Neutral Citation Number: [2023] EWHC 625 (Admin)

Case No: CO/3162/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/03/2023

Before :

MR JUSTICE LANE

- -

THE KING
(On the application of)

Between :

BARBARA ATWILL	**claimant**
- and -	
NEW FOREST NATIONAL PARK AUTHORITY	**defendant**
-and-	
ANGELA VICKERS	**First Interested Party**

- -

Ms C Colquhoun (instructed by **Addleshaw Goddard**) for the **claimant**
Ms P Pattni (instructed by **the Solicitor and Monitoring Officer, NFNPA**) for the **defendant**
The Interested Party appeared remotely but did not participate in the hearing

Hearing date: 16 February 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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MR JUSTICE LANE

Mr Justice Lane :

1. With permission granted by Sir Duncan Ouseley on 31 October 2022, the claimant challenges the decision of the defendant (as local planning authority), on 19 July 2022, to grant an application by Angela Vickers, the interested party ("IP"), purportedly made under section 73 of the Town and Country Planning Act 1990 ("the 1990 Act"), for planning permission for the variation of condition 2 of planning permission no. 18/00262 for "dwelling; detached garage with office over; sewage treatment plant; details of lighting; demolition of existing dwelling and outbuilding to allow minor material amendment (AMENDED PLANS)" on land at Paysanne, Godshill Wood, Fordingbridge. I shall call this decision the 2021 variation.

A. BACKGROUND

2. The claimant and her husband occupy a property known as Bluebell Cottage, Godshill Wood, Fordingbridge. Bluebell Cottage lies directly to the north and uphill of the application site. Both properties lie within a wooded area of Godshill which is part of the protected New Forest National Park and the Western Escarpment Conservation Area ("CA"). Both sites are also subject to a policy preventing the erosion of rural darkness and tranquillity through artificial lighting.

3. The claimant and her husband have, since 2020, actively drawn the defendant's attention, through a series of complaints, analyses and correspondence, to a number of matters; first, to what has been built on the application site, in purported accordance with planning permission ref. 18/00262 ("the 2018 permission"), which they say clearly amounts to unlawful development; and secondly, to issues which mean that, in any event, the 2018 permission cannot lawfully be implemented or "built out".

4. The claimant asserts that the unlawful development causes significant harm to the amenity of her property, and those of others living in the area, as well as wider planning and environmental harm as a result of the direct intervisibility between the dwellings and the light emissions from the application site.

5. The defendant has recognised the harm being caused. The defendant served an enforcement notice ("EN") on the IP on 26 February 2021, under section 171A(1)(a) of the 1990 Act. The EN asserts that the IP has without permission constructed "(i) a dwelling, which has not been constructed in accordance with approved plans for a replacement dwelling; and (ii) an outbuilding" on the application site. The EN requires the demolition of both. The EN is currently the subject of an appeal by the IP under grounds (a), (f) and (g) of section 174(2). I am told that the EN appeal, which the defendant is resisting, is being held in abeyance in order to allow for the determination by this court of the status of the 2021 variation.

6. What is said to be the unlawful development comprises not only the dwelling and the outbuilding but also other development (including a swimming pool), which has been the subject of a retrospective planning permission (ref. 20/00005) that the defendant refused. This other development has not as yet been the subject of enforcement action.

7. The IP was allowed by the defendant to apply for retrospective permission for the dwelling, again through an application under section 73 of the 1990 Act (ref. 20/00903) ("the 2020 variation application"). On 15 February 2021, the defendant refused permission for the 2020 variation application on the basis that the as-built scheme had "resulted in a building which is unacceptably large in relation to the original dwelling", which had "resulted in adverse impacts on neighbouring amenity, as well as on the immediate locality, the wider Conservation Area and the landscape", due in particular to the "extent of glazing and re-orientation of the dwelling" (Section 12 of the officer's report on the 2020 variation application). In addition, it was confirmed in that report that the "alterations which have led to these adverse impacts are not considered to be minor material amendments".

