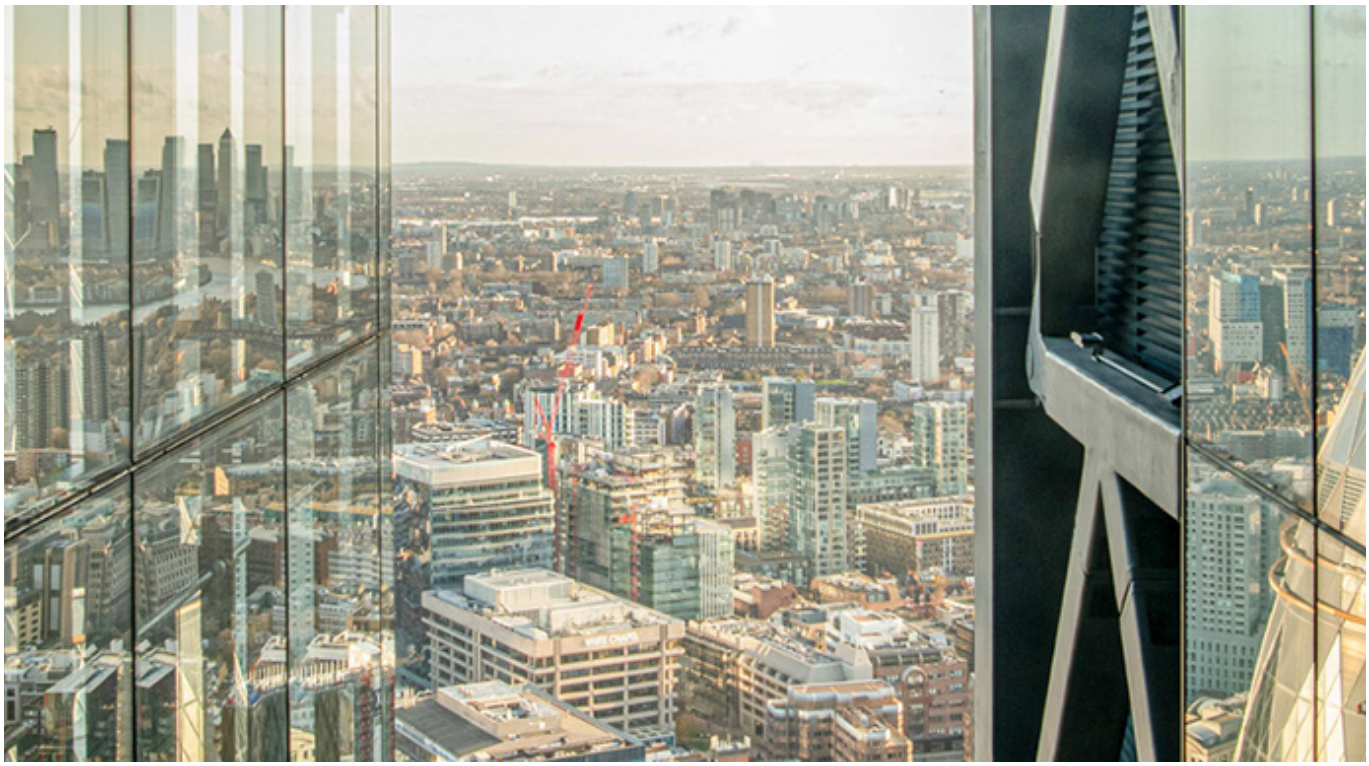

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Introduction

Celina Colquhoun
Call 1990

Christopher Moss
Call: 2021

Welcome to our January 2024 edition of the Planning Environment & Property Newsletter. A very happy new year to you all, we hope that you managed to enjoy some time off over the Christmas break. What better way to start back, than with a roundup of key decisions and developments from the end of 2023 across the sector?

The end of the year saw a swathe of planning related changes with the enactment of the Levelling Up and Regeneration Act 2023 followed shortly later with the release of the new National Planning Policy Framework. Following on from James Burton's detailed pre-Christmas article on the NPPF: The Christmas 2023 NPPF: a survey (Tidings of comfort and joy, or a bleak midwinter?) published on our website on 1 January 2024, Celia Reynolds provides her thoughts on reworks to the tilted balance.

