INTRODUCTION

Jonathan Darby

Welcome to this week's Planning, Environment and Property newsletter. It has been another busy week, with a number of relevant announcements to digest. The implications (and likely practical effect) of the Government's 'build, build, build' message are still being digested, whilst minds also turn towards predictions for the contents of the Treasury's planning 'policy paper' (due to be published later this month). I also note that the long-delayed National Infrastructure Strategy is now due to be published in the autumn.

This week's offering includes articles from Richard Harwood QC (on zoning); David Sawtell (on the definition of 'exceptional circumstances' in the context of rectification of the Land Register); and John Pugh-Smith (on section 73).

As ever, we hope that you enjoy the read!

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ZONING IN

Richard Harwood QC

For a variety of reasons it has been seen as desirable to find means of avoiding having to have a planning application determined by a local authority. Those efforts continue to this day, but it is worth looking back at the last 73 years of measures to do just that. There are 19 other ways of getting the planning consent.

(i) Planning permission could be granted by a general development order, what is now the General Permitted Development Order. Introduced by the Town and Country Planning Act 1947 itself this authorizes classes of development, sometimes subject to a procedure for the prior approval of details by the local planning authority. These are used widely, sometimes for defined levels of extension to buildings, and in some cases in a relatively uncontrolled fashion, for changes of use of buildings, or works by statutory undertakers on their own land.

(ii) the making of a special development order by the Secretary of State. A special development order is 'applicable only to such land or descriptions of land as may be specified in the order'. These were used widely for new towns and urban development corporations. The New Towns Special Development Order 1977 grants planning permission for development in accordance with proposals approved by the Secretary of State under section 7 of the New Towns Act 1981. Special development orders were also made for individual urban development corporations, to grant planning permission for their proposals which has been approved under the Local Government, Planning and Land Act 1980. These included London Docklands. More recent use of the power has been less heroic. The latest order being the Town and Country Planning (Car Park D Ebbsfleet International Station) (EU Exit) Special Development Order 2019.

(iii) Additionally the Secretary of State or Welsh Ministers may grant deemed planning permission under the Town and Country Planning Act 1990 s 90 where authorisation for the development is given under other mechanisms. Originally contained in the 1947 Act, this is used, for example, when electricity generation consents have been granted, and has been extended to the Transport and Works Act 1992 for railway and water based projects.

(iv) A Planning Inquiry Commission, introduced by the Town and Country Planning Act 1968, is a half-forgotten and possibly mythical creature. The Secretary of State may constitute a Planning Inquiry Commission to inquire into and report into any called-in application, planning appeal, proposed deemed planning permission for development by a local authority, National Park authority or by statutory undertakers or any development by a government department.

There has never been a planning inquiry commission. Indeed, there is no prospect of one either. However when the Conservative front bench put forward amendments to repeal them in 2008, Ministers resisted on the basis that there were other things to do.

(v) An enterprise zone scheme under the Local Government, Planning and Land Act 1980, Sch 32 might grant planning permission for development or a class of development specified in the scheme.

(vi) Simplified planning zones made by the local planning authority or the Secretary of State were introduced by the Housing and Planning Act 1986. Any person may initiate a zone which would grant class consents. Objections would be considered by an Inspector before the authority or Minister's decision. They have had limited use, the

most prominent current SPZ being on the Slough Trading Estate

(vii) Local development orders initiated by the local planning authority were introduced by the Planning and Compulsory Purchase Act 2004. They grant planning permission of any specified class on all of the land in the authority's area, part of it or on a specified site. They are approved by the local authority and since 2013 there has been no power of ministerial call in in England. Little use has been made of them, although they might be more popular if someone could apply to the authority for an order to be made, taking much of the work off the council.

(viii) Section 76A inquiries for major infrastructure projects in England were introduced by the Planning and Compulsory Purchase Act 2004. This is a specific call-in procedure for an application for planning permission or for the approval of a authority required under a development order 'if the Secretary of State thinks that the development to which the application relates is of national or regional importance'. Whilst in place, has not been used in practice and with the revocation of its procedural rules in April 2015, it won't be.

