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Introduction

Celina Colquhoun
Call 1990

Welcome to our New Year 'Bumper' edition of the Planning Environment & Property Newsletter.

We begin, Janus like, apt for this time of year, with two articles – one looking back on 20 years of PEP law at 39 from Stephen Tromans KC and David Sawtell and the other from John Pugh Smith on *Hopes & Fears* for the year ahead.

We then present a series of articles on recent cases from 2022 which have caught our attention:

James Burton discusses the Court of Appeal's decision in *Arnold White*[1] and why the planning regime does not trump the Forestry Act 1967;

Stephanie David provides insight into one of the first cases dealing with the OEP's investigative powers – *Wild Justice;*[2]

Jake Thorold then looks at the Court of Appeal's judgment in *Finch*[3] and when it may be relevant to assess the "indirect effects" of a proposed development within an EIA;

Celina Colquhoun picks up on Richard Harwood KC's case of *Reid*[4] which adds further clarity on s Section 73 and the impact of removal of planning conditions upon planning permissions following *Finney;*

Christopher Moss looks at *Smith*[5] and the lawful scope of PINS' usage of Appeal Planning Officers to assist inspectors in decision making;

Jon Darby discusses *Manchester Ship Canal v SEFRA* in which he and James Strachan KC successfully defended against a challenge to the first compulsory purchase order made under s155 of the Water Industry Act 1991;

and we end with the Supreme Court's decision in *DB Symmetry*[6] in which **Richard Harwood KC** again and **Victoria Hutton** acted dealing with the important distinction between imposing a condition as opposed to using a planning obligation to achieve in particular the dedication of land for a highway.

We hope this provides some food for thought and wish you all a happy, productive and prosperous 2023.

Reflections on 20 years of planning, property and environmental law at 39

Stephen Tromans KC
Call 1999 | Silk 2009

David Sawtell
Call 2005

2022 saw the 20th anniversary of the inception of what is now the Planning, Environment and Property Group at 39, celebrated by an excellent summer party. It invites some reflections on the changing nature of this practice area over the two decades, which have seen many ups and downs of policy and law, but a steady positive rise in the practice of the Group, from the original five members who joined 39 Essex Street (then actually at that address) from the Chambers of Lionel Read QC.

1 *Arnold White Estates Ltd v Forestry Commission* [2022] EWCA Civ 1304.
2 *R (Wild Justice) v The Water Services Regulation Authority* [2022] EWHC 2608 (admin).
3 *R (Finch) v Surrey County Council* [2022] EWCA Civ 187.
4 *Reid v Secretary of State for Levelling Up Housing & Communities; Newark & Sherwood District Council* [2022] EWHC 3116 (Admin).
5 *Smith v (1) Secretary of State for Levelling up, Housing and Communities (2) London Borough of Hackney* [2022] EWHC 3209 (Admin).
6 *DB Symmetry Ltd v Swindon BC* [2022] UKSC 33.

Planning

We started at what was actually quite an exciting time in planning law. The ramifications of the relatively new Human Rights Act 1998 for the UK's planning law framework were still being debated and worked out in the courts. EU law was being used in some cases very effectively to challenge decisions involving environmental impact assessment, with the court having to grapple with concepts such as sympathetic interpretation of domestic legislation and indirect and horizontal direct effect of directives. However, back then the very significant practical effects of the Habitats Directive remained in the future. Many of the members of the Group were involved in cases which sought to test the boundaries of judicial intervention – sometimes successfully, in other cases not. Similarly, strategic environmental assessment gave rise to important litigation and brought home in particular the need for consideration of alternatives.

Over the period of the Group's life there have of course been many political initiatives which have had more or less of an impact – some very little impact in retrospect. Regional planning under the Labour Government came and went and the 2020 Planning White Paper came to naught. Other changes such as local planning have had more enduring effects. We saw the streamlining on planning policy through the National Planning Policy Framework – itself not without obscurities requiring resolution by the courts.

Interesting and larger than life Secretaries of State have come and gone, such as John Prescott and Eric Pickles to name but four. Some areas of planning have been and continue to be political footballs, most notably housing supply and onshore wind energy. The planning system has however largely failed to arrest the decline in the nation's biodiversity.

In procedural terms the period has seen the decline if not the demise of the major planning inquiry, and practitioners have become familiar with the infrastructure planning regime for nationally significant infrastructure projects, with its much more written and front-loaded procedure. The growth in the use of hearings versus public inquiries has also given rise to the need to develop different types of advocacy skills.

In terms of court procedures, the requirements of the Aarhus Convention on access to justice have been accommodated within the rules on costs, not without controversy and difficulty. We have a dedicated Planning Court with its own procedures and requirements.

Environment

Turning to environmental law, what is initially striking is the number of issues which seem to have remained as quite intractable problems over 20 years. Throughout that period, I have found myself repeatedly asked the same questions on the definition of waste, with industry still often at loggerheads with the Environment Agency. Similarly, 20 years ago I was doing cases on combined sewer overflows to bathing waters, and in 2022 the newspapers were still running outraged articles about storm sewage discharges around the UK coast. Smelly landfills and industrial processes remain meat and drink to environmental lawyers, though there has been a substantial growth over those 20 years in group litigation and new ways of funding such claims.

There are of course many areas where new forms of regulation have developed, in terms of environmental taxes, emissions trading schemes and producer responsibility. Underlying these in many cases was of course EU law, and plainly the most potentially far reaching change over the 20 years was the UK's exit from the European Union and all that has flowed from this in terms of legal mechanisms to achieve some sort of orderly transition – a process which is far from over. The creation of the Office for Environmental Protection offers new possibilities, which may be as well, given how the Environment Agency and other regulators have been starved of resources.

The final key development to be mentioned must be climate change, as it has risen up the political agenda and as its consequences have begun to play out obviously in real time. The Climate Change Act 2008 was certainly a ground breaking piece of legislation, but attempts in the UK to hold government to account for the actions necessary for effectively combating climate change have not been generally blessed with great success. Undoubtedly climate change litigation is likely to dominate the next decade.

Property

Twenty years ago, we were looking forward to the Land Registration Act 2002 coming into force. The 'title promise' encapsulated in section 58(1) of the 2002 Act, which confirms the conclusiveness of an entry of a person in the register as the proprietor of a legal estate, was only finally confirmed by the Court of Appeal in *Swift 1st Ltd v The Chief Land Registrar* [2015] EWCA Civ 330. Overall, the impact of the 2002 Act has been evolutionary rather than revolutionary, developing the 1925 property regime rather than radically reformulating it.

The biggest changes in the last twenty years have been procedural rather than doctrinal. The Woolf Reforms that led to the Civil Procedure Rules 1998 were supplemented by Sir Rupert Jackson's report on civil litigation in 2010, which has led towards a cultural change towards cost budgeting and alternative dispute resolution. The advent of the Business and Property Courts in 2018 saw, for the first time, property work being drawn together at the same time, acting as the forerunner to a greater use of digital platforms for filing and hearings, as well as changes to the nature of disclosure, first in a Disclosure Pilot and then in the new PD57AD.

The First-tier Tribunal has also assumed a far greater role in property disputes. The work of the Land Registry Adjudicators was rolled into the Tribunal in 2013, giving it a significant jurisdiction in respect of land registration disputes. Reforms to long leasehold law have also given the First-tier Tribunal a larger role in disputes over the forfeiture of long residential leases. The Crime and Courts Act 2013 provided that Tribunal judges are judges of the county court and hence able to exercise that jurisdiction, leading to experimentation with 'double hatting' in a number of different areas, including the Landlord and Tenant Act 1954. The nature of property litigation and dispute resolution itself continues to change. We are still concerned with developments, large and small, and rights in and respect of the land itself and neighbouring plots. The cladding crisis has led to significant tension between leaseholders, management companies and landlords, with the Building Safety Act 2022 granting significant new powers to the First-tier Tribunal to intervene. Land is increasingly regarded, not only a as a financialised resource giving significant private wealth, but as a potential home, a place for protest, and the location for urban regeneration and renewal.

