Landmark Chambers

Welcome to Landmark Chambers' '*Finney v Welsh Ministers*' webinar

The recording may be accessed here.

Your speakers today are…

Landmark Chambers

Neil King QC (Chair)

Robert Walton QC

Topic:
Alternatives to s.73

Sasha Blackmore

Topic: The impact of Lambeth - interpreting planning permissions

Your speakers today are…

Landmark Chambers

Topic:
Where does Finney leave us?

Richard Turney

Topic:
What did the Court decide?

Ben Fullbrook

Landmark Chambers

What did the Court decide?

Ben Fullbrook

Introduction

- The background to *Finney*
- The facts in *Finney*
- What *Finney* decided

Section 73 Town and Country Planning Act 1990

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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.

The background to *Finney*

(1) The origins of s.73

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- Helpful summary contained in ***Pye v Secretary of State for the Environment*** [1998] 3 PLCR 28 per Sullivan J at 78:
  - Issue had arisen whereby the beneficiary of a planning permission which was granted subject to conditions which he did not like would have to appeal the whole permission, thereby putting the principle of development at risk
  - The provisions which are now contained in section 73 were designed to address this issue.
  - Circular 19/86 provided an explanation of this.

The background to *Finney*

(1) The origins of s.73

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Circular 19/86

"…This new section will provide an applicant with an alternative to appealing against the original permission... On receipt of an application under s.73 of the 1990 Act … the local planning authority may consider only the conditions to which the planning permission ought to be subject and may not go back to their original decision to grant permission. 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."

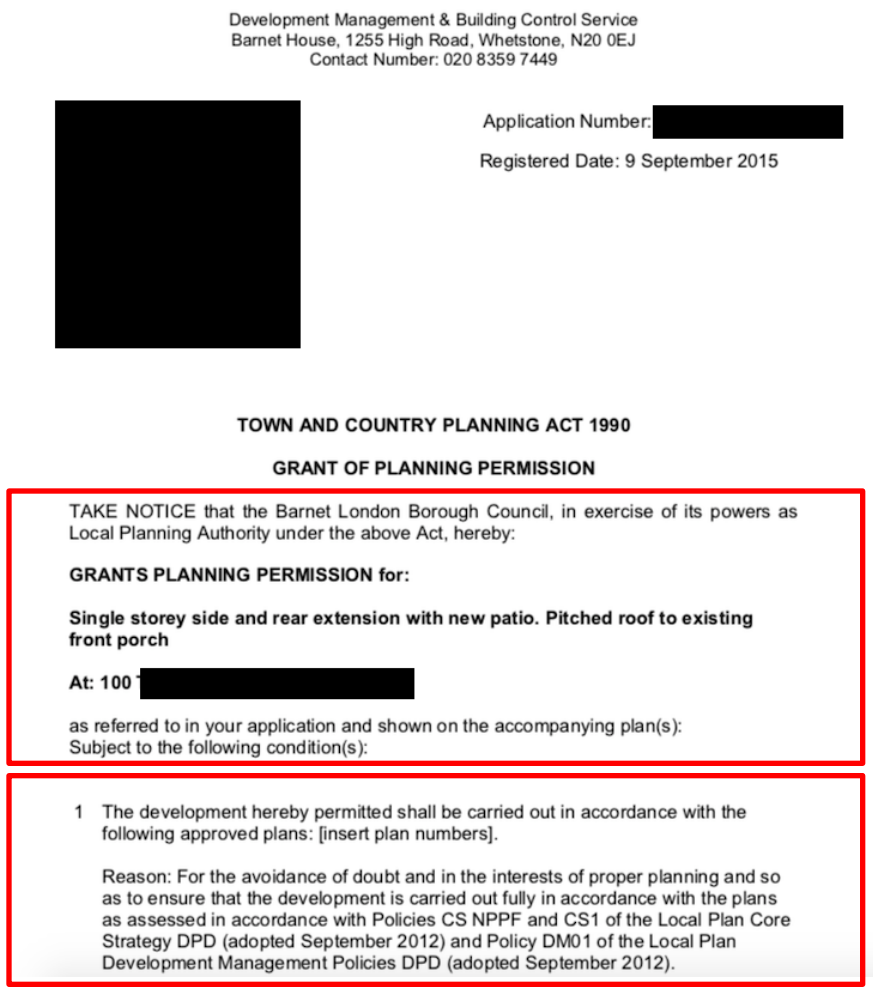
The background to *Finney*

(2) Initial consideration of s.73

- ***Pye v Secretary of State for the Environment*** [1998] 3 PLCR 28, approved by Court of Appeal in ***Powergen UK v Leicester City Council*** (2001) 81 P&CR 4 per Sullivan J at §§26-8:
  - Original planning permission comprises the operative part and the conditions;
  - An application under s.73 is an application for planning permission
  - LPA must consider development plan and material considerations
  - BUT "*shall consider only the question of the conditions subject to which planning permission should be granted*"
  - *"Considering only the conditions subject to which planning permission should be granted will be a more limited exercise than the consideration of a "normal" application for planning permission under section 70 , but … how much more limited will depend on the nature of the condition itself."*

The background to *Finney*

(3) The "operative part" of the planning permission



Development Management & Building Control Service
Barnet House, 1255 High Road, Whetstone, N20 0EJ
Contact Number: 020 8359 7449

[redacted]

Application Number: [redacted]

Registered Date: 9 September 2015

TOWN AND COUNTRY PLANNING ACT 1990

GRANT OF PLANNING PERMISSION

TAKE NOTICE that the Barnet London Borough Council, in exercise of its powers as Local Planning Authority under the above Act, hereby:

GRANTS PLANNING PERMISSION for:

Single storey side and rear extension with new patio. Pitched roof to existing front porch

At: 100 [redacted]

as referred to in your application and shown on the accompanying plan(s):
Subject to the following condition(s):

1 The development hereby permitted shall be carried out in accordance with the following approved plans: [insert plan numbers].