(ix) A further consent is for urgent Crown development applications made to the Secretary of State under the Town and Country Planning Act 1990, s 293A, which were brought in when Crown land became subject to planning control in the Planning and Compulsory Purchase Act 2004.

(x) Development consent orders for nationally significant infrastructure projects were introduced by the Planning Act 2008. Applications are made to the Minister, considered by an inspector or inspectors at an examination before a Ministerial decision. These have been successful for two reasons. Firstly if a scheme, such as an airport or nuclear power station, meets certain criteria, the DCO regime must be used. But secondly, it has worked. It brings together a series of provisions such as planning consent, compulsory acquisition and highways orders and takes it through a rigorous and timetabled procedure. If you just needed planning permission, you might not use it. However development consent orders would be a potential means for dealing with and driving forward new settlements, provided that their use was voluntary.

(xi) Neighbourhood development orders brought in by the Localism Act 2011 and initiated by a parish council or a designated neighbourhood forum. Like local development orders these can grant planning permission for a class of development or specific development in all or part of the neighbourhood area, or on a specific site. They are subject to independent examination and a referendum.

(xii) Community right to build orders are a species of neighbourhood development orders, again introduced by the Localism Act. They are orders applied for by community organisations for a specified development on a specified site.

(xiii) The ability to make planning applications directly to the Secretary of State in England in the areas of underperforming local planning authorities was introduced by the Growth and Infrastructure Act 2013. Despite being amended by the Housing and Planning Act 2016, these have not taken off. Popularity of this mechanism was not helped by the first application, for 220 dwellings at Hospital Lane Blaby, being refused by the Inspector. There are a lot of schemes which might be approved by a local authority which would not get past a Planning Inspector.

(xiv) Similarly applications may be made to the Welsh Ministers in the areas of underperforming local planning authorities,

introduced by the Planning (Wales) Act 2015.

(xv) Applications for developments of national significance which must be made to the Welsh Ministers, again introduced by the Planning (Wales) Act 2015.

(xvi) The Infrastructure Act 2015 includes powers for mayoral development orders in London. These would allow the Mayor of London to grant planning permission on the application of, and with the agreement of the local planning authority. The necessary secondary legislation has not been made and the power has not been brought into force.

(xvii) Permission in principle may be granted by a local planning authority, or on appeal by the Minister, on application. This was introduced by the Housing and Planning Act 2016, and has had some use.

(xviii) Again under the 2016 Act permission in principle may also be granted by the inclusion of a site in Part 2 of a Brownfield Land Register. Whilst all areas have Part 1 registers identifying brownfield land, few have used them to grant permission.

(xix) Finally, going back to the past, planning consent may be granted by an Act of Parliament. However private Bills proved slow and prone to sabotage. Hybrid Bills, such as the High Speed 2 and Crossrail Acts, can be used for very major projects, although it is fair to say that the procedures are not fit for purpose.

With the exception of Acts of Parliament and DCOs, these are addressed in more detail in Planning Permission Richard Harwood QC, chp 17, 18 and 26; Planning Policy Richard Harwood QC and Victoria Hutton, chp 8 which are presently offered at 20% off from Bloomsbury Professional.

This article is based on a slightly more interesting podcast which can be listened to here.

RECTIFICATION OF THE LAND REGISTER, MORTGAGES AND THE EXCEPTIONAL CIRCUMSTANCES TEST: *DHILLON v BARCLAYS BANK PLC AND THE CHIEF LAND REGISTRAR* [2020] EWCA CIV 619

David Sawtell

The recent Court of Appeal decision in *Dhillon v Barclays Bank Plc and the Chief Land Registrar* [2020] EWCA Civ 619 examines the definition of 'exceptional circumstances' in the context of rectification of the Land Register. The case provides important guidance on this test, which goes to the heart of the system of land registration. It also provided the Court of Appeal (consisting of Coulson LJ, who gave the only substantive judgment, together with Patten and Rose LJJ) with an opportunity to comment on the Law Commission's 2018 report on the Land Registration Act 2002.