8. The EN confirms that the IP's dwellinghouse, as built, differs in terms of its positioning, footprint and dimensions from the approved plans for planning permission 18/00262 for a replacement dwelling. Accordingly, it has been built without planning permission, as has the accompanying outbuilding. As I have said, the EN requires the dwelling and outhouse to be demolished and the site cleared.

9. The claimant emphasises that the EN does not recognise the 2018 permission as forming a basis for remedying a breach of planning control in accordance with section 173(4)(a), although that was a power open to the defendant. It is submitted by the claimant that this would appear to imply that the defendant now accepts that the 2018 permission cannot form the basis of such a remedy.

10. In its statement of case to the Planning Inspectorate in connection with the EN appeal, the defendant confirms that its position is that the appeal should be dismissed and the EN upheld in every respect. The claimant says it is notable that the IP's Statement of Case contains no reference to the 2018 permission being a "fallback". Instead, it is argued by the IP that permission should be granted for the as-built scheme; or that permission be granted for an alternative scheme, applying ground (a) and/or (f), relying on the approach taken in Tapecrown v First Secretary of State [2006] EWCA Civ 1744 and Ahmed v SSCLG [2014] EWCA Civ 566.

11. In addition, whilst it is not acknowledged on the face of the defendant's Statement of Case, or on that of the IP, the claimant contends that, as a consequence of the works to date, even if the 2018 permission could have been implemented, based on the inaccurate plans, it is a matter of fact that the 2018 permission cannot now, in any event, be built-out, given the works which have already taken place.

12. The claimant objected to the 2021 variation in a series of letters. In summary her objections were as follows:-

    (i) The amendments proposed to the 2018 permission, the subject of the purported section 73 application, amounted to material changes to that permission (just as the 2020 variation application did);

    (ii) The dwelling and development proposed are, in any event, contrary to public policy, given the increase in size upon the original dwelling which the 2018 permission sought to replace (when assessed against DP36 of the Local Plan);

(iii) The dwelling as amended would cause an unacceptable increased harm to a sensitive area, and harm to amenity, beyond the 2018 permission, together with other environmental harms; and

(iv) As set out in a letter dated 18 July 2022, the claimant drew the defendant's attention to the legal status of the 2018 permission; namely that it had not been lawfully implemented within the requisite three-year period (i.e. by 21 September 2021) and so was no longer extant.

13. The Officer's Report of 19 July 2022 for the section 73 application listed a number of differences between the 2018 permission and the 2021 variation application, including: differences in size of the dwelling; differences in orientation (bringing it closer to neighbouring boundaries); an increase in the size of the double-height gable-end window; and other changes to the fenestration. Despite these differences, the Officer concluded, in what the claimant says was in sharp contrast to the 2020 variation assessment but applying the same test, that these amendments amount to minor material amendments.

14. The defendant's Planning Committee was advised by the Officer at its meeting on 19 July 2022 that demolition of the original dwelling was an act which amounted to the lawful implementation of the 2018 permission and that this permission had therefore not lapsed. The Officer recommended that the defendant could and should grant the 2021 variation, subject to a condition that "within two years of the date of this decision, the as-built dwelling shall be amended in accordance with drawing numbers SGA-143-102D PL1 and SGA-143-104N Issue PL2 unless otherwise agreed with the New Forest National Park Authority". This condition allows for time within which the development can be carried out but if, as contended by the claimant, the development subject to the 2018 permission had not been lawfully begun, then the condition has the effect of extending time for a development which needed to be started by 14 September 2021. This, it is submitted, is contrary to section 73(5)(a) of the 1990 Act.

