PYE v. THE SECRETARY OF STATE FOR THE ENVIRONMENT AND NORTH CORNWALL DISTRICT COUNCIL

QUEEN'S BENCH DIVISION

(Sullivan J.): May 5, 1998

Condition on outline planning permission imposing time limit for submitting reserved matters for approval—Permission extant but time limit expired—Application under section 73 of the Town and Country Planning Act 1990 to extend time limit for submitting reserved matters refused—Appeal to Secretary of State dismissed—Application under section 288—Whether such an application was a "renewal" of the outline planning permission—Whether planning authority entitled to apply the policy guidance as to the renewal of planning permission contained in paragraph 60 of Circular 11/95

Planning permission was granted on August 11, 1992 for "Renewal of permission for the erection of dwelling". Condition 2 required the submission of reserved matters within three years from the date of the planning permission, *i.e.* before August 11, 1995. Condition 4 provided that development had to have begun not later than the expiration of either five years from the date of the planning permission, or two years from final approval of reserved matters, whichever was the later.

The planning permission was not implemented. On December 24, 1996, after the expiration of the period prescribed by condition 2 but before the expiration of the period prescribed by condition 4, an application was made under section 73 of the Town and Country Planning Act 1990 for the "extension for the three-year period for submission of detailed plans and particulars in connection with reserved matters".

The council refused the application. The applicant appealed to the Secretary of State for the Environment. The Inspector appointed to determine the appeal considered the different approaches to such applications set out in the conflicting decisions in *Allied London Property Investment Limited v. Secretary of State for the Environment* and *R. v. London Docklands Development Corporation, ex p. Sister Christine Frost* and applied the approach in the latter case. She concluded that it would be unreasonable to vary condition 2 and dismissed the appeal.

The applicant applied to the court under section 288 of the Town and Country Planning Act 1990 to quash the Inspector's decision. The

application focused on the different approaches to such applications set out in the two conflicting decisions. The applicant submitted that the approach in *Allied London* was correct and that there was a distinction between an application for renewal of planning permission and an application under section 73. The applicant also submitted that the Inspector had misunderstood the effect of the *Frost* case, wrongly reconsidered the appropriateness of the principle of the development and applied paragraph 60 of Circular 11/95 as though the application was one for renewal, which it was not.

Held: dismissing the application:

1. An application made under section 73 is an application for planning permission. Whilst section 73(2) provides that on such an application the planning authority shall consider only the question of the conditions subject to which planning permission should be granted, the instruction that the planning authority "may not go back on their original decision" is a gloss placed upon the section by paragraph 13 of the Annex to Circular 19/86.
2. To hold an applicant, in response to an application under section 73, to the conditions to which his previous planning permission was granted is not merely a course of action which is expressly open to the planning authority under section 73(2)(b), it is also not "going back" on the original decision, but rather it is a reaffirmation of it.
3. Whilst a planning permission granted under section 73 is a fresh permission, if the practical effect of granting that fresh permission would be the same as the renewal of the original permission, because the latter is no longer capable of implementation, there was no reason why the planning authority should not be entitled to apply, by way of analogy, the policy guidance as to the renewal of planning permission. The approach in the *Frost* case was endorsed.

Cases referred to:

- *Allied London Property Investment Limited v. Secretary of State for the Environment* 72 P. & C.R. 327.
- *R. v. London Docklands Development Corporation, ex p. Sister Christine Frost* 73 P. & C.R. 199.
- *R. v. Secretary of State for the Environment, ex p. Corby Borough Council* [1994] 1 P.L.R. 38.
- *Knott v. Secretary of State for the Environment and Caradon District Council* [1997] J.P.L. 713.
- *Pioneer Aggregates Limited v. Secretary of State for the Environment* [1985] 1 A.C. 132.

David Mole, Q.C. AND *Richard Guy* for the applicant.
Timothy Straker, Q.C. for the first respondent.

SULLIVAN J.: This is an application under section 288 of the Town and Country Planning Act 1990 to quash a decision of the first respondent's Inspector contained in a decision letter dated November 17, 1997, in which she dismissed the applicant's appeal against refusal by the second respondent of an application made under section 73 of the Town and Country Planning Act 1990 ("the Act") for an extension of a three-year period for submitting detailed plans and particulars in connection with reserved matters under a planning permission relating to land adjoining Linda Cottage, Badgall, Tregeare.

The planning permission in question is dated August 11, 1992 and is described as "Renewal of permission for erection of dwelling". The documents before the court do not disclose when planning permission was first granted, but nothing turns on that particular date.

The planning permission was subject to a number of conditions. Condition 1 was a standard reserved matters condition. Condition 2 was in standard form and required detailed plans and particulars in connection with reserved matters to be submitted to the council for approval within three years from the date of planning permission, that is to say, before August 11, 1995.