At the outset, however, it should be noted that there were two unusual features to the facts of the case. Both the registered proprietor of the property, Mrs Dhillon, and the mortgagee, Barclays Bank plc, were uninvolved in a fraud conducted by another party. Secondly, if Mrs Dhillon's application had succeeded, she would have acquired a valuable property free of a mortgage that she would not have been able to purchase herself. While the clarification of the approach to be adopted in applying the exceptional circumstances test is welcome, the facts of the case may well provide little practical guidance as to how it is to be applied in the future.

The background facts

Mrs Dhillon lived at 47 Moresby Road. By 1999, she had acquired the opportunity to buy the property under the Right to Buy scheme, but did not have the means to pay the purchase price. In 2002, however, someone forged her signature and paid the purchase price for the property, which was put into her name (the first transfer).

Eleven days later, the property was transferred again, with a forged signature, to a company (Crayford Estates Limited) which charged the property to a lender (the second transfer). The trial judge treated both of those conveyances as void, a determination that was not challenged by the parties (NRAM v Evans [2017] EWCA Civ 2013; [2018] 1 WLR 639).

Crayford Estates Limited was registered as the legal proprietor and the charge was registered. A few days afterwards, the mortgage loan was re-financed with a mortgage from Woolwich Plc, now Barclays Bank Plc, which was granted a first legal charge over the property.

Crayford Estates was struck off the Register of Companies and the property vested in the Crown as *bona vacantia*. The Crown disclaimed the property and it was escheated.

Mrs Dhillon applied to the court to have the property vested in her name. On 15 November 2010, pursuant to an Order of Master Moncaster, she was registered as proprietor of the property, but subject to the Barclays charge.

In 2016, Mrs Dhillon issued proceedings seeking rectification of the Land Register so as to remove the Barclays charge. The Chief Land Registrar filed a Defence asserting that, because there were 'exceptional circumstances' within the meaning of paragraph 3(3) of Schedule 4 of the Land Registration Act 2002, there should be no rectification of the Register. This was the central issue at trial and on appeal.

The matter came before His Honour Judge Pelling QC, sitting as a Judge of the High Court ([2019] EWHC 475 (Ch)). In the Court of Appeal, Coulson LJ noted that the two most significant findings of the first instance judge were that (i) Mrs Dhillon could not have afforded to buy the property; and (ii) the signatures on the two transfers were forged and not put there with her authority.

The trial judge rejected her claim for rectification. At [68]-[72], he held that Mrs Dhillon ought not to be in a better position than Crayford Estates; she could not have been able to acquire the property herself in the first place.

It was an important point on appeal that Mrs Dhillon was *"seeking to wind the clock back to a point in time between the two fraudulent transfers"* ([34]); she wanted to rely on the first fraudulent transfer (into her name), escaping the consequences of the second fraudulent transfer (into the name of the company, secured by mortgage lending). Coulson LJ noted that, *"it would be contrary to common sense, and any notion of justice, to consider the question of exceptional circumstances, and perhaps more particularly whether or not the non-rectification of the Register was justified, without having regard to that fact."*

The Land Registration Act 2002 and the policy of rectification

Cheshire and Burn's Modern Law of Real Property (18th edition, OUP, 2011) states that, *"The fundamental principle of the system of registration of title is that the register is conclusive as to the legal title of the registered proprietor to the estate that is registered in his name."* (p.1079). Both the (now repealed) Land Registration Act 1925 and the Land Registration Act 2002 have a mechanism to cure defects on the Land Register, along with provisions for a right of indemnity (i.e. compensation) if anyone suffers loss as a consequence of its rectification. As Rimer LJ noted in *Chief Land Registrar v Franks* [2011] EWCA Civ 772, [2012] 1 WLR 2428 at [25], *"The essential purpose of the scheme created by the Act is to provide a system of state-guaranteed registered title."* The case of *Dhillon* engaged two of the three basic principles of the system of land registration: (1) the mirror principle, namely that the Register provides an accurate and complete reflection of property rights in relation to a piece of land; and (2) the insurance principle, that if the register is shown to be incorrect, then those who suffer loss as a result are compensated. (The third principle, the curtain principle, that the Register does not record beneficial ownership of land, was not in play in this case).