Conclusions

For those of us who have been on the journey throughout, it has been an exhilarating and at times exhausting ride. We have been blessed to be joined on the trip by both excellent home-grown talent from within Chambers and some exceptional lateral hires, to make the PEP Group what it is today. It certainly would not be where it is without the wonderful support of 39 Essex Chambers as a whole and the brilliant practice management team led by Andy Poyser. We have adapted and developed to assist our clients as law, policy and procedure have changed, sometimes beyond recognition, and the new silks and great junior barristers coming through mean that the PEP Group will meet whatever challenges the next 20 years will bring.

NEW YEAR HOPES & FEARS (PINS Issues)

John Pugh-Smith
Call 1977

Introduction

As a "planning professional", both as a long-time practising barrister and now, increasingly, as a neutral dispute resolver, there are occasions when a New Working Year triggers both feelings of cautious optimism and of continuing frustration.[7] Given how much of my time is still spent engaged with the outworkings of the Planning Inspectorate or "PINS" (as we usually refer), their pre-Christmas presents and offerings of *Smith v Secretary of State for Levelling Up, Housing & Communities and Hackney LBC* [2022] EWHC 3209 (Admin), their (current) Stakeholder Survey, their latest performance statistics, and, the potential outworkings of latest round of amendments to the LURB and NPPF[8] have prompted this article.

The *Smith* Case

A separate case note has been provided by my colleague, Christopher Moss.

In terms of timing, the last working week before Christmas saw the public release of Mr Justice Kerr's judgment.[9] The case raises an interesting and important legal issue revolving around a PINS's cost savings initiative of using "Appeal Planning Officers" or "APOs" to address delays and free-up inspectors' time, one of the Rosewell recommendations.[10] The context was an advertisement appeal.

The principal legal issue, upon which the statutory challenge succeeded, was whether the appointed Inspector, in breach of the requirements of procedural fairness and natural justice, failed to determine the appeal independently of the APO and had unlawfully sub-delegated his functions to an inexperienced junior officer, whose recommendation and reasoning he accepted without alteration. Whilst the relevant legislation did not require a site visit to be carried out, the appeal acceptance letter had stated that a site visit would be carried out by an Inspector or their representative. In the event, the APO had conducted the site visit on behalf of the Inspector, following which she had recommended that the appeal be refused on the sole ground of visual amenity. The Inspector had 'topped and tailed' the APO's decision without adding further reasoning before signing and issuing the decision in his own name, appending the decision of the APO.

Within the Judgment, we are reminded that whilst planning inspectors are not required by law to possess certain qualifications, they are in practice highly qualified professionals. Here, the APO had a university degree and had received some degree of training. Accordingly, Mr Justice Kerr determined that the employment of APOs to assist with reporting, document handling and carrying out site visits as a representative of an inspector was a lawful practice. However, in this case, as the Inspector had unlawfully delegated powers to the APO, such delegation was procedurally unfair because the APO had exercised a professional judgment that she was not professionally equipped to exercise. Mr Justice Kerr also observed that the better practice, to ensure fairness, would be *"for the APO to address the facts, avoiding planning judgments and avoiding*

7 Mediation and planning disputes (localgovernmentlawyer.co.uk)
Mediation and planning: here to stay? (localgovernmentlawyer.co.uk)

8 Unfortunately, space dos not allow for a summary of these amendments and proposals: Please refer e.g. to: https://www.localgovernmentlawyer.co.uk/planning/401-planning-news/52573-gove-consults-on-reforms-to-five-year-housing-land-supply-new-flexibilities-to-meeting-housing-needs-as-part-of-planning-overhaul

9 Dated 16th December 2022: https://www.bailii.org/ew/cases/EWHC/Admin/2022/3209.html

10 https://www.gov.uk/government/publications/independent-review-of-planning-appeal-inquiries-report (published 12 February 2019)
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1126183/Planning_Inspectorate_Statistical_Release_December_2022.pdf

discussion of the merits with the inspector; for the template to record the APO's findings; and for the decision maker then to fill in the planning judgment parts addressing the merits".

PINS Stakeholder Survey

The Stakeholder Survey,[11] published on 19 December 2022 with a return date of 13 January 2023, has sought to identify (through perhaps through an unhelpful scoring system ranging from "Strongly Agree" to "Strongly Disagree") the extent to which PINS currently demonstrates each of its stated values of *"Impartiality; Fairness; Openness; A customer-focused service"*. The survey, using the same scoring process, also asks whether PINS is: *"Trustworthy; Professional; Consistent in our processes; Consistent in our communications; Consistent in our decisions"*. Bold questions, all the more so now in the context of not only the *Smith* judgment but also the latest Performance Statistics published on 22 December 2022.[12] At this stage, one can only speculate what form answers will take and how they will be both received and addressed.

PINS Latest Performance Statistics

These advise: *"During recent months performance for hearings and inquiries has improved due to additional Inspector resource being used to improve performance in these areas; as a result the number of open written representations cases has increased causing longer decision times.* More specifically, PINS closed over 1800 appeal cases in November, higher than most months; but it was still generally receiving more appeals than it could currently decide. The overall number of open cases at the end of November was 14,477. It received 1,821 new cases in November and closed 1,801 (including withdrawn cases). Hearings, inquiries, and site visits saw the highest number in any month in the last two years (1,738); and in most months it was holding more than it did in the corresponding month last year. Nevertheless, median timeliness (i.e. the time taken by the 'middle' case if all cases were sorted from quickest to longest) by procedure type was:

- Written Representations: 26 weeks (last 12 months); 30 weeks (Nov 2022)
- Hearings: 56 weeks (last 12 months); 51 weeks (Nov 2022)
- Inquiries: 47 weeks (last 12 months); 41 weeks (Nov 2022)

Enforcement decisions made in November had a median decision time of 52 weeks, with the 12-month median being 44 weeks. The median time for planning appeals decided by inquiry under the Rosewell Process (i.e. housing appeals) was 29 weeks. There were 390 Planning Inspectors employed by the Inspectorate in November 2022 with a full-time equivalent of 348.

Nonetheless, are the statistics really going to get significantly better on a sustained basis without wider and more flexible solutions?

A fresh approach

In the context of this article the *Smith* judgment[13] is helpful in the following wider respects. It confirms:

1) If the legislative provisions expressly permit or forbid what happened, that will dictate the result. If the process to be followed is at large and within the decision maker's discretion, it is for him or her to decide on the process, provided it is fair. Whether or not the process is fair is a matter for the court, not the decision maker. The test of fairness is not whether it is rational to have adopted the particular procedure decided upon.[14]
2) The factual context includes the nature of the decision to be taken, the considerations relevant to the decision, the experience and qualifications (both required in law and needed in practice) to be appointed to make

11 https://forms.microsoft.com/r/yDLDKW8a47
12 https://www.gov.uk/government/statistics/planning-inspectorate-statistical-release-22-december-2022
13 Para. 69
14 @ Para. 88

> the decision; and the characteristics and role played by, respectively, the decision maker and the person giving assistance to the decision maker.[15]

Accordingly, while there are now, necessarily, judicially prescribed limits on the deployment of APOs, the foregoing should still give PINS (and DLUHC) hope that more innovative solutions towards helping reduce the backlog of appeals and speed up the process are legally permissible. I suggest that these could swiftly include not only the greater use of technical assessors (e.g. on heritage, design and viability disputes) but also independent mediators (facilitators) to help resolve or limit discrete issues within the appeal and call-in processes, for example, housing land availability, viability and section 106 contributions, mitigation measures.