Condition 4 was also in standard form and required that development shall be begun not later than the expiration of either five years from the date of planning permission, or two years from final approval of reserved matters, whichever was the later. Thus, development had to be begun before August 11, 1997, with the possiiblity of it beginning somewhat later if final approval of reserved matters occurred after August 10, 1995.

The reason given for the imposition of conditions 2 and 4 was "in accordance with the requirements of section 92 of the 1990 Act". Condition 12, which was I suspect a legacy from when planning permission was first granted, provided that a layout plan showing siting of dwelling and proposed septic tank system had to be submitted to and approved by the local planning authority before any detailed plans were submitted for approval.

Application for planning permission under section 73 was made on December 24, 1996, for "extension for the three-year period for submission of detailed plans and particulars in connection with reserved matters."

It will be noted that application was made after the three-year period prescribed by condition 2 had expired, but before the expiration of the five-year period prescribed by condition 4.

Although the application sought an extension of the three-year period, it did not say for how long. By letter of December 11, 1996 it was stated that there was "no intention to extend the date of actual development beyond June 2, 1997."

On March 4, 1997 the council refused the application on the basis that

the effect of granting permission would be to extend the duration of planning permission for at least another two years. Development at Badgall would be contrary to current policies and the council were not prepared to extend previous permissions unless they were in accordance with current policy. The applicant appealed against that decision. In its written representations the council contended (*inter alia*) that allowing the appeal would extend the life of the outline planning permission and in effect be a renewal of consent contrary to policy.

The applicant's response is not entirely clear, but it appears to reiterate the point that the original five-year lifetime of the planning permission would not be extended.

In reply, the council cast doubt on whether it would have been possible, in the time available after the application was submitted in December 1996 (the letter refers to December 12, but it is clear from the documents that the application was not completed until September 24) to submit details, gain approval and then commence development by August 10, 1997:

> "assuming that the condition relating to commencement is also varied otherwise the permission would automatically be extended to two years from approval of reserved matters."

The council therefore concluded that the application should be treated as one for renewal of planning permission.

In her decision letter the Inspector identified the main issue as "whether it is reasonable to vary condition No. 2". She then summarised the relevant provisions of both the development plan, the Replacement Cornwall Structure Plan, and the emerging Local Plan Deposit Draft North Cornwall District Local Plan. She referred to the Audrey Lees report, in the light of which the council had resolved to place strict control over new house building in the countryside.

Having referred to the applicant's personal circumstances, to which she attached only limited weight, she said this at paragraphs 8 to 13:

> "8. I have taken account of two recent court judgments which concern extensions to the time within which an application for the approval of reserved matters might be made. In the case of *Allied London Property v. Secretary of State for the Environment and Swale B.C.*, the Deputy Judge held that s.73(2) of the Town and Country Planning Act 1990 restricted the decision-maker to consider only the question of the conditions subject to which planning permission should be granted and could not be used for the ulterior purpose of considering the acceptability of the development as a matter of principle. However, in an earlier, unreported judgment unknown at the time of the *Allied London*

hearing, the opposite view was taken. In the case of *R. v. London Docklands Development Corporation, ex p. Frost*, Mr Keene J. concluded that the question to be asked by the decision-maker was: should this planning permission be allowed to continue in force for a period of time beyond the original dates? This extends the scope of inquiry, in my opinion, to the principle of development and its appropriateness at the time the application for variation is under consideration. In consider that this judgment is not easily reconciled with that reached in the *Allied London* case.

9. I note that the court judgment in the *Allied London* case indicated that the decision-maker must consider the reasons for and functions of the condition, must apply section 54A of the 1990 Act, as amended, and should not exclude from consideration the effects of his or her decision.

10. In this appeal, it seems to me that the reasons for and function of condition No. 2. were to secure the approval of the reserved matters in time to allow development to be started within five years from the date of the permission being granted. On behalf of the appellant, it was argued that there was sufficient time for the development permitted in 1992 to begin within the required five years, even though the application to extend the three-year period for submission of reserved matters was made in December 1996. However, the five-year period expired in August 1997 and it seems to me that, even if the application had not gone to appeal, it would have been difficult to obtain the approvals for all the reserved matters and meet the five-year time-limit. I have also taken account of the fact that the time-limits attached to application No. 92/1250 are those given in section 92 of the Town and Country Planning Act 1990. No planning grounds as to why the usual time-limits should not have been applied in this case have been suggested to me.