We also have a series of articles on other cases from 2023 which have caught our attention:

- **Stephen Tromans KC, Stephanie David,** and **Ruth Keating** consider the case of *R (Suez Recycling and Recovery UK Ltd) v Environment Agency* which concerned Compliance Assessment Reports and the routes by which they can be challenged;
- **Richard Wald KC** and **Jake Thorold** consider *R(Clarke-Holland) v SSHD*, in which they both acted for one of the Claimants (West Lindsey District Council), on the use of Class Q emergency permited development rights to accommodate asylum seekers;
- **David Sawtell** takes a look at *Duchess Bedford House RTM Co Ltd v Campden Hill Gate,* a case demonstrating the difficulty of construing leasehold covenants;
- **Daniel Kozelko** provides his thoughts on the potential for uncertainty in the scope of s73 Town and Country Planning Act 1990 in light of the conflicting decisions in *Armstrong* and *Fiske*;
- Lastly, **Rebecca Cattermole** covers the decision in *FSV Freeholders Limited v GL1 Limited* which provides an example of some of the complexities caused by the myriad array of residential leaseholders' statutory rights that arise when dealing with blocks of flats.

We hope this provides some food for thought and wish you all a happy, productive and prosperous 2024.

The right to appeal Compliance Assessment Reports:

R (Suez Recycling and Recovery UK Ltd) v Environment Agency [2023] EWHC 3012 (Admin)

Stephen Tromans KC
Call 1999 | Silk 2009

Stephanie David
Call 2016

Ruth Keating
Call 2017

Judgment in *R (Suez Recycling and Recovery UK Ltd) v Environment Agency* [2023] EWHC 3012

(Admin) was handed down on 28 November 2023 – a decision concerning Compliance Assessment Reports ("CARs") and the routes by which they can be challenged. Fordham J allowed the claim for judicial review on issue 1 (discussed below) but rejected the remaining 5 issues.

Background

Suez is the operator of the Byker Reclamation Plant ("the Plant"). Suez applied for judicial review of two CARs, dated 5 August 2020 ("CAR1") and 12 August 2020 ("CAR2") in relation to odour assessments undertaken near the Plant respectively on 31 July 2020 and 7 August 2020, issued by the Environment Agency (the "EA").

Suez is regulated by the EA pursuant to an environmental permit. Condition 5.2.1 of the permit provides that emissions from the activities at the Plant shall be free from odour *"at levels likely to cause annoyance outside the site, as perceived by an authorised officer of the Agency"*. The CARs recorded a breach of the odour condition. Suez wished to challenge the CARs both as to their lawfulness and on the merits: the *"central aim…to secure a decision taken 'afresh'"* (at [5]).

Suez initiated a judicial review in 2020 (the first claim for judicial review) but the EA responded that there was an alternative remedy by way of a complaint. The complaint ran its course. On 30 June 2021, the Internal Reviewer upheld the findings of non-compliance. Suez then commenced a second judicial review: the present claim. Suez argued that the EA had breached its public law obligations in relation to:

i) issuing CAR1 and CAR2;
ii) the internal review; and
iii) not providing an appeal on the merits.

The claim relied on:

i) the Regulators' Code issued in 2014 (the "2014 Code") (a statutory code of practice issued pursuant to section 22 of the Legislative and Regulatory Reform Act 2006 ("2006 Act")); and
ii) s 22 of the 2006 Act.

Issues before the Court

The issues were as follows:

1. Issue 1: Has the EA complied with its duty under the 2006 Act in relation to the 2014 Code in considering the provision of a right of appeal against an adverse score on a CAR ([22])?
2. Issue 2: Relatedly, was a right of appeal required as a matter of common law procedural fairness ([54])?
3. Issues 4 and 5, relating to the officers' decision-making in relation to the CARs, were formulated as follows:
   a. Were the odour assessments that informed the EA's CAR reports lawful? In particular, did the EA officers carry out a *Tameside*-compliant investigation and comply with the relevant guidance? Were their decisions as to (a) breach of the permit and/or (b) Compliance Classification Scheme ("CCS") scores, vitiated by mistake of fact or irrationality?
4. Issues 3 and 6 concerned the Stage 2A Decision ([65]): was the Stage 2A Review decision procedurally fair or vitiated by irrationality?