In this context, it needs to be recalled that the remit of the *Independent Review of Planning Appeal Inquiries* chaired by Bridget Rosewell OBE was: "*To review the use and operation of the planning appeal inquiries procedure to make it quicker and better. The Review will examine the end-to-end process and will make recommendations to significantly reduce the time taken to conclude planning inquiries, while maintaining the quality of decisions".* In a bare 60 pages, it contained pragmatic, pithy phrased insights into the strengths and weaknesses of the inquiries system and provided recommendations for improvement of each stage of the process, including the following passage:[16] *"Achieving these targets won't just need the introduction of technology or improving the availability of suitable inspectors: it also requires a significant culture change on the part of all the main parties involved, led by the Planning Inspectorate, so that a rigorous performance culture is embedded within the behaviours of all parties".*

Regrettably, neither the words "mediation" nor "facilitation" appear in a word search of the Report, all the more so since only 7 years earlier PINS had undertaken a detailed study, under the chairmanship of Leonora Rozee OBE (a former lead inspector) with its resulting and much lengthier report published in June 2010.[17] Within its conclusions the following, equally pithy, observation was made: *"The culture of the planning system tends to be based on knowledge of the system and reflects different players' sense of their rights rather than their responsibilities. Whilst this is starting to change it often leads to a confrontational approach to dealing with planning issues and an imbalance between those 'in the know' and those outside (especially more marginalised groups in society). The more consensual approach required for effective mediation is not embedded."*[18]

Further, the Rozee recommendations embraced the following three headings:

1) **developing and building a market** to include: developing awareness, assessing the value of mediation, developing practice, selling the idea and assessing the effectiveness;
2) **providing advice and guidance** to include: developing understanding; quality assurance;
3) **developing skills and creating capacity** to include: providing a framework, developing the infrastructure to support the use of mediation, developing the skills and knowledge of all players in the planning system.

Indeed, when the Government planning reforms of 2011 were originally envisaged, one of the aims had been to try to put an end to the "us and them" character of the planning system. Accordingly, it came as no surprise that the Government's Killian Pretty Review of 2008 recommended the greater use of alternative dispute resolution or ADR to

15 @ Para. 89
16 Para. 33
17 Final-Report-Mediation-in-Planning-PDF.pdf (natplanforum.org)
18 Para. 4.28

try to end the adversarial approach of planning and provide a speedy alternative to appeals, and, that both The Department of Communities and Local Government (as it then was) and the PINS responses in 2010 endorsed that approach together with "A Mediation Guide" endorsed by the then Planning Minister, Bob Neill MP. However, save for the 2011 S106 Brokers Initiative for 'stalled developments' and the 2021 Enforcement Pathfinder Initiative both Central Government and PINS have not achieved further tangible and sustained progress.

So, given the current and likely state of affairs surely now is the time for fresh thinking and approaches?

Challenges and solutions

As somebody long-known as an advocate of deploying mediation within the planning system it would be unrealistic of me not to articulate the challenges in this article; but there is also a need to identify the achievable solutions too; for I am a sufficient pragmatist to recognise that mediation is best deployed in certain situations and not a "one-fit" imposed solution, as is now likely for the smaller claims civil justice system.[19]

Addressing the challenges, it needs to be acknowledged at the outset that there is a reluctance within the planning industry, and especially amongst local authorities, either to explore, or let alone take up mediation. The anecdotal but consistent evidence suggests that this is due to a mindset that, partly, arises because both mediation and its benefits are poorly understood, and, partly, because of unjustified concerns that mediation is not compatible with decision-making within a statutory framework, and the role of the public interest (in various respects) within the planning system.
However, these challenges can be addressed by education, both formal (such as Government guidance as in Scotland)[20] and informal (such as training run by experienced mediators). However, experience within the civil justice system, shows that it will, almost certainly, be necessary to adopt the incentivisation model, namely, the use (or threat) of cost sanctions for parties that unreasonably refuse to mediate. Indeed, even a small and swift change to the PPG advice on "appeal costs" would, in itself, be an easy solution as well as considerably help change current mindsets.

Furthermore, these initiatives should be accompanied by a series of short training sessions on mediation (webinars/seminars) organised by and delivered through PEBA, and to which local authorities, planning consultants and planning lawyers and other professionals are invited. Finally, so as to ensure the delivery of high-quality mediation, a public list of qualified, experienced mediators with planning law experience will be maintained by, say, PEBA and/or the RICS.[21]

Concluding Remarks

As a practising planning professional and mediator it has been my experience that the use of mediation and other related techniques to facilitate dialogue can achieve positive outcomes in even the most protracted and ill-tempered disputes. So, why not become an active participant in this major "sea change" in dispute resolution in the planning context as one New Year resolution?

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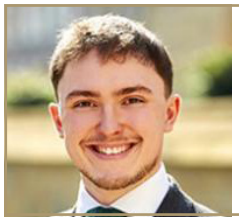
19 https://hsfnotes.com/adr/2022/08/19/uk-government-proposes-mandatory-mediation-in-small-claims-and-consults-on-increased-regulation-of-the-mediation-industry/

20 https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2021/07/guidance-promotion-use-mediation-scottish-planning-system/documents/circular-2-2021-guidance-promotion-use-mediation-scottish-planning-system/circular-2-2021-guidance-promotion-use-mediation-scottish-planning-system/govscot%3Adocument/circular-2-2021-guidance-promotion-use-mediation-scottish-planning-system.pdf

21 I am grateful to my PEBA colleagues, Paul Tucker KC, Harry Spurr and Josef Cannon, who have contributed to this aspect of this article.

advisor to the All Party Parliamentary Group on ADR, one of the Design Council's Experts and a member of its Highways England Design Review Panel. He has been and remains extensively involved in various initiatives to use ADR to resolve a range of public sector issues. including the DLUHC/PINS Enforcement Mediation Pathfinder Initiative.

Smith v (1) Secretary of State for Levelling up, Housing and Communities (2) London Borough of Hackney [2022] EWHC 3209 (Admin)



Christopher Moss
Call: 2021

Facts

In *Smith*, Mr Justice Kerr considered the lawful scope of PINS' usage of Appeal Planning Officers ("APO") to assist inspectors in determining planning applications.

The Claimant operated an agency for clients wishing to place advertisements. He had applied unsuccessfully to the London Borough of Hackney for permission to erect a large illuminated advertising billboard on Shoreditch High Street. He then appealed to the Secretary of State who appointed an inspector to consider the application.

The inspector was assisted by an APO who conducted a site visit as his representative. After this visit, the APO provided a reasoned written recommendation and decision template for the inspector. The recommendation was to dismiss the appeal on the sole ground of visual amenity. The inspector accepted this recommendation and the APO's reasoning. He issued a decision comprising the 12 paragraphs of the APO's report, repeated in full including her electronic signature. These 12 paragraphs were 'topped and tailed' by the inspector without adding any further reasoning and signed electronically by him.

The Claimant applied for a statutory review of the inspector's decision on three grounds:

1) That the inspector had, in breach of the requirements of procedural fairness and natural justice, failed to determine the appeal independently of the APO and had unlawfully sub-delegated his functions to an inexperienced junior officer, whose recommendation and reasoning he accepted without alteration;
2) The fact the site visit was carried out by an APO breached a legitimate expectation that the inspector would carry out the site visit himself; and
3) That the APO did not have all the relevant documents submitted to PINS at the time she conducted her site visit.

Judgment

The Claimant was successful on ground 1, grounds 2 and 3 were dismissed as being without merit. Mr Justice Kerr held that whilst an inspector has the discretion to decide on what procedure to adopt in determining an application, they must not do so in an unfair way. He cited the principles of fairness as set out by Lord Mustill in *R (Doody) v SSHD* [1994] 1 AC 531, focussing on requirements 3 and 4 specifically. These are that, what fairness demands depends on the context of the decision, and that an essential feature of that context is the governing statute, its language and the shape of the legal and administrative system within which the decision is taken.