Reason: For the avoidance of doubt and in the interests of proper planning and so as to ensure that the development is carried out fully in accordance with the plans as assessed in accordance with Policies CS NPPF and CS1 of the Local Plan Core Strategy DPD (adopted September 2012) and Policy DM01 of the Local Plan Development Management Policies DPD (adopted September 2012).

The Grant or "operative part"

The Conditions

Cotswold Grange County Park llp v Secretary of State for Communities and Local Government [2014] JPL 981 per Hickinbottom J at §15:

"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."

The background to *Finney*

(3) The "operative part" of the planning permission

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Can you use s.73 to grant a new planning permission with revised conditions where the effect of the revised conditions would be to contradict or change the operative part of the original planning permission?

The background to *Finney*

(3) The "operative part" of the planning permission

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

The background to *Finney*

(3) The "operative part" of the planning permission

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

- *§33 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.*
- *§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.*

The background to *Finney*

(3) The "operative part" of the planning permission

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R (Vue Entertainment) v City of York [2017] EWHC 588 (Admin)

The background to *Finney*

(3) The "operative part" of the planning permission

Landmark Chambers

R (Vue Entertainment) v City of York [2017] EWHC 588 (Admin)

- 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.
- 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.

The background to *Finney*

(3) The "operative part" of the planning permission

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R (Wet Finishing Works) v Taunton Dean Borough Council [2018] PTSR 26

The background to *Finney*

(3) The "operative part" of the planning permission

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R (Wet Finishing Works) v Taunton Dean Borough Council [2018] PTSR 26

- Singh J dismissed an argument that an LPA was prohibited from granting a s.73 application with an amended condition allowing construction of 90 dwellings when the operative part of the original permission had allowed only 84
- Relied on ***Arrowcroft*** §33

The Facts in *Finney*

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The Facts in *Finney*

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Town & Country Planning Act 1990

Cyngor Sir Gâr Carmarthenshire County Council

FULL PLANNING PERMISSION

ENERGIEKONTOR UK LTD - JUSTIN REID
4330 PARK APPROACH
THORPE PARK
LEEDS
LS15 8GB

Application No: **W/31728** registered: 18/03/2015 for:

Proposal : INSTALLATION AND 25 YEAR OPERATION OF TWO WIND TURBINES, WITH A TIP HEIGHT OF UP TO 100M, AND ASSOCIATED INFRASTRUCTURE INCLUDING TURBINE FOUNDATIONS, NEW AND UPGRADED TRACKS, CRANE HARDSTANDINGS, SUBSTATION, UPGRADED SITE ENTRANCE AND TEMPORARY CONSTRUCTION COMPOUND (MAJOR DEVELOPMENT)

Location : LAND NORTH OF ESGAIRLIVING, RHYDCYMERAU, LLANDEILO, CARMS

Carmarthenshire County Council HEREBY GRANT FULL PLANNING PERMISSION for the development proposed by you as shown on the application form, plan(s) and supporting document(s) subject to the following condition(s):

CONDITIONS

1 The development hereby permitted shall be commenced before the expiration of five years from the date of this permission.

2 The development shall be carried out in accordance with the following approved plans and documents:

The Facts in *Finney*

- Section 73 application for the “removal or variation” of condition 2 of the planning permission so as to enable inclusion of a new plan showing turbines with height of 75m
- In answer to the question: “Please state why you wish the condition(s) to be removed or changed”, Energiekontor wrote: “To enable a taller turbine type to be erected.”
- Permission granted on appeal by Planning Inspector. The Inspector concluded: *“The appeal is allowed and planning permission is granted for installation and 25-year operation of two wind turbines, and associated infrastructure including turbine foundations, new and upgraded tracks, crane hard standings, substation, upgraded site entrance and temporary construction compound (major development) at land to the north of Esgairliving Farm, Rhydcymerau in accordance with the application Ref W34341 dated 5 August 2016, without compliance with condition number 2 previously imposed on planning permission Ref W/31728 dated 8 March 2016 and subject to the conditions set out in the schedule attached to this decision”*

What *Finney* Decided

(1) The Parties' submissions

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- The **Appellant**, Mr Finney, argued that the effect of the Inspector's decision was to either the operative part of the original planning permission, or to impose condition which was inconsistent with it. He submitted that, as a result, the Inspector's decision was *ultra vires* s.73

- The **Respondents** argued:
  - That there was no such limitation on the exercise of s.73, the only limitation being that the development approved must no amount to a fundamental alteration of the proposal put forward in the original permission. Accordingly, the Inspector had not acted unlawfully.
  - That the approach advocated by the Appellant would have practical implications for developers who would be at the mercy of LPAs who often framed their permissions with varying levels of detail

What the *Finney* Decided

(2) The Judgment

- Lewison LJ (with whom David Richards and Arnold LJJ agreed) found in favour of the Appellant.
- He considered that this was primarily a question of statutory interpretation (§42).
- He referred back to Circular 19/86 which stated that the primary purpose of s.73 was to give a developer relief against one or more conditions
- Section 73 specifies that on an application under s.73 the LPA may consider *"only"* the question of the conditions (s.73(2)) and may only choose between two options: grant the same permission subject to different conditions (or no conditions) or refuse the application.
- Accordingly, s.73 contained no power to grant a new planning permission with a different operative part from that contained in the original.
- It would also be unlawful for an LPA to impose a new or amended condition on a planning permission under s.73 which was inconsistent with the operative part of the permission (§43)

What the *Finney* Decided

(2) The Judgment

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- On the matter of the preceding cases, the Court of Appeal held that:
  - Its approach was consistent with ***Arrowcroft*** and that §§33 and 35 of ***Arrowcroft*** were discussing 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” (§29)
  - ***Wet Finishing*** was wrongly decided; ***Vue Entertainment*** was rightly decided (§46).

What the *Finney* Decided

(2) The Judgment

- On the question of the practical implications, the Court of Appeal held:
  - It would not be *"a proper use of s.73"* for a developer to apply to change an innocuous condition in order to open the gate to section 73, and then use that application to change the description of the permitted development (§42)
  - As to whether developers would find it more difficult to amend details of their planning permissions, Lewison LJ stated (§45): *"If a proposed change to permitted development is not a material one, then section 96A provides an available route. If, on the other hand, the proposed change is a material one, I do not see the objection to a fresh application being required."*

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Alternatives to s.73

Robert Walton QC

Introduction

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- Amendment on grant of permission:
  - LPA power to amend the description of development;
  - LPA power to amend the scheme using conditions.