Decision

Issue 1 – Right of Appeal in 2014 Code

The EA's position turned on narrowing the meaning of a *"regulatory decision"* within [2.3] of the 2014 Code, which sets out a right of appeal in relation to *"a decision, in the exercise of a regulatory function, which is adverse to a regulated person by imposing on them a mandatory obligation."* Since the CARs issued to Suez in 2020 had not imposed a mandatory obligation, the routes to appeal available to Suez were restricted and excluded any appeal against CAR 1 and CAR 2 as regulatory decisions.

The EA's interpretation involved applying *"a confining prerequisite"* on the meaning of a regulatory decision: imposing a mandatory obligation [31], [33]. Fordham J found that approach involved a material error of law [33].

The intention was for the 2014 Code to be *"clear and straightforward"* with the primary audience regulators and the regulated [34]. A *"regulatory decision"* was the gateway to an appeal before an impartial decision-maker, subject to reasoned departure (addressed more below) [38]. This was a responsibility of the regulator and a safeguard for the regulated person (at [34].)

A *"regulatory decision"* had to be a decision; that was something more specific and concrete than *"conduct of the regulator"*, against which a complaint, rather than an appeal, could be made [34]. An adverse decision had to be one taken by a regulator in the exercise of a regulatory function, such as "securing compliance with or the enforcement of conditions related to an activity" [35]. When the Code said *"regulatory decision"*, it did not mean taking adverse decisions in the exercise of regulatory functions and then narrowing them down to those decisions imposing a mandatory obligation. The consequence of the EA's misdirection had been that, when Suez challenged the CARs on their merits, the EA had not provided a merits re-evaluation appeal ([35]-[40]).

Issue 2 – Right of Appeal based on common law fairness

Fordham J could not accept that common law procedural fairness provided a freestanding guarantee that all CARs must attract a right to pursue a merits re-evaluation (at [56]). It was agreed between the parties that the 2014 Code was the *"applicable statutory code"* addressing the regulatory context and the *"rights of merits re-evaluation"*. If the common law provided a freestanding guarantee, it would never be open to the EA to adopt a position of reasoned departure from the provision providing for re-evaluation (addressed below) ([56]).

The question whether there has been a common law procedural unfairness, in the making and maintaining of an adverse CAR, will depend on individual facts and circumstances.

Issues 4 and 6 – Officers' decision-making

Fordham J emphasised that the permit condition was framed in terms of the assessment of an agency officer, which required them evaluating the nature and intensity of the odour from the perspective of neighbours [63]. The officers had recorded their experience of serious and severe odour and its attribution to the plant. This was a matter of subjective evaluation, not objectively verifiable fact *(ibid)*. The public law standard of legally adequate enquiry involves a built-in latitude for the decision-maker, and not a hard-edged substitutionary review. He rejected this ground.

Issues 3 and 6

As to issues 3 and 6, Fordham J found it impossible to conclude that there was any breach of public law duties of procedural fairness or substantive reasonableness (at [66]).

Conclusion

Fordham J's decision on Issue 1 meant that the Stage 2A Decision would be quashed; and he ordered the EA to pay 60% of Suez's costs (at [71]).

CARs are, as Fordham J determined, regulatory decisions giving rise to a right of appeal under the 2014 Code: the EA's officers had decided there was serious non-compliance that could trigger a financial charge [39]; the CARs identified action to be taken, were conclusionary and publicly available (to promote transparency) [49], [48]; and they affected commercial reputation and the action of third parties [39]. Without a merits re-evaluation as part of an appeal of a CAR, there was a risk of a "merits-lacuna" [47].

Fordham J accepted that his approach to the meaning of a *"regulatory decision"* was broad, giving rise to *"questions of appropriateness, proportionality and workability"* [38]. The answer, he determined, lies with the statutory duty to "have regard" to the 2014 Code, which meant that the EA could depart from a merits re-evaluation provided that *"identified and articulated reasons"* are given (ibid). Thus:

> *"The Agency is entitled to conclude that the application of the provision is outweighed by*

other relevant considerations. But it does need to ask itself that question. It needs to start in the right place. It needs to make a conscious decision, recognising that it is departing from the 2014 Code. It needs to record that decision. And it needs to have on record the reasons for that decision."

