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Case No: CO/2235/2022

**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**
**PLANNING COURT**
**BIRMINGHAM DISTRICT REGISTRY**

Heard at Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/12/2022

**Before** :

**MRS JUSTICE FARBEY**

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**Between :**

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|---|---|
| [redacted] | **Claimant** |
| **- and -** | |
| **SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES** | **Defendant** |
| **- and -** | |
| **NEWARK AND SHERWOOD DISTRICT COUNCIL** | **Interested Party** |

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**Richard Harwood KC** (instructed by **Shakespeare Martineau LLP**) for the **Claimant** appeared by video link
**Killian Garvey** (instructed by the **Government Legal Department**) for the **Defendant** appeared by video link
**Christian Hawley** (instructed by **Newark and Sherwood District Council**) for the **Interested Party** appeared by video link

Hearing date: 10 November 2022

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# Approved Judgment

This judgment was handed down remotely at 10.30am on 6 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

**Mrs Justice Farbey :**

## Introduction

1. The claimant, [redacted] seeks an order quashing the decision of a planning inspector to dismiss his appeal in relation to the use of land at Kilvington Lakes, Vale of Belvoir, Newark ("the site"). The interested party, Newark and Sherwood District Council ("NSDC"), is the relevant local planning authority. The proceedings are brought under section 288 of the Town and Country Planning Act 1990 ("the Act") and CPR Part 8. They raise two questions about the proper interpretation of section 73 of the Act. That section deals with applications for planning permission to develop land without compliance with conditions attached to a previous planning permission.

2. The two questions of interpretation which fall to be considered are:

   (1) Did the inspector have the power to consider an appeal against NSDC's refusal of a new section 73 planning permission when the application for the new permission sought changes to conditions in two, separate previous planning permissions?

   (2) Did she in any event misdirect herself in law by concluding that the appeal could not succeed in so far as section 73 does not permit the removal of conditions in such a way that the new planning permission would give rise to a fundamental change to the use of the land?

3. The first of these questions was raised by the Secretary of State and NSDC as a "preliminary point" because it concerns the inspector's jurisdiction to have decided the appeal at all. However, it was raised as a bar to relief on the basis that I should not exercise my discretion to grant relief even if the inspector's decision involved other errors of law because the appeal was bound to fail for want of jurisdiction.

## Factual background

*The site*

4. The site is described in the papers before me as located in the countryside close to the village of Kilvington. It was previously mined for gypsum but mining came to an end in 2006. Centred around a number of lakes, much of the land is agricultural, woodland or grassland. There are a number of public footpaths running through the site as well as a section of dismantled railway line which is now a noted wildlife corridor.

5. There are some existing buildings, mostly centred around a farm. These include the farmhouse itself as well as various agricultural buildings, all of which are derelict. There are some residential properties close to the site, including within the villages of Kilvington and Alverton.

*The 2015 planning permission*

6. On 9 November 2015, NSDC granted planning permission to a previous developer for the development of the site ("the 2015 permission"). The description of the development was:

> "34 self-catering holiday units, a 25-bed inn building, watersports building, storehouse and outfitters along with a commercial and educational unit, nature trails, cycle trails, pathways and family facilities. Re-routing a public right of way at Kilvington."

For succinctness, I shall refer to the description as holiday accommodation.

7. The 2015 permission was subject to a number of conditions including conditions 19, 20 and 21 as follows:

> "19 Notwithstanding the provisions of Part C, Class C3 'Dwelling Houses' of the Schedule of the Town and Country Planning (Use Classes) Order 2005, (or any order revoking or re-enacting that Order), the premises shall be used for the purpose of holiday accommodation only and for no other purpose, including any other purpose within Class C3 of the Order.
>
> 20 The site operator shall maintain a register of occupiers for each calendar year, which shall be made available for inspection by the local planning authority, at any time, and a copy of the register shall be supplied to the local planning authority at the end of each calendar year.
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> 21 The properties hereby permitted for use as holiday accommodation shall not be occupied by the same person or persons for a total period exceeding 6 weeks in any calendar year."

8. Development commenced in September 2018 (with various non-material amendments to the permission having been approved). Phase 1 of the scheme was carried out, including the siting of some of the units.

9. The effect of condition 19 was (in short terms) that the site lost the benefit of the Town and Country Planning (Use Classes) Order 1987 ("the Order"). Absent condition 19, the site could under the Order have been used for residential accommodation without that use being treated as development that required fresh planning permission. Condition 19 prohibited that change of use. Conditions 20 and 21 were imposed as an aid to the enforcement of condition 19.

