R. v. LEICESTER CITY COUNCIL, EX P. POWERGEN U.K. LIMITED

COURT OF APPEAL (Morritt, Schiemann and Potter L.JJ.): May 19, 2000[1]

(2001) 81 P. & C.R. 5

H1 *Town and country planning—Outline permission—Reserved matters—Section 73 of the Town and Country Planning Act*

H2 On January 25, 1995, the respondent granted outline planning permission for the redevelopment of land at Raw Dykes Road, Leicester ("the site") for retail, business, petrol filling station, public house/restaurant and open space uses. Condition 1 on that permission required an application for approval of reserved matters to be made within three years of its grant. It also required the development to be begun within five years from the date of the grant, or if later, within two years from the final approval of any reserved matters. Condition 2 required particulars of reserved matters to be submitted to and approved by the respondent before the development was begun. On January 8, 1998, an application for approval of reserved matters was submitted in respect of the foodstore. On January 12, 1998, the applicant applied under section 73 of the Town and Country Planning Act 1990 ("TCPA") to extend the time limit for the submission of reserved matters to four years. On January 14, 1998, the respondent wrote to the applicant advising that unless an application for approval of reserved matters in respect of the rest of the site was received by January 25, 1998, the outline permission would lapse. The applicant did not submit such an application. The application for approval of reserved matters as regards the foodstore was approved on May 20, 1998. On August 3, 1998, the applicant applied under section 73 for a variation of condition 2 so as to enable the reserved matters referred to in condition 1 to comprise only those matters relevant to any part of the site which the applicant wished to develop at any time. On March 9, 1999 the respondent refused both section 73 applications. The application in respect of condition 2 was refused because allowing it would allow work to begin on the foodstore with reserved matters approval, which would be contrary to changed shopping policy. The applicant sought the judicial review of the refusal of the section 73 application in relation to condition 2. Safeway, the second respondent, appeared as operator of a foodstore whose turnover would be affected by the proposed foodstore. Dyson J. dismissed the application (*see 80 P. & C.R. 154*).

H3 **Held**, dismissing the appeal, that first, it was plain from an examination of section 92 of the TCPA that, absent any specification of separate periods under section 92(5), in that section "reserved matters" refers to every matter reserved by the outline planning permission for subsequent approval of the authority and "development" refers to the development as a whole. Either the permission granted by the respondent echoed that section faithfully or conditions having that effect were to be implied under section 92(3). Further, in construing the permission in its context it was clear that throughout the whole document "development" referred to development of the whole site. Second, on the facts of the present case it was not possible to show that the doctrine of legitimate expectation operated so as to entitle the applicant to proceed to build the foodstore. Third, the effect of granting a new permission in the terms sought by the applicant would be to enable a development to proceed after the expiry date of the permission. The authority was not prevented from taking into account the fact that the earlier permission had reached its expiry date. Current

[1] Paragraph numbers added by the publishers.

planning policy and facts were to be taken into consideration when deciding whether or not to permit condition 2 as proposed by the applicant, the effect of which would be to permit the foodstore development. There was nothing irrational in the respondent refusing, after the expiry of the relevant time limit, to grant a permission pursuant to a section 73 application in circumstances where the relevant policies had altered.

H4 **Legislation construed:**
Town and Country Planning Act 1990, sections 73 and 92.

H5 **Cases referred to:**
(1) *Pye v. Secretary of State for the Environment* [1998] 3 P.L.R. 72.
(2) *R. v. London Docklands Development Corporation, ex parte Frost* [1996] 73 P. & C.R. 199.

H6 **Appeal** by Powergen U.K. Ltd against the refusal of an application for judicial review by Dyson J. of a refusal by Leicester City Council dated March 9, 1999, for an application under section 73 of the Town and Country Planning Act 1990 to vary a condition on a planning permission dated January 25, 1995 for a mixed use development on land at Raw Dykes Road, Leicester. The second respondent was Safeway Stores Ltd, an interested party.

John Taylor, Q.C. and *Vincent Fraser* for the applicant.
Tobias Davey for the first respondent.
Duncan Ouseley, Q.C. and *Michael Redman* for the second respondent.