The CAR process has proven in some cases highly controversial and a source of grievance to operators. Responsible operators do take adverse CAR outcomes seriously and it is perhaps surprising that the process has not been challenged before now. Whilst plainly the case leaves discretion to the regulator in not providing a merits based re-evaluation, that decision must now be properly reasoned and recorded. That may present a challenge for regulators but will be welcomed by operators. The Agency will however be relieved that procedural fairness was found not to require such a review in all cases, and that the built in latitude for regulators when it comes to matters of subjective assessment (such as on odours) was re-emphasised.

High Court dismisses challenge to government plans to use former MOD military bases for asylum seeker accommodation but grants permission to appeal

Richard Wald KC
Call 1997 | Silk 2020

Jake Thorold
Call 2020

In December of last year Thornton J gave judgment in one of a series of judicial review challenges brought over the last few years against the government's various atempts to deploy novel solutions to the problem of finding accommodation for asylum seekers.

Summary

In *R(Clarke-Holland) v SSHD* [2023] EWHC 3140 Thornton J held that the Secretary of State for the Home Department ("SSHD")'s use of emergency permited development rights under Class Q of the Town and Country Planning (General Permitted Development) (England) Order 2015 Sch.2 Pt 19 ("Class Q"), to mitigate an emergency need to accommodate asylum seekers, was lawful where the proposed development was on Crown land and the numbers of asylum seekers she had a legal duty to accommodate were at unprecedented levels. In her judgment Thornton J also held that an EIA screening direction that the proposed use of the sites was not likely to have significant effects on the environment was not irrational, despite it being based on only a 12-month period of use in circumstances where a longer term need was envisaged. Nor, according to Thornton J, did the SSHD's decision to deploy the two former RAF sites fall foul of her public sector equality duty ("PSED") under section 149 of the Equality Act 2010 or fail lawfully to take account of a material consideration in relation to the value for money of the use of RAF Wethersfield.

Background in Brief

This case arose out of three claims, two by local planning authorities (West Lindsey District Council and Braintree District Council) and one by a Braintree local resident, for judicial review of a Parliamentary announcement that two decommissioned Ministry of Defence sites, RAF Scampton and RAF Wethersfield, both situated on Crown land, would be used to accommodate asylum seekers.

The SSHD, who wished to use the two sites to assist with an urgent need for accommodating asylum seekers, issued a statement explaining that the situation constituted an emergency within the meaning of Class Q and that she intended to use permited development rights to prevent, reduce or mitigate such emergency. The second

defendant, the Secretary of State for Levelling Up, Housing and Communities ("**SSLUHC**") issued a screening direction, under the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 Pt 2 reg.5(3), that the proposed use of the sites was not likely to have significant effects on the environment.

Judgment of the Court

Thornton J dismissed all three claims and held as follows:

"**Emergency**" –The SSHD contended that the record levels of asylum seekers requiring accommodation constituted an event or situation which threatened serious damage to human welfare in the UK by virtue of homelessness, so as to legitimate the use of Class Q. seekers. S

The claimants argued that the concept of "emergency powers" carried a special connotation which imported a restrictive approach, and that the effect of Class Q was to disapply the usual planning rules because it was so broad that it could be used to justify almost any type of development unless constrained by the core meaning of the term "emergency" as something 'sudden or unexpected'. In para.Q.2 of Class Q, "emergency" is defined as an event or situation which threatens serious damage to human welfare, the environment or national security. Therefore, the scope of the emergency in Class Q is restricted by the requirement for a threat of serious damage in relation to three specified categories of harm.

Thronton J rejected the Claimants' arguments and held that the question of whether there was a threat of serious damage by way of homelessness of asylum seekers required the application of the SSHD's judgement, *R. (on the application of Mawbey) v Lewisham LBC* [2019] EWCA Civ 1016, [2020] P.T.S.R. 164, [2019] 6 WLUK 249 followed, reviewable on normal public law principles. Thornton J considered that the SSHD had used the legally correct construction of "emergency" in the emergency statement. The SSHD's reliance on Class Q was therefore lawful, given that the proposed development was on the Crown's behalf and on Crown land, and that the numbers of asylum seekers she had a legal duty to accommodate were at unprecedented levels (paras 64, 66-69, 71).