*The 2020 planning permission*

10. On 11 June 2019, a second developer applied to NSDC under section 73 of the Act for condition 21 (prohibiting the holiday units from being occupied by the same person for more than six weeks) to be removed. By notice dated 20 August 2019, the application was refused. On 23 January 2020, a planning inspector allowed the developer's appeal. The inspector issued a new planning permission which removed condition 21. Owing to other immaterial changes, conditions 19 and 20 were renumbered as 17 and 18 respectively but their wording remained identical and they had the same effect (preventing a change of use from holiday to residential accommodation). The description of the development did not change.

*The claimant's application*

11. On 7th December 2020, the claimant submitted a planning application under section 73 of the Act. The application form sought the removal of conditions 19 and 20 of the 2015 planning permission and conditions 17 and 18 of the 2020 planning permission which (as I have noted) were identical. The application was accompanied by a detailed Planning Supporting Statement by RPS Group Plc. That statement mirrored the application form in that it sought the removal of conditions 19 and 20 of the 2015 permission and also conditions 17 and 18 of the 2020 permission.

12. By letter dated 15 January 2021, NSDC refused to consider the application on the grounds that the removal of conditions would lead to a change to the description of the development which required a fresh application for full planning permission. The application made under section 73 was said to be invalid. By letter dated 28 January 2021, NSDC confirmed that it was "satisfied that it [had] no power to entertain this application under section 73." In a further letter dated 12 March 2021, NSDC reiterated its position and said that it would not determine the application under section 73.

13. The claimant appealed against the non-determination of the application. By letter dated 19 November 2021, the Planning Inspectorate refused to deal with the appeal, on the basis that an inspector would have no jurisdiction to determine the appeal as the local planning authority had said it would not determine the application.

14. On 3 December 2021, the claimant sent a letter before claim to the Secretary of State. On 16 December 2021, the Secretary of State conceded that there was a right of appeal and so the appeal went ahead.

*The inspector's appeal decision*

15. The inspector considered the appeal on the basis of written representations. In her written decision, she stated that the effect of removing conditions 19 and 20 of the 2015 permission and conditions 17 and 18 of the 2020 permission would be to enable the 34 holiday units to be used as permanent residential dwellings. She set out what she regarded as the two main issues as follows (keeping the inspector's text but replacing her bullet points with numbered points):

> "The main issues in the appeal are:
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> (1) Whether it is possible in law to alter the use of the 34 self catering holiday units by 'removing' the disputed conditions attached to the planning permissions, in the way proposed; and
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> (2) If it is possible to do so:
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> i. Whether it is reasonable and necessary to restrict the use to holiday accommodation bearing in mind the site's location in the open countryside;
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> ii. The effect of the proposal on highway safety;
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> iii. Whether or not the proposal makes an adequate contribution to affordable housing; and

> iv. Whether or not the proposal would adequately mitigate any impact on health care and public transport."

16. I shall refer to these issues as the first and second main issues respectively (for present purposes, it does not matter that the second main issue is divided into parts).

17. In her reasons for dismissing the appeal, the inspector confined her consideration to the first main issue, namely whether it was "possible in law to alter the use." She started by considering the judgment of the Court of Appeal in *Finney v Welsh Ministers* [2019] EWCA Civ 1868, [2020] PTSR 455 which she distinguished on its facts:

> "6. The application that is the subject of the appeal was submitted under section 73 of the Town and Country Planning Act 1990. This enables the development of land without complying with conditions subject to which a previous planning permission was granted. The *Finney* judgement established that an application under s73 may not be used to obtain a permission that would require a variation to the terms of the 'operative' part of the planning permission, that is the description of development for which the original permission was granted.
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> 7. In this case the description of development on the original application refers to the development comprising 34 self catering holiday units. The appeal proposal does not seek to change the description. However, the Council have argued that by seeking to 'remove' the disputed conditions imposed on the previous applications it would enable the units to be used as permanent residential dwellings, which would be contrary to the description of the development.
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> 8. The circumstances of this case are different to those in the Finney judgement. In the *Finney* case the effect of the s73 application was that it imposed a new ('varied') condition that enabled a wind turbine of up to 125m which was clearly contrary to the description of development which sought permission for a turbine of 100m. Whereas, in this appeal, the effect would be to remove the conditions restricting how the units were used. As such, there would be no condition imposed that was inconsistent with development."

18. It was not in dispute before me that the inspector meant to say in the final sentence of this passage that there would be no condition imposed that was inconsistent with the description of the development.

19. In a key passage of the decision, the inspector went on to conclude:

> "9. Nonetheless, if the conditions were to be removed it would enable the 34 units to be used in an unrestricted way. This would cause conflict with the original description of development which specifies that the use of these units is as self-catering holiday units and so clearly sought a restricted use. The fact that

> they were holiday units and not unrestricted residential uses was fundamental to them being allowed in a location where the development of unrestricted residential uses is strictly controlled by both local and national policies."

