

Finney v Welsh Ministers

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

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*

- 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*

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



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).

Cotswold Grange County Park Ilp 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 Grant or “operative part”

The Conditions

The background to *Finney*

(3) *The “operative part” of the planning permission*

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

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

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



The background to *Finney*

(3) The “operative part” of the planning permission

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

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



The background to *Finney*

(3) The “operative part” of the planning permission

***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*



The Facts in *Finney*

Town & Country Planning Act 1990



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*

- 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*

- 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.*”

Thank you for listening

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London

180 Fleet Street
London, EC4A 2HG
+44 (0)20 7430 1221

Birmingham

4th Floor, 2 Cornwall Street
Birmingham, B3 2DL
+44 (0)121 752 0800

Contact us

 clerks@landmarkchambers.co.uk

 www.landmarkchambers.co.uk

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