Environmental impact assessment – For the purposes of Directive 2011/92, a screening direction is intended to identify cases in which the relevant project is likely to have significant effects on the environment. In the present case, Thornton J concluded that it was lawful for the development to be screened on each site on the basis that it was a 12-month project, which was a mater of judgement for the decision-maker. It was apparent from witness evidence adduced after the decision was made that a longer term use of the sites was envisaged. However, Thornton J found, as a mater of evidence, that no setled plans for the duration or type of use beyond the 12-month period had been formulated at the time of the decision because the future depended on the outcome of efforts to reduce the numbers of asylum seekers requiring accommodation. The Class Q route was seen as a stand-alone solution to the urgent difficulties faced by the SSHD in light of her statutory duty to accommodate asylum seekers. The SSHD was aware that, according to the conditions atached to Class Q, it might be necessary to decommission the sites at the end of 12 months if planning permission had not been obtained by then, but was willing to take that risk for the benefits afforded by the 12-month permission. The judgement, for screening purposes, that the project was for 12 months, was therefore not irrational and at the time of the screening direction there was no obligation to consider the cumulative effects of the proposed development with any other or future use of land at the sites for asylum accommodation, as such future use was too inchoate (paras 95-96, 101-102).

Public sector equality duty – The local planning authority claimants argued that, despite recognising the risk of community tensions which would result from the developments, the SSHD had undertaken inadequate engagement and consultation with the local authorities and service

providers to discharge the PSED. In Thornton J's judgment, the SSHD had experience of the accommodation of asylum seekers on other sites and it was not irrational for her to rely on her department's understanding of the potential for community tensions. Provision had been made for onsite facilities for asylum seekers to reduce the need to rely on local resources and the claimants had not identified any characteristics of the sites in issue that set them apart from those in other areas of the country. Thornton J concluded that the courts should not intervene merely because it considered that further inquiries would have been desirable, but rather only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision. And there was nothing in the Equality Act 2010 s.149 to prevent performance of the public sector equality duty by undertaking equality assessment on a "rolling" basis. By outlining the parameters of a response to manage the risk but leaving the detailed practicalities to be determined after the public announcement, the SSHD had not deferred discharge of her duty, but only the detail of the implementation which her department had previous experience of managing (paras 103, 107, 110-112).

Value for money – One of the claimants (Braintree DC) submited that the SSHD had failed to acquire the information necessary to make a lawful decision, despite it being readily available to the SSHD. Thornton J dismissed this argument, finding that the fact that a Minister did not know about, or have their atention drawn to, a relevant consideration was insufficient by itself to vitiate their decision: the consideration would have to be so obviously material that a failure to take it into account would be irrational, *R. (on the application of National Association of Health Stores) v Secretary of State for Health* [2005] EWCA Civ 154, Times, March 9, 2005, [2005] 2 WLUK 523 followed. The SSHD had been informed about value for money considerations and had been prepared to take decisions which she understood did not amount to value for money. Given the context, value for money was not so obviously material that it was irrational for her not to inquire into the details of the underlying analysis (paras 118-119).

Whilst all three claims were dismissed, Thornton J granted permission to appeal in respect of all grounds and the Civil Appeals Office has indicated that the two day appeal will be heard by the Court of Appeal by November 27th of this year. In the meantime WLDC has taken enforcement action in relation to the proposed use of RAF Scampton and (in contrast to RAF Weathersfield) no accommodation of asylum seekers has commenced on that site.

Richard Wald KC and **Jake Thorold** acted and continue to act for West Lindsey District Council in relation the High Court challenge, the pending Court of Appeal hearing and the ongoing enforcement proceedings.