15. The IP's application was granted and notice of grant was issued on 19 July 2022.

B. THE GROUNDS OF CHALLENGE

16. **Ground 1:** This alleges an error of law concerning whether development had "begun" and the status of the 2018 permission. In his report, the Planning Officer did not address the question of whether the 2018 permission was still extant. When questioned about this issue at the meeting of the Committee on 19 July 2022, the Officer advised that the demolition works which had taken place lawfully implemented the 2018 permission. However, the claimant contends that the Officer gave no consideration to the fact that the entirety of the works undertaken subsequently were unlawful (as acknowledged by the defendant in its enforcement action). This unlawfulness had clear implications for the defendant's ability to conclude that the carrying out of any of those works (including the demolition) meant that the development which was the subject of the 2018 permission had begun and the permission was thereby implemented. The claimant says that the defendant failed, as a matter of law, to apply correctly or at all the requisite test as to whether the 2018 permission had been lawfully implemented.

17. In addition, the claimant argues that the 2021 variation was granted subject to a condition (condition 1) stating:

> "Within two years of the date of this decision, the as-built dwelling shall be amended in accordance with drawing numbers SGA-143-102D Issue PL1 and SGA-143-104N Issue PL2 unless otherwise agreed in writing with the New Forest National Park Authority".

18. In light of the above, the claimant submits that the consequence of the 2018 permission not being implemented means that the works the subject of the 2021 variation represent development which requires lawful commencement. The application was not for retrospective planning permission but for permission pursuant to section 73. In purporting to allow these works to take place (whether they are termed amendments or otherwise), the defendant purported to allow development to commence beyond the relevant three-year time limit imposed upon the 2018 permission. This, the claimant contends, further renders the decision unlawful.

19. **Ground 2:** This alleges a failure to take into account the IP's inability to implement and complete the 2018 permission. Further or in the alternative, even if it were to be concluded that the 2018 permission had not lapsed, the issues identified by the claimant during her opposition to the IP's development disclose a series of discrepancies between the plans and what has been undertaken by the interested party, such that the 2018 permission is not implementable in accordance with those plans.

20. **Ground 3:** This ground concerns what is said to be the wrongful omission or removal of a condition limiting the use of the outbuilding/garage on the application site. The 2021 variation failed to repeat or re-attach the condition which limited the use of the outbuilding/garage to "purposes incidental to the dwelling on the site" and which prohibited it from being used "for habitable accommodation such as kitchens, living rooms and bedrooms". This omission or removal was neither sought nor justified as a change to the 2018 permission. The claimant says this means the decision to grant the 2021 variation was unlawful.

21. **Ground 4:** This concerns the alleged wrongful inclusion of a condition based upon unlawful development. Irrespective of the other grounds, the claimant says that, in purporting to grant the 2021 variation, the defendant wrongfully imposed conditions which relate specifically to an unlawful building.

22. **Ground 5:** This ground is about the defendant's "unreasonable conclusion" regarding "minor material amendments". Whilst the claimant accepts that the question of what is a material amendment or a minor material amendment is largely a matter for planning judgment, it was critical to understand what development had, in fact, been granted by the 2018 permission, in order to make any meaningful assessment of materiality. As indicated in the background described earlier, there were inconsistencies and discrepancies within the plans attached to the 2018 permission, as well as inconsistencies between the assessment made by the Officer in the report of 2018 and what the plans purported to show. The conclusions that the differences between the as-built scheme and the 2018 permission listed in the 2020 Officer's report amounted to material and not minor material amendments is, the claimant submits, at odds with the decision that the number and extent of the differences

between the 2018 permission and the 2021 variation were minor material amendments. In these circumstances, the Officer's judgment can be impugned as perverse or irrational.

23. **Ground 6:** This ground focuses on the Conservation and Heritage (Listed Buildings and Conservation Areas) Act 1990 ("the Listed Buildings Act"). The claimant submits that the defendant failed to comply with its duty under section 72 of the Listed Building Act. The 2018 permission appears to have been the subject of consultation with the defendant's Building Design and Conservation Officer ("BDCO"). However, no such consultation took place in respect of the 2021 variation. The Officer, therefore, appears to have reached a view about the impact on the CA (which he concluded was acceptable), without any new consultation with the BDCO or any proper regard to what the BDCO had earlier said (which was that the proposal was, in effect, at the margin of acceptability). As such, the defendant has failed to comply with its statutory duty under section 72 of the 1990 Act, rendering the decision unlawful.