SCHIEMANN L.J.:

Introduction

1 This appeal by developers raises two points specific to its facts and one point of some general importance in relation to the scope of the powers given to a local planning authority on an application made under section 73 of the Town and Country Planning Act 1990 for a planning permission subject to conditions different from those which were applied to an earlier planning permission in respect of the same land. Such an application is commonly referred to as an application to modify conditions imposed on a planning permission.

2 The background to the present dispute lies in section 92 of the Town and Country Planning Act 1990. That section was enacted to prevent the accumulation of unimplemented permissions. That is undesirable because, when further planning decisions have to be made in relation to an area, it is a help to good planning not to be inhibited by past grants of permission. On the other hand, landowners clearly must have some time in which to implement grants of permission. The section is a compromise between these two *desiderata*. It is convenient to set out parts of the section because it forms the background to much of the argument.

> (1) ... "outline planning permission" means planning permission granted ... with the reservation for subsequent approval ... of matters not particularised in the application ("reserved matters").
> (2) ... where outline planning permission is granted ... it shall be granted subject to conditions to the effect—
> (a) that, in the case of any reserved matter, application for approval must be made not later than the expiration of three years beginning with the date of the grant of outline planning permission; and

(b) that the development to which the permission relates must be begun not later than—
(i) the expiration of five years from the date of the grant of outline planning permission; or
(ii) if later, the expiration of two years from the final approval of the reserved matters or, in the case of approval on different dates, the final approval of the last such matter to be approved.
(3) If outline planning permission is granted without the conditions required by subsection (2), it shall be deemed to have been granted subject to those conditions.
(5) [the authority concerned with the terms of an outline planning permission] may also specify ... separate periods under paragraph (a) of subsection (2) in relation to separate parts of the development to which the planning permission relates; and, if they do so, the condition required by paragraph (b) of that subsection shall then be framed correspondingly by reference to those parts, instead of by reference to the development as a whole.

3 On January 25, 1995 Leicester City Council ("LCC") granted outline planning permission for "Redevelopment of site for retail use (class A1), business use (class B1) petrol filling station (*sui generis*), public house/ restaurant (class A3) and public open space" on a site of approximately 15 hectares. I shall refer to this as the Total Site.

4 The Total Site is the site of a former power station. In reliance upon the grant of planning permission Powergen have undertaken the demolition of the power station, remediated the whole site, decontaminated the site, constructed a road link and paid LCC a licence fee at a total cost of £5.7 million. The preparation of the site for development involved a time consuming process longer than was anticipated at the time planning permission was applied for.

5 The planning permission was subject to 25 conditions which, however, did not include a condition on the lines suggested by section 92(5). Condition 1 provided that:

> Application for approval of reserved matters shall be made within three years from the date of this permission and the development shall be begun not later than:
> (a) five years from the date of this permission; or
> (b) if later, two years from the date of the final approval of all the reserved matters.

6 The reason given for this condition was "to comply with section 92 of the Town and Country Planning Act 1990".

7 Condition 2 provided that:

> Detailed plans and particulars of the siting, design, external appearance and a means of access to the development, and the landscaping of the site (referred to in condition 1 as reserved matters) shall be submitted to and approved by the City Council as local planning authority before the development is begun and shall have regard to:
> (a) the size and height of the development including details of the materials to be used on all external elevations and roofs;
> (b) the provision of necessary footway crossings;

(c) a landscaping scheme showing the treatment of all parts of the site to remain unbuilt upon, and including:
(i) details of the position and spread of all existing trees, shrubs and hedges to be retained or removed;
(ii) new tree and shrub planting, including plant type, size, quantities and locations;
(iii) means of planting, staking and tying of trees, including tree-guards;
(iv) other surface treatments;
(v) fencing and boundary treatments;
(vi) any changes on levels;
(vii) the position and depth of surface and/or drainage runs.

The reason given for the condition was "to secure the satisfactory development of the site".

8 Condition 8 provided:

"If the development is carried out in phases, then the approved landscaping scheme shall also be carried out in phases, each phase of the landscaping scheme to be carried out within one year of completion of the phase of development to which it relates"

9 The reason given for the imposition of this condition was "in the interests of amenity".

10 As I have pointed out, although condition 8 envisages development possibly being carried out in phases, it is clear that the outline permission imposed the conditions envisaged in section 92(2) and it did not follow the course indicated in section 92(5) as a possibility.