Mr Justice Kerr rejected the Secretary of State's argument that HHJ David Cooke's judgment in *Harris v Secretary of State for Communities and Local Government* [2014] EWHC 3740 (Admin), endorsing a precursor scheme to the use of APOs where a planning officer would undertake site visits and help an inspector to draft the decision letter, provided a complete answer to the Claimant's ground 1. He held that in *Harris*, unlike the instant case, there was no evidence the planning officer had exercised any professional judgment on what the outcome of the appeal should be. Rather, he had simply conducted a

site visit and reported back to the inspector on the facts. He held that *Harris* demonstrated only that there is nothing objectionable in a person subordinate to the inspector helping assemble evidence and reporting on the facts, evidence and issues relevant to an application.

Mr Justice Kerr went on to state that the question in each case will be whether any delegation has gone beyond what is permissible. In considering this he reiterated the principles from *Doody* that what will be fair and permissible is a question for the court based on the legal and factual context of the decision.

Mr Justice Kerr held, following *Harris*, that there was nothing objectionable to the recruitment of APOs to assist with document handling, carrying out site visits on behalf of an inspector, and preparing reports that marshalled facts and evidence. However, it was clear that here, the APO had strayed beyond that and provided a report addressing the planning merits of the application. This was an exercise she was underqualified to undertake. He held that fairness will often require that APOs refrain from exercising planning judgment. He stated that best practice is for the role of APOs to be restricted to reporting on facts. Further, he held that the unfairness of the initial planning judgment being made by a person underqualified to do so, could not be remedied on the basis that it was merely provisional. It was plain that such an initial report would provide the inspector with a powerful steer.

In light of his findings on ground 1, Mr Justice Kerr quashed the inspector's decision dismissing the claimant's appeal and held that the appeal would need to be redetermined by a different inspector.

Comment

Mr Justice Kerr's judgment provides a helpful application of the well-established principles of procedural fairness outlined by Lord Mustill in *R (Doody) v SSHD* [1994] 1 AC 531 in the context of a delegated decision maker delegating further. It is trite law that what fairness requires depends on the legal and factual context so, in some ways, *Smith* turns on its facts. However, what is clear from Mr Justice Kerr's judgment is that it will usually be unfair for a planning inspector to delegate exercises of planning judgment to another, less-qualified, person. This is the case even if the decision reached by the less-qualified person is provisional as it will nevertheless provide "the inspector with a powerful steer" [100]. In such circumstances, fairness will most likely require that the application is redetermined by a different inspector.

One would imagine the facts of the instant case were an unusual extreme. Nevertheless, it will be important for practitioners who have had their appeals dealt with in some way by an APO, to scrutinise what their involvement was in the decision. Namely, to assess whether it is likely an APO has gone beyond their "useful role" marshalling the facts and veered into an exercise of planning judgment. Whilst Mr Justice Kerr stops short of stating explicitly that any exercise of planning judgment by a person other than the inspector will be procedurally unfair; his statement at [99], that APOs should avoid any involvement with the planning merits of a decision, suggests this is likely to be the case.

Relevance of an OEP investigation in the context of judicial review claim *R (Wild Justice) v The Water Services Regulation Authority* [2022] EWHC 2608 (admin)

Stephanie David
Call 2016

The Office for Environmental Protection ("OEP") was, for the first time, joined as an interested party in R (Wild Justice) v The Water Services Regulation Authority [2022] EWHC 2608 (admin). The case concerned whether the Defendant ("Ofwat") was properly carrying out its environmental regulatory duties in respect of the discharge of untreated sewage into rivers and water bodies.

The Water Industry Act 1991 ("1991 Act") imposes statutory duties on the Secretary of State and Ofwat in respect of securing the functions of water and sewerage undertaker across England and Wales. By s 94(1) of the Act, there is a statutory duty to improve the public sewers and make provision for emptying them. S 18 allows enforcement action to be taken in respect of securing compliance with the s 94(1) duty. By s 27(2), Ofwat has a duty to collect information relating to the carrying on by companies of their functions in respect of water and sewerage undertakers.

There is also the Urban Waste Water Treatment (England and Wales) Regulations 1994, which implemented the Urban Waste Water Treatment Directive and is retained EU law. By regulation 4(2), sewerage undertakers have to ensure the collecting systems (namely sewers) satisfy the requirements set out in schedule 2 to the regulation in respect of the design, construction and maintenance of sewers, having regard inter alia to the prevention of leaks and the limitation of pollution. Regulation 4(4) requires that urban waste-water is treated in accordance with regulation 5 before it is discharged. Ofwat's enforcement powers set out in s 94(3) of the 1991 Act also apply to regulations 4(2) and 4(4).

The Claimant alleged that:

i) Ofwat was taking an unlawful *"passive stance"* in respect of the enforcement of the 1994 Regulations, in particular regulations 4 and 5;[22]

ii) Ofwat breached section 27(2) of the 1991 Act insofar as it unlawfully failed to collect information relating to the performance of obligations under the 1994 Regulations and it breached s 2(2A) of the 1991 Act; and

iii) Ofwat misdirected itself in law insofar as it considered that its obligations could be discharged by reference to the data collected by the Environment Agency.

Bourne J refused permission to apply for judicial review. He observed that the accusation of a failure to act is put in a generic way based upon an asserted lack of evidence of any such action. The Claimant had not identified any specific action that Ofwat should have taken.

Bourne J determined that the core obligation in s 94 is *'to provide and maintain sewers in each area "to ensure that the area is and continues to be effectively drained."'* He considered that there is a substantial overlap between s 94 and regulation 4, but the latter imposes requirements in relation to water treatment plants.

He took into account the investigation and enforcement steps that had been taken by Ofwat and which were continuing, such as Ofwat undertaking routine monitoring activity as part of its cyclic process for setting price controls and obtaining data from the EA concerning compliance with the requirements of permits for treatment and discharges. This ongoing monitoring may trigger an investigation by Ofwat; and, if necessary, enforcement action taken. He also considered the Ofwat's letter dated 18 November 2021 to the

22 These regulations implemented the Urban Waste Water Treatment Directive and remains in force as retained EU law

Chief Executives of water companies launching an investigation, given Ofwat's concerns about the scale and extent of companies' non-compliance with the Flow to Full Treatment ("FTT") conditions on their environmental permits for wastewater treatment works in England. He concluded that, in light of the investigation and enforcement steps, it is unarguable that the Defendant had not turned its mind to compliance with its statutory duties or had failed to perform them. He observed that that does not mean that Ofwat has *"necessarily discharged its investigation and enforcement duties in a sufficient or satisfactory way"* but the court is not well placed to assess the specific action taken by Ofwat. He noted that the data collected by the EA and Ofwat's enforcement action are relevant to the water companies' obligations under the 1994 Regulations. The Claimant was therefore wrong to assert that the data and investigations were unrelated to the 1994 Regulations.

In their argument, Ofwat referred to an investigation being undertaken by then OEP, hence it was joined as an interested party. That investigation was in relation to a complaint advanced by Wildfish against the Secretary of State, the EA and Ofwat into their alleged failure to comply with their respective duties regarding the regulation of the water companies' duties to manage sewage. Counsel for Ofwat did not advance the argument that the OEP investigation constituted an adequate alternative remedy; and indeed, counsel for the OEP emphasised the differences between an Ofwat investigation and a judicial review. Instead, on behalf of Ofwat, counsel argued that the fact of the investigation lessens the public interest in the judicial review, which is relevant to the court's discretion in respect of permission.

Bourne J emphasised that, given there were no arguable grounds for judicial review, the OEP investigation did not influence his decision, but he observed that the public is likely to be reassured by the fact the OEP is undertaking such an investigation.