24. **Ground 7:** The claimant submits there is an absence of clarity in respect of the lighting scheme on the application site. Whilst condition 9, as now imposed, is accepted by the claimant to constitute a more robust position than that put forward by the Officer's report in 2021, she says there is a clear tension between the wording of condition 9 and condition 1. As such, the 2021 variation is subject to unclear and unimplementable conditions and is thus unlawful.

C. PROCEDURAL MATTERS

25. At the hearing on 16 February 2023, I ruled on a number of procedural matters. In summary, I held that there was no need for the claimant to seek permission to amend ground 1, so as to encompass a new ground 1A. The point in issue was, as Ms Pattni accepted, encompassed in the claimant's statement of facts and grounds, as originally filed.

26. I refused the claimant's application to adduce the second witness statement of Mr Cain. I agreed with Ms Pattni that this statement did not take the claimant's pleaded case any further and it was therefore unnecessary to have regard to it. I also refused permission to adduce a second witness statement of the claimant, seeking to adduce a transcript of the proceedings of the defendant's Planning Committee meeting of 19 July 2022, at which the impugned decision was made. I agreed with Ms Pattni that this material had been submitted too late in the day. The only purpose of adducing the transcript was to confirm that the Officer told the Committee that the development in question had commenced because of the demolition works. As will already be apparent, it is not in contention that the Officer did so.

D. DECIDING THE GROUNDS OF CHALLENGE

27. In considering each of the grounds, I have had full regard to the written and oral submissions made by Ms Colquhoun and Miss Pattni. I am grateful to them for their assistance.

Ground 1

28. When he granted permission to bring judicial review, Sir Duncan Ouseley said:-

> "Crucially, I regard the ground concerning the commencement of development under a permission, by demolition, as having merit. The whole new build has been built other than as pursuant to the permission, and all the building development is subject to enforcement proceedings, for which purpose the demolition took place. I am by no means clear why this is thought to be irrelevant; The variations are variations to what is supposed to be an existing, implementable permission".

29. Those remarks were made, in particular, in the context of ground 1.

30. Section 73 of the 1990 Act provides so far as relevant:-

> "**73**. **Determination of applications to develop land without compliance with conditions previously attached.**
>
> (1) This section applies, subject to subsection (4), to applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted.
>
> (2) On such an application the local planning authority shall consider only the question of the conditions subject to which planning permission should be granted, and-
>
> (a) if they decide that planning permission should be granted subject to conditions differing from those subject to which the previous permission was granted, or that it should be granted unconditionally, they shall grant planning permission accordingly, and
>
> (b) if they decide that planning permission should be granted subject to the same conditions as those subject to which the previous permission was granted, they shall refuse the application.
>
> …
>
> (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.
>
> (5) Planning permission must not be granted under this section for the development of land in England to the extent that it has effect to change a condition subject to which a previous planning permission was granted by extending the time within which-

> (a) a development must be started;
>
> (b) an application for approval of reserved matters (within the meaning of section 92) must be made."

31. So far as relevant, section 56 of the 1990 Act provides as follows:-

> "**56. – Time when development begun**
>
> (1) Subject to the following provisions of this section, for the purposes of this Act development of land shall be taken to be initiated-
>
> (a) if the development consists of the carrying out of operations, at the time when those operations are begun;
>
> …
>
> (2) For the purposes of the provisions of this Part mentioned in subsection (3) development shall be taken to be begun on the earliest date on which any material operation comprised in the development begins to be carried out.
>
> …
>
> (4) In subsection (2), "material operation" means-
>
> (a) any work of construction in the course of the erection of a building;
>
> (aa) any work of demolition of a building;
>
> …".

32. Ms Pattni submits that section 73 is cast in broad terms. Once "development" has begun, section 73 becomes available. Thereafter, issues such as whether permitting a variation of a condition would be acceptable are matters of planning judgment, to be left to the local planning authority, subject to challenge only on conventional public law grounds.