20. She then considered condition 21 of the 2015 permission:

> "10. The appeal proposal does not seek to remove condition 21 on the original permission and so if the appeal was allowed this permission would retain a condition that would prevent any occupier of the units using it for more than 6 weeks in any one year. As such, it could be considered that this permission would not grant unrestricted use of the units."

21. Although the claimant had not invited the inspector to consider condition 21, she felt obliged to consider it in the wider context of the 2015 permission:

> "11. However, without condition 20 requiring a register of occupiers to be kept, I consider that [condition 21] would not be enforceable and so would fail the tests for conditions set out in paragraph 56 of the National Planning Policy Framework. Given this it would not be appropriate to impose that condition. Thus, the effect of allowing the appeal with respect to the original application would also enable the units to be used in an unrestricted way."

22. She went on to conclude:

> "12. Consequently, I consider that the effect of the proposal would not be consistent with the description of the development and so the appeal cannot succeed. Therefore, as a matter of law and on the facts of the appeal, I conclude it is not possible to alter the use of the buildings by 'removing' the disputed conditions attached to either the original or the revised planning permissions in the way proposed."

23. Having concluded that it was not legally possible to remove the conditions that she had been asked to remove, she decided not to consider any of the other matters of planning judgment in her list of main issues. As a result of the inspector's decision, the claimant continues not to have the benefit of the Order and cannot develop residential accommodation at the site.

## The present review

*The claimant's grounds for review*

24. Proceedings in this court were commenced on 22 June 2022. Permission to apply for statutory review was granted on 18 August 2022 by HHJ Worster sitting as a Judge of the High Court. The grounds for review are twofold and may be taken from the skeleton argument of Mr Richard Harwood KC who appears on behalf of the claimant:

i) **Ground 1:** The inspector erred in law in holding that a section 73 planning application could not be made for the grant of planning permission for development of a description within a Use Class without a condition which removes the benefits of the Use Classes Order.

ii) **Ground 2:** The Inspector erred in law in considering that condition 21 of the 2015 planning permission would remain in force unless omitted by a section 73 permission.

*The Secretary of State's "preliminary point"*

25. In resisting the statutory review, Mr Killian Garvey on behalf of the Secretary of State responded to the claimant's grounds but, in addition, raised what he called a "preliminary point." He submitted that, irrespective of the merits of the claimant's grounds, it was not open to the inspector to allow the appeal. The application under section 73 had sought the removal of conditions attached to two different planning permissions (from 2015 and from 2020 respectively). An application based on two permissions fell outside the scope of section 73, at least when one of those permissions (from 2015) was historic. Mr Christian Hawley on behalf of NSDC adopted Mr Garvey's preliminary point while also resisting the claimant's grounds on their merits.

**Legal framework**

*The nature of planning permission*

26. Where an application is made to a local planning authority for planning permission, the authority may grant planning permission either unconditionally or conditionally (section 70(1) of the Act).

27. In *Cotswold Grange County Park LLP v Secretary of State for Communities and Local Government* [2014] EWHC 1138 (Admin), [2014] JPL 981, para 15, Hickinbottom J distinguished between the grant of permission and conditions attached to the grant in the following terms:

> "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."

28. In *Pye v Secretary of State for the Environment, Transport and the Regions* [1998] 3 PLR 72 at pp 85-86, Sullivan J distinguished between the operative part of a planning permission (on the one hand) and the conditions subject to which the development is permitted to be carried out (on the other hand).

29. In *Finney*, the court referred (at para 19) to the distinction between "the operative part or grant" and the conditions. The court observed at para 29:

> "It is clear that what Sullivan J [in *Pye*] meant by the 'operative' part of the planning permission was the description of the development, rather than the conditions."

30. In the present case, it was not in dispute that there was a legal distinction to be made between the description of holiday accommodation, and the conditions numbered 19 and 20 (in 2015) and 17 and 18 (in 2020).

*The nature of development*

31. Section 57(1) of the Act says that, subject to provisions which are not relevant to the present case, "planning permission is required for the carrying out of any development of land." Development includes "the making of any material change in the use of any buildings or other land" (section 55(1) of the Act).

32. In so far as relevant to the present proceedings, there are two ways in which a developer may change the use of land without planning permission.

33. First, on the plain reading of section 57(1), a change of use that is not material will not constitute development and so will not require planning permission. In *Waverly District Council v Secretary of State for the Environment* [1982] JPL 105, Hodgson J held:

> "If there was planning permission for use A and the land was actually being used for use A, then no planning permission was needed for use B, if use B was not a material change of use from use A. This was not because planning permission for use A included use B but because there was no material change of use from the one being used, that question being of course one of fact and degree."

Hodgson J's analysis was approved in *Winchester City Council v Secretary of State for Communities and Local Government* [2015] EWCA Civ 563, paras 15 and 18.