It will be seen that the effect of these conditions was that:

(1) no development could be begun until detailed plans of the reserved matters had been approved by the authority;
(2) application for approval of the rerserved matters had to be made before January 25, 1998;
(3) the development could only proceed if it was begun within the later of the two time periods set out in condition 1.

11 Matters proceeded slowly and it became apparent to Powergen that unless they secured a relaxation of conditions they might be unable to develop. Mr Busby of the authority's Development Control Group on November 26, 1997 wrote a letter to Powergen which included the following:

"The council is concerned about what will happen to the rest of the site and whether the remainder will make sense in terms of the overall planning of the site. This is likely to affect the council's consideration of the application unless other reserved matters, *e.g.* public open space, nature area, footpath and cycle path networks, are submitted at the same time and it can be demonstrated how the proposed supermarket will relate to the remainder of the site. The deadline for all reserved matters is January 24, 1998, barring some details that could be the subject of planning conditions should permission be granted."

12 Mr Busby wrote again on December 19, saying:

"Reserved matters for the other aspects of the outline scheme should be

submitted to agree with the description. If they are not submitted before January 25, 1998 the outline permission may lapse."

13 On January 8, 1998 Powergen submitted an application for the approval of reserved matters pursuant to the planning permission for an "83,000 sq. foot food superstore and petrol filling station with carwash and 585 car parking spaces together with landscaping and public open space". The land occupied by the development the subject of the reserved matters application occupied a substantial part of the Total Site. I shall refer to it as the "Food Store Segment".

14 On January 12, 1998 Powergen made an application to extend the time period specified in condition 1. That application was refused by the Authority on March 15, 1999 and no challenge has been raised to the legal correctness of that refusal or as to the length of time taken to arrive at the decision. The policy background justifying the refusal of what had previously been permitted in principle was that central and local government policies had changed since 1995 and therefore the authority were anxious not to do anything which would permit the outline permission to be implemented.

15 On August 3, 1998 an application was made which purported to be for a variation of condition 2 and for consequential variations of various other conditions. The nature of the variation asked for appears from the suggested wording of a new condition 2, namely, "Before the development *or phase of the development* is begun detailed plans and particulars of ... the development *or phase of the development* ... shall be submitted to and approved by ...". The effect of granting that application would have been to enable the "reserved matters" referred to in condition 1 to comprise, not all the matters relating to every part of the site, but only those relating to that part of the site with which the applicants were at any particular time anxious to proceed. It is submitted to be a consequence of this that the application made on January 8, 1998 would have been made within the time limit specified in condition 1.

16 That would have had a number of advantages from the applicants' point of view. Legally they would be able to assert that condition 1 had been fulfilled by the making of the application for the Food Store Segment. Commercially they would be relieved of the pressure to produce plans for and/or to carry out various landscaping measures, parking provisions, investigations for archaeological remains or for the protection and enhancement of sites of wildlife or other ecological significance.

17 On the other hand the granting of that application had various disadvantages from the point of view of the authority. In particular it would have enabled the food store development to go ahead although this was by now against the authority's policy. It would have prevented the authority from having an overall scheme for the site before them before any part of the development took place—something which they obviously thought desirable. It would also remove the cut off date by which the authority would know that the permission could no longer be implemented.

18 On March 15, 1999 LCC refused planning permission for the section 73 applications. As I have already said, no complaint is made in relation to the refusal of the application relating to condition 1. In relation to the application relating to condition 2 the refusal was for the following reasons:

1. The effect of varying condition 2 would be to allow work to begin on a

food superstore having reserved matters approval. That development would be contrary to policy S6 of the City of Leicester Local Plan which states that planning permission will not normally be granted for additional superstores in the city.
2. There is no quantitative need for additional large food stores in the central Leicestershire area.
3. The regeneration of the site by development of retail use is in preference to other more central sites also identified for regeneration and which have been identified as being available, suitable and viable, [and] could have an adverse effect on the continuing investment in the city and other centres by competing for investment.

The Construction of Condition 2

19 Powergen's primary submission before Dyson J. and before us was that they have complied with condition 1. They submit that the reference in condition 2 to "the development" is a reference to "such part of the development as the developer chooses to proceed with". The judge rejected this construction of the permission for reasons which he set out in full. He rejected Powergen's submission that such a construction of the permission produced a result which was commercially absurd because, there being no obligation to carry out all of the development, it was pointless for the company to produce, and for the council and its officers to consider, plans for development which there was no present intention to carry out.