Alteration and rectification of the Land Register therefore comprise an important part of the system of land registration. Section 58(1) of the Land Registration Act 2002 states that, *"If, on the entry of a person in the register as the proprietor of a legal estate, the legal estate would not otherwise be vested in him, it shall be deemed to be vested in him as a result of the registration."* This is the title promise. Title guarantee is, however, qualified: the Land Register may be altered in certain circumstances. The extent to which a registered proprietor's title to land may be challenge (the 'indefeasibility' question) and any resulting compensation, or indemnity, if the Register turns out to be wrong go to central aspects of a land registration system.

Schedule 4 of the Land Registration Act 2002 sets out a regime for the alteration of the Register. It distinguishes between alteration and rectification. The latter is a subset of alteration which involves the correction of a mistake, where the alteration prejudicially affects the title of a registered proprietor (paragraph 1). The distinction between alteration and rectification is important as rectification of the Register, or a decision by the Registrar or the court not to exercise the power to rectify it, triggers a right to an indemnity,

Paragraph 2(1)(a) of Schedule 4 gives the court the power to make an order for alteration to correct a mistake. Paragraph 3 applies to the court's powers under paragraph 2 "so far as relating to rectification". The relevant parts state:

2) *If alteration affects the title of the proprietor of a registered estate in land, no order may be made under paragraph 2 without the proprietor's consent in relation to land in his possession unless —*
   (a) he has by fraud or lack of proper care caused or substantially contributed to the mistake, or
   (b) it would for any other reason be unjust for the alteration not to be made.
3) *If in any proceedings the court has power to make an order under paragraph 2, it must do so, unless there are exceptional circumstances which justify its not doing so.*

Schedule 4, therefore, imposes a higher test to rectify the Register, which is applicable where the correct of a mistake prejudicially affects the registered proprietor's title. It then raises the bar still higher if that proprietor is in possession of the land and he or she does not give consent: in those cases, that proprietor must have either contributed to the mistake by fraud or lack of proper care, or it would be *'unjust'* for the alteration not to be made. If the proprietor is not in possession, then paragraph 3(3) requires the court to make an order under paragraph 2 unless exceptional circumstances justify not doing so.

This gradated response to alterations to the Register, with a different test being applied depending on the level of prejudice to the registered proprietor and an examination of his or her culpability if they are in possession, has resulted in a number of decided cases. The system of alteration and rectification was also the subject of Chapter 13 of the Law Commission's recent report, *Updating the Land Registration Act 2002* (Law Com No 380), published in July 2018. Coulson LJ noted at [51] that there are difficulties with the current wording of the test, highlighting in particular the *"fine"* distinction between 'unjust' and 'exceptional circumstances', noting that the former is a higher hurdle to surmount (see, in particular, M Dixon, 'Updating the Land Registration Act 2002: Title Guarantee, Rectification and Indefeasibility' [2016] Conveyancer and Property Lawyer 6, 423 at 425). The Law Commission's draft Bill would make significant changes to Schedule 4, making it more prescriptive with added length and detail.

