



Section 73: Why do we (or the Courts) keep getting it wrong?

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Background

Armstrong v SSLUHC

R (Fiske) v Test Valley BC

Have the Courts got it right?

Practical Implications





Background



PART III

CONTROL OVER DEVELOPMENT

Determination of applications

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.



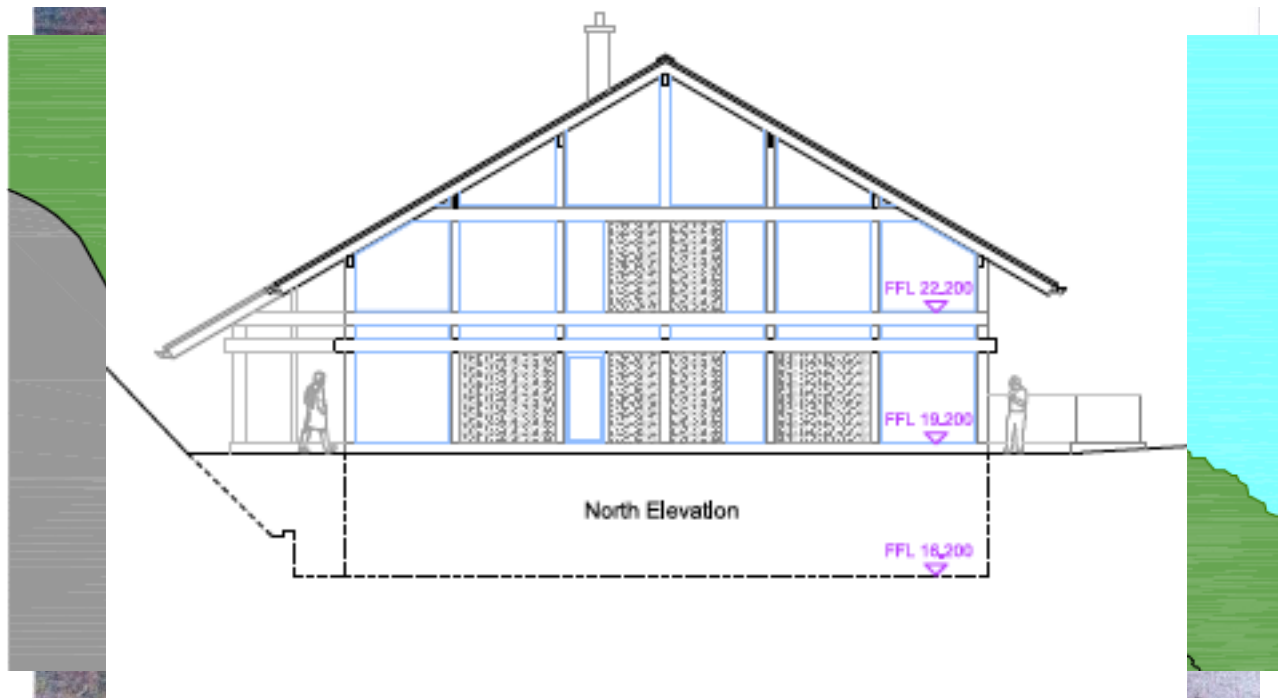
Finney v Welsh Ministers

- *Ratio* – S.73 cannot be used to amend the description of development
- *Obiter* – had description not been amended, conflict between description (100m turbine) and condition (125m turbine) = unlawful



Armstrong v SSLUHC





Section 73: What's in scope?

Minor Material
Amendments?

Fundamental
Alterations?



Section 73: What's in scope?



"In accordance with well-established principles, a condition should only generally be imposed on a planning permission where (amongst other things) it is necessary for the development in question to be acceptable in planning terms. In that sense, **most conditions** could be seen as "**fundamental**" to the **planning permission**. ... A **test that limited the scope** of section 73 to what a decision-maker considered to be a non-fundamental variation **would potentially make a significant inroad into that scope** which is difficult to understand, particularly given that the **merits of any proposed variation would still need to be considered.**" [87]



R (Fiske) v Test Valley BC





Site Layout - Plan Ref no. H.0357_06-H - 20/01/17
Site Location Plan - Plan Ref no. H.0357_01-D - 21/10/15
Site Location Plan - Plan Ref no. H.0357_24-C - 21/10/15
Details - Plan Ref no. H.0357_11-B - Version Deer Fence - 21/10/15
Details - Plan Ref no. 13_XXX-04_01 - 21/10/15
Details - Plan Ref no. DIS000 - 21/10/15
Composite Plan - Proposed - Plan Ref no. 13_XXX-05.1 02 - 17/11/15
Composite Plan - Proposed - Plan Ref no. 13_XXX-05.2 02 - 17/11/15
Details - Plan Ref no. H.0357_28 - Version CCTV - 17/11/15
Details - Plan Ref no. H.0357_03-D - Version screened zone - 05/06/17



Fiske: Key conclusions on law

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

"As to whether restriction 2 also exists i.e. a second, wider, restriction i.e. no fundamental alteration to the permission as a whole (even absent a conflict with the operative wording), Finney §29 suggests that there is such a restriction, based on Arrowcroft §33. Moreover, the parties in this case agree that there is such a restriction. In these circumstances, I proceed on the basis that there is a restriction 2, despite the doubts cast on that in Armstrong..." [126]

(4) Restriction 1 is not limited to a case where the conflict or inconsistency with the operative wording is fundamental; it suffices that there is any conflict; it encompasses the position where the condition alters the nature and extent of the grant i.e. as found in the operative wording." [124]

Fiske: applying law to the facts

- Conflict between description of development and conditions.
- Because description gave “*permission for a solar farm and, within that, a substation.*” And conditions attached to s.73 Permission required compliance with approved plans which did not permit construction of a substation.
- S.73 Permission unlawful on that basis alone.
- Also, removal of substation and prohibition upon its construction = fundamental alteration = unlawful.



Section 73: Have the Courts got it right?



The current position



Cannot amend description of development (*Finney*)



Cannot amend conditions if it results in *any* conflict or inconsistency with description of development (*Fiske*)



Can make minor material amendments (so long as no conflict) (*Armstrong*)



Possibly can make fundamental alterations (so long as no conflict) (*Armstrong*, but see *Fiske*)

Have the Courts got it right?

- No power under s.73 to amend description of development (*Finney*)
- Not restricted to minor material amendments (*Armstrong*)
- Not restricted to non-fundamental amendments (*Armstrong*)
- Cannot amend conditions if it results in *any* degree of conflict or inconsistency with description of development (*Fiske*)





Section 73: Practical Implications



Minor Material Amendments?



Fundamental Alterations?



Increase in s.73 consents?



Still want to try your luck?





Will LURA help me?



Section 73: Why do we (or the Courts) keep getting it wrong?

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Ask us more questions:

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