Further clarification of Finney;[23] Arrowcroft[24] & Lambeth[25] on Section 73 and impact of removal of planning condition upon operative part of permission – *Reid v Secretary of State for Levelling Up Housing & Communities; Newark & Sherwood District Council* [2022] EWHC 3116 (Admin)

Celina Colquhoun
Call 1990

Introduction

Many of us will recall the 'shake up' to certain assumptions and practice when using section 73 of the Town and Country Planning Act 1990 ('the 1990 Act') to amend planning permissions as a consequence of the Court of Appeal's decision in Finney and also the Supreme Court's decision in Lambeth. This recent case of Reid helpfully refines and clarifies matters a little further, looking in particular at the consequences of removing conditions as opposed to adding or amending them.

It also deals with a couple of interesting jurisdictional points where applicants might choose to 'cover all bases' as it were for safety's sake but which in fact only creates more potential problems.

The case

The case involved a s288 challenge to an Inspector's decision refusing an appeal against the local planning authority's non determination of the claimant's application pursuant to section 73. That (single) application had sought the simple removal of two conditions, imposed upon a s73 permission involving the use of land for "34 self-catering

23 *Finney v Welsh Ministers* [2019] EWCA Civ 1868, [2020] PTSR 455
24 *R v Coventry City Council, Ex P Arrowcroft Group plc* [2001] PLCR 7
25 *R (oao Lambeth) v SSCLG* [2019] UKSC 33

holiday units", which prevented reliance upon the Town and Country Planning (Use Classes) Order 1987 ("the UCO") to change the use of such units to permanent dwelling houses. The same s73 application however also sought the removal of the equivalent conditions under the original planning permission.

The Claimant made no bones about the purpose of his application, namely that once the conditions were removed, he wanted to be able to rely in future upon the UCO to change the use of the units to permanent dwellings but, from the start, the LPA and subsequently the Inspectorate, formed the view that because of this potential consequence the removal of the conditions themselves would lead to the sort of conflict between the development as described in the operative part of the planning permission and the conditions imposed that Finney had determined was not within the powers of s73. The LPA in fact had concluded that it could not determine the application at all on that basis and indeed PINs initially declined to accept it had jurisdiction to determine the appeal. The Claimant duly persuaded the Inspectorate that such a position would be unlawful and instead the appeal was determined but then refused.

It appears however that that initial position may have infected the Inspector's approach as, having identified the main issues as being first whether it was *"possible in law to alter the use of the 34 self catering holiday units by 'removing' the disputed conditions attached to the planning permissions, in the way proposed";* and then secondly if it was possible, the reasonableness of the conditions and the impacts of allowing their removal, the Inspector limited her decision to determining the first issue. Having concluded it was not possible she did not therefore go on to consider the second issue in the alternative.

In addition, the Inspector dealt with the fact that the application related to the original permission as well seeking the removal from that permission the same two conditions (albeit which had different numbers than the s73 permission). She concluded that it was not possible to remove the conditions from this permission on the basis that it made a remaining condition (which had been removed on the s73 permission) unenforceable.

The s288 issues and judgment

Mrs Justice Farbey concluded in accordance with the claimant's ground 1 that the Inspector had misdirected herself in law in respect of the remit of s 73. This was because whilst the consequence of the removal of the two limiting conditions might allow for the change of use lawfully to occur, the act of removing the conditions itself did not lead to any inconsistency between the description and the (remaining) conditions. The Inspector herself had indeed recognised *"there would be no condition imposed that was inconsistent with [the description of the] development"* but had applied a test which considered the *"effect of the proposal"* which she concluded itself *"would not be consistent with the description of the development and so the appeal cannot succeed"*.

In considering the guidance in *Finney* and *Arrowcroft*, the claimant was clearly able to rely upon *Finney* but the SofS sought to rely upon Arrowcroft on the basis that the removal of the conditions which ensured the permitted use would be inconsistent with the nature of the planning permission and bring about a fundamental change to that permitted use. This was rejected on the facts.

Farbey J in effect accepted the argument that the effect was only a potential one albeit one which the claimant had said he would take advantage of. This however did not prevent the lawful application of s73. Instead that was a matter the Inspector could go on to consider as part of the second series of issues. The Inspector however had stopped short of doing so and had not continued to complete that task.

The Claimant's second ground raised the way the Inspector had approached the fact that the appeal related to two permissions (i.e. the historic original one as well as the s73 permission). Farbey

J concluded that it had not been necessary to include the original permission and in fact that the Claimant in doing so had neither helped himself or indeed the Inspector. The Inspector's conclusions on this point however which had treated the original permission as still live and relevant made no sense in the judge's view.

The judge also concluded that an application under s73 should not relate to more than one permission.

It may be that the Claimant had sought to cover the original permission and subsequent s73 permission based on a concern about the consequence of the grant of a s73 application which did not operate to rescind or replace the terms of the original or any earlier permission but acts to create a new permission. The point was made in the Supreme Court's judgment in *R (oao Lambeth) v SSCLG* [2019] UKSC 33 at [38] and although not fully argued the SC noted that certain conditions on an earlier permission *"would in principle… remain valid and binding – not because they were incorporated by implication in the new permission, but because there was nothing in the new permission to affect their continued operation"*. The judgment here does not however address that specific point but instead the judge took a pragmatic approach on the facts which showed that the original permission had in effect been overtaken by events.

This matter however provided the basis for an argument raised by the SofS relating to the inspector's jurisdiction which was supported directly by the LPA acting as an interested party in the claim to have decided the appeal at all and which was raised as a bar to relief. In short the SofS argued that because the Inspector had no power to consider an appeal addressing a s73 application relating to changes to conditions in two, separate previous planning permissions, the appeal could not lawfully be redetermined (or indeed determined in the first place).
Again, whilst the judge had noted the claimant had not helped himself by making the application on this basis, it had had not been an issue raised before the Inspector on appeal by the LPA (or indeed by PINs of its own volition). Indeed the only jurisdictional issue had been the remit of s73. To that end, Farbey J held that it was unfair upon the Claimant that this jurisdictional point be raised now before the High Court when the Claimant had not had the opportunity to address the matter on appeal. No bar to relief therefore should arise.

In particular however the judge concluded that whilst it *"was otiose to ask an inspector to consider"* the original permission it did *"not follow that an inspector must lack jurisdiction to determine the entire appeal"*. She did however *"prefer to reach no generalised or exhaustive conclusions about jurisdiction but to concentrate on the situation that arose in this case"*.

Conclusions

In terms of what to take from this, first, the guidance as to the remit of s73 in *Finney* and in *Arrowcroft* is essentially a practical one of interpretation i.e. does the variation sought be it removal or addition/amendment of a condition lead to an inconsistency on the face of the permission. The question of whether the change sought could lead to a fundamental change to the development is about the desirability or justification for the change, in other words is the reason the condition was imposed in the first place still appropriate in planning terms?

The second lesson is do not make an application under s73 addressing more than one existing permission. This does not however mean that if you consider that the circumstances are such that two implementable permissions exist each with different conditions that you treat one or other as 'superseded' until such time as one lapses or another is implemented or indeed comes to an end (the lesson of course from Hillside).[26] It may well be however if it is not clear which permission has been implemented that the only 'safe' solution is to make two s73 applications. In this instance

26 *Hillside Parks v Snowdonia NPA* [2022] UKSC 30

however the judge considered it was unnecessary to have addressed the issue at all.

Reid v Secretary of State for Levelling Up Housing & Communities; Newark & Sherwood District Council [2022] EWHC 3116 (Admin)
https://www.39essex.com/information-hub/insight/scope-section-73-planning-applications

Richard Harwood KC appeared for the successful Claimant.

R (Finch) v Surrey County Council [2022] EWCA Civ 187

Jake Thorold
Call 2020

This case concerns a grant of planning permission for commercial extraction of oil in Surrey. Local objectors brought judicial review proceedings, contending (among other things) that the applicant's Environmental Statement was flawed as it failed to include an assessment of 'downstream' carbon emissions which would result from the eventual use of petrol to be refined as a result of the proposed development.