11. On the effects of my decision, I am aware that, if I do not allow the time-limit to be extended, the original permission will lapse. With reference to section 54A, it is clear to me that the settlement of Badgall is not included in the list of villages in policy HSG2 of the deposit draft Local Plan where small-scale housing development would be permitted. As the intended dwelling would be in a rural area and not essential for the purposes of agriculture or other activity normally undertaken in the countryside, its erection would, in my opinion, conflict with the

purpose of Policy H11 of the Structure Plan and with the aim underlying Policy HSG4 of the emerging Local Plan, and with the council's resolution arising from Recommendation 23 of the Audrey Lees report.

12. Condition No. 4 of the planning permission No. 92/1250 provides for the start date of the development to be two years from the final approval of the last of the reserved matters. If I were to allow this appeal and extend the period for the submission of reserved matters, it seems to me that the effect would be similar to renewing the original 1992 planning permission, and enabling a development which does not accord with the current development plan and the emerging Local Plan to go ahead.

13. If the approach adopted by the court in the *Frost* case is applied, Circular 11/95—The Use of Conditions in Planning Permissions, paragraph 60 is relevant to this appeal. This advises that the renewal of planning permission may be refused where there has been some material change in planning circumstances since the original permission was granted. I consider that the Replacement Structure Plan, the Audrey Lees report and policies of the deposit draft Local Plan amount to substantial changes in circumstances which would count against the renewal of the permission granted for this appeal site in 1992."

She dealt with two other matters not relevant for present purposes and concluded that it would be unreasonable to vary condition No.2 and so she dismissed the appeal.

Before turning to the *Allied London* and *Frost* cases referred to by the Inspector it is helpful to refer to the relevant statutory framework, followed by the policy background. Section 73 provides:

"73—(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.

(3) Special provision may be made with respect to such applications—

(a) by regulations under section 62 as regards the form and content of the application, and

(b) by a development order as regards the procedure to be followed in connection with 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 within the development having been begun."

By section 70:

"(1) Where an application is made to a local planning authority for planning permission—

(a) subject to sections 91 and 92, they may grant planning permission, either unconditionally or subject to such conditions as they think fit; or

(b) they may refuse planning permission.

(2) In dealing with such an application the authority shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations."

Section 54A provides:

"Where, in making any determination under the planning Acts, regard is to be had to the development plan, the determination shall be made in accordance with the plan unless material consideration indicate otherwise."

The renewed planning permission in the present case was an outline planning permission, so section 92 required the imposition of the time limits prescribed by conditions 2 and 4, although the council could have substituted other periods for the three years, five years and two years found in conditions 2, 4(i) and 4(ii) respectively, under section 92(4). Section 93(4) provides:

"In the case of planning permission (whether outline or other) which has conditions attached to it by or under section 91 or 92—

(a) development carried out after the date by which the conditions require it to be carried out shall be treated as not

authorised by the permission; and
(b) an application for approval of a reserved matter, if it is made after the date by which the conditions require it to be made, shall be treated as not made in accordance with the terms of the permission."

The Town and Country Planning (Applications) Regulations 1988 have been made under section 62, and prescribe the manner in which applications for planning permission shall be made. By virtue of subsection 73(3), special provision has been made in regulation 3(3) as follows:

"An application—
(a) for renewal of planning permission where—
(i) a planning permission previously been granted [*sic*] for development which has not yet begun, and
(ii) a time limit was imposed under section [91] (limit of duration of planning permission) or section [92] (outline planning permission) of the Act which has not yet expired, or
(b)under section [73] (an application for the variation of a condition subject to which the planning permission was granted) ... shall be made in writing and give sufficient information to enable the authority to identify the previous grant of planning permission and any condition in question."

The provisions which are now contained in section 73 were first introduced, as section 31A into the Town and Country Planning Act 1971 by section 49 of the Housing and Planning Act 1986. Circular 19/86 provided guidance in respect of new provisions.

Paragraph 13 of the Annex to the Circular states:

"13. This paragraph introduces a new section 31A into the 1971 Act [now s.73 of the 1990 Act] to provide that in the case of land with an extant planning permission granted subject to conditions, an applicant may apply to the local planning authority for relief from any or all of those conditions. It may be seen as complementing the power in ... s.73A which provides that applications for planning permission may relate to development already undertaken if they are for permission to retain buildings or works, or to continue a use of land, without complying with some conditions subject to which a previous permission was granted. This new section will provide an applicant with an alternative to appealing against the original permission. It will also enable him (after the expiry of the 6 month period during

> which an appeal must be lodged) or any subsequent owner of the land (who does not have the right to appeal) to obtain relief from conditions without the need to submit a second full application. On receipt of an application under s.73 of the 1990 Act . . . the local planning authority may consider only the conditions to which the planning permission ought to be subject and may not go back to their original decision to grant permission. If the authority do decide that some variation of conditions is acceptable, a new alternative permission will be created. It is then open to the applicant to choose whether to implement the new permission or the one originally granted."