20 It is plain from an examination of section 92 that, absent any specification of separate periods under subsection (5), in that section "reserved matters" refers to every matter reserved by the outline planning permission for subsequent approval of the authority and "development" refers to the development as a whole. Either the permission granted by LCC echoes the section faithfully or conditions having that effect are to be implied—see section 92(3). In those circumstances the resolution of the construction point may not matter. However, I agree with Dyson J. for the reasons which he set out in full, that construing this permission in its context it is clear that throughout the document "development" refers to the development of the whole.

The effect of dealings between the parties

21 Powergen's secondary submission was to the effect that by reason of the dealings between the parties they are entitled to implement that part of the outline permission which relates to the retail development. This submission turns on the details of the dealings between the parties and whether these gave to Powergen any legal rights to proceed with the building of the Food Store without further permissions. The judge held that the officers, whose words were relied upon as preventing the authority from now taking any point in relation to time, had neither actual nor ostensible authority to make representations to that effect and rejected an argument to the effect that the doctrine of legitimate expectation entitled Powergen to such rights. He went on to hold that the words relied on could not give rise to the expectation asserted and that in any event they had not been relied on. I agree with the reasoning and conclusion of Dyson J. that on the facts of this case it is not possible to show that the doctrine of legitimate expectation operates so as to entitle Powergen to proceed to build the food store.

The scope and character of the powers given by section 73

Introduction

22 Powergen submit that the decision in relation to condition 2 is legally flawed because the authority were not permitted to refuse that application for the reason which they gave. Before turning to the law, I should note the following additional matters of fact.

23 In May 1998, LCC resolved to approve the reserved matters which had been submitted on January 8, 1998 in relation to the Food Store Segment. In recommending approval of the reserved matters application, LCC's Director of Environment and Development advised that an indicative layout had been submitted by the applicants in relation to what I shall call the Remaining Segment. He stated that whilst this particular block layout would probably not be acceptable in that form, the final form of development (which would be the subject of a separate planning application) was in his view capable of meeting the general requirements of the planning brief and that the design of the superstore and the general layout were satisfactory.

24 On January 4, 1999 LCC resolved to grant planning permission for some, but not all, of the Remaining Segment to be developed as offices, restaurant and public house. I assume that some time a full planning permission in respect of this part of the Remaining Segment was issued.

The Legal Background

25 Section 73 of the 1990 Act provides:

> 1. This section applies, subject to sub-section (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.
>
> ...
>
> 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.

SOME PRELIMINARY POINTS

26 The background to this section was considered by Sullivan J. in his judgment in *Pye v. Secretary of State for the Environment* [1998] 3 P.L.R. 72. Sullivan J. said the following:

> "An application made under section 73 is an application for planning

permission: see section 73(1). The local planning authority's duty in deciding planning applications is to have regard to both the development plan, which brings into place section 54A, and to any other material considerations: section 70(2).

In general terms, the practical consequences of imposing a condition on a grant of planning permission must be a material consideration that a local planning authority should consider, unless prevented from so doing by some other express provision in the statutory code.

Prior to the enactment of (what is now) section 73, an applicant aggrieved by the imposition of the conditions had the right to appeal against the original planning permission, but such a course enabled the local planning authority in making representations to the Secretary of State, and the Secretary of State when determining the appeal as though the application had been made to him in the first instance, to 'go back on the original decision' to grant planning permission. So the applicant might find that he had lost his planning permission altogether, even though his appeal had been confined to a complaint about a condition or conditions.

It was this problem which section 31A, now section 73, was intended to address ...

While section 73 applications are commonly referred to as applications to 'amend' the conditions attached to a planning permission, a decision under section 73(2) leaves the original planning permission intact and unamended. That is so whether the decision is to grant planning permission unconditionally or subject to different conditions under paragraph (a), or to refuse the application under paragraph (b), because planning permission should be granted subject to the same conditions.

In the former case, the applicant may choose whether to implement the original planning permission or the new planning permission; in the latter case, he is still free to implement the original planning permission. Thus, it is not possible to "go back on the original planning permission" under section 73. It remains as a base line, whether the application under section 73 is approved or refused, in contrast to the position that previously obtained.

The original planning permission comprises not merely the description of the development in the operative part of the planning permission ... but also the conditions subject to which the development was permitted to be carried out ...