- Amendment after grant of permission:
  - S.96A;
  - s.96A then s.73;
  - “Drop in” applications;
  - s.97 Modification Order.

LPA power to amend description of development

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70.— Determination of applications: general considerations.

(1) Where an application is made to a local planning authority for planning permission—

(a) …. they may grant planning permission, either unconditionally or subject to such conditions as they think fit; or

(b) they may refuse planning permission.

NPPG

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Can a local planning authority amend the description of development?

Before publicising and consulting on an application, the local planning authority should be satisfied that the description of development provided by the applicant is accurate. The local planning authority should not amend the description of development without first discussing any revised wording with the applicant or their agent.

Paragraph: 046 Reference ID: 14-046-20140306

- Adding (e.g.) number of units to description of development would deprive Application of ability to make a s.73 application
- Unit numbers already controlled by condition – so amending description of development does not change anything in terms of what it consented
- Developers should therefore resist such changes.

Using conditions to amend the scheme

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Bernard Wheatcroft Ltd v Sec State for the Environment (1982) 43 P & CR 233.

- Application submitted for 420 houses on 35 acres
- Revised scheme introduced on appeal: 250 houses on 25 acres
- SS held he had no power to grant pp for reduced scheme

Wheatcroft cont.

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Forbes J:

- SS could impose conditions that have the effect of reducing the permitted development below the development applied for;
- 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
- [Did not decide SS had power to grant permission for more development was sought – see *Finney*]

Wheatcroft test flawed?

Holborn Studios Ltd v Camden LBC [2017] EWHC 2823 (Admin)

"**In my judgment this conflation of the substantive and procedural constraints on the powers of the local planning authority is flawed**. It is quite possible for a person to be deprived of an opportunity of consultation on a change which would not result in a permission for a development that is in substance not that which was applied for."

"In considering whether it is unfair not to re-consult, in my judgment it is necessary to consider whether not doing so deprives those who were entitled to be consulted on the application of the opportunity to make any representations that, given the nature and extent of the changes proposed, they may have wanted to make on the application as amended".

Amendments post permission: s.96A

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“(1) A local planning authority may make a change to any planning permission …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 … 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”.

s.96A - procedure

- Procedure governed by article 10 of the T&CP (Development Management Procedure) Order 2015:
  - Notification must be given to landowners;
  - LPA must take into account reps received within 14 days of notification
  - 28 day time limit for decision (unless extension agreed in writing).

Section 96A – how different to s.73?

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- Only available to a person with an interest in the land to which the application relates;
- Not limited to amending conditions – i.e. allows non material changes to the description of development too;
- LPA discretion as to scope of consultation;
- No statutory requirement to consider development plan;
- EIA unlikely given change must be non-material;
- Decision within 28 days (or such longer period as agreed in writing);
- Decision issued in writing (cf new permission under s.73);
- Amends the existing permission – does not result in the grant of a new pp;
- No right of appeal under s.78 - JR only.

s.96A: In practice (1)

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Remedying deficient or unintelligible conditions

In *R (Hill) v Cornwall Council* [2016] EWHC 1264, a JR against a planning permission succeeded solely on the ground that one of the conditions, as drafted, was unintelligible and thus unenforceable. The High Court postponed the giving of final judgment to allow an application to be made under s.96A to amend the condition.

s.96A in practice (2)

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Inserting an additional condition as a precursor to a s.73 application

In *R (Daniel) v East Devon DC* [2013] EWHC 4114 (Admin) permission had been granted for development to take place in part on land not within the ownership or control of the developer. It was unable to acquire the land or secure consent from the landowners. This made it impossible to carry out the development. The original permission did not include a condition setting out the approved plans. The developer therefore used s.96A to impose an additional condition listing those plans and then applied under s.73 to vary that condition so that the development would take place on a reduced footprint (excluding the land outside of the developer's control). The court upheld the LPA's decision to grant the s.73 application.

Section 96A plus Section 73

- E.g. the description of development in *Vue Entertainments Ltd*:

"The demolition of existing structures and the erection of an 8,000 seat community stadium, leisure centre, multi-screen cinema, retail units, outdoor football pitches, community facilities and other ancillary uses, together with associated vehicular access, car parking, public realm, and hard and soft landscaping".

Use s.96A application to change description of development to:

Section 96A plus Section 73

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"The demolition of existing structures and the erection of a ~~an 8,000~~ seat community stadium …."

- No changes to condition requiring scheme to be built in accordance with plans, so change is not material.

- Then use s.73 to amend conditions – substituting revised plans – cf increase from 2000 to 2400 seater cinema.

- Simultaneous application / back to back determination by the LPA.

“Drop in” applications

Planning permission granted in February 2017 for the “erection of 53 care apartments within Class C2, parking, access, footpath, landscaping & other associated works”.

Permission then secured in 2019 for “demolition and erection of 70 bed care home within Use Class C2 (replacing building 4 approved by A27/16/PL) …”

Drop in applications cont.

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Legal - Advice in relation to red edge of application site.
The application can proceed to be determined. However if approved the applicant is not legally entitled to implement both permissions as implementation of this latest application (if approved) would prevent full implementation of the existing permission and this application does not incorporate the existing permission.

COMMENTS ON CONSULTATION RESPONSES:

Comments noted and relevant conditions included.
With regard to the legal advice it was suggested to the agent that this application was withdrawn and resubmitted with an amended scheme relating to the whole of the application site approved under A/114/18/PL. However they have not chosen to pursue this option. Therefore approval of this application will result in two permissions one of which can't be fully implemented. In addition this application requires a section 106 Agreement to secure contributions and these would be additional to those secured under planning permission A/14/18/PL.

- Certificate of lawfulness application showing combined schemes refused – now at appeal.