The Inspector referred to Circular 11/95 in paragraph 13 of her decision letter. Paragraph 4 of the Annex to that Circular summarises the effect of section 73 without providing any policy guidance. Paragraph 60 of the Annex deals with "Renewal of permissions before expiry of time-limits" and is as follows:

> "60. Developers who delay the start of development are likely, as the time-limit for implementation approaches, to want their permission renewed. Under Regulation 3 of the Town and Country Planning (Applications) Regulations 1988, applications for such renewals may be made simply by letter, referring to the existing planning permission, although the local planning authority have power subsequently to require further information if needed. As a general result, such applications should be refused only where:
>
> (a) there has been some material change in planning circumstances since the original permission was granted (*e.g.* a change in some relevant planning policy for the area, or in relevant highway considerations, or the publication by the Government of new planning policy guidance, material to the renewal application);
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> (b) continued failure to begin the development will contribute unacceptably to uncertainty about the future pattern of development in the area; of
>
> (c) the application is premature because the permission still has a reasonable time to run."

Against that background, I turn to the *Allied London* and *Frost* cases, decisions of Mr Christopher Lockhart-Mummery, Q.C., sitting as a Deputy Judge of the Queen's Bench Division, and Keene J. reported at 72 P. & C.R. 327 and 73 P. & C.R. 199, respectively. The *Frost* case predated Mr Lockhart-Mummery's decision in *Allied London*, but was unreported at the time and his attention was not drawn to it.

It is convenient to deal with the cases, not in chronological order, but in the order in which they are dealt with by the Inspector, starting with the *Allied London* decision.

In that case planning permission was granted for construction of a retail park on February 12, 1991, subject to a condition that application for approval of reserved matters be made in three years and development begin in five years. In response to a section 73 application, a one-year extension for submissions of reserved matters was granted on February 2, 1994. Another extension was applied for on October 31, 1994. Although it does not appear from the report of the case, I have been told that the extension sought was for a minimum of one year.

Application for approval of reserved matters was made on January 27, 1995, a few days before the expiry of the time-limit. That application was refused and an appeal was made which awaited determination at the time of Mr Lockhart-Mummery's decision.

Meanwhile, the application for a further extension of time was refused, there was an appeal against that refusal by a decision letter of September 8, 1995 and the Inspector dismissed that appeal.

The Inspector applied the approach in paragraph 60 of Circular 11/95 and concluded that planning permission for a year's extension should not be granted because there had been a material change in planning circumstances.

Mr Lockhart-Mummery noted that the legislative framework draws a distinction between an application for renewal of planning permission and an application under section 73, saying that the former can be made only "where the development has not begun and no time limit has expired" whilst there was no such constraint upon the latter.

At page 338 he said:

> "In my judgment, the proper approach to these matters is as follows.
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> First, the scope of the considerations arising under section 73(2) is clearly significantly more restrictive than that arising when the question of principle is at large on a normal planning application. Only the question of conditions can be considered. As Circular 19/86 advises, the planning authority may not go back to their original decision to grant planning permission.
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> Secondly, therefore, the authority must consider the condition, the reason for it, its function, the degree to which it makes the development acceptable, and therefore whether variation would in this context be acceptable. This inevitably will involve in most cases consideration as to the relative impact on material planning considerations of adhering to the existing

condition, as distinct from allowing a new condition. (Mr Straker made a subsidiary submission to the effect that, in appeal decisions, there is no obligation to give reasons, and hence the reason for a condition may not be adequately apparent. I reject this submission—if a condition is properly imposed, the reasons underlying it ought to be readily capable of deduction; indeed, if a condition is challenged, the planning authority will have to justify it by reference to its underlying objective.)

Thirdly, the section clearly requires that, as a matter of construction as to its scope, no distinction is drawn between time conditions and other conditions.

Fourthly, the decision-maker must consider the development plan and other material considerations when discharging the exercise under section 73. If the development plan has material relevant to the decision, this will have the legal and policy implications respectively set out in section 54A and PPG 1.

Fifthly, it is plainly right that the decision-maker should not exclude from his mind the effects of his decision. Take the following example. Planning permission is granted for major industrial development in an area of low unemployment [*sic*], subject to conditions requiring landscape and highway improvements. The applicant demonstrates that it cannot proceed subject to those conditions, and offers less satisfactory conditions dealing with the same matters. The decision-maker is faced with two possibilities. On the one hand, an attractive development with fully satisfactory landscaping and highway infrastructure, which cannot or is unlikely to go ahead and produce the desired jobs. On the other hand, a less satisfactory development in terms of landscaping and highway improvements, which nonetheless is likely to go ahead and produce the desired jobs. The primary consideration for the decision-maker must be the adequacy of the alternative landscape and highway conditions. But, in my judgment, he would err in law if he were to leave out of the planning balance entirely the applications which would flow from the result of a favourable, as opposed to a unfavourable, decision.