34. Secondly, a change of use to another purpose within the same Use Class (as specified by an order of the Secretary of State) will be excepted from counting as development (section 55(2)(f)). The Order specifies various Use Classes. A change from one use within a particular Use Class to another use within the same Class will be excepted from the definition of development in section 57(1) and so does not need planning permission.

35. It was common ground that a change of use from holiday accommodation to residential accommodation amounts to a change of use within the same Use Class (see article 3 of the Order read with Use Class C3 at para 3 of Schedule 1 to the Order). By operation of the Order, such a change of use is not development and does not require planning permission.

36. In my judgment, the reasoning of Hodgson J in *Waverly* applies with equal force to a change of use in reliance on the Order. Planning permission for one described use (holiday accommodation) does not include permission for a non-described use (residential accommodation) in the same Use Class; but no planning permission is needed for a change from one to the other because Parliament has excepted such a change from counting as development. Put differently, the change of use is permitted not by the description of the permitted development but by operation of law (i.e. by the operation of section 55(2)(f) of the Act and the Order which has been made under it).

37. For similar reasons, a grant of permission for a particular described use cannot in itself constitute a condition inconsistent with consequential development permitted by the Order; otherwise, the operation of the Order would be curtailed in a way which could not have been intended (*Dunoon Developments v Secretary of State and Poole Borough Council* (1993) 65 P & CR 101, 107). It is nevertheless lawful for a local planning authority to impose a condition which removes the statutory benefit of the Order and restricts the use of land to that which is described in the planning permission (*Dunoon*, 104). It appeared to be common ground before me that the question whether a condition removing the benefit of the Order should be imposed or subsequently removed is a question of planning judgment.

*Section 73*

38. Section 73 of the Act provides (in so far as material):

> "(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.
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> (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. …
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> (4) This section does not apply if the previous planning permission was granted subject to a condition as to the time within which the development to which it related was to be begun and that time has expired without the development having been begun.
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> (5) Planning permission must not be granted under this section for the development of land in England to the extent that it has effect to change a condition subject to which a previous planning permission was granted by extending the time within which–
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> (a) a development must be started;
>
> (b) an application for approval of reserved matters (within the meaning of section 92) must be made."

39. In *R v Coventry City Council, Ex P Arrowcroft Group plc* [2001] PLCR 7, 119, para 22, Sullivan J observed that the result of a successful application under section 73 is a wholly new planning permission. A determination under section 73 does not affect any

amendment to the existing planning permission but leaves the original planning permission intact.

40. Sullivan J held that a section 73 determination involves only the question of conditions subject to which planning permission should be granted. It does not and cannot alter the nature of the planning permission. Consequently, any conditions imposed under section 73 cannot be inconsistent with the nature of the planning permission. A planning authority is able to impose different conditions under a fresh planning permission under section 73 but only if they are conditions which could lawfully have been imposed upon the original planning permission in the sense that they "do not amount to a fundamental alteration of the proposal put forward in the original application. " A planning authority would otherwise be granting planning permission for a development with one hand and effectively refusing planning permission for that development with the other hand by imposing an inconsistent condition (*Arrowcroft*, para 33).

41. In *Finney*, the court considered the addition of a condition that tip heights for wind turbines should not exceed 125 metres when the description in the original planning permission was to install and operate turbines with a tip height of up to 100 metres. The question for the court was whether, on an application under section 73, it was open to a local planning authority (or on appeal the Welsh Ministers) to alter the description of the development contained in the operative part of the planning permission. In answering this question in the negative, the court (at para 22) cited *Arrowcroft* as bearing on the question and considered the statutory objective of section 73:

> "13. In *Pye v Secretary of State for the Environment, Transport and the Regions* [1998] 3 PLR 72 Sullivan J explained the origin and purpose of section 73 . It first entered the planning system as section 31A of the Town and Country Planning Act 1971. Before its introduction, a developer dissatisfied with a condition imposed on the grant of planning permission had no choice but to appeal. That exposed him to the risk of losing the planning permission altogether. Guidance about the policy underlying section 73 was given in Circular 19/86 from which the following points emerge: (i) Its purpose was to enable an applicant to apply 'for relief from any or all of [the] conditions'. (ii) The planning authority 'may not go back on their original decision to grant permission'. (iii) If the planning authority decide that 'some variation of the conditions' is acceptable, a new alternative permission will be created. The applicant may then choose between the two permissions.
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> 14. Sullivan J's description of the origins and purpose of section 73 was approved by this court in *R v Leicester City Council, Ex p Powergen UK Ltd* (2000) 81 P & CR 5; and by the Supreme Court in *Lambeth London Borough Council v Secretary of State for Housing, Communities and Local Government* [2019] PTSR 1388. In the latter case Lord Carnwath JSC said at para 11:
>
> > 'A permission under section 73 can only take effect as an independent permission to carry out *the same development as*