- LPA arguing that the two permissions are inconsistent with each other.

- NB: *Pilkington v Sec State* [1973] 1 WLR 1527: "special cases will arise where one application deliberately and expressly refers to or incorporates another" – per Lord Widgery at [1531]

- Key points:
  - Drop in application should refer expressly to the original permission and all documentation must show how the two schemes fit together.

s.97 Modification Orders

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- Key features
  - In exercising the power the LPA shall have regard to the development plan and any other material considerations;
  - May be exercised at any time before the building operations to which the permission relates have been completed or the change of use permitted has taken place;
  - Revocation or modification does not impact any building or other operations that have already been carried out under the permission;
  - LPA liable to pay compensation in respect of expenditure that has been wasted as a result of the order: see s.107;
  - Order subject to statutory review under s.288: see s.284(2)(a).

Extensions of time

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- Urgent need for planning permissions to be extended
- 12 month extension granted in Scotland: see s.38(3A) of the Town and Country Planning (Scotland) Act, as inserted by paragraph 9 of schedule 7 to the Coronavirus (Scotland) Act 2020
- Extension would have to be prospective – otherwise equivalent to the grant of a fresh permission
- Not possible on s.73 application. What about s.96A or s.97?

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Where does Finney leave us?

Richard Turney

Where does *Finney* leave us?

- Rule 1: in granting permission under s 73, the operative part/description of development cannot be amended

- Rule 2: there cannot be a contradiction between the operative part and the conditions

What does *Finney* NOT say?

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- That a *material* change to a planning permission cannot be achieved under s 73
  - It can be, and indeed s 73 would (now) serve no purpose if it could not

- That the rules about interpretation of planning permission have changed… so the first task is to the construe the original planning permission

Easy(?) cases

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- *Finney*: “operative part” should have remained “up to 100m”; a condition showing a turbine at 125m tip height would create an inconsistency – breaks Rule 1, and would have broken Rule 2 if description had survived

- *Wet Finishing Works* [2018] PTSR 26: permission for “84 NO. DWELLINGS AND ASSOCIATED WORKS”, proposal was for “VARIATION OF CONDITION No 02 (APPROVED PLANS) OF APPLICATION 43/11/0080 FOR ALTERATIONS TO LAYOUT AND ADDITIONAL SIX UNITS AT TONE MILL, MILVERTON ROAD, WELLINGTON” – breaks Rule 2

- Cases where description cannot be contradicted (and need not be amended) by proposed change (e.g. substituting a materials condition) – lawful

Hard cases

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- Description of development expressly refers to plans ("in accordance with drawings XXX and YYY"), and the proposal involves a change to a plan. Does it breach Rule 2? Can the resulting permission be properly interpreted?

- What if the description has already been "amended" by an earlier s 73?

- What about where the description of development expressly incorporates "the application"?

- What about a description containing some wholly irrelevant information (e.g. "the erection of a DIY retail unit for Texas Homecare…" in *Lambeth*)?

Validity (1)

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- Can an “historic” s 73 permission be relied on where:
  - It has been granted with an amended description?
  - There is an inconsistency between the description and the conditions?
- General principle: “Applicants for planning permission are entitled to rely on the local planning authority to discharge the responsibilities placed upon it… when they are granted planning permission they are entitled to rely upon it as a lawful grant of permission unless it is set aside by a court”

  Regina (Gerber) v Wiltshire Council [2016] 1 W.L.R. 2593, [55]

Validity (2)

- The validity of conditions *can* sometimes be challenged in later appeals and proceedings (see e.g. *Newbury DC v SSE* [1981] AC 578; *Tarmac Heavy Building Materials UK Ltd* (2000) 79 P. & C.R. 260; *Earthline Ltd* [2003] 1 P. & C.R. 24)

- If a condition was imposed in breach of Rule 2, might need to be careful about a subsequent application based on its continued existence and effect

The PPG

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- “Section 73 cannot be used to change the description of the development.” (Paragraph: 014 Reference ID: 17a-014-20140306)

- “Depending on the case, it may be possible for the local planning authority to impose a condition making a minor modification to the development permitted. It would not be appropriate to modify the development in a way that makes it substantially different from that set out in the application.” (Paragraph: 012 Reference ID: 21a-012-20140306)

The search for a new approach

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- Rationalising “operative” part
  - On application form
  - In response to LPA amendment
  - On appeal
  - By 96A?
- Amended DMPO or guidance on form of planning permissions? (…see *Lambeth* too)
- The Supreme Court in *Finney*?

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The impact of Lambeth - interpreting planning permissions

Sasha Blackmore

Overview

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1) Recap: ***Finney***
2) Recap: ***Trump*** and ***Lambeth***; a changing approach to interpretation and implication
3) The “Natural and Ordinary meaning”; keep it simple!
4) Implication – where now?
5) The scope of s.73 when considering the meaning of development

Recap: *Finney*
Description of development (1)

"*Installation and 25 year operation of two wind turbines, with a tip height of up to 100m, and associated infrastructure including turbine foundations, new and upgraded tracks, crane hardstandings, substation, upgraded site entrance and temporary construction compound upon a site situated to the north of the village of Rhydcwmerau, Carmarthenshire.*"

A different *Finney:* *potential* Description of development (2)

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"*Installation and **predicted** 25 year operation of two wind turbines with a **likely** tip height (to be **specified by condition)** and associated infrastructure including turbine foundations, new and upgraded tracks, crane hardstandings, substation, upgraded site entrance and temporary construction compound upon a site situated to the north of the village of Rhydcwmerau, Carmarthenshire."*

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***Recap**: Trump* and *Lambeth*; a changing approach to interpretation and implication