Sixthly, however, the decision-maker cannot manipulate the decision as to whether or not the variation of the condition is acceptable, in order to achieve purposes which will, or will not, result from the implementation of the planning permission as a matter of principle. This was the burden of Miss Robinson's submission in reply, which I accept. To put the same point another way, the purpose of the relevant powers is to consider the

acceptability of existing and proposed conditions; those powers cannot be exercised for the ulterior purpose which is involved in considering the question of the acceptability of the development as a matter of principle.

On this basis, the decision letter is clearly flawed. The Inspector has not considered the relevant merits or harm of the development to proceed now, as distinct from the merits or harm of the development having proceeded in the recent past. He expressly finds that a further year's extension would not cause unacceptable uncertainty about the future pattern of development in the area. His stance in this the grant of planning permission would now appear to be contrary to current planning policies, and such grant should be reassessed as a matter of principle. He has, accordingly, refused to vary the condition in order to achieve the objective of securing that the merits of the principle of the development may be reassessed.

The decision letter is flawed for another reason, in my judgment, arising under the same first issue. The Inspector clearly applied the policy contained in paragraph 60 of 11/95. This policy is expressly declared as relevant to renewal of permissions before expiry of time-limits. I have earlier sought to distinguish between applications for renewal on the one hand, and applications under section 73 on the other. Further, I have raised the potentially wide range of circumstances which can arise on applications under section 73. In my judgment, paragraph 4 of Circular 11/95, while not containing policy as such, is an indication that the Secretary of State did not intend paragraph 60 to be guidance equally applicable to section 73, as to renewals. It seems to me that the Inspector has had regard to a policy which, on its face, is not apt to deal with the varied range of circumstances arising on section 73 applications. For this reason he has had regard to an immaterial consideration, further justifying the quashing of this decision."

Accordingly, he quashed the Inspector's decision letter.

In *Frost*, two outline planning permissions were granted in April 1992 by the LDDC for two riverside sites subject to standard time conditions so that reserved matters should have been submitted for approval by April 1995 and the development commenced by April 1997. In January 1995 the developers sought to extend the period for submission of reserved matters and in April 1995 LDDC resolved to grant permission so as to extend that period by a further three years.

The applications were treated as though they were made under section 73, and were dealt with by the LDDC as though they were, in effect,

applications for renewal of planning permission, so that the LDDC expressly applied the guidance set out in paragraph 60 of Circular 11/95.

Sister Frost sought leave for judicial review to challenge the LDDC's decisions, arguing that the LDDC were wrong to apply paragraph 60. Although the matter was disposed of at the leave stage, it is clear from the report that it was argued fully before Keene J.

Keene J. noted that:

> "Unlike an application to the local planning authority wholly *de novo* and unlike an appeal to the Secretary of State against conditions where he may decide to refuse permission for the development itself, under section 73 a local planning authority, by subsection (2), has a somewhat more confined role, at least on the face of the language of the subsection."

He rejected a submission that an applicant could not use section 73 to vary time conditions imposed under sections 91 or 92 of the Act. He concluded that although regulation 3 of the 1988 Regulations did seem to distinguish between section 73 applications for variation of condition on the one hand, and renewal of planning permission subject to a time-limit on the other, there was no reason why a permission could not be "renewed" in appropriate cases by the variation of a time condition using section 73.

He referred to the judgment of Pill J. (as he then was) to the same effect in *R. v. Secretary of State for Environment, ex p. Corby Borough Council* [1994] 1 P.L.R. 38, at page 45. Keene J. continued at page 206:

> "There is therefore, in my judgment, jurisdiction to deal with what in ordinary parlance may be called a renewal of permission by application under section 73 if the developer chooses to make his application by way of one for variation of the time-limit condition. That is one of the alternatives available to him.
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> That creates no problem with the Secretary of State's advice in Circular 11/95 or earlier circulars. I would in any event be reluctant to construe section 73 by reference to a circular of the Secretary of State, but the difficulties suggested by the applicant seem to me more apparent than real. The statute, in section 73(2), does confine the local planning authority to considering only the matter of the conditions on the permission. That may, with some conditions such as a noise level condition or an hours of work condition, appear to confine the authority's consideration within a relatively narrow compass, although even then it is to be recognised that the planning authority is still able to consider the conditions as a whole and not merely the one or two which the applicant may wish to have varied. But when the condition in question is one imposing a time-limit for application for approval

> of reserved matters or for beginning development, the scope of matters to be considered in relation to conditions will be defined, in effect, by the question: should this planning permission be allowed to continue in force for a period of time beyond the original dates contemplated? That is, to all intents and purposes, the same question which arises on a renewal, however that renewal is sought. And the Secretary of State's guidance in renewal cases, such as in paragraph 60 or Circular 11/95, would be relevant. It is potentially a question which may go to the principle of a development to be judged in the current situation at the time when the application for variation is under consideration."