> *previously permitted*, but subject to the new or amended conditions. This was explained in the contemporary Circular 19/86, para 13, to which Sullivan J referred. It described the new section as enabling an applicant, in respect of 'an extant planning permission granted subject to conditions', to apply 'for relief from all or any of those conditions'. It added: 'If the authority do decide that some variation of conditions is acceptable, a new alternative permission will be created. It is then open to the applicant to choose whether to implement the new permission or the one originally granted.' (Emphasis added.)
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> 15. Some further points are, I think, uncontroversial: (i) In deciding on its response to an application under section 73 , the planning authority must have regard to the development plan and any other material consideration. The material considerations will include the practical consequences of discharging or amending conditions: *Pye* [1998] 3 PLR 72, 85B. (ii) When granting permission under section 73 a planning authority may, in principle, accede to the discharge of one or more conditions in an existing planning permission; or may replace existing conditions with new conditions. But any new condition must be one which the planning authority could lawfully have imposed on the original grant of planning permission. (iii) A condition on a planning permission will not be valid if it alters the extent or the nature of the development permitted: *Cadogan v Secretary of State for the Environment* (1992) 65 P & CR 410."

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

## Ground 1

*The parties' submissions*

43. In relation to Ground 1, Mr Harwood submitted that the inspector had erred in concluding that, if the conditions removing the benefit of the Order were removed, it would give rise to a fundamental alteration in the permitted use of the land that would be in unlawful conflict or otherwise inconsistent with the description of the development. Mr Harwood emphasised that the description of the development (holiday accommodation) had remained the same at all times. It would remain the same and would endure with or without the conditions removing the benefit of the Order. There was no inconsistency between the enduring description and the benefit of the Order. The inspector's conclusion to the contrary had involved a misdirection in law.

44. Mr Harwood accepted that the inspector had purported to consider "the facts of the appeal" as well as the law (at para 12 of her decision). He accepted that the inspector's reference (at para 9 of her decision) to a change of use "in a location where the

development of unrestricted residential uses is controlled by local and national policies" was a matter of planning judgment rather than law. He submitted that, nevertheless, those brief references to the planning context of the section 73 application were part and parcel of the inspector's consideration of the law and could not be divorced from her erroneous legal conclusion. The inspector had not expressed any complete judgment about whether a change of use to residential accommodation was desirable because she had, on her erroneous view of the law, prevented herself from considering anything other than the first main issue. As a result, essential questions of planning judgment – contained in the second main issue – had not been answered. Any limited exercise of planning judgment was irretrievably flawed by the fact that the inspector had regarded herself as incapable of considering all relevant matters.

45. Mr Garvey submitted that in considering the lawfulness of the inspector's decision, it was important for the court to ask the correct question. *Finney* and *Arrowcroft* had each dealt with different points of law. *Finney* held that section 73 cannot be used to change the description of permitted development. That was not the point at issue in the present case because there was no question of the inspector changing the description in the permission. On the other hand, *Arrowcroft* held that conditions cannot bring about a "fundamental alteration" to the permitted development. The court in *Finney* had considered *Arrowcroft* but had ultimately answered a different question.

46. The starting point in the present case was *Arrowcroft*. Although, on its facts, *Arrowcroft* had concerned the addition rather than the removal of conditions, its reasoning was applicable. Section 73 does not permit a "fundamental alteration" to the permitted development – whether by addition or removal of conditions.

47. Mr Garvey submitted that the question whether the removal of conditions gives rise to a fundamental change is one of fact and degree. The question for the inspector in the present case was essentially whether the removal of conditions which took away the benefit of the Order would effect a fundamental change to the development. The inspector was bound to undertake a three-stage process. First, she should have asked whether the question of fundamental alteration was engaged which was a question of law. Secondly, she was bound to consider whether the proposed change of use was a fundamental alteration, which was a mixed question of law and planning judgment. If and only if the answer to that second question was "no", she had to go on to consider the planning merits – i.e. consider the issues that she had compendiously described as the second main issue.

48. That three-stage approach was reflected in the inspector's decision. First, she had directed herself properly as to the need to consider fundamental change. Secondly, she had applied the law and her planning judgment by reference to the facts of the case and local and national policies. Thirdly, given her conclusion on fundamental change, she was entitled to dismiss the appeal without considering the second main issue. As her conclusion on fundamental change had involved an element of planning judgment, it was only challengeable on rationality grounds and no such challenge had been made.

49. Mr Hawley adopted Mr Garvey's submissions. The inspector had properly asked and answered the question whether the removal of the conditions would amount to a "fundamental alteration" under *Arrowcroft*. In answering that question, she had considered all factors relevant to that question. The claimant's Planning Statement had clearly set out that the claimant proposed to change the use of the land from holiday

accommodation to residential accommodation. The inspector had considered that that proposal was a fundamental change. Having reached that conclusion, she was not required and indeed could not go on to consider any other issues. Her conclusion as to what amounted to fundamental change had involved a judgment that this court was bound to respect in the absence of irrationality or other legal bar.