The nature of Mrs Dhillon's title

Coulson LJ briefly considered what the nature of Mrs Dhillon's title was. When the company, Crayford Estates, was registered as proprietor, it acquired the title of the vendor (Hackney). When the mortgage was granted to Barclays, the bank acquired the registered charge and the company was left with the equity of redemption. When

the company was struck off, the company's title escheated to the Crown. When the Moncaster vesting order pursuant to section 181 of the Insolvency Act 1986 was made, the freehold title, subject to the bank's charge, was vested in Mrs Dhillon. What was vested was the equity of redemption: no new freehold was created. The escheat had no effect on the registered charged.

Exceptional circumstances

The appeal was principally concerned with the question of 'exceptional circumstances' within the meaning of paragraph 3(3) of Schedule 4 of the Land Registration Act 2002. Coulson LJ endorsed the test given by Morgan J in *Paton and another v Todd* [2012] EWHC 1248 (Ch); [2012] 2 EGLR 19, at [66]-[67]. That case was concerned with the almost identically worded provision in paragraph 6 of Schedule 4 (which deals with the Registrar's power to alter the Register). In that case, the registered proprietor was not in possession; pursuant to paragraph 6(3), the application for rectification had to be approved unless there were exceptional circumstances that justified a contrary decision. Morgan J stated the following.

- As with section 82(1) of the Land Registration Act 1925, a residual discretion as to rectification was conferred on the court.
- In a rectification case, the court must adopt a structured approach. Firstly, the paragraph imposes a duty to rectify the Register. Secondly, it does not apply in a case where there are exceptional circumstances which justify not rectifying the Register.
- The court must ask itself two questions: *"(1) are there exceptional circumstances in this case? and (2) do those exceptional circumstances justify not making the alteration?"*
- 'Exceptional' is an ordinary English word. It describes a circumstance which is such as to form an exception, which is out of the ordinary course. To be exceptional a circumstance need not be unique or unprecedented, or very rare but it cannot be one that is regularly, or routinely, or normally encountered.

At [87], Morgan J disagreed with the reasoning of the deputy adjudicator because although there were exceptional circumstances (the first part of the test), there was insufficient evidence of the consequences for the parties of an alteration of the Register (the second part of the test). As Coulson LJ noted at [46] in Dhillon, the matter was remitted to the adjudicator *"to consider the practical effect for each party of both altering and not altering the Register."*

The Law Commission report was considered by Coulson LJ. He noted, however, that the judge had to apply the law as it stands. He also observed that the Law Commission's principal concern was to protect those who have been deprived of a title by fraud, which was *"emphatically"* different to the instant case. Coulson LJ then went on to criticise the proposal that the whole concept of 'exceptional circumstances' should be done away with. His remarks at [59] on the Law Commission's suggestion that the right to an indemnity should assuage concerns about injustice is worth considering:

> *"More significantly, when applied to the facts of this case, it would mean that the Law Commission would endorse Mrs Dhillon's right to acquire the freehold of the property unencumbered (without ever having paid a penny piece for it), and that BB [Barclays Bank] should not worry themselves about that result, because they will be indemnified for their loss by the tax-paying public. Such a conclusion might be said to raise eyebrows, not least amongst that same tax-paying public."*

Coulson LJ held that the judge was correct to focus on Mrs Dhillon's position: after all, the exceptional circumstances arose from her position ([63]). On the other hand, Barclays' position was unexceptional.

Coulson LJ adopted the two-stage test in Paton and applied them. There were exceptional circumstances which were not routinely or normally encountered. Secondly, they justified

non-rectification of the Register, not least because it would create a *"windfall"* for Mrs Dhillon, giving her *"the unencumbered freehold of a million-pound property she had never owned and could never have afforded."*

The importance of statements of case

The Court of Appeal issued a reminder to parties that statements of case are still an important part of civil procedure. Coulson LJ noted at [19] that if the "pleadings become forgotten as time goes on", this can lead to the trial becoming "something of a free-for-all", a result that is "not appropriate". He cited the warning given by David Richards LJ in *UK Learning Academy Ltd v Secretary of State for Education* [2020] EWCA Civ 370 at [47], where he stated that, *"the statements of case play a critical role in civil litigation which should not be diminished."* David Richards LJ made the following points in that case.