The case is particularly interesting for raising the question of whether, and if so in what circumstances, an EIA should include an assessment of environmental impacts resulting from the subsequent use of products emanating from a proposed development. Can such use constitute an "indirect significant effect of the proposed development" for the purposes of Regulation 4(2) of the EIA Regulations?

In the High Court, Holgate J considered that such impacts are "legally incapable" of being an effect requiring assessment, essentially concluding that "indirect effects" must still be impacts which the proposed development itself has on the environment, as opposed to environmental impacts which result from the later use of an end product.

All three Court of Appeal judges disagreed with this, concluding that the existence and nature of "indirect effects" depended on the particular circumstances of the proposed development. A wider assessment of emissions arising from an end product may in some circumstances be appropriate, with the central consideration being the degree of connection between the development and its putative effects. The judges agreed that the question of whether a particular impact is a "likely significant effect" of a proposed development – whether directly or indirectly – is an evaluative judgment for the local planning authority to make on the facts.

In this particular case, Lindblom SPT and Lewison LJ concluded that Surrey County Council had acted lawfully and given sufficient reasons for concluding that the downstream emissions were not required to be considered. Moylan LJ dissented, however, finding that cogent reasons were required for not assessing an impact agreed to be inevitable should the proposed development go ahead. In his view, such reasons hadn't been given.

Permission to appeal has been granted by the Supreme Court. Having already achieved a considerable victory in the Court of Appeal by establishing that downstream emissions are capable of being an effect requiring EIA assessment, the Appellant is evidently after a clearer steer from the Supreme Court on when such emissions should be considered. Whether the Supreme Court will provide it remains to be seen…

Planning regime does not trump Forestry Act 1967, nor does 1967 Act prove exemption for "multi-stage" consents: *Arnold White Estates Ltd v Forestry Commission* [2022] EWCA Civ 1304

James Burton
Call 2001

In this case, which provides helpful insight into whether legislative provisions outside the statutory town and country planning regime, but interacting with it, are "trumped" by the planning regime, the Court of Appeal (Sir Keith Lindblom, Senior President of Tribunals, Holroyde LJ, Vice-President of the Court of Appeal (Criminal Division) and Coulson LJ) considered the following question (per the Senior President of Tribunals at [1]):

> *"When a notice has been issued by the Forestry Commission under section 24 of the Forestry Act 1967 for a breach of restocking conditions on a felling licence which has been relied upon as authorising the felling of trees on a site, what is the effect on that notice if planning permission is subsequently granted for a development whose construction would make it impossible to comply with those conditions?"*

The appellant, Arnold White Estates Ltd ("the Company") contended that the Forestry Commission ("the Commission") had acted unlawfully in maintaining a 1967 Act s.24 notice it had issued on 28 July 2020 to enforce compliance with restocking conditions to a felling licence granted in October 2018 for woodland at Ilford Park, near Newton Abbot in Devon ("the Licence"). Outline planning permission for mixed use development on the land had been granted in June 2016, prior to the Licence. The Licence having been granted, the Company then implemented the Licence, but failed to carry out the restocking required by the conditions attached to it. The Commission issued a 1967 Act s.24 notice in July 2020, requiring restocking in accordance with the licence ("the Notice"), and the Company did not seek to appeal the Notice. However, a further planning permission, for an access road and drainage works, which was a full (not outline) permission, was granted in September 2020. ("the Full Permission"). The requirements of the Notice were incompatible with the Full Permission.

The Company sought to persuade the Commission to either withdraw the Notice, or concede it was overridden by the Full Permission.

The basis of the Company's argument, maintained on appeal against refusal of permission for judicial review of an averred "decision" by the Commission to agree with the Company, was the exemption at s.9(4)(d) of the 1967 Act. Section sets out (many) exemptions to the 1967 Act requirement that a person obtain a licence before felling growing trees, and s.9(4)(d) provides that a felling licence is not required if the felling:

> *"(d) is immediately required for the purpose of carrying out development authorised by planning permission granted or deemed to be granted under the Town and Country Planning Act 1990 …"*

The Commission's position was that there was nothing in legislation to the effect that planning permission overrode a s.24 notice, nor would it regard planning permission as a reasonable excuse for non-compliance, particularly given the climate emergency which meant that it could not "lightly agree to a net loss of woodland cover, however small, even if planning consent is obtained". It added that it did not have statutory power to amend or revoke a s.24 notice once served.

The Court of Appeal agreed, rejecting the claim (the Senior President giving the lead judgment, the Vice-President and Coulson LJ agreeing) and agreeing with the judges below (Sir Ross Cranston on the papers and Thornton J at an oral renewal).

The Senior President began the analysis by noting that whereas control of felling had originated during the Second World War as a means of ensuring a strategic reserve of standing timber, the policy behind the legislation had changed dramatically since, such that the felling regime was (is) now aimed at preserving and enhancing the amenity provided by woodlands and forests [7].

The Company's case (summarised at [61]–[62]) was essentially that the concept of "outline" planning permission did not exist when the 1967 Act was passed, and s.9(4)(d) as presently enacted had to be read as applying to "multi-stage" planning consents, such that the combination of the 2016 outline planning permission and the later Full Permission, *after* the Licence, meant that the Full Permission overrode the requirements of the restocking conditions to the Licence, hence the Notice should fall away.

Importantly, the Company argued that the town and country planning system was inherently concerned with the public interest, including the protection of amenity and sustainability for which the felling restrictions in the 1967 Act were designed, but the town and country planning system embraced a wider view, to which the 1967 Act should give way.

There was no direct challenge either to the Licence itself or to the Notice on their own terms, there being no submission that s.9(4)(d) of the 1967 Act provided an exemption from the requirement to obtain a felling licence solely on the basis of the outline planning permission.

The Court of Appeal held that on a proper interpretation of the provisions governing felling in the 1967 Act, a subsequent grant of planning permission did not automatically trump an extant felling licence, or the conditions imposed upon it ([63]). The Senior President noted ([64] and [68]) that the 1967 Act was a carefully constructed and self-contained statutory scheme, in which Parliament had made provision for the synchronicity between the statutory felling regime and the statutory town and country planning regime (e.g. s.9(4)(d) and also elsewhere), but that Parliament had not done so in relation to a situation in which a felling licence was followed by a detailed planning permission that contradicted it. He did not see the concept of "immediately required for the purpose of carrying out development authorised by planning permission …" in s.9(4)(d) of the 1967 Act as a difficult one, rather the Senior President said this ([65]):

> *"Felling will be 'immediately required' where the planning permission definitely requires it to be done if the development permitted is to proceed and does not entail any further relevant approval having to be obtained from the local planning authority. This would include a grant of full planning permission or a grant of outline planning permission together with the subsequent approval of reserved matters in a 'multi-stage development consent' process. It would exclude an outline planning permission without the necessary approval of reserved matters, which would be only the first stage in such a 'multi-stage' process: for example, the outline planning permission granted by the council in June 2016, in which reserved matters approval was required by condition 1 for details of layout, scale, the appearance of the buildings and landscaping in each phase before any development in that phase could be commenced …"*

In the circumstances, to accommodate the Company's case would have required the Court to read into this carefully constructed and self-contained statutory scheme provisions that did not exist: a "significant change", to the effect that an earlier and lawful felling licence would be overridden by a subsequent detailed grant of planning permission. This the Court of Appeal was not prepared to do, Parliament being assumed to have sought to legislate *"as fully as it considered necessary for the different scenarios which might arise"* and such a significant change surely requiring explicit provision in the statute itself ([68]–[69]).