Trump Int'l Golf Club Scotland Ltd v Scottish Ministers [2015] UKSC 7

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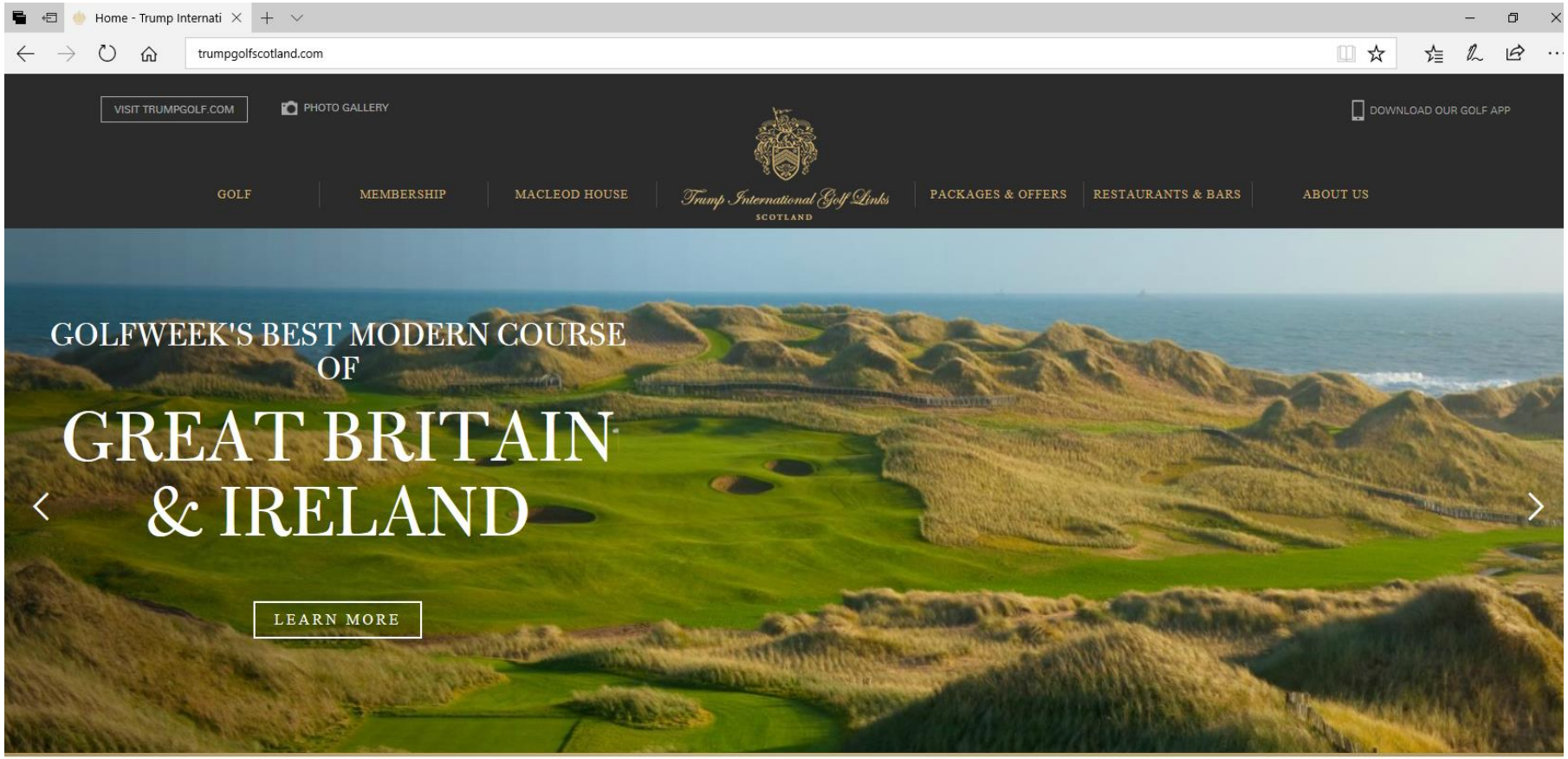

Lambeth in the Supreme Court

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Background:
Earlier Supreme Court decisions

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- ***Marks & Spencer plc v BNP Parisbas Securities Services*** [[2015] UKSC 72
- ***Arnold v Britton*** [2015] UKSC 36
- ***Impact Funding Solutions Ltd v Barrington Services Ltd*** [2017] AC 85 (October 2017, post-dates ***Trump)***
- Older cases: ***Attorney General of Belize v Belize Telecom Ltd*** [2008 UKPC 10 and ***Geys v Societe Generale, London Branch*** [2013] 1 AC 523.
- Not only English cases: the Supreme Court also cite approvingly a decision of the Singapore Court of Appeal in ***Foo Jong Peng v Phua Kiah Mai*** [2012] 4 SLR 1267.
- And of course: ***Trump*** and ***Lambeth***

Interpretation and Implication

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<u>Consistency between classes of documents being interpreted</u> → desire to ensure that planning law is not "an island"

<u>Different courts</u> → shift in focus of interpretation from restricted focus on meaning of words used to a more purposive approach

- **Marks & Spencer** Neuberger, Clarke, Sumption, Carnwath, Hodge
- **Trump**: Neuberger, Mance, Reed JSC, Carnwath, Hodge
- **Lambeth**: Reed, Carnwath, Lloyd-Jones and Briggs and Black

Lambeth in the Supreme Court

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- Reversed High Court and Court of Appeal decisions
- Held: "*Whatever the legal character of a document*", the focus was "*to find the 'natural and ordinary meaning' of the words used, viewed in their particular context (statutory or otherwise) and in light of common sense*"

Lambeth in the Supreme Court

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In addition, created other new areas of uncertainty:

- Scope of s.73 on pre-existing conditions
- Scope for an implied term – "*difficult to envisage when*…"

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The “Natural and Ordinary” meaning; keep it simple!

Lambeth and other examples

Lambeth: Decision Notice (structure)

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Determination of Application Under Section 73—Town and Country Planning Act 1990

The London Borough of Lambeth hereby approves the following application for the variation of condition as set out below under the above mentioned Act …

Development At: Homebase Ltd, 100 Woodgate Drive, London SW16 5YP.

For: Variation of condition 1 (Retail Use) of Planning Permission Ref: 10/01143/FUL (Variation of condition 6 (Permitted retail goods) of planning permission Ref 83/01916 … granted on 30.06.2010.