A plague on both your mansion blocks: interpreting leasehold covenants in *Duchess of Bedford House RTM Co Ltd v Campden Hill Gate* [2023] EWCA Civ 1470

David Sawtell
Call 2005

We are regularly told that leasehold covenants should be interpreted in the same way as any other commercial agreement, shorn of the 'old intellectual baggage' of legal interpretation that Lord Hoffmann deprecated in *Investors' Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896. The judgment of Asplin LJ in *Duchess of Bedford House RTM Co Ltd v Campden Hill Gate* (on second appeal from the judgment of HHJ Gerald, with Adam Johnson J hearing the first appeal in [2022] EWHC 2489 (Ch)) is another demonstration of the complexity involved in construing such covenants, especially when section 62 of the

Law of Property Act 1925 is involved.

The underlying dispute concerned car parking, which is itself a valuable and important right, especially to urban leasehold apartment properties. The case itself turned on a reservation of rights clause in a headlease.

Duchess of Bedford House in Holland Park is a 1930s mansion building comprised of three separate blocks. The owners of long leases in flats in Duchess of Bedford House were in dispute with the residents of Campden Hill Gate over car parking in the garden square at Sheldrake Place, and sought a declaration of their right to park over Sheldrake Place East.

The Phillimore Estate, the freeholder, had originally granted a long lease of Duchess of Bedford House in 1929, and out of that had granted in 1938 both a under-lease and a long sub-underlease. By 1969, the individual flats in Duchess of Bedford House were let out under short, three-year, Rent Act protected tenancies. The neighbouring property of Campden Hill Gate and the roads, garage block and central gardens of Sheldrake Place was demised by the Phillimore Estate to Campden Hill Gate Limited's predecessor in title, Keston Securities Limited, under a long headlease in 1969. Over time, the Rent Act tenancies in Duchess of Bedford House were replaced by long underleases, owned by a number of the claimants.

A number of rights were reserved to the lessor, the Phillimore Estate, under the 1969 headlease of Campden Hill Gate. These included *"all other easements quasi-easements and rights belonging to or enjoyed by any adjoining or neighbouring premises"*. The claimants argued that these reserved rights (which they themselves therefore enjoyed) include the right to park on Sheldrake Place East. They further argued that the effect of the reservation was to create (by way of regrant) a legal easement of the claimed right to park. Alternatively, it was submitted, if the right to park did not already have the character of a legal easement, then it was converted into a legal easement by operation of section 62(2) of the Law of Property Act 1925 by the grant of a headlease in Duchess of Bedford House in 1974, when the 1938 leases were surrendered.

The relevant parts of section 62(2) provides that, *"A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses, or other buildings, all … easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof."* Section 62(4) provides that the section only applies if and as far as a contrary intention is not expressed in the conveyance.

The claimants argued that, by 1969, the residents of Duchess of Bedford House had a settled practice of parking that was an easement or quasi-easement which was reserved to the freeholder, Phillimore Estate, by the 1969 headlease, which would have passed under the grant of the 1974 headlease as a legal easement under section 62. The issue in the dispute and in the appeal was whether the 1974 headlease excluded such a conveyance.

The relevant carve out in the 1974 headlease was in the form of a declaration: *"AND IT IS HEREBY DECLARED that the demise hereby made shall not be deemed to include and shall not operate to demise any … easements rights or advantages whatsoever in through over or upon any land of the Lessors or forming part of the Phillimore Kensington Estate aforesaid* ***except those now subsisting*** *or which might restrict or prejudicially affect the future rebuilding alteration or development or redevelopment thereof or of any other adjoining or neighbouring property."* [emphasis added]

At first instance, HHJ Gerald held (relying on

Newman v Jones, 22 March 1982 (unreported), a decision of Sir Robert Megarry V-C) that a right to park had existed in 1969, this right had been reserved to the Phillimore Estate under the terms of the 1969 headlease and that the effect of the reservation was to convert a de facto right or quasi-easement into a legal easement in favour of the Phillimore Estate as freeholder. In *Newman v Jones,* Sir Robert Megarry V-C held that section 62 had turned a 'settled practice' of tenants parking their cars on the forecourt of their block of flats into a grant of an easement to park in the lease to Mr and Mrs Newman. Adam Johnson J had rejected an appeal on this point. The Court of Appeal agreed: the approach adopted in *Newman v Jones* was equally applicable to the instant case. At [75], Asplin LJ rejected the submission that *Newman v Jones* was concerned with a grant, whereas the instant case was concerned with a reservation: *"A settled practice which led to the conclusion that the right to park was appurtenant or reputed to be appurtenant to the flats in Newman v Jones can equally be used to establish a 'right or quasi-easement belonging to or enjoyed by' the flats for the purposes of… the reservation in the 1969 Headlease."* Further, it was not necessary to establish that each and every individual tenant parked in Sheldrake Place in order to establish that a quasi-easement or right to do so existed in 1969: the right was communal, relating to the block as a whole.