Nor did the fact that the planning authority had taken into account an illustrative masterplan showing removal of trees when it granted outline planning permission in 2016 affect the operation of the 1967 Act. The statutory felling regime was not subordinate to the planning regime, rather there was a synergy between the two, and the duties of the Commission went beyond the role of planning authorities in discharging their development control functions, whilst similarly the considerations relevant to the Commission might not necessarily be taken into account by planning authorities ([71]). The Company's argument would have meant it would have benefitted from the Licence, including by removing trees such that they were not there to be considered by the planning authority when it was considering an application for planning permission, but not carried the burden of the Licence, which would go against the interests of good forestry as the Commission perceived them to be when it granted the Licence and issued the Notice ([74]).

As to the Company's arguments regarding an implied power in the Commission to amend or withdraw a s.24 notice (as to which the Company relied by analogy upon the principle applicable to abatement notices issued under the Environmental Protection Act 1990 as discussed in the judgment of Richards J, as he then was, in *R. v Bristol City Council Ex p. Everett* [1999] 1 W.L.R. 92), again the Court was not persuaded and, if it had to resolve the point, would have rejected any such implied general power to withdraw a notice ([79]).

The Court did not rule out a residual discretion for the Commission to amend or withdraw a s.24 notice in limited circumstances, such as in a case where it became clear the notice had been mistakenly issued, or was inaccurate or ambiguous in its wording, but all would depend on the particular circumstances ([80]). Given, though, that the 1967 Act contained provisions providing expressly for power in the Minister to withdraw notices, such as s.17B(2) regarding the Minister's power to withdraw a restocking notice, or s.20(2) to withdraw felling directions, and that the Commission had options as to whether to press a s.24 notice to prosecution within the statutory two year period for doing so, or indeed not to contest an appeal against such a notice, the statutory regime accorded with good sense, and it would require legislation to impose a general power to withdraw a s.24 notice ([83]–[86]). There was no analogy with Everett, it being in the nature of the statutory nuisance regime for the authority to keep matters under continuous review, whereas there was no such continuous review duty imposed on the Forestry Authority under the felling regime ([87]). Equally, the two-year limitation period for any prosecution for failure to comply with a s.24 notice was relevant ([88]). Here, there was nothing unlawful in the Commission's view of the statutory framework, nor its refusal to amend or withdraw the s.24 notice ([89]).

The statutory forestry regime is far from the only statutory regime which interacts with the planning regime. This decision is the clearest possible warning not to fall into the trap of believing that the planning regime necessarily trumps the other, including because planning decision-making takes into account matters relevant to the other regime. Whether the planning regime ousts the other depends entirely on the proper interpretation of the legislation.

Industry first CPO withstands High Court challenge

Jonathan Darby
Call 2012

James Strachan KC and Jonathan Darby recently acted for United Utilities in successfully defending a challenge to the United Utilities Water Limited (Eccles Wastewater Treatment Works) Compulsory Purchase Order 2016. The Order grants powers to United Utilities to construct a new pipeline and outlet into the Manchester Ship Canal. It is believed this is the first confirmed compulsory purchase order to have been made under section 155 of the Water Industry Act 1991. The Inquiry into the confirmation of the Order ran for eight weeks through 2018, closing in early 2019. Detailed objections were raised in relation to water quality, process engineering, planning and ground movement. At the end of the inquiry, the Inspector produced a 235 page report concluding that there was a compelling case in the public interest for authorising the discharge into the Canal via the new pipeline and outlet proposed. The Secretary of State agreed and confirmed the Order by decision letter dated 14 October 2021.

That decision was challenged by the main objector to the Order, the Manchester Ship Canal Company Ltd, via s.23 of the Acquisition of Land Act. It advanced two grounds relating to what it characterised as the unlawful grant of an unfettered private law right to discharge into the Canal, as well as associated considerations relating to Article 1 of the First Protocol to the European Convention on Human Rights. The substantive hearing took place over two days in November 2022.

Giving a detailed judgment, Mrs Justice Thornton DBE dismissed the challenge. The Judge concluded (amongst other things) that the Manchester Ship Canal Company's case "ignore[d] the statutory context in which the right was granted; the process by which it was granted and the economic and environmental regulation of United Utilities", including the environmental permitting regime to which any 'new' discharge will be subjected. The Judge considered that the supervisory control over United Utilities' activities that was sought by the Manchester Ship Canal Company through the imposition of a further proviso affecting the rights of discharge to be acquired "would be to subject [United Utilities] to two 'regulators' – regulation by the Environment Agency, operating a detailed and precise regulatory regime and regulation by MSCC operating via statutory provisions expressed in loose terms with next to no machinery for their effect and operation". The effect would be to "produce uncertainty for [United Utilities] which has a statutory duty under the [Water Industry Act 1991] to provide a public sewerage system in the North West of England". In concluding that the decision disclosed no error of law, the Judge stated that "there is an obvious rationale to the Inspector taking account of the availability of a detailed and precise environmental regulatory regime, backed up by criminal sanctions and overseen by a specialist regulator, as well as the water quality evidence which demonstrates the scheme will have a net beneficial impact on the Canal. The procedure for the grant of a CPO, in particular the public inquiry, provides an appropriate forum in which to assess any necessary protection for a landowner whose land is subject to a compulsory use."

Applying the criteria in *Bolton MDC v Secretary of State for the Environment* [1995] 1 WLR 1176, the Judge also awarded United Utilities its costs of defending the claim in addition to those of the Secretary of State on the basis that:

1) A material part of the case advanced by the Manchester Ship Canal Company before the Court was not advanced at the inquiry, with the issues continuing to crystallise during the hearing. The Judge was "assisted considerably by UU's knowledge (as promoter of the CPO) as to what took place at the inquiry" in order to separate

out the case advanced at the inquiry from that advanced before the Court in order to properly assess the criticisms of the Inspector/Secretary of State.

2) UU had a distinct interest in the outcome of the proceedings which was separate from that of the Secretary of State and removed from the more typical case – that of a developer with the benefit of planning permission and a statutory review. As a sewerage undertaker, it promoted the CPO in the public interest, not for commercial purposes and it did so in order to meet the sewerage duties imposed on statutory undertakers pursuant to the Water Industry Act and the environmental protection requirements of the Environment Agency. It had a separate interest in resisting any attempt by MSCC to 'regulate' its activities via the loose machinery of the discharge proviso, given the existing regulation by the Agency and the apparent potential for conflict.

3) United Utilities was required by Court Order to file and serve an acknowledgement of service and skeleton argument as well as to take other steps in the preparation of the claim for the substantive hearing. This distinguished the claim from the more typical circumstance in which an interested party or second defendant is neither required nor necessarily expected to file and serve a response to a claim and therefore might not reasonably expect to recover its costs if it elects to do so.

James and Jonathan were instructed by Michael Pocock of Pinsent Masons.

DB Symmetry Ltd v Swindon BC

Daniel Kozelko
Call 2018

In *DB Symmetry Ltd v Swindon BC* the Supreme Court considered whether a planning authority could, as part of a grant of planning permission, impose a planning condition that required the developer to dedicate land within the development site to be a public highway. DB Symmetry Ltd (**DBS**) had an outline planning permission which included a condition (condition 39) which concerned proposed access roads. On an application for a certificate of proposed use or development, Swindon BC (**SBC**) rejected the contention that the formation of the access roads as private roads would be lawful. Instead, SBC said that condition 39 imposed a planning condition that the access road be formed and used as part of the public highway. This was challenged by DBS, who said such a condition would be unlawful, and that the wording of the condition did not require dedication as public highway in any event.

The matter was appealed to the Secretary of State, whose planning inspector considered the appeal on the papers and allowed the appeal. She determined that condition 39 merely set requirements as to the manner of construction of access roads and their ability to function as highways whether private or public. On statutory appeal to the High Court, Andrews J allowed the appeal and concluded that the word 'highway' in the condition was to be given its ordinary meaning as a public road. DBS appealed to the Court of Appeal, who unanimously allowed the appeal against Andrews J's judgment. Importantly, in its judgment, the Court of Appeal held that a condition requiring a developer to dedicate land as public highway without compensation would be unlawful. Considering that the inspector's decision have a realistic interpretation of condition 39, it was appropriate to interpret the condition as valid rather than void (applying the 'validation principle'

of interpretation) and thus the condition did not mandate dedication. SBC then appealed to the Supreme Court.