Original Wording:…

Proposed Wording…

Approved plans …

Summary of the reasons for granting planning permission: In deciding to grant planning permission, the council has had regard to the relevant policies of the development plan and all other relevant material considerations … Having weighed the merits of the proposals in the context of these issues, it is considered that planning permission **should be granted subject to the conditions listed below.**

Conditions…

Lambeth: Decision Notice (3)

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Original Wording:

The retail use hereby permitted shall be used for the retailing of DIY home and garden improvements and car maintenance, building materials and builders merchants goods, carpets and floor coverings, furniture, furnishings, electrical goods, automobile products, camping equipment, cycles, pet and pet products, office supplies and for no other purpose (including the retail sale of food and drink or any other purpose in Class A1 of the Schedule to the Town and Country Planning (Use Classes) Order 1987 [(SI 1987/764)] (as amended) or in any provision equivalent to that Class in any statutory instrument revoking and re-enacting that Order).

Proposed Wording:

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 [(SI 1995/418)] (or any Order revoking and re-enacting that Order with or without modification), for no other goods.

Lambeth: Decision Notice (2) - Conditions

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1. The development to which this permission relates must be begun not later than the expiration of three years beginning from the date of this decision notice. Reason: To comply with the provisions of section 91(1)(a) of the TCPA 1990…

2. Prior to the variation [hereby] approved being implemented a parking layout plan at scale of 1:50 indicating the location of the reserved staff car parking shall be submitted to and approved in writing by the local planning authority. The use shall thereafter be carried out solely in accordance with the approved staff car parking details. Reason: To ensure that the approved variation does not have a detrimental impact on the continuous safe [and] smooth operation of the adjacent highway …

3. Within 12 months of implementation of the development hereby approved details of a traffic survey on the site and surrounding highway network shall be undertaken within one month of implementation of the approved development date and the results submitted to the local planning authority. If the traffic generation of the site, as measured by the survey, is higher than that predicted in the transport assessment submitted with the original planning application the applicant shall, within three months, submit revised traffic modelling of the Woodgate Drive/Streatham Vale/Greyhound Lane junction for analysis. If the junction modelling shows that junction capacity is worse than originally predicted within the transport assessment, appropriate mitigation measures shall be agreed with the council, if required, and implemented within three months of the date of agreement. Reason: to ensure that the proposed development does not lead to an unacceptable traffic impact on the adjoining highway network …"

Landmark Chambers

Keep it simple

Supreme Court: Lambeth

Landmark Chambers

(1) Ordinary reading. An "*ordinary reading of the decision notice compels a different view.*" Taken at "*face-value*", "*the wording of the operative part of the grant seems to me to be clear and unambiguous*". The "*suggested difficulties*" of interpretation "*do not arise from any ambiguity in the terms of the grant*"

(2) Keep it simple. It is "*unnecessary to examine in detail the more ambitious alternatives proposed by Mr Reed*". Mr Reed's submission "*in the simple form*" was "*correct*" and "*It is not necessarily assisted by the varying formulations and citations discussed in his submissions to this court. There is a risk of over-complication*"

(3) Reasonable reader. Should look through the eyes of a "*reasonable reader*" but such a reader should "*start by taking the document at face value*". Such a reader should not be "*driven to the somewhat elaborate process of legal and contextual analysis hypothesised…*" by the Court of Appeal

(4) Extraneous materials. No issues with extraneous materials in this case

(5) Section 73. The background to section 73 should have been considered, as "*once it is understood that it has been normal and accepted usage*" to describe section 73 as varying or amending a condition, "*the reasonable reader would in my view be unlikely to see any difficulty*" in understanding "its intended meaning and effect".

Landmark Chambers

Keep it simple…
even when it's even more complicated

UBB Waste Essex Ltd v Essex County Council

Landmark Chambers

- Illustrates the difficulty of "*natural and ordinary meaning*"
- Judgment of Lieven J, 18 July 2019 (rolled up hearing ordered by Holgate J)
- About the lawfulness of a CLOPUD
- Lieven J had to consider (1) the terms of the CLOPUD (2) the terms of the original grant of consent (3) the construction of 3 complex conditions (2, 3, and 31) and which (4) had the effect of incorporating the Planning Statement, the Environmental Statement, and the Environmental Non-Technical Statement

UBB Waste Essex Ltd v Essex County Council

Landmark Chambers

- The CLOPUD permitted "*the importation and treatment… of up to 3,000 tonnes per annum of source-segregated green garden waste….*"
- The SSGGW came from Household Waste Recycling Centres (HWRC)
- The issue was whether SSGGW from HWRC was excluded by the terms of the permission
- That depended on whether SSGGW from HWRC was "residual" waste…

UBB Waste Essex Ltd v Essex County Council

Landmark Chambers

"Enclosed facility for the Mechanical and Biological Treatment (MBT) of municipal solid waste and commercial and industrial waste, including waste water treatment infrastructure; biofilter and air filtration infrastructure; a visitor, education and office facility; parking area; surface water management system; hardstanding's; internal roads; new access and junction arrangements onto Courtauld Road; earthworks; landscaping, fencing and gates; weighbridge complex; lighting and ancillary development."

10. Condition 2 of the Planning Permission states:

> *"2. The development hereby permitted shall be carried out in accordance with the details of the application dated 23 March 2012 and covering letter dated 23 March 2012, together with:*
>
> *• ...*
>
> *• Environmental Statement dated March 2012 and appendices 1.1-1.9, 5.2, 5.2, 6.1, 7.1, 9.1 and 9.2,*
>
> *• Environmental Statement Non-Technical Summary dated March 2012,*
>
> *• Environmental Statement Errata dated April 2012,*
>
> *• letter from Alistair Hoyle dated 10 May 2012 and enclosed Environmental Statement Addendum to Flood Risk Statement dated May 2012 and drawing number 5093106/C/P/200,*
>
> *• Planning Statement and appendices 1-8,*
>
> *•...[1]*
>
> *And in accordance with the contents of the Design and Access Statement dated March 2012.*