33. The claimant relies on case law concerning the operation of section 191 of the 1990 Act, whereby an application may be made for a certificate of lawful use or development. In Commercial Land Ltd v Secretary of State for Transport, Local Government and the Regions [2002] EWHC 1264 (Admin), Ouseley J addressed what a decision maker faced with a section 191 application needs to do, in order to decide whether development was commenced no later than the date specified in a condition attached to planning permission. At paragraph 35, Ouseley J held that:-

> "… the question of whether the operations done were comprised within the development involves looking at what has been done as a whole and reaching a judgment as a matter of fact and agree upon the whole. It does not entail any artificial process of ignoring part of what has been done …".

34. At paragraph 31, Ouseley J had addressed the provision in section 56(2) whereby, for the purposes of the provisions mentioned in subsection (3), "development shall be taken to be begun on the earliest date on which any material operation comprised in the development begins to be carried out". Ouseley J held that:-

> "No doubt there will be cases where the difference between the plans approved and the development carried out, is so large that of itself that prevents the operations relied on being operations comprised in the development and of itself would permit an Inspector rationally so to conclude without more ado. However, the question of whether a material operation is or is not "comprised in the development" cannot necessarily be answered by asking simply if there is a difference between the approved plans and the actual operations relied on."

35. In Green v Secretary of State for Communities and Local Government [2013] EWHC 3980 (Admin), Cranston J dismissed a challenge to a decision of an inspector, who had upheld an enforcement notice which alleged a breach of planning control by the erection of a building without planning permission. At paragraph 30, Cranston J said:-

> "… [The inspector] considered the appellant's contention that the implementation of planning permission was achieved through the demolition of the existing structure on the site, the removal of the tanks and equipment, and the evacuation of trenches and that all this amounted to the commencement of the development. However, assessing the matter objectively, in accordance with Commercial Land, he concluded… that the works undertaken were so different from the permitted development that they did not constitute the commencement of the 2006 permission. That, in my judgment, was a perfectly permissible exercise of planning judgment."

36. Supperstone J followed Commercial Land and Green in Silver v Secretary of State for Communities and Local Government [2014] EWHC 2729 (Admin).

37. In East Dunbartonshire Council v Secretary of State for Scotland and another [1998] Scot CS 46, the Inner House of the Court of Session was concerned with an appeal against the grant of a certificate of lawful use or development under the planning legislation relating to Scotland. The court addressed the issue of what was meant by beginning development, as defined by section 40 of the Town and Country Planning (Scotland) Act 1972. Section 40 corresponds to section 56 of the 1990 Act in England.

38. The Court of Session rejected the submission on behalf of the appellant that "in order to satisfy section 40 it is not sufficient that operations have been carried out, within the terms of the planning permission, before the material date: they contend that the operations must have been carried out with the intention of carrying out or completing the development, even if that completion may have been prevented by other factors."

39. It is plain from East Dunbartonshire that neither party suggested that section 40 was satisfied by the initiation of operations that were not within the terms of the planning

permission. The court held that:-

> "… There is authority that the work which is alleged to constitute specified operations must be work done pursuant to the planning permission in question (see e.g. *R v Secretary of State for the Environment Ex parte Percy Bilton Industrial Properties Ltd* 1975 31 P. & C.R. 154 per Lord Widgery CJ at 158-9: *Etheridge v Secretary of State for the Environment* 1983 P. & C.R. 35 per Woolf J at 40-1)…".