*Analysis and conclusions*

50. Section 73 is concerned only with changes of conditions. The operational part of the planning permission (the description of what is permitted) endures and cannot be changed. It is plain from the case law that the imposition of a condition altering the nature of what was permitted is unlawful.

51. The rationale for such a conclusion is not hard to discern. A public decision-maker cannot adhere to a description of permitted development while at the same time deciding to impose a condition that is inconsistent with that description. Such a decision would be irrational. To echo the words of Sullivan J in *Arrowcroft*, it is irrational to give with one hand and take away with the other.

52. There was some discussion before me about whether *Finney* and *Arrowcroft* only prohibit conditions that are logically inconsistent with the permitted development, reflecting Sullivan J's reference to "an inconsistent condition" in para 33 of his judgment. If *Arrowcroft* refers to logic, the court is as well-placed as a planning inspector to assess the conditions: there is no scope for an inspector's planning judgment. If, on the other hand, the question is whether the conditions amount to a "fundamental alteration" of the permitted development (to which Sullivan J also refers in para 33 of *Arrowcroft*), the question for the inspector may be one of fact and degree involving planning judgment exercisable by the inspector (subject to public law grounds of intervention). *Finney* refers at para 43 to a "conflict" between the description and a condition which "alters the nature" of what was permitted. I do not need to determine the precise delineation between logic and judgment in the present case: it does not matter.

53. Both *Finney* and *Arrowcroft* concerned the adding of conditions. That was not the issue before the inspector who had to consider the removal of conditions. It is not inevitable or even clear that the removal of conditions gives rise to the same considerations as their addition. In adding conditions, a decision-maker is not permitted to intrude upon the operative part of the permission. It is difficult to see how the removal of a condition could give rise to such intrusion. When a condition is removed, the operative part of the permission remains intact, albeit in an unconditioned way. In the present case, the removal of the relevant conditions would and could have had no effect on the description.

54. Even if the reasoning of *Finney* and *Arrowcroft* applies to the removal of conditions, there is in the present case nothing in the description that is inconsistent with development permitted by the Order. If the section 73 application were allowed, the way in which the development would change is not because anything in the description would be changed but because the conditions denying the benefit of the Order would be removed. Removing the conditions would not be giving with one hand and taking with the other in the sense indicated by *Arrowcroft*. A decision-maker could rationally adhere to the existing description of permitted development while at the same time

deciding to remove the conditions denying the benefit of the Order. As Mr Harwood submitted, whether or not to do so was what the inspector was tasked with confronting. Her function was to consider whether, as a matter of planning judgment, the conditions should be removed.

55. In the present case, the inspector asked herself whether the use of the site for "unrestricted residential uses" would be inconsistent with the description of development restricted to holiday accommodation. She concluded that the change from holiday to residential accommodation would not be consistent with the description. In considering this question, she ought to have taken into consideration that what can be done with the use of the land may not be exhaustively written into the description but may arise by the operation of law.

56. By law (section 55(2)(f) of the Act and the relevant provisions of the Order), the operational part of the permission allowed a developer to use the land for residential purposes if he or she chose to do so. The only bar to using the land for residential purposes was the imposition of conditions denying the benefit of the Order. The removal of that bar would as a matter of fact change the use of the land because the claimant proposes to build residential accommodation. But the removal of the bar cannot possibly lead to any alteration of the operational part of the permission (the description) because the operational part of the permission would remain identical.

57. The inspector in effect treated the conditions as having changed the description, taking the view that the description allowed only restricted use (holiday accommodation) and that it precluded development permitted under the Order (which the inspector called "unrestricted use"). In my judgment, she has thereby curtailed the operation of the Order in a way which could not have been intended.

58. That is a far cry from saying that the claimant should have carte blanche to build houses for permanent residency. Whether he should be permitted to build permanent homes is (as I have said) a matter of planning judgment. Part of that planning judgment is, as the inspector noted, that the site is in a location where the development of unrestricted residential uses is strictly controlled. However, as Mr Harwood submitted, the inspector truncated her judgment by failing to consider the various different elements of the second main issue. Her decision to confine herself to the question of fundamental alteration upon removal of the conditions, rather than to consider all relevant planning considerations, was an error of law.