4. The PS at section 1.2 [1/13/493] under the heading *"The proposal"* states that the

> *"proposal... will satisfy the residual municipal waste management needs of Essex County Council and Southend on Sea Borough Council ... The Facility is capable of treating up to 416, 955 tonnes per annum (tpa) of residual waste, but with a smaller proportion of locally derived commercial and industrial (C&I) (third party) waste ... The technology consists of: Pre-processing – sorting raw residual waste and extracting recyclables such as plastic and metals for beneficial use ..."* [emphasis added]

Condition 21 of the Planning Permission states:

> *"21. No waste other than 416,955t tpa of those waste materials defined in the application details shall enter the site. Records of waste type and tonnage shall be kept by the operator and made available to the Waste Planning Authority upon written request.*
>
> *Reason: waste material outside of the aforementioned would raise additional environmental concerns, which would need to be considered afresh and to comply with East of England Policy WM1, Basildon District Plan Policy C15 and Waste Local Plan Policies W3A, W3C, W8A and W10E"* [emphasis added]

(a) Residual household waste - 78%

(b) Street sweepings - 2%

(c) Bulky waste - 0.5%

(d) Trade waste - 5.5%

*(e) Household Waste Recycling Centre ("**HWRC**") Residual Waste - 14%*

UBB Waste Essex Ltd v Essex County Council

Term	Definition
"1990 Act"	Town and Country Planning Act 1990
"AD"	Anaerobic Digestion
"Biowaste"	Types of food and green waste, including SSG waste
"C&I Waste"	Commercial and Industrial Waste
"CLEUD"	Certificate of Lawful Existing Use and Development (see s.191 of the 1990 Act)
"CLOPUD"	Certificate of lawfulness for a proposed use or development (see s.192 of the 1990 Act)
"EA"	Environmental Agency
"EIA"	Environmental impact assessment carried out under, at the time of the application for the Planning Permission, the Town and Country Planning (Environmental Impact Assessment) Regulations 2011. .
"EIA Directive"	European Directive 2011/92/EU on Environmental Impact Assessment
"ES"	Environmental Statement
"Essex JMWMS"	Essex Joint Municipal Waste Management Strategy 2008-2032

MRS JUSTICE LIEVEN DBE
Approved Judgment

Double-click to enter the short title

"EWP"	Essex Waste Partnership
"The Facility"	The MBT Facility at Courtauld Lane, Essex
"HWRC"	Household waste recycling centre
"MBT"	A residual waste treatment process that involves both mechanical and biological treatment processes
"MSW" (Residual Municipal Solid Waste)	means waste that is household or household like - it comprises household waste collected by local authorities as well as some commercial and industrial waste (e.g. from offices, schools and shops) that may be collected by the local authority or a commercial company.
"NTS"	The Non Technical Summary of the ES
"QSRF"	'Quick Solid Recovered Fuel', which consists of waste processed through the QSRF Line
"QSRF Line"	a number of modifications to the Facility implemented by UBB in 2015 whereby certain waste is shredded, passed under a magnet to remove ferrous metals, diverted away from the biohalls and the Refining Hall, and then transported to the Treatment Output Loading Area.

MRS JUSTICE LIEVEN DBE
Approved Judgment

Double-click to enter the short title

"PAF"	Planning Application Form
"PS"	Planning Statement
"Planning Permission"	The planning permission dated 6 December 2012 allocated reference number ESS/22/12/BAS granted by Essex County Council for the Facility
"Residual Waste"	Waste that is not sent for reuse, recycling or composting and therefore excludes SSG Waste
"Residual Waste Contract"	The contract dated 31 March 2012 between UBB and the Defendant in its capacity as WDA for the County of Essex
"Ricardo"	Ricardo Energy & Environment
"SOM"	Stabilised Output Material a bulk output that is suitable for landfilling produced by the MBT plant.
"SRF"	Solid Recovery Fuel – a fuel that is capable of incineration produced by the MBT plant.
"SSG Waste" (SSGGW)	Source segregated green garden waste
"SSO Waste"	Source segregated organic waste. SSG Waste is a type of SSO Waste.
"TPA"	Tonnes per annum

UBB Waste Essex Ltd v Essex County Council

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- Lieven J found that the “natural and ordinary meaning” was such that essentially green waste was excluded

- Four principles set out in her judgment (but in fact 6):
  1) “***Permissions should be interpreted as by a reasonable reader <u>with some knowledge of planning law and the matter in question</u>”***
     - This does not mean that they are the “informed reader” of a decision letter;
     - but the reasonable reader will understand the role of the permission, conditions, and any incorporated documents
     - “*Mr Sharland points out with some justification that reasonable people may differ on what amounts to common sense”;*
     - …. References to common sense really point to the “planning purpose” of the permission or condition

UBB Waste Essex Ltd v Essex County Council

Landmark Chambers

2**) Planning "purpose" to be considered**

- "*where this is reflected in the reasons for the conditions and/or the documents incorporated*"
- This "*planning purpose*" is not a "*private intention", but the "planning purpose which lies behind the condition*"

3) **Holistic view taken of incorporated documents**

- It may be the case that documents are not wholly consistent
- There may be some ambiguity with parts of them
- Try to understand the nature of the development and planning purpose to be achieved
- Not appropriate to focus on one sentence without seeing its context – "*unless that sentence is so unequivocal as to give a clear-cut answer*"

UBB Waste Essex Ltd v Essex County Council

Landmark Chambers

4) Extrinsic documents

- Only if ambiguity - "*save perhaps for exceptional circumstances"*
- Difference between documents in the public domain "*and easily accessible"* (e.g. Planning Officer's report) and private documents