40. In Choiceplace Properties Ltd v Secretary of State for Housing Communities and Local Government [2021] EWHC 1070 (Admin), Dove J considered the consequences upon the ability to implement a planning permission of a condition that the development should be carried out in accordance with plans. It transpired that those plans were inaccurate and contained errors. Dove J concluded that the inspector did not err in law in refusing an application for a certificate of lawful use or development. Dove J held:-

> "25. … The Inspector was correct in pointing out that the drawing showed a relationship between the proposed development and surrounding buildings which should have been capable of replication on the site at the time permission was granted and it was not. In short, the development is not capable of being implemented in accordance with the approved drawings because it is not capable of being implemented in a manner which replicates the street elevations both longitudinally and axially which are purported to be shown to scale on drawing P.04…"

41. Despite Ms Pattni's able submissions, I am in no doubt that ground 1 is made out. The starting point is that, as recognised by the Court of Session in East Dunbartonshire (citing authorities binding in this jurisdiction), when determining if development has commenced, the operations relied on must be ones which can properly be said to be undertaken pursuant to the grant of the planning permission in question. No coherent reason has been advanced for why the determination of the commencement of development for the purposes of section 73(4) should be any different from other situations arising under the town and country planning legislation. The determination does not depend upon the issue of whether the development authorised by the 2018 permission could be implemented or "built out".

42. In particular, I see no reason why the cases concerning certificates under section 191 of the 1990 Act should have no bearing on a decision taken under section 73. It would be highly anomalous if a decision on the commencement of development for the purposes of section 73 could be taken on an entirely different basis from that of decisions concerning certificates of lawful use and development. Accordingly, the reliance of the defendant upon the demolition works alone was unlawful. I agree with Ms Colquhoun that the defendant cannot, at this point, defend the decision by belatedly relying upon the contention that the 2018 permission was "in part retrospective", in that it covered the installation of a sewage treatment plant or septic tank. In any event, treating the sewage treatment facilities as referable to the dwelling authorised by the 2018 permission suffers from the same problem as the defendant's

reliance upon the demolition. Neither is properly referable to the construction of that dwelling, which took place in breach of planning control, such that there is now an EN which requires demolition and levelling of the site.

43. I also agree with the claimant that, insofar as the defendant contends that, at the time the IP carried out the demolition, she may not have been intending to carry out unauthorised development, the contention is inconsistent with East Dunbartonshire which, although not binding on me, is persuasive. The test must be an objective one. As the Inner House held, "It would be particularly undesirable … to attempt to introduce into the statutory scheme requirements which were not capable of reasonably precise definition… a requirement that the specified operation should be undertaken with some sort of intention in regard to the carrying out of the development would be extremely difficult to define and apply."

44. The second element of ground 1 is that, if it is correct that the 2018 permission was not lawfully implemented, it was unlawful of the defendant to impose a condition upon the 2021 variation, which extended the implementation period by a further two years by stating:-

> "Within two years of the date of this decision, the as-built dwelling shall be amended in accordance with drawing numbers SGA-143-102D Issue PL 1 and SGA-143-104N Issue PL2 unless otherwise agreed in writing with the [defendant]".

45. I find that this condition is contrary to section 73(5). Although it purports to refer solely to "amendments" to a building, the 2018 permission was not implemented. This means the works that are the subject of the 2021 variation represent development which requires lawful commencement. In purporting to allow these works to take place, whether by way of amendments or otherwise, the defendant purported to allow the development to commence beyond the relevant three-year time limit imposed by the 2018 permission.

46. Ground 1 accordingly succeeds.

Ground 2

47. In view of my conclusion on ground 1, ground 2 does not strictly arise, as it is predicated on the assumption that the 2018 permission has not lapsed. I shall nevertheless address it.

48. I do not accept the defendant's submission that, as a matter of fact, the 2018 permission is implementable in accordance with the plans attached to it. At the hearing, a good deal of time was spent by Ms Colquhoun showing, by reference to the various plans, how any dwelling, as constructed, would differ materially from the plans attached to the 2018 permission. Amongst other things, the dwelling is shown orientated differently from one plan to another.

49. As explained by Lieven J in UBB Waste Essex Ltd v Essex County Council [2019] EWHC 1924 (Admin), a planning permission is to be interpreted (i) by a reasonable reader with some knowledge of planning law and the matter in question; and (ii) in accordance with common sense. The interpretive exercise should include

consideration of the planning "purpose" or intention of the permission, where this is reflected in the reasons for the conditions etc. Where there are documents incorporated into the permission or conditions by reference, a holistic view has to be taken, having regard to the relevant parts of those documents (paragraphs 51 to 55).