Lord Hodge gave the unanimous judgment of the Supreme Court dismissing the appeal. The matter was broken down into:

1) whether, as a matter of law, a condition mandating dedication could be made; and,
2) the proper interpretation of condition 39 on the facts. Here the focus is on the first of these two issues.

Lord Hodge began by noting that the legislation does not set clear limits on the scope of planning conditions. However, the provisions do not sit in a vacuum but must be interpreted in the context of the TCPA 1990[27] as a whole (including the provisions on planning obligations and compulsory purchase). It also required consideration of *Hall & Co v Shoreham-by-Sea UDC*[28] (**Hall**). Lord Hodge held that Hall stood as authority for the proposition that a local planning authority cannot use a planning condition to require a landowner to dedicate land as a public highway. Importantly, to do so was to not use the compulsory purchase provisions available to the local planning authority and thus not to pay compensation for the lost land. Such an approach was unlawful. Lord Hodge rejected the contention that Hall is confined to its own facts. Indeed, Lord Hodge went on to reject the contention that a public authority may use powers which do not involve the payment of compensation in preference to those which do. That such an approach was not appropriate was also one set out in historic Government guidance concerning the implementation of planning conditions.

The Court then turned to consider planning obligations under s.106 TCPA 1990. It was not in dispute that a dedication could have been achieved using an agreement made under this provision. It is recognised in law that a local planning authority can obtain by agreement with the landowner through a planning obligation a purpose which could not be achieved by planning condition. However, both legislation and case law controls the use of planning obligations.

Considering planning conditions and planning obligations side by side, Lord Hodge saw a fundamental conceptual difference. In respect of obligations, a developer can only be subject to the obligation by voluntary act. This is not the case for a planning condition. Thus, for a planning authority which wants to give permission to a proposed development, it should either negotiate an agreement with the landowner or exercise powers of compulsory acquisition or pay compensation. A condition could not be used to achieve the dedication. In any event, Lord Hodge found that condition 39 did not purport to undertake such a dedication.

This case is an important evocation of the principle that a public authority may use powers which do not involve the payment of compensation in preference to those which do. It also highlights the important distinctions between conditions and obligations; the former is (usually) a constrained route whereas the latter provides significant flexibility. Indeed, more than anything else, this case is a cautionary tale on the importance of focusing on consensual resolution of planning difficulties using s.106 and the great risks of inappositely drafted conditions.

Richard Harwood KC and Victoria Hutton appeared for the Council. A recording of their webinar discussing the Supreme Court judgment is here.

27 Town and Country Planning Act 1990.
28 [1964] 1 WLR 240.

CONTRIBUTORS

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Call 1999 | Silk 2009

Stephen is recognised as a leading practitioner in environmental, energy and planning law. His clients include major utilities and industrial companies in the UK and elsewhere, banks, insurers, Government departments and agencies, local authorities, NGOs and individuals. He has been involved in some of the leading cases in matters such as environmental impact assessment, habitats, nuisance, and waste, in key projects such as proposals for new nuclear powerstations, and in high-profile incidents such as the Buncefield explosion and the Trafigura case.

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

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Celina regularly acts for and advises local authority and private sector clients in all aspects of planning and environmental law. She also regularly appears in the High Court and Court of Appeal in respect of statutory challenges and judicial review. She undertakes both prosecution and defence work in respect of planning and environmental enforcement in Magistrates' and Crown courts. She specialises in all aspects of compulsory purchase and compensation, acting for and advising acquiring authorities seeking to promote such Order or objectors and affected landowners. Her career had a significant grounding in national infrastructure planning and highways projects and she has continued that specialism throughout.
"She has a track record of infrastructure matters"
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James Burton

Call 2001

James specialises in environmental, planning, and related areas, including compulsory purchase and claims under Part 1 of the Land Compensation Act 1973. He acts for both developers and local authorities, as well as national agencies such as Natural England and the Marine Management Organisation. Recent notable cases/inquiries include *Grafton Group UK plc v Secretary of State for Transport* [2016] EWCA 561; [2016] CP Rep 37 (the successful quashing of a CPO promoted by the Port of London Authority after a five week inquiry), *Mann & ors v Transport for London* [2016] UKUT 0126 (LC)R (a successful group action under Part 1 of the Land Compensation Act 1973 and the 1-3 Corbridge Crescent/1-4). James successfully appeared on behalf of the London Borough of Tower Hamlets in the two week tall Building Proposal at the Oval inquiry. James has also appeared frequently in Committee (both Commons and Lords) in relation to HS2.

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David Sawtell

Call 2005

David specialises in real property development and construction. His work regularly involves restrictive covenants, easements, and commercial leases: he is often instructed in ground (f) and (g) cases under the Landlord and Tenant Act 1954. He is heavily involved in cases where fire safety and building defects are in issue, and is involved in a number of the initial leading applications in the FTT in respect of remediation under the Building Safety Act 2022. David also teaches land law and equity at Peterhouse, University of Cambridge, and writes extensively academically. *"If you want counsel on your side who is a fighter then David is my first choice for all property and construction matters."* The Legal 500, 2022

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Jonathan Darby

Call 2012

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

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CONTRIBUTORS

Stephanie David
Call 2016

Stephanie accepts instructions across all areas of Chambers' work, with a particular interest in planning matters (including environmental offences). Stephanie makes regular court appearances, undertakes pleading and advisory work and has a broad experience of drafting pleadings, witness statements and other core documents. She has been instructed to advise on a range of matters, including enforcement notices, environmental offences (such as fly-tipping), and applications for planning statutory review. She has also appeared before the Magistrates Court to obtain entry warrants on behalf of Environmental Health Officers.

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Daniel Kozelko
Call 2018

Daniel has a mixed practice incorporating planning, environmental, and public law. His instructions have included: acting in proceedings to obtain a certificate of lawfulness of existing use or development; advising on material changes of use of land in the context of retail developments; and, work on matters involving damage to utilities and highways. Daniel has also recently returned from a secondment at the Supreme Court of the United Kingdom, where he was judicial assistant to Lord Carnwath and Lady Arden. In the course of that secondment Daniel worked on a number of cases raising planning and environmental issues, including *R (on the application of Samuel Smith Old Brewery (Tadcaster) and others) v North Yorkshire CC* [2020] UKSC 3 and *Dill v Secretary of State for Housing, Communities and Local Government and another* [2020] UKSC 20.

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Jake Thorold
Call 2020

Jake accepts instructions across all of Chambers' practice areas with a particular interest in public, planning and environmental law. In 2021-2022 Jake was a Judicial Assistant at the Supreme Court of the United Kingdom and Judicial Committee of the Privy Council, assigned to Lord Sales and Lady Rose. In this role Jake was involved with some of the most important planning cases of the year, including Hillside Parks Ltd v Snowdonia National Park Authority and DB Symmetry v Swindon Borough Council. Jake is currently instructed on a number of planning matters, including as sole counsel for three residents groups in the South Kensington Tube Station Inquiry.

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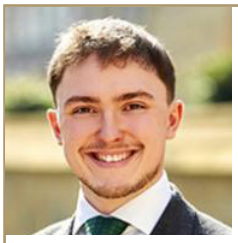

Christopher Moss
Call: 2021

During pupillage Christopher was involved in a variety of planning and environmental law matters and is keen to grow his practice in these areas. He is currently being led by Daniel Stedman Jones in a statutory review of a decision refusing a planning application for a major solar farm on agricultural land, contrary to an inspector's recommendation. He has also been instructed to advise and draft pleadings in relation to tree-related subsidence.

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