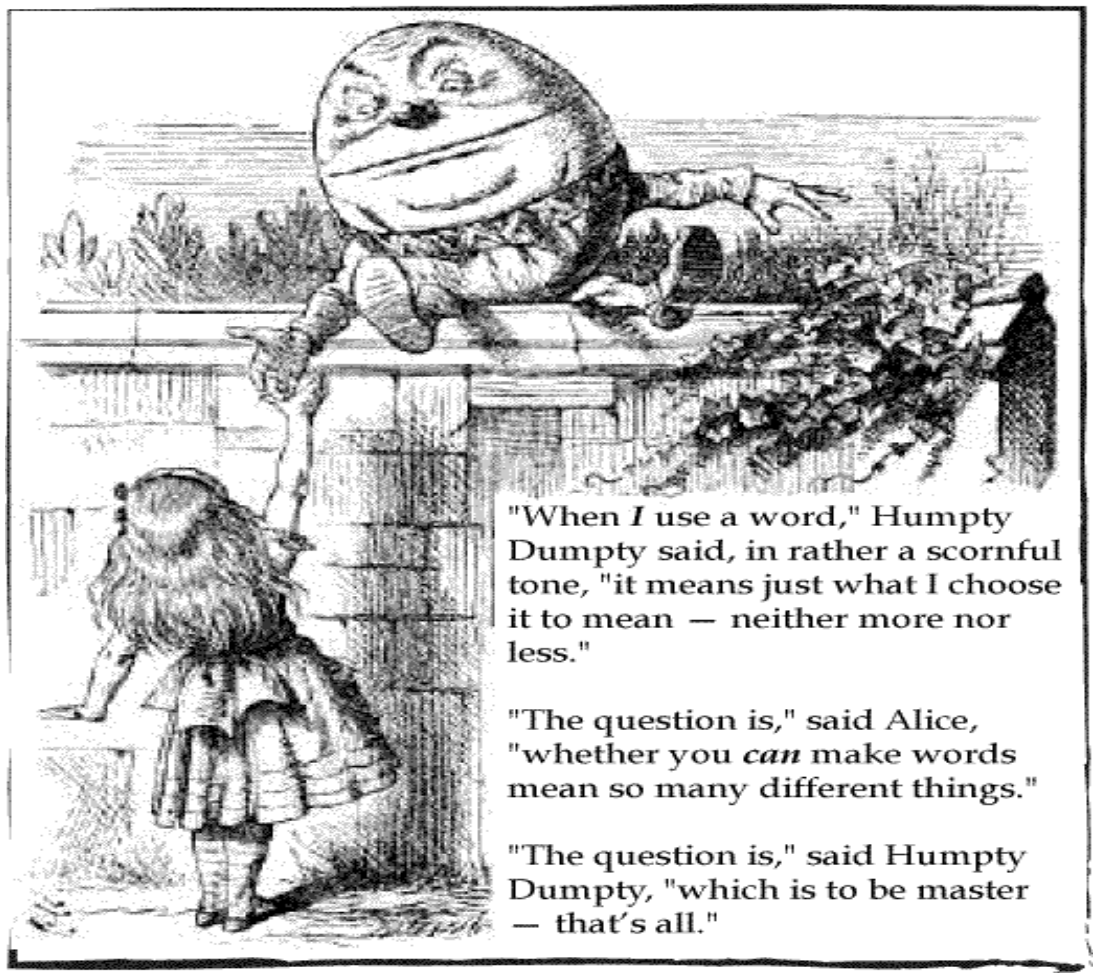
"*The Court should be extremely slow to consider the intention alleged to be behind the condition from documents which are not incorporated and particularly if they are not in the public domain. This is for three reasons. The determination of planning applications is a public process which is required to be transparent. Any reliance on documents passing between the developer and the LPA, even if they ultimately end up on the planning register, is contrary to that principle of transparency. Planning permissions impact on third party rights in a number of different ways. It is therefore essential that those third parties can rely on the face of the permission and the documents expressly referred to. Finally, breach of planning permission and their conditions, can lead to criminal sanctions*"

5) Starting point is the words of the permission itself

6) Whether one interpretation leads to an odd result

Interpretation of conditions
Lambeth

Landmark Chambers



Finney: Description of development

"*Installation and 25 year operation of two wind turbines, with a tip height of up to 100m, and associated infrastructure including turbine foundations, new and upgraded tracks, crane hardstandings, substation, upgraded site entrance and temporary construction compound upon a site situated to the north of the village of Rhydcwmerau, Carmarthenshire."*

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Implication – where now?

Implication: Reminder from *Trump*

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(1) "*the court will, understandably, exercise **great restraint** in implying terms into public documents which have criminal sanctions, I see no principled reason for excluding implication altogether*" (Lord Hodge [34).

(2) while planning cases not "*directly applicable*" Lord Hodge considers ***Sevenoaks*** and says "*In agreement with Lord Carnwath JSC, I am not persuaded that there is a complete bar on implying terms into the conditions in planning permissions …*" ([32]).

(3) "*There is no reason in my view to exclude implication as a technique of interpretation, where justified in accordance with the familiar, albeit restrictive, principles applied to other legal documents. In this respect planning permissions are not in a special category*" (Lord Carnwath, para 64) who called for a "***relatively cautious***" approach (para 66).

Implication: Lambeth

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- The parties' cases were
- Claimant: there should be an implied term in this case
- Defendant SoS: following ***Trump***, there could be scope for an implied term as a matter of principle in the right case - but not in this case
- IP (landowner): there was no scope for an implied term in a planning condition as a matter of the statutory scheme

- Lord Carnwarth:

  "*…I observe in passing (in agreement with Mr Lockhart-Mummery's submission as to the limited scope of the judgments in the* ***Trump*** *case…) that it is difficult to envisage circumstances in which it would be appropriate to use implication for the purpose of supplying a whole new condition, as opposed to interpretation of an existing condition…."*

Scope for an implied term

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- But the IP's case was that there was no scope for an implied term
- Lord Carnwarth was referencing the IP's argument, which was that in the cases considered in ***Trump,*** these cases were about "incomplete conditions"
  - So → an "incomplete condition" can be completed – ***Trump*** was about the lack of an implementation clause
  - ***When is a condition "incomplete"?***
    - We all know how key words can be omitted from conditions which can change the meaning of the condition
    - What can be considered to reach that point?
  - ***Could description of development be "incomplete"***
    - ***If it was "completed", would that widen the description enough?***

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Q&A

We will now answer as many questions as possible.

Please feel free to continue sending any questions you may have via the Q&A section which can be found along the top or bottom of your screen.

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Q&A

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Thank you for listening

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