50. Whilst I have followed the approach to interpretation articulated by Lieven J, ground 2 is, at heart, a public law challenge founded on either or both of alleged irrationality and alleged failure to have regard to relevant considerations. Notwithstanding that this represents a high hurdle for the claimant, I find the evidence underpinning ground 2 is simply overwhelming. Besides what I have said regarding the orientation of the building, there is confusion regarding its height and appearance.

51. I accordingly do not accept Ms Pattni's submission that the facts of this case are comparable to those of Melap Singh v Secretary of State for Communities and Local Government [2010] EWHC 1621, where Hickinbottom J concluded that whether a change to development for which planning permission had been granted was material or not was a matter of fact and degree for the authority. That is, of course, true. This court cannot substitute its own view for that the defendant. The court will, however, be likely to act where a public law error is established. With this in mind, I find that the defendant has no real answer to the charge that it has not had regard to the serious discrepancies between the plans and what can take place on the ground.

52. It is significant that, in connection with the EN appeal, the defendant has not seen fit to refer to, and the IP has apparently not relied upon, any alleged ability to implement the 2018 permission. I am conscious that the defendant contends its position on the EN does not prejudice its position on the 2021 variation. In reality, however, I find that it does. If it had been considered that the terms of the 2018 permission could be complied with, that would have been an obvious issue for the EN appeal.

53. Ground 2 accordingly succeeds.

Ground 3

54. In the circumstances, I can be brief with ground 3. This ground contends that the defendant acted unlawfully in failing to repeat, in the 2021 variation, a condition which limited the use of the garage associated with the dwelling house to purposes incidental to that dwelling; and required that the garage must not be used for habitable accommodation such as kitchens, living rooms and bedrooms.

55. I agree with the claimant that the defendant cannot pray in aid class E Part 1 of Schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015, since class E Part 1 would apply only if the garage had been built as a consequence of permitted development rights. It was not.

56. The defendant argues that, even though this condition was removed from the face of the 2021 variation, the condition imposed on a detailed separate retrospective planning permission (ref. 19/00303) ("the 2019 garage permission"),which was granted for the as-built garage/outbuilding (as it had not been built in accordance with the 2018 permission) and which limited the use of the garage in a similar way, would apply to the garage the subject of the 2021 variation permission. However, I agree with Ms Colquhoun that once the 2021 variation is lawfully implemented, the 2019

garage permission cannot be relied upon as the basis for enforcing the condition related to development the subject of the 2021 variation permission.

57. Ground 3 accordingly succeeds.

Ground 4

58. Ground 4 also assumes that the 2018 permission can still be subject to a decision under section 73 of the 1990 Act. The claimant submits that the defendant wrongfully imposed conditions 1 and 3, both of which relate specifically to an unlawful building. It is said that this relies upon and refers to the amended scheme being an amendment to the unlawful "as built" development, rather than the development the subject of the 2018 permission. It would not have been possible to impose a condition on the 2018 permission which addressed the form of development by reference to any future unlawful development which was wholly outwith the 2018 permission.

59. The defendant describes this as a "nit-picking" challenge and that no sensible reader would infer that the reference to the "as-built" scheme gives that scheme an implied planning permission. Reliance is placed upon the principles concerning the interpretation of planning permission, summarised by Lieven J in UBB Waste.

60. I agree with Ms Colquhoun that the defendant's approach proceeds on the basis that the 2021 variation was viewed as a form of enforcement tool. This is not, however, appropriate in the context of a section 73 decision, which must relate only to an existing permission, the conditions of which are sought to be varied. As a result, any reliance upon UBB Waste falls away.