Considering only the conditions subject to which planning permission should be granted will be a more limited exercise than the consideration of a "normal" application for planning permission under section 70, but as Keene J. pointed out, at p. 207 of *R. v. London Docklands Development Corporation, ex parte Frost* (1996) 73 P. & C.R. 199, how much more limited will depend on the nature of the condition itself. If the condition relates to a narrow issue, such as hours of operation or the particular materials to be employed in the construction of the building, the local planning authority's consideration will be confined within a very narrow compass.

Since the original planning permission will still be capable of implementation, the local planning authority, looking at the practical consequences of imposing a different condition as to hours or materials,

will be considering the relative merit or harm of allowing the premises to remain open until, say, 10 o'clock rather than 8 o'clock in the evening, or to be tiled rather than slated.

Equally, if an application is made under section 73 within the original time limited for the submission of reserved matters, while implementation of the planning permission is still possible and is not precluded by the provisions of section 93(4), for a modest extension of time for the submission of reserved matters, the local planning authority's role in considering only the question of conditions subject to which planning permission should be granted will be more confined than in a normal section 70 case. The practical effect of submitting details one year later than would otherwise be allowed may be very limited.

In my view, however, the position is different where ... an application is made under section 73 to alter a condition, so as to extend the period for submission for reserved matters at a time when the original planning permission is no longer capable of implementation by reason of the effect of section 93(4), because time for submission for reserved matters has expired.

While the council are constrained to consider only the question of the conditions subject to which planning permission should be granted, in deciding whether to grant a planning permission subject to different conditions under paragraph (a), or to refuse the application under paragraph (b), are they required to ignore the fact that the original planning permission is no longer capable of implementation, so that if they adopt the latter course it will not be possible for the development to take place, whereas if they adopt the former course, it will be possible for the development to take place?

In my view, there is nothing in section 73 that requires the local planning authority to ignore the practical consequences generally of imposing a different condition, and this is surely a most important practical consequence of granting an application for planning permission under paragraph (a) or refusing the application under paragraph (b).

It may well be that the case since the original grant of planning permission, the arguments for carrying out development have strengthened ...

[*sic.* in such circumstances] Granting a planning permission subject to a condition providing for an extended period for submission of details would enable the development to be carried out, whereas as refusing the application would mean that a permission for a much needed building could not be implemented.

I do not see why, in such circumstances, the council, in considering the application under section 73, should be required to shut their eyes to those practical consequences. If that is correct, I do not see why the position should be any different if the planning policies have changed since the grant of the original planning permission so that its implementation has become less desirable in planning terms.

The local planning authority have to have regard to the factual circumstances as they exist at the time and to have regard to the facts that exist at the time of their decisions. If at that time the original planning permission is incapable of implementation by reason of

section 93(4), I can see no basis in the statutory code for requiring the local planning authority to ignore that important fact.

Much less do I see any justification for requiring the local planning authority to base their decision upon a hypothesis: comparing the merits of development proceeding now with the merits of its having proceeded at some time in the past when it is known that the hypothesis does not accord with reality."

27 I express my concurrence with what is there said.

28 Subsection (4) indicates that the section clearly does not apply where the application purportedly made pursuant to it is made at a time when development had not been begun within the time specified by a condition. However, what is the position where the application is made in time but the consideration by the authority of that application is after the expiry of time? Does the authority lose jurisdiction by reason of the expiry of time? In my judgment, based in part on the use of the verb "apply" in both subsections (1) and (4), the crucial time is the time of the application and there is no subsequent loss of jurisdiction to consider the matter. We have heard no submissions to the contrary.

29 The question can arise whether, on an application which asks for a variation of one particular condition, the authority can grant a new permission subject to a number of conditions which were not the subject of the application to vary. Mr Taylor submitted that a proper reading of subsections (1) and (2) of s.73 led to the conclusion that only the condition the subject of the application was to be the subject of consideration by the authority. I disagree. Just as on an application for permission to carry out a development the authority can impose conditions on a permission for development which they would find objectionable unless such conditions were imposed, so on an application to carry out development without complying with one condition the authority can impose a different new condition or a number of new conditions and/or remove another condition subject to which the earlier permission was granted. An example given by Mr Ouseley Q.C., who appeared for the second respondent, was a situation where a retail operator wished to have deliveries for longer hours than was permitted under the original permission. In such circumstances the Authority might be content to grant this but only on condition that the warehouse was sited further away from nearby dwellings than had been regarded as acceptable at the time of the grant of the original permission.