59. For these reasons, Ground 1 succeeds.

**Ground 2**

*The parties' submissions*

60. In relation to Ground 2, Mr Harwood took the court to the inspector's analysis of condition 21 of the 2015 permission in paras 10 and 11 of her decision. Her view was that condition 21 (which limits any occupant to a total of six weeks in a year) would remain on any new, section 73 permission and that it would restrict the use of the site. However, its enforcement would rely on a register of occupiers being kept. If the section 73 appeal were successful, the condition requiring a register would be removed which would render condition 21 unenforceable. Condition 21 would therefore fall foul

of national planning policy under which unenforceable conditions should not be imposed (see para 56 of the National Planning Policy Framework (2021)). It followed that the effect of allowing the appeal in relation to the 2015 permission would – like the appeal in relation to the 2020 permission – enable the holiday units to be used in an unrestricted way. The inspector concluded that that would not be consistent with the description of the development.

61. Mr Harwood made the point that condition 21 was not replicated in the 2020 permission, so was not among the conditions which would be retained in any new permission granted under section 73. While the application had referred to both previous permissions, and the six-week limit remained on one permission, on any reading the application was not seeking to reinstate that restriction in the new permission. The inspector's analysis of condition 21 showed critical failures to understand the legislative regime and so undermined the overall analysis in the decision letter.

62. Mr Garvey submitted in writing that any condition that had not been removed from the 2015 permission would still have effect. This necessarily included condition 21. Given that the claimant had not sought to remove condition 21 from the 2015 permission, the inspector had considered what effect the removal of condition 20 would have on the remainder of the 2015 conditions. The inspector expressed her planning judgment that condition 21 would be unenforceable as there was an inherent link between conditions 20 and 21. She had thereby reached a planning judgment about condition 20 in the context of the enforceability of condition 21. It is fair to note that Mr Garvey did not press this argument orally but accepted that the inspector's engagement with the purely historic condition 21 was hard to understand.

63. Mr Hawley adopted Mr Garvey's submissions. The inspector's analysis of condition 21 was discrete and did not undermine her reasoning or conclusion in the other parts of her decision. He accepted that the inspector's treatment of condition 21 was (in his words) tangled.

*Analysis and conclusions*

64. Given my conclusion on Ground 1, it is difficult to see how the inspector's overall decision can stand. Her conclusion about condition 21 of the 2015 permission is flawed on account of the same errors of law as Ground 1. However, I wish to make some discrete observations about Ground 2.

65. The inspector dealt with condition 21 because the claimant muddied the waters by applying to change an historic permission. The only material difference between the 2015 and 2020 permissions was that the former contained condition 21. A previous developer had applied to remove condition 21 and had succeeded on the appeal that generated the 2020 permission.

66. Given the previous developer's successful endeavours, the claimant cannot claim with any degree of realism that anyone had at any time thereafter chosen to rely on the 2015 permission rather than to implement the new 2020 permission. The 2015 permission was historic. It was otiose to the inspector's consideration of the substantive planning issues before her. There was no reason to include it in the section 73 application or in the appeal to the inspector. At best, it was a distraction.

67. Give the involvement not only of NSDC but also of the Secretary of State, it would have been open to either or both of those parties to have objected to the claimant raising historic matters or at least to have raised it as an issue. In so far as the inspector felt obliged to deal with the 2015 permission, she did not receive the assistance from the parties that could have been expected.

68. It is however inevitable that the inspector's consideration of condition 21 is legally flawed. It is irrational to conclude (in effect) that a condition that is designed to prevent the site from having the benefit of the Order cannot be removed because its removal would render unenforceable a purely historic condition. Ground 2 succeeds.

**The "preliminary point"**

*The parties' submissions*

69. In relation to the preliminary point, Mr Garvey emphasised that the only material difference between the 2015 and 2020 permissions was that condition 21 was not contained in the 2020 permission. It would be illogical for a developer to treat the 2015 permission as extant when the purpose and effect of the 2020 permission was to remove condition 21. Following the 2020 permission, it was as a matter of law open to the developer to choose whether to implement the new permission or the one originally granted (*Lambeth*, para 11, cited at para 14 of *Finney*, above). It would however have made no sense for the developer to have opted for a permission that undid his success at appeal. It followed that the claimant could not argue that the 2015 permission was anything other than historic.

70. Mr Garvey submitted that it made no sense to deploy section 73 in relation to a purely historic condition. Parliament could not have intended that developers could in effect revive purely historic permissions through the vehicle of a section 73 application. This would lead to confusion for the public and the wider community whose interests the planning system is intended to serve. Mr Garvey pointed to section 73(5), which prevents a section 73 application from being deployed to revive a previous permission by extending the time for the start of the development or the time in which an application for approval of reserved matters must be made. Properly interpreted, section 73 did not look backwards in time.

71. Mr Garvey submitted that the structure of section 73 is that there is "*a* previous planning permission" (emphasis added) to which conditions are attached (section 73(1)). A planning authority is confined on a section 73 application to considering conditions which of necessity attach to a specific grant of planning permission. A permission granted under section 73 will change or remove conditions attached to "the previous planning permission" (section 73(2)). The use of the word "the" connotes the specific, and inevitably single, planning permission to which the conditions had previously attached. There was no scope for two permissions to be the subject of a single section 73 application.