61. Ground 4 accordingly succeeds.

Ground 5

62. Ground 5 challenges what is said to be the unreasonable conclusion of the defendant that the amendments in respect of the application under section 73 were minor material amendments. Ms Pattni seeks to counter ground 5 by relying upon the judgment of James Strachan KC, sitting as a judge of the High Court, in Armstrong v Secretary of State for Levelling Up, Housing and Communities and another [2023] EWHC 176 (Admin). After a review of the authorities, the judge concluded that section 73 may be utilised where the proposed disapplication or variation of an existing condition would not be inconsistent with the operative part of the planning permission. There was no justification for inferring any further limitation on the scope of that section. Accordingly, section 73 is available even if granting the application would bring about more than a "minor material amendment" as described in the commentary on sections 73 and 96A of the 1990 Act in the Government's Planning Policy Guidance. Before Armstrong, it had been generally considered that an amendment which was not a "minor material amendment" would require a new planning application under section 70 of the 1990 Act.

63. In the light of Armstrong, the relevant law can be stated as follows. An application under section 73 will not founder merely because the proposed change involves more than a "minor material amendment" . Nor will it necessarily founder if the proposed change involves a "fundamental variation to the design of [a] single dwelling on the

Site that is otherwise permitted by the operative part of the planning permission" (paragraph 66 of the judgment). However, in the light of the judgment of the Court of Appeal in Finney v Welsh Ministers and others [2019] EWCA Civ 1868, section 73 cannot be deployed if the result would be to change the "operative part" or the "grant" of permission; that is to say, the description of the development contained in the grant.

64. Unlike the "operative part" of the 2018 permission, the wording of the 2021 variation refers to "details of lighting". There is, thus, a difference in the "operative parts" or descriptions. I do not regard the difference as *de minimis* or otherwise immaterial. As will be apparent from this judgment, in the present case lighting is a matter of significance.

65. On this basis, ground 5 succeeds.

Ground 6

66. The claimant contends that the 2018 permission was the subject of consultation with the defendant's BDCO. No such consultation appears, however, to have taken place in respect of the 2021 variation. This is said to be significant, given that the BDCO had expressed concerns in respect of the 2018 scheme, regarding it as being "at the limits of acceptability in terms of its size, scale, form and siting, as well as impacts in its wider setting".

67. Ms Pattni submits that the defendant considered that the amended proposals comprised in the application for the 2021 variation discharged the concerns raised by the BDCO and that there was, accordingly, no requirement to re-consult him.

68. I find the claimant has failed to make out her case under this ground. It was a matter of planning judgment whether the views of the BDCO should again be sought.

69. Ground 6 accordingly fails.

Ground 7

70. Ground 7 concerns conditions 1 and 9 and an alleged absence of clarity in respect of the lighting scheme for the development. Lighting issues have been a cause of concern for the claimant, given the setting of the IP's property relative to her home and, more generally, because of the sensitivity of lighting within the rural area: see paragraph 2 above.

71. The claimant argues that condition 9 says "all external lighting" is to be "removed" and "details of all external lighting [are] to be the subject of an approved scheme". By contrast, condition 1 requires accordance with a plan (SGA-143-104N), which contains details and specifications in respect of lighting. The claimant argues that this is another example of a conflict between an "approved" plan and a condition, which gives rise to what is said to be confusion. The conflict between the plan and condition 1 is said to render the conditions unclear, unreasonable, unenforceable and accordingly unlawful.

72. The defendant states that, whilst it is accepted the plan in question has an imbedded specification of a "*Jim Lawrence*" outdoor wall light, the plan of the western elevation specifically states: "external wall light removed". On a proper reading of the plans,

there is according to the defendant no ambiguity or conflict with condition 9. The external lighting is to be removed and a lighting specification submitted for approval.

73. At the hearing, it transpired, upon examination of the relevant plans, that the true position may be that the external wall lights which are to be removed are limited to those on the western elevation of the dwelling, since what appear to be lights delineated on drawings of other elevations are not subject to the words "external wall light removed".

74. Despite Ms Pattni's valiant efforts, there is, in my view, a significant degree of confusion on this issue, such that there is, as the claimant submits, an unresolved tension between the relevant conditions.

75. Ground 7 accordingly succeeds.

E. DECISION

76. The claimant's challenge succeeds on grounds 1 to 5 and 7.