Submissions and Conclusions

30 Mr John Taylor, Q.C., who appeared for Powergen, drew attention to the opening words of s.73(2):

> ... the Local Planning Authority shall consider only the question of the conditions subject to which a previous planning permission was granted.

31 He submitted that these words had the result that an authority faced with a s.73 application was not allowed to refuse it just because it now disapproved of a permission which it or the Secretary of State had granted in respect of the land on an earlier occasion. To refuse for such a reason would be to exercise the power of refusal for an impermissible purpose, namely, to

prevent, without paying compensation, the implementation of a permission which had been lawfully granted.

32 He pointed out that section 73(2)(a) contemplated the grant of unconditional planning permission, submitted that this would conflict with the requirements of sections 91 and 92 of the Act as to time limits and submitted that therefore the permission granted pursuant to s.73 must in some way relate to the earlier permission.

33 He submitted that to construe section 73 as envisaging the grant of an independently viable permission would produce absurd results in situations where details had already been approved under the earlier outline permission. They would need to be submitted and approved afresh under the later permission. In such circumstances there would be no advantage in making a section 73 application rather than starting afresh.

34 He argued that if each permission pursuant to a section 73 application were to be regarded as an independently viable permission then the time limits for submission of reserved matters and commencement of development would start afresh.

35 He submitted that the *Frost* and *Pye* cases to which I have already adverted were cases where what was sought was an extension of the period within which something had to be done whereas the present, in form at any rate, was not.

36 These are powerful arguments and they were skilfully put. Nonetheless, I am not persuaded by them. The purpose behind the imposition of time limits in sections 91 and 92 is to enable the planning authority and others to know what outstanding permissions are capable of implementation and which, if I may borrow a term from food retailing, have reached their expiry date. That expiry date can be reached in one of two ways—the expiration of the time within which application for details must be made, or the expiration of the time within which the development must be begun. In the uncertain world of planning that at least limits the amount of uncertainty and provides a basis on which decisions have to be reached as to what is to happen to that land and land nearby in the future. There is no doubt that the effect of granting a new planning permission in the terms sought by the appellants would be to enable a development to proceed after the expiry date of the permission. The appellants accept the legal correctness of the authority's refusal to extend the time period specified in condition 1 of the earlier permission. They argue that they should be allowed to achieve substantially the same end by altering the terms of condition 2. In my judgment that would clearly fly in the face of the policy behind sections 91 and 92.

37 That would not dispose of the point if the words in section 73(2) "shall consider only the question of the conditions subject to which a previous planning permission was granted" clearly prevented the authority from taking into account the fact that the earlier permission had reached its expiry date. I do not consider that they do. My reasoning is essentially the same as that of Sullivan J. in the *Pye* case set out above. I accept that there the court was concerned with an application in terms to extend the tme for submission of details whereas in the present case the court is only concerned with an application which has that effect. This however seems to me to be a distinction of no significance. If Sullivan J.'s reasoning is correct, as I think it is, then it must apply to both situations.

38 I accept that section 73(2)(a) contemplates the grant of an unconditional planning permission, but I do not accept Mr Taylor's submissions to the

effect that therefore it is wrong to regard a permission granted pursuant to a section 73 application as not being an independently viable permission because of any application of sections 91 and 92. Those sections also contemplate the grant of unconditional permissions and provide that if permission is granted unconditionally then it shall be deemed to have been granted subject to time conditions.

39 Nor do I accept his argument in relation to having to resubmit details which had already been approved. Sometimes the alteration of a condition which is asked for will involve alterations as to previously approved details, sometimes it will not. In those cases where it does not there is no difficulty in referring to the old plans and it may well be that the authority will be inhibited by the opening words of section 73(2) from considering their merits.

40 The most seductive way in which Mr Taylor put his submissions was to my mind as follows. He submitted that the authority must focus on the condition mentioned in the application ("condition x"—in the present case condition 2) and ask themselves "were we to substitute condition y for condition x what harm would result which does not result from the grant of permission with condition x?". I agree that, if it does not now matter from a planning point of view whether the future development of the site is governed by condition x as imposed on the old permission or condition y as suggested by an applicant, then the authority would be wrong to refuse permission just because they objected to the development in principle. An example might be a proposed change in the fenestration in a building.

