation to the original permission. This was refused but there was no appeal. Instead proceedings seeking a declaration were commenced under CPR 8. The reason for this was that it was accepted that the certificate of lawfulness sought was outside the scope of section 192 because it concerned the issue of compliance with obligations in a planning agreement.

7. Failure to mention conditions from original planning permission in section 73 permission - in the Lambeth case the issue was whether the planning conditions attaching to a planning permission carried over to a subsequent section 73 planning permission even though not expressly mentioned. The starting point was a planning permission granted in 1985 for the erection of a DIY retail unit. Condition 6 limited the use of the unit "for the retailing of goods for DIY home and garden improvements and car maintenance, building materials and builders' merchants goods and for no other purpose (including any other purpose in Class I of the Schedule to the Town and Country Planning (Use Classes) Order 1972 or in any provision equivalent to that Class in any statutory instrument revoking and re-enacting that Order)."

This condition was varied by a section 73 planning application in 2010 to allow for the sale of a wider range of specific goods but retaining the original restriction "for no other purpose in Class A1 of the Schedule to the Town and Country Planning (Use Classes) Order 1987 (as amended)". This widened the range of goods specifically permitted to be sold it retained the general prohibition and did so by means of a planning condition.

A further application was then made in 2014 to vary condition 1 of the 2010 variation of condition 6 of the 1985 permission which resulted in a decision stating "The retail unit hereby permitted shall be used for the sale and display of non-food goods only and, notwithstanding the provisions of the Town and Country Planning (General Permitted Development) Order 1995 (or any Order revoking or re-enacting that Order with or without modification), for no other goods." The obvious problem with this was that it was not expressly formulated as a revised planning condition. Rather it read as a change in the description of the development. The absence of wording making it an express condition led to the claim that the effect of this wording was to allow retail use without any restriction. This was argued to be justified on the ground that the grant of the new section 73 permission was not subject to a condition restricting the range of goods that could be sold and, therefore, any change of use within Class A1 is permissible.

A restatement of part of the description of the development could have exposed the grant to a challenge as being outside the scope of the statutory power but it was too late for such a challenge so "there is no issue now as to the validity of the grant as such" (para. 32). In consequence it was taken to be imposing a revised condition by substituting for the original wording of the condition the proposed wording in the application (para. 29). This

interpretation was consistent with the terms of the application and it being made under section 73. It was important that the planning application was seeking a variation of a specific existing condition leaving the other existing conditions in place and not a grant without any conditions.

The issue came down to one of interpretation bearing in mind the composition of the original planning permission, the scope of the statutory power in section 73, the terms of the planning application and the applicable principles of interpretation .

Government guidance indicated that clarity is assisted by repeating the relevant conditions attached to the original planning permission which are to continue to apply to the new section 73 permission. Self-evidently good advice but failure to abide by it does not mean that in all cases those earlier planning conditions do not have a role to play in relation to a subsequent section 73 permission.

8. Do earlier planning agreements cover a development authorised by a section 73 permission? - a similar point to that in the Lambeth case arose in the Norfolk Homes case but with regard to planning obligations as opposed to planning conditions. In that case the grant of an outline planning permission was conditional on the execution of a planning agreement which the owner provided in 2012. The agreement was expressed to be conditional upon the commencement of the development and the development was specifically defined as the one authorised by the original 2012 permission. In 2013 and 2015 section 73 permissions were granted but without any express condition that fresh planning obligations must be undertaken. The owner commenced the development authorised by the second 73 permission whilst both the original permission and the first section 73 permission lapsed. The Council argued that this triggered the 2012 planning agreement on the grounds that as a matter of interpretation the agreement covered a development authorised by a subsequent section 73 permission or alternatively a term should be implied so the express definition of development was extended to include one authorised by a section 73 permission varying the original permission.

As was emphasised by the Finney case the description of the development must remain unchanged by the section 73 permission which can only change the conditions attached to an earlier permission. Notwithstanding this as emphasised in both Finney and Lambeth the section 73 permission is a standalone permission and the earlier permission continues in its original unvaried form. As part of the process of considering the section 73 application it is open to a planning authority to require a fresh planning agreement to be executed by the owner which is not prohibited by section 73(2) (para. 58).

Holgate J. stated (para. 87) "if a s.73 permission is granted, there is no assumption in the legislation that any pre-existing planning obligation will apply to that permission, or to development carried out under that permission. Instead, that is a matter left to be addressed

by the parties before the s. 73 permission is granted, and, if there is an issue, then potentially by an Inspector dealing with an appeal."

The learned judge stated that It is open to the planning authority to draft the original planning agreement in such a way that the planning agreement would cover not only a development authorised by the original planning permission but one authorised by a subsequent section 73 permission. This could be achieved if the definition of development in the planning agreement was not linked to the original planning permission but formulated in more general terms or, alternatively, was linked to the original permission and any section 73 permission varying the conditions attached to it. However, he considered the 2012 planning agreement to be unambiguous and clear and to have been carefully drafted by lawyers well versed in the preparation of such documents (para. 92). In consequence it was not possible to interpret the express definition of development so as to include a development authorised by a subsequent section 73 permission.

Although Holgate J. did not consider that the implication into the definition of development of a reference to a section 73 permission would contradict any express terms the argument failed for two reasons. First, there was no need for such an implication to give practical coherence to the planning agreement. It was open to the local planning authority to require a fresh planning agreement to be entered into as part of the process triggered by the section 73 planning application. Second, the reasonableness criterion had not been satisfied for a number of reasons. An automatic reference to a section 73 permission would mean that section 73 permissions would have to be expressly excluded if the planning agreement were to be limited to the development authorised by the original permission. An automatic reference could be important if the section 73 permission makes a significant change. For example, it could change the condition which requires the development to be carried out in accordance with approved plans. Such an automatic extension would deny the owner the ability to appeal the planning agreement in relation to the section 73 permission which route would have been available if the planning agreement was being requested before the grant of the section 73 permission.

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