- Statements of case should identify the issues to be determined. This allows parties to direct their evidence and their submissions accordingly.
- They allow the court to keep the trial within "manageable bounds". Court time is not wasted, and the judge knows which issues to concentrate on.
- Technical points should not stand in the way of a just disposal of a case. A judge may allow a departure from a pleaded case, although it is good practice to amend the pleading itself, even at trial.

In the *UK Learning Academy* case, the trial judge had reminded the parties at the pre-trial review and at trial that statements of case, at the very least, identify the issues to be determined. This led to difficulty in managing the trial, and on appeal, the appellant ought to run a different case to the one advanced at trial (relying on promissory estoppel as opposed to an estoppel preventing the respondent from relying on a 'no oral modification' clause).

In the *Dhillon* case, counsel for the Chief Land Registrar attempted to argue that the claim was not a claim for rectification, but was merely a claim for alteration of the Register under rule 126 of the Land Registration Rules 2003. Coulson LJ held at [18] that this submission was not open to the Chief Land Registrar. At [19] he noted that *"The question of the relief being claimed by Mrs Dhillon was central to this case. If the CLR had wanted to say that this was not a case of rectification at all, then it was required to plead such a contention."*

Both *Dhillon* and the *UK Learning Academy Case Ltd* case, therefore, stand as clear reminders of the need to identify the issues to be determined in the pleadings. Failure to do so could lead to problems both at trial and on appeal.

Conclusion

As the law currently stands, the test for rectification and exceptional circumstances is open textured. *Dhillon* gives us welcome new clarity on the application of the *Paton v Todd* test. *Dhillon* also encourages an approach that does not simply look to the indemnity provisions of the Land Registration Act 2002 so as to avoid injustice. Coulson LJ's comments on the Law Commission's proposals should also give some pause for thought. Given the unusual facts of *Dhillon*, however, the authors of their draft Bill may well not be too discouraged. It is likely that the question of rectification of the Register will continue to exercise practitioners, academics, the Registrar and the courts for some considerable time to come, whether or not Parliament choose to legislate.

SECTION 73 AND ALL THAT

John Pugh-Smith

The Governmental underlying goal behind its latest reform proposals, reflected both in the new Business & Planning Bill and the forthcoming Planning White Paper, is to get the system working more efficiently and effectively as the country emerges from the Covid Pandemic's effects. However radical an agenda it is claimed to be, what will it achieve in terms of ensuring that existing permissions can be successfully implemented; and in that regard, how can it statutorily engage with the pragmatic application of Section 73 of the Town and Country Planning Act 1990 over the last 30 years in a body of case law that has included, most recently, the Supreme Court's decision in *Lambeth LBC v Secretary of State for Housing Communities and Local Government* [2019] UKSC 33 and its effective endorsement, by its rejection of a permission application to further appeal early into the Lockdown, of *Finney v Welsh Minsters* [2019] EWCA Civ 1868? Is this a timely opportunity for Parliament to intervene by introducing a new statutory power to allow material amendments to existing planning permissions?

It will be recalled that the facts of *Lambeth* arose from a series of section 73 consents, the last of which (a 2014 consent) failed to restate any of the conditions from the previous consents, including the restriction on the sale of goods. Through a subsequent CLEUD application the then vexed issue arose. Could the premises now lawfully be used for an unrestricted retail use? Overturning the Court of Appeal's rejection of the Council's challenge to the Certificate, granted on appeal, the Supreme Court held that the 2014 consent needed to be interpreted at face value; for it was a consent for the variation of one condition only, with nothing to indicate that any other conditions were discharged or removed. However, by applying this reasoning to, in effect, rescue the Council[1] from a classic pitfall associated with section 73 the (presumably unintended) consequence of this judgment is that it introduces potential uncertainty about the interpretation, and standalone nature, of individual section 73 consents. Indeed, *Lambeth* raises the concern that, in situations where the operative permission is a section 73 consent, there may be circumstances where there are still operative conditions from historic permissions notwithstanding that they are not included in the implementing section 73 consent.