72. Given the limits of section 73 when properly interpreted, the inspector had no jurisdiction to apply section 73 to two permissions and no jurisdiction to apply section 73 to an historic permission. Given that she should not have considered the appeal under section 73 at all, she would inevitably have come to the same conclusion (i.e. not to allow the appeal) even if any error raised by the claimant had not been made. The

court should therefore refuse relief under the well-established test in *Simplex GE (Holdings) v Secretary of State for the Environment* (1989) 57 P&CR 305.

73. Mr Hawley essentially adopted and elaborated on Mr Garvey's submissions.

74. Mr Harwood submitted that it was unfair that this wholly new point about the inspector's jurisdiction had not been raised with her. It was a technical point that had no practical effect: it did not alter the substance of what was applied for or the substance of what would be granted. The section 73 application was clear. The planning system suffered when technical points prevented the proper scrutiny of a planning application in accordance with the proper exercise of planning judgment.

75. Mr Harwood submitted that there was no legislative requirement that a previous permission referred to in a section 73 application be capable of being brought into effect. By virtue of section 6 of the Interpretation Act 1978, words in the singular include the plural unless the contrary intention appears. Section 73(5) was incapable of founding a contrary intention in section 73 and so there was no legislative barrier to seeking a new planning permission under section 73 by reference to two previous permissions.

*Analysis and conclusions*

76. A section 73 application will concern the particular conditions under which development is permitted and those conditions are the conditions attached to a particular planning permission. In considering a particular planning permission, it would not make sense to consider conditions from other planning permissions or to ask whether conditions from other planning permissions should be removed. To this extent, Mr Garvey and Mr Hawley are correct to say that the determination of a section 73 application relates to a single planning permission and concerns only the conditions attached to that single permission.

77. The claimant was not however asking the inspector to amalgamate the two previous permissions into one new permission (and I do not think that the inspector fell into that trap). Rather, the claimant was seeking a decision from the inspector on two different permissions (one historic and the other not historic). It was otiose to ask an inspector to consider the 2015 permission but it does not follow that an inspector must lack jurisdiction to determine the entire appeal.

78. In the present case, it is self-evident that the 2015 permission is historic. That will not necessarily be the case: there may be cases in which the developer has a real and justifiable doubt about whether a permission has been confined to history; or there may be a dispute between the parties to an appeal as to what is or is not historic (as in *Lambeth*: see paras 37, 38 and 41). I am not persuaded that an inspector would always be bound to refuse to consider an appeal in these circumstances, which would be the effect of my holding that there is no jurisdiction. Nor do I regard section 73(5) as necessarily supporting Mr Garvey's submissions because it deals with specific issues of timeliness which may raise different policy considerations.

79. I prefer to reach no generalised or exhaustive conclusions about jurisdiction but to concentrate on the situation that arose in this case.

80. Setting aside condition 21, the inspector was not asked to look backwards in time. Conditions 19 and 20 were identical to the non-historic, operative conditions 17 and 18. It is in my judgment impossible to regard the section 73 appeal as aiming illegitimately to revive a purely historic state of affairs. There was no lack of logic in the scope of the substantive planning issues that the claimant was asking the inspector to decide and no lack of clarity as to what substantive and live issues fell for decision. I am not persuaded that Parliament intended that the entire appeal should be regarded as invalid when the real point (as it seems to me) is that resort to more than one planning permission was otiose rather than illogical or manipulative. As Mr Harwood emphasised, there can be no harm to the planning system or to the public interest should the substantive issues be considered.

81. In these circumstances, I am not persuaded that the inspector had no jurisdiction to consider the appeal but I am also in no doubt that the claimant has suffered unfairness from the point being raised for the first time in this court. He was as a result afforded no opportunity to save the appeal – if it were invalid - and there was no form of fair procedure enabling the claimant to address this point.

82. Irrespective of what has happened in the past, the claimant now accepts, and will have the benefit of this judgment to confirm, that the 2020 permission contains everything on which the inspector should focus. There is no need for an inspector to consider condition 21 and therefore no need for an inspector to consider the 2015 permission which has led to confusion.

83. In my judgment, it would be unfair if the inspector's unlawful decision stood as the last word without the claimant having been afforded an opportunity to put things right in relation to asking the inspector to consider (or rather not to consider) the 2015 permission (which was never intended to add any additional substantive issue). As Mr Harwood submitted, there can be no prejudice to anyone if the appeal were to be reconsidered: there has never been any real doubt about what the claimant wants, which is to use the site for permanent homes. While grateful to Mr Garvey for his thoughtful submissions, I do not regard the preliminary point as preventing me from granting relief.

84. For these reasons, the preliminary point fails, this claim is allowed and I shall quash the inspector's decision.