The Court of Appeal then turned to whether the grant of the 1974 headlease operated as a grant of a right to park, or if it was excluded by the carve out clause. But for the carve out clause, the headlease would have passed on the benefit of subsisting rights and easements appurtenant to Duchess of Bedford House whether under the general law or by virtue of section 62(2) and elevated them into easements, rights, privileges or advantages enjoyed by the occupiers of Duchess of Bedford House over any retained parts of the Phillimore Estate at the time of the demise. Asplin LJ referred to the *"well-known principles which are set out in a series of cases including Arnold v Britton [2015] AC 1619 and Wood v Capita Insurance Services Ltd [2017] AC 1173".* The difficulty with the carve out clause, however, was the fact that 'except those now subsisting' appears within it.

The right to park was a 'subsisting' right in 1974, taking effect as a legal easement by means of the reservation in the 1969 headlease. The new leaseholder in 1974 would have wished to ensure that as far as possible, the new leasehold arrangements being entered into were not less advantageous than those in place under the previous arrangements which were being replaced. It would naturally have wished to ensure that any rights 'now subsisting' were preserved. Consequently, any subsisting rights would be conveyed. The first instance judgment and Adam Johnson J's judgment were upheld on these points.

The appeal was allowed, however, on the last part of the carve out. The final limb of the carve out applied to rights *"which might restrict or prejudicially affect the future rebuilding alteration or development or redevelopment".* Adam Johnson J disagreed with HHJ Gerald, holding that the right to park, if granted, could prevent future development. The Court of Appeal overturned the first appeal on this point: Asplin LJ agreed at [60] that an overly wide interpretation of the reserved right to redevelop had the potential to engulf the remainder of the clause, to create uncertainty and to render the exclusion meaningless.

The appeal, therefore, was allowed and the residents of Duchess of Bedford House in Holland Park were allowed to park on Sheldrake Place East.

At first blush, the decision appears to go no further than the dispute between the two warring mansion blocks. This would be wrong. The Court of Appeal considered the reasoning in *Newman v Jones* (which was also considered in *Moncrieff v Jamieson* [2007] 1 WLR 2620, but not on this point), and applied it. Both this decision and *Newman v Jones* illustrates the potential for section 62 of the Law of Property Act 1925 to

create legal easements from the conveyance of leasehold estates, and in this case, by way of reservation. Secondly, it illustrates the difficulties involved in interpreting the laconic and frequently Delphic language used in reservations. The fact that the final result required two appeals, with the outcome changing each time, illustrates the wisdom of ADR in many such disputes: as the Prince observed at the end of *Romeo and Juliet, "Go hence to have more talk of these sad things."*

The December 2023 NPPF: The presumption in favour of sustainable development

Celia Reynolds
Call 2022

Summary of Changes

The new NPPF, published 19 December 2023, significantly restricts the circumstances in which the presumption in favour of sustainable development, the 'tilted balance', can be said to apply. Previously, the tilted balance required local planning authorities ("**LPAs**") to continuously demonstrate a deliverable five-year housing land supply ("**5YHLS**").

Under new national policy, LPAs with a recently adopted local plan will no longer be required to demonstrate a 5YHLS. Paragraph 76 of the NPPF now provides:

> "76. Local planning authorities are not required to identify and update annually a supply of specific deliverable sites sufficient to provide a minimum of five years' worth of housing for decision making purposes if the following criteria are met:
>
> a) their adopted plan is less than five years old; and
>
> b) that adopted plan identified at least a five-year supply of specific, deliverable sites at the time that its examination concluded."