On the other hand, with *Finney*, the issue was whether an amendment in the stated height of wind turbines (from 100 to 125 metres) in the development description of the decision notice[2] was within or outside the scope of section 73, and, given the wording of the condition for which amendment was being sought.[3] While, again fact specific,[4] and, perhaps necessary for this type of EIA sensitive renewable energy project, the (presumably unintended) consequences of the Court of Appeal's decision are notable for two reasons. First, is the increasing practice for LPAs to set out lengthy descriptions of development, whether requested or not. Secondly, the outcome of *Finney* is at odds with how the more relaxed use of section 73 had been increasingly used, with seeming judicial endorsement by the High Court in *R (Wet Finishing Works Ltd) v Taunton Deane Borough Council* [2017] EWHC 1837 (Admin). There, Singh J dismissed an argument that the LPA was prohibited from granting a section 73 application with an amended condition allowing construction of 90 dwellings when the "operative

1 See further, my previous PEP Newsletter article Section 106s and the 'technical traps' submission: https://1f2ca7mxjow42e65q49871m1-wpengine.netdna-ssl.com/wp-content/uploads/2020/04/PEPNewsletter_23April2020.pdf

2 *"Installation and 25 year operation of two wind turbines, with tip height of up to 100M, and, associated infrastructure including turbine foundations, new and upgraded tracks, crane hard standings, substation, upgraded site entrance and temporary construction compounds (major development)"*

3 Condition 2: *"The development shall be carried out in accordance with the following approved plans …"*

4 The developer was seeking a blade increase tip to 125 metres to introduce a different type of turbine.

part"[5] of the original permission had allowed only 84 units.[6] However, by reaffirming previous law on the scope of section 73, implying that the *Wet Finishing Works* approach was wrong[7] (to the extent that it held otherwise) – *Finney's* significance lies in its practical implications for the use of section 73 to vary schemes going forward and the current lack of real flexibility within the planning system generally.

Both *Lambeth* and *Finney* add to a growing body of case law on a statutory provision which is now 33 years old,[8] which speaks volumes about the problematic ways in which this provision is still misunderstood and misapplied in practice. These problems stem from two underlying causes. The first is between the odd relationship between the scope of Section 73 and its legal effects. This starts from the very title of the provision: *"Determination of applications to develop land without compliance with conditions previously attached."* That is a misnomer in itself. Rather, at law, while the provision grants the power to vary or remove conditions on an existing permission it results in a free-standing planning permission independent of the original consent. Secondly, is the statutory oddity that the only other statutory power to amend existing planning permissions is confined to non-material amendments under Section 96A, which, at law, is not a grant of planning permission (see *R (Fulford Parish Council) v York City Council & Persimmon Homes (Yorkshire) Limited* [2019] EWCA Civ 1359).[9]

So, the obvious "fix" would be for the Government now to use its latest round of planning reforms to introduce the new statutory power to allow material amendments to existing planning permissions. Like so many practitioner-led initiatives it could be done relatively simply by putting the ability to make 'minor material amendments' on the same statutory footing as Section 96A, ironically, another "quick fit" provision to ease the planning system during another economic recession back in 2008.[10] At law, and, in effect, it would be a supplementary decision that amends the original consent rather than the creation of a fresh consent (as with Section 73).

Such a resolution would both remove the current statutory anomaly between non-material amendments and minor material amendments, and, the present need to use Section 73 to amend schemes on a substantive basis. Indeed,

5 See *R v Coventry City Council ex parte Arrowcroft Group plc* [2001] PLCR 113 @ 35 (Sullivan J):
"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."
See also *R (Vue Entertainment Ltd) v City of York* [2017] EWHC 588 (Admin) @ 15-16 (Collins J):
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.