For the sake of completeness I should mention that section 73 has also been considered in *Knott v. Secretary of State and Caradon District Council* [1997] J.P.L. 713, but the dicta in that case does not assist in reconciling the two earlier authorities.

Mr Mole, Q.C., on behalf of the applicant, submits that the approach in the *Allied London* case is correct. There is a distinction between an application for renewal of planning permission and an application under section 73. In the present case, the acceptability of development in principle was irrelevant and the Inspector should have considered the relative merits or harm of allowing the erection of the dwelling to be commenced at some time following her decision letter in November 1997, rather than by August 1997, or somewhat later depending upon the date when reserved matters might have been finally approved under the 1992 planning permission.

He submits that the *Frost* case can be reconciled with the approach adopted in the *Allied London* case once it is appreciated that Keene J. was, on the facts of the former case, considering an application under section 73 which did, in effect, amount to a renewal of the planning permission in question, because two months from the end of the three-year period, the period for submission of reserved matters was to be extended by another three years.

He contrasts that with the position in the *Allied London* case where the Inspector's decision letter was issued in September 1995, some five months before the time-limit envisaged in the planning permission of February 1991 for the commencement of development.

If, on the approach adopted in the *Allied London* case, one is considering the effects that would be caused by allowing the development to be commenced three years later than it might otherwise have been, then one day draw the conclusion that those effects are equivalent to the effect of renewing planning. But that will not necessarily be the case; there is a

spectrum, *Frost* being at one end and *Allied London* at the other. Whether an application to extend a time-limit will amount, in effect, to a renewal, will be a question of fact and degree in each case.

Here, he submits, although an extension of time was sought, it was not so extensive as to amount to renewal.

The applicant had not sought an extension of time for commencement beyond August 1997, or a few months thereafter, as envisaged in the original permission. If the Inspector was concerned that the extension would be so long as to amount to a renewal, she should have given a short period for submission of details, and then abbreviated the period for commencement of development under condition 4, so that it did not automatically extend for as long as two years after the final approval of details.

He submits that the Inspector misunderstood the effect of the *Frost* decision, wrongly reconsidered the appropriateness of development in principle and applied paragraph 60 of Circular 11/95 as though the application was one for renewal, which it was not. Although the Inspector looked at the matter in November 1997, she should have borne in mind that the application had been made in December 1996 and would be somewhat unfair if the passage of time since then had disadvantaged the applicant.

Mr Straker, Q.C., who appears on behalf of the first respondent (the second respondent not being represented) submits that *Allied London* and the *Frost* decisions are irreconcilable and the approach in the latter is to be preferred. The decision maker under section 73 must have regard to the practical consequences of his or her decision.

Considering only the question of the conditions subject to which planning permission should be granted may necessarily require consideration of whether such conditions would facilitate or inhibit development, and thus require the decision maker to consider the desirability of the development in principle.

He urges caution in respect of the advice in paragraph 13 of Circular 19/86 because it proceeds upon the assumption that the applicant has an extant planning permission, so that if permission is granted under paragraph (a) of section 73(2), the applicant will be able to choose whether to implement the original, or the new planning permission.

In deciding whether to grant a planning permission subject to different conditions under paragraph (a), or whether planning permission should be granted subject to the same conditions as in the original planning permission under paragraph (b) of section 73(2), the local planning authority is entitled to take into consideration the fact that the original planning permission is no longer capable of implementation, because of the operation of section 93(4), whereas a planning permission subject to

different conditions under paragraph (a) would be capable of being implemented.

One looks to the statutory language from which it is plain that Parliament is not attempting to diminish the importance of time limits (see section 73(4)).

Parliament required the local planning authority to decide whether planning permission should be granted with no, different, or the same conditions. Since the local planning authority is considering an application for planning permission, both section 54A and section 70 are applicable, and the local planning authority should consider the planning consequences of proceeding under paragraph (a) or (b) of section 73(2).

He submits that the applicant's approach requires the local planning authority and the Secretary of State on appeal, to embark upon a hypothetical exercise, asking what would have been the harm if development had been begun by August 1997, or a few months thereafter, when it is known as a fact that the development cannot be implemented, unless the time-limits are extended.

He submits there is no warrant under the 1990 Act for posing that hypothetical question. Moreover, it would allow repeated applications to be made for extensions of time limits, because on each occasion the difference between commencing development by the hypothetical date, as extended, and commencing development by a date as further extended, would be marginal.

