**Case Name:** *Redrow Homes Ltd v Secretary of State for Levelling Up, Housing and Communities & Anor* [2023] EWHC 879 (Admin) (19 April 2023)

**Full case:** Click Here

**Commentary:** This was an unsuccessful challenge by the Claimant against the Inspector's decision ("the Decision") to refuse an application under section 73 of the Town and Country Planning Act 1990 ("the s.73 Application") to remove a condition ("Condition 19") which formed part of the original planning permission granted by New Forest District Council ("the Council"). Condition 19 required written documentary evidence to be submitted to demonstrate that residential buildings had met Code Level 3 prior to the occupation of any residential building.

The Claimant was originally granted planning permission in 2012 for a mixed use development that included 168 dwelling and restaurant, retail/commercial space along with a "pedestrian bridge over railway" ("the Footbridge"). The s.106 agreement which accompanied the original planning permission included a restriction which required the "construction and substantial completion" of the Footbridge prior to occupation of the 75th open market dwelling. This restriction was later varied by a deed of variation, to occupation of the 125th open market dwelling. The restriction, as varied, required that the final 17 open market units forming part of the development could not be occupied until the Footbridge had been delivered.

The Claimant, having virtually completed the development, attempted to apply for a s.73 variation to remove Condition 19 from the original planning permission. It was not in dispute that the real purpose behind the s.73 Application was to seek to remove or vary the obligation to deliver the Footbridge. The Council refused the application, not because it thought that Condition 19 should not be removed, but instead because it did not want to risk undermining the s.106 obligation that required the construction of the Footbridge. The Council's reason for refusal was that if it were to grant the s.73 Application it would mean that a new planning permission was to be granted for the development, without the necessary new s.106 agreement being entered into to secure the delivery of the Footbridge, amongst other obligations.

The Claimant appealed against this refusal and in their statement of case stated that they were prepared to enter into a s.106 agreement. They confirmed that they did not consider it necessary to require the last 17 open market dwellings to remain vacant but instead a varied obligation should provide for a 2 year period for the bridge to be delivered, failing which the Claimant would have to offer the Council the sum of at least £1 million which could be used to deliver the Footbridge. Upon being granted further time by the Inspector at the hearing to submit any s.106 agreement or unilateral undertakings, the Claimant submitted the following two unilateral undertakings on an alternative basis:

1. To remove the requirement for 17 open market dwellings to be left unoccupied unless or until the bridge is delivered and replace this with a positive requirement to deliver the bridge within 2 years but with no restriction on the unoccupied homes (in the absence of any evidence of any planning harm); OR
2. To remove the requirement for 17 open market dwellings to be left unoccupied unless or until the bridge is delivered and replace it with 5 open market dwellings.

The Council submitted that the Inspector should disregard the two undertakings on the basis that there are only two recognised methods for varying a s.106 agreement: (1) by agreement between the LPA and the person against whom the obligation is enforceable or (2) by an application under s.106B TCPA 1990. The Council argued that the Claimant was trying to instead vary a s.106 obligation through a third method (i.e. via a s.73 application).

The Inspector dismissed the appeal and the reasoning provided by the Inspector was challenged by the Claimant on two grounds.

Ground 1

The Claimant argued that the Inspector erred in law since the Inspector's Decision Letter indicated that she had misdirected herself in concluding that she had no power to allow the appeal and impose a fresh s.106 obligation. This argument was put forward by the Claimant on the basis that the Inspector used the following phrase at paragraph 17 of the Decision Letter: "*Notwithstanding my finding in relation to the removal of condition 19, were I to allow the appeal, the submission of UUs [unilateral undertakings] seeking to modify the terms of the planning obligation agreed under the original planning permission fall outside the scope of an application made under Section 73 of the Act*". This phrase, the Claimant argued, indicated that the Inspector restricted herself from taking into account the undertakings offered and concluded that she could not allow the appeal on that basis.

The Court rejected this ground and held that, although the Inspector's use of the above-mentioned phrase was "infelicitous", reading the Decision Letter as a whole, it was apparent that the Inspector knew and understood that she had the power to allow the appeal upon a satisfactory s.106 agreement being achieved. This was evident since the Inspector, in earlier paragraphs of the Decision Letter, had discussed why the undertakings offered were not satisfactory in the circumstances of the case. The Court held that if, as the Claimant submitted, the Inspector had erred in law and concluded that she did not have the power to allow the appeal, then there would have been no need for the earlier paragraphs.

Ground 2

The Claimant argued that, notwithstanding Ground 1, the Inspector's reasons were not sufficiently clear as to on what basis she dismissed the appeal.

The Court rejected this argument too since it held that it was clear from the Decision Letter, read as a whole, why the Inspector dismissed the appeal as discussed under Ground 1, namely since she considered the merits of the undertakings offered as insufficient.

This was a highly fact specific case and the judgement dealt with the language of the Inspector's Decision Letter, the specific unilateral undertakings offered by the Claimant at appeal stage, and the application of the case of *Norfolk Homes Ltd v North Norfolk District Council* [2020] EWHC 2265.

The key takeaways from this case are as listed below:

1. Where a s.73 application is allowed, the local authority must grant a fresh permission that exists alongside the original planning permission, which remains intact [26];
2. If the local authority grants a s.73 permission, it may not alter the description of development which was authorised in the earlier permission, nor may it impose a condition on a s.73 permission which purports to have the effect of altering the earlier permission [27];
3. The Inspector's Decision Letter should be read as though by an informed readership, without excessive legalism and as a whole [48];
4. The Court noted in the judgement that the heavy reliance by the Claimant on *Norfolk Homes* was not entirely appropriate in the circumstances of this case. The main reason for this being that, although in *Norfolk Homes* Mr Justice Holgate had held that a s.106 agreement that accompanied an original planning permission ceased to have effect under a subsequent s.73 permission, *Norfolk Homes* was distinguishable from the current circumstances. One of the primary distinctions was that in Norfolk Homes, the original planning permission had not been implemented and as such the s.106 obligations had not yet arisen; however, in the current circumstances, the original planning permission was almost entirely built out, therefore the s.106 obligations had arisen in this case. Consequently, the Court held that in such an event, the effect of the fresh s.73 permission cannot be to wipe out obligations which have already arisen. However, the Court held that this was a matter to be considered in another case [49-51].

*Case summary prepared by Chatura Saravanan*