6 Following *R v Coventry City Council ex parte Arrowcroft Group plc* @ 33:
"… 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."

7 Lewison LJ @ 46:
*In short, I consider that in **Vue** Collins J was correct in his analysis of the scope of section 73. To the extent that Singh J held otherwise in **Wet Finishing Works**, I consider that he was wrong. It follows, in my judgment, that the judge was also wrong in following Singh J (although conformably with the rules of precedent it is quite understandable why he did so."*

8 Originally Section 31A was added to the Town and Country Planning Act 1971 by the Housing and Planning Act 1986 (s.49) with effect from 7th January 1987 and re-enacted as Section 73 in the initial consolidation through the Town and Country Planning Act 1990.

9 Lewison LJ @ para. 24
See also the PPG: https://www.gov.uk/guidance/flexible-options-for-planning-permissions
N.B. *"Applications under **section 96A of the Town and Country Planning Act 1990** do not fall within the range of applications for which **section 78 of the 1990 Act** grants a right of appeal. The applicant would need to submit a planning application to seek approval for the proposed amendments".* [Paragraph: 012 Reference ID: 17a-012-20140306]

10 Introduced by the Planning Act 2008 (s.190(2)) with effect from 1st October 2009.

addressing matters in this way could then enable Section 73 consents to be published on a clearer basis and with less complexities arising from overlapping Section 106 planning obligations.[11] It might even reduce the number of reported cases, articles and webinars on the subject?

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11 See, again ,my previous article *"Section 106s and the 'technical traps' submission."*

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Richard specialises in planning, environment, public and art law, appearing in numerous leading cases including SAVE Britain's Heritage, Thames Tideway Tunnel, Chiswick Curve, *Dill v SoS* and Holborn Studios. Recent cases include housing, retail, minerals, environmental permitting, nuisance, development consent orders, and development plans. He is a case editor of the Journal of Planning and Environment Law and the author of Planning Permission, Planning Enforcement (3rd Edition pending) and Historic Environment Law and co-author of Planning Policy. He is also a member of the Bar Library, Belfast. To view full CV click here.

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John is a recognised specialist in the field of planning law with related environmental, local government, parliamentary and property work for both the private and public sectors. He is also an experienced mediator and arbitrator and is on the panel of the RICS President's appointments. He is a committee member of the Bar Council's Alternative Dispute Resolution Panel, an advisor to the All Party Parliamentary Group on ADR, one of the Design Council's Built Environment Experts and a member of its Highways England Design Review Panel. He has been and remains extensively involved in various initiatives to use ADR on to resolve a range of public sector issues. To view full CV click here.

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David specialises in substantial real property, construction and development disputes, as well as insolvency, commercial and company law work related to the same. His work frequently has an international edge, involving cross border and overseas transactions and disputes, and has a growing appellate practice. He appears regularly in the Chancery Division, Upper Tribunal, and the First Tier Tribunal (Property Chamber) in respect of both residential leases and land registration, and has considerable experience of commercial leasehold disputes. He is instructed as leading junior counsel by a core participant in the Grenfell Tower inquiry. To view full CV click here.

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Jon is ranked by Chambers & Partners as a leading junior for planning law and is listed as one of the top planning juniors in the Planning Magazine's annual survey. Frequently instructed as both sole and junior counsel, Jon advises developers, consultants, local authorities, objectors, third party interest groups and private clients on all aspects of the planning process, including planning enforcement (both inquiries and criminal proceedings), planning appeals (inquiries, hearings and written representations), development plan examinations, injunctions, and criminal prosecutions under the Environmental Protection Act 1990. Jon is currently instructed by the Department for Transport as part of the legal team advising on a wide variety of aspects of the HS2 project and has previously undertaken secondments to local authorities, where he advised on a range of planning and environmental matters including highways, compulsory purchase and rights of way. Jon also provides advice and representation in nuisance claims (public and private), boundary disputes and Land Registration Tribunal matters. To view full CV click here.

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