He submits there is no spectrum, but that a dividing line is crossed if the original planning permission is no longer capable of implementation because of the failure to comply with a time-limit. In such cases an application, as in the present case, to extend the time for submission of detailed matters will amount, in effect, to a renewal of planning permission and so the Local Planning Authority and the Inspector were correct to apply paragraph 60 of Circular 11/95. The Inspector had to proceed on the basis of the facts as she found them in November 1997, and abbreviating time-limits for submissions of details for commencement would have made no difference to her approach, or to her conclusion that it would be unreasonable to vary condition 2.

Faced with the task of reconciling these two authorities, I find it helpful to go back to first principles. As Lord Scarman observed in his speech in *Pioneer Aggregates Limited v. The Secretary of State for the Environment* [1985] 1 A.C. 132 at p. 140H, "planning control is the create of statute". Parliament has enacted a comprehensive code and:

> "As ever in the field of statute law it is the duty of the courts to give effect to the intention of Parliament as evidenced by the statute, or statutory code, considered as a whole."

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 play 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 which the local planning authority should consider, unless prevented from so doing by some other express provision in the statutory code.

Whilst section 73(2) says that on an application under subsection (1) the local planning authority shall consider only the question of the conditions subject to which planning permission should be granted, the instruction that the local planning authority "may not go back on their original decision" is a gloss that has been placed upon the section by paragraph 13 of Circular 19/86.

It is important to see the context in which the Department of the Environment thought it right to add that non-statutory gloss. As paragraph 13 points out, prior to the enactment of (what is now) section 73, an applicant aggrieved by the imposition of 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, and the reference to "going back on the original decision" must be understood in that context.

Whilst 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 baseline, 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, in this case the erection of a dwelling, but also the conditions subject to which that development was permitted to be carried out.

To hold an applicant, in response to an application under section 73, to the conditions to which his previous planning permission was granted is not merely a course of action which is expressly open to the local planning authority under paragraph 73(2)(b); it is not, in my view, fairly described as "going back" on the original decision, rather it is a reaffirmation of that original decision.

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 page 207 of the *Frost* case, 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-limit for the submission of reserved matters, whilst 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, as in the present case, an application is made under section 73 to alter a condition so as to extend the period for submission of 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), becamse time for submission of reserved matters has expired.

Whilst the council is 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), is it required to ignore the fact that the original planning permission is no longer capable of implementation so that if it adopts a latter course it will not be possible for the development to take place, whereas if it adopts the former course, it will be possible for the development to take place?

In my view, there is nothing in section 73 which 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 the case that since the original grant of planning permission, the arguments for carrying out the development have strengthened. Thus, in the present case, where planning permission is for the erection of a dwelling, the shortage of housing locally might have increased since 1992 and Badgall might have been identified in the emerging Local Plan as a settlement suitable for some additional residential development.

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 refusing the application would mean that a permission for a much needed dwelling could not be implemented.

I do not see why, in such circumstances, the council in considering an application under section 73 should be required to shut its 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 has 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 its decision. 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 its 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. That reads too much into the non-statutory guidance in Circular 19/86 that the local planning authority "may not go back on their original decision to grant planning permission". Where the statutory code requires assumptions to be made, for example, for the purposes of assessing compensation, it says so expressly.

Whilst it is true that a planning permission granted under section 73 is a

fresh permission, if the practical effect of granting that fresh permission would be the same as the renewal of the original planning permission, because the latter is no longer capable of implementation by reason of section 93(4), I can see no reason why the local planning authority should not be entitled to apply, by way of analogy, the Department's policy guidance as to the renewal of planning permission which is contained in paragraph 60 of Circular 11/95. If the practical effect of granting a planning permission under section 73 or a renewal of planning permission is the same, it makes good sense to apply the same policy approach in deciding whether to grant planning permission in either case.

It will be noted that an application to renew an outline planning permission may be made only where a time limit imposed by section 92 has not expired. Thus, in the present case, an application to renew the 1992 planning permission would have had to be made before August 11, 1995, whilst it was still possible to implement the planning permission. On such an application, the local planning authority would have been entitled to take into consideration whether there had been a material change in planning circumstances in deciding whether or not to grant planning permission for renewal.

It would be very odd indeed if, by waiting until the time limit imposed by condition 2 had expired, so that it was no longer possible to implement the planning permission, the applicant could then apply under section 73 for planning permission to be granted subject to an extended time limit, and say to the local planning authority that they were not entitled to take into consideration whether there had been a material change in planning circumstances in deciding whether or not to grant planning permission subject to different conditions.

For those reasons, I endorse the approach adopted by Keene J. in the *Frost* case. I accept that, as Mr Lockhart-Mummery, Q.C. observed in the *Allied London* case, a "potentially wide range of circumstances" can arise on applications under section 73, and it will not be appropriate to apply the approach in paragraph 60 of the Annex to Circular 11/95, by way of analogy, to all of those circumstances. But where it is appropriate on the facts because the practical effect of granting a new planning permission subject to different time conditions will be the same as "renewing" the original planning permission, it is a sensible course for the local planning authority, and the Secretary of State on appeal, to adopt.