41 But Mr Taylor's formulation of the question subtly conceals that in the present case it does matter. The comparison is not between the present effects of condition x imposed now and the present effects of condition y imposed now, but rather between the present effects of condition x imposed years ago and the present effect of condition y imposed now. Once it is clear that this is the right comparison, then it is obvious that in a case such as the present the difference is enormous. The present effect of condition 2 imposed years ago is to prevent the food store development going ahead whereas the present effect of a permission containing the proposed condition 2 is to permit the food store development. It is in my judgment beyond argument that current planning policy and facts must be taken into consideration when deciding whether or not to permit that new effect.

42 Mr Taylor had a further argument based on events after the expiry date in January 1995. He submitted:

> (a) that no condition should be imposed unless its imposition serves some planning purpose;
> (b) that the purpose of imposing condition 2 on the 1995 permission was to secure the approval of the authority for the details of the development of the Total Site;
> (c) that this purpose had been achieved by March 15, 1999, albeit in two bites, namely, (1) the approval of the details for the Food Store Segment in May 1998 pursuant to the application made on January 8, 1998 and (2) the resolution of January 4, 1999; and
> (d) that in those circumstances it was irrational on March 15, 1999 to refuse to vary the old condition 2.

43 I accept of course that conditions should not be imposed unless their imposition serves some planning purpose. However, as it seems to me, one

of the purposes of the imposition of conditions 1 and 2 on the 1995 permission, required as it was by section 92, was to secure a situation in which no development should proceed under that permission unless, amongst other things, application pursuant to the 1995 permission for approval of all of the reserved matters in relation to the Total Site was made before January 25, 1998. That purpose had not been achieved by March 15, 1999 for three separate reasons. One is that the application for planning permission which produced the resolution of January 4, 1999 did not as a matter of fact cover the Total Site. The second is that this application was, I believe, not made before January 25, 1998. The third is that it was not an application for approval of details under the 1995 permission. The Authority on January 4, 1999 was dealing with an application to grant a new full planning permission. In considering that application it was bound to look primarily at the Remaining Segment which was the subject of this new application and also to bear in mind that the outline permission which had been granted in 1995 for the Total Site was no longer capable of implementation. The conclusion reached by the Authority on the application which resulted in the resolution of January 4, 1999 is not necessarily the same as the one it would have reached on an application for approval of details under the 1995 outline permission for the Total Site.

44 At times Mr Taylor I think came close to submitting that it was irrational of the authority to refuse the section 73 application in respect of condition 2. If that was his submission I would reject it. When the authority came to consider the application under section 73 to grant a new permission in respect of the Total Site subject to a different condition 2 it was perfectly rational to refuse to do so. It might well have been rational to refuse to do so in 1995 but it was certainly rational to refuse to do so in 1999 when planning policies had changed. The original conditions were imposed in pursuance of the policy set out in section 92 of the Act which is to prevent the accumulation of unimplemented permissions. The application under section 73 was clearly designed to achieve a result which would be at variance with that policy. There is nothing irrational in an authority refusing, after the expiration of the three years referred to in section 92(2)(a), to grant such an application in circumstances where the relevant policies have altered. Indeed, in my view, in present circumstances to have granted a permission pursuant to an application under section 73 without considering that a food store development was now governed by different policies from those which appertained in 1995 would have been just as unlawful as granting such a permission following a normal application for full planning permission without such a consideration of current policies.

45 I agree with Sullivan J. that when considering whether or not to grant planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted, the authority must take into account the provisions of the development plan and any other material considerations. If one asks "material to what?" the answer is—material to the application under section 73. Thus, for instance, if the application is to retain a use of land without complying with a condition imposed on a previous permission that the use should cease after five years it must be right to examine that application in the light of facts and policies as they are at the time of the decision on the new application.

46 In the result, for reasons which are substantially those well set out by Dyson J. in his judgment, I would dismiss this appeal.

47 **POTTER J.:** I agree.

48 **MORRITT L.J.:** I also agree.

H9 *Appeal dismissed.*
Permission to appeal to the House of Lords refused.

H10 *Solicitors*—Wragge & Co., Birmingham; Legal Services, Leicester City Council; Clifford Chance, London.

H11 *Reporter*—Scott Lyness.