I have no difficulty in accepting the second to the fifth inclusive of Mr Lockhart-Mummery's propositions.

As to his first proposition, I have commented on Circular 19/86. The nature of the considerations arising under section 73(2) will be largely dependent on the conditions in question, but I accept that in many cases

they will be significantly more restrictive than those which arise when the question of principle is at large in a "normal" planning application.

Turning to his sixth proposition, I do not believe that references to the decision-maker "manipulating" his decision or to "ulterior purpose" are helpful pointers to the interpretation of section 73. The section requires the local planning authority to decide whether to grant planning permission subject to different conditions under paragraph (a), or to maintain existing conditions and refuse the application under paragraph (b).

In doing so, I do not consider that it is obliged to approach the matter on the basis of the hypothesis set out on page 339 of Mr Lockhart-Mummery's judgment. Where the approaches adopted in the *Allied London* and the *Frost* cases differ, I prefer to follow the approach adopted in the latter. I am satisfied that the Inspector followed that approach in her decision letter.

As I have indicated, Mr Mole submits that, on its facts, this was not a "renewal" case, because little or no extension was being sought to the period within which development would be commenced under condition 4. The Inspector thought that even if the application had not gone to appeal it would have been difficult to obtain approvals for all of the represented matters and meet the five-year time-limit. She did not mention condition 12, which would have added to that difficulty. However, that may be, she had to consider the factual position as it was at the date of her decision letter on November 17, 1997.

By that date, it was plain that an extension would be required not merely to the time for submitting reserved matters for approval, but also to the time for commencement of development, even upon the hypothesis that final approval of reserved matters might have taken place some months after August 1997.

In any event, I consider that the detailed differences between the timescales in the Frost and Allied London cases relied on by Mr Mole are of no real significance. I prefer Mr Straker's approach: that a watershed is reached when, by virtue of the operation of section 93(4) it becomes impossible to implement the original planning permission.

The plain fact here was that the 1992 planning permission could not be implemented unless a planning permission was granted under section 73(2)(a) with an extended period for submission of reserved matters. If that planning permission was granted, then the development could be implemented. That is fairly described as amounting to a "renewal" of the 1992 planning permission, even if the development might then be commenced months, rather than years, after August 1997.

It follows that, in my view, the Inspector adopted the correct approach and I therefore refuse this application to quash her decision letter.

Solicitors—Parnells, Launceston; Treasury Solicitor.

Reporter—Martin Edwards.

COMMENTARY

This case goes a long way to resolving the confusion about whether planning authorities may reconsider the principle of a development on a section 73 application to renew an unimplemented planning permission. This confusion was created by the conflicting decisions in *R. v. London Docklands Development Corporation, ex p. Sister Christine Frost* where Keene J. held that an application under section 73 to extend the time-limit for submitting reserved matters for approval on an unimplemented planning permission was a renewal of that permission and therefore the planning authority was entitled to reconsider the principle of the development. However, Mr Christopher Lockhart-Mummery, Q.C. (sitting as a Deputy High Court judge) in *Allied London Property Investment Limited v. Secretary of State for the Environment* took the contrary view.

Sullivan J. adopted the approach of Keene J. in the *Frost* case. He could see no reason why a section 73 application in relation to an extant planning permission that was no longer capable of implementation ought to be treated any differently from a straightforward renewal. Thus the policy approach in paragraph 60 of Circular 11/95 which enables the principle of the development to be reconsidered in certain circumstances should apply. It follows that where a developer seeks to renew an unimplementable but extant planning permission, the policy approach adopted by the decision maker should be the same whether the renewal is sought under section 73 or under regulation 3 of the Town and Country Planning (Applications) Regulations 1988. To this extent Sullivan J. has adopted a common sense approach.

However, as Sullivan J. recognised, this decision is limited in its application and there are, as Mr Lockhart-Mummery suggested, a potentially wide range of circumstances in which section 73 applications might be made and where the particular condition in question would dictate that this approach was not appropriate. For example, where a section 73 application which sought a modest extension of time was made within the time-limit for submitting reserved matters for approval (so that the permission was still capable of implementation) a more limited exercise would be required than on a "normal" section 73 renewal application. The practical consequences of submitting reserved matters one year later may be very limited.

Equally, this decision does not provide any guidance as to the approach that should be adopted where there has been a partial implementation of a planning permission. Sullivan J.'s reasoning suggests that in those

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circumstances a limited exercise would be involved but that may depend upon the degree to which the permission has been implemented and issues such as colourability, phasing and conditions precedent.

Commentary by—Martin Edwards.

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