Having regard to the latest consultation on the Levelling-up and Regeneration Bill, it is estimated that 40% of local authorities will be caught by paragraph 76, having a local plan which has been adopted within the last five years.[1] However paragraph 76, and related footnote 8, apply only to applications made on or after 19 December 2023.[2] Where paragraph 76 does not apply, LPAs will continue to be required to prepare an annual report on the housing supply, as before.[3]

Where local plans are over five years old, LPAs may be able to avail of lessened housing supply requirements under paragraph 226 where they have an emerging local plan. Eligible authorities are those with emerging local plans that set out proposed allocations towards meeting housing need (including a policies map), which have either been submitted for examination or been consulted on pursuant to Regulations 18 or 19, Town and Country Planning (Local Planning) (England) Regulations 2012. In those circumstances, LPAs will only be required to identify a deliverable four-year housing land supply against the housing requirement set out in adopted strategic policies or against local housing need where the strategic policies are more than five years old. However, paragraph 226 will only apply for two years.

The update further removes two of three buffers that LPAs were previously required to take into account in their calculations on 5YHLS. In particular, the buffers of "5% to ensure choice and competition in the market for land" and "10% where the local planning authority wishes to demonstrate a five-year supply of deliverable sites through an annual position statement or recently adopted plan, to account for any fluctuations in the market during that year" have been removed.[4]

1 DLUHC, 'Levelling-up and Regeneration Bill: reforms to national planning policy' (Consultation outcome, 19 December 2023) < https://www.gov.uk/government/consultations/levelling-up-and-regeneration-bill-reforms-to-national-planning-policy/levelling-up-and-regeneration-bill-reforms-to-national-planning-policy> accessed 10 January 2024.

2 NPPF (December 2023), footnote 79.

3 NPPF (December 2023),

4 NPPF (September 2023), §74.

Moving forward, just the 20% buffer remains, which continues to be applicable where there has been a significant 'under delivery' of housing over the previous three years, i.e. 85% below the requirement, as measured by the annual Housing Delivery Test.[5] Likewise, it remains the case that:

a) Where delivery has fallen below 95% of the local planning authority's housing requirement over the previous three years, the authority should prepare an action plan in line with national planning guidance, to assess the causes of under-delivery and identify actions to increase delivery in future years.

b) Where delivery falls below 75% of the requirement over the previous three years, the presumption in favour of sustainable development will apply, in addition to the 20% buffer.

Ultimately, the circumstances in which development plan policies will be considered out-of-date has been narrowed by the new NPPF. This is plainly evidenced by the amendments made to the meaning of 'out-of-date' at footnote 8:

NPPF September 2023

This includes, for applications involving the provision of housing, situations where the local planning authority cannot demonstrate a five-year supply of deliverable housing sites (with ~~the appropriate~~ buffer, as set out in paragraph 74); or where the Housing Delivery Test indicates that the delivery of housing was ~~substantially~~ below (less than 75% of) the housing requirement over the previous three years.

(strikethrough material removed in December 2023 NPPF)

NPPF December 2023

This includes, for applications involving the provision of housing, situations where: (a) the local planning authority cannot demonstrate a five year supply (or a four year supply, if applicable, as set out in paragraph 226) of deliverable housing sites (with a buffer, if applicable, as set out in paragraph 77) and does not benefit from the provisions of paragraph 76; or (b) where the Housing Delivery Test indicates that the delivery of housing was below 75% of the housing requirement over the previous three years.

(underlined material added in December 2023 NPPF)

Analysis

The stated intention of the December 2023 NPPF was to "accelerate the delivery of new homes." While that objective is clearly admirable in principle, it is difficult to see how the new NPPF is conducive to that aim in practice.

The primary effect of the December 2023 NPPF will be to disapply the tilted balance for a large number of LPAs. Consequently, the changes demonstrate a commitment to protect areas from unwarranted speculative development and bolsters the principle that development must be 'plan-led.' Equally, paragraph 76 creates strong incentives for LPAs to provide up-to-date local plans by freeing LPAs from the obligation to provide annual updates to their 5YHLS for the first five years of a local plan's implementation. Such outcomes may fairly be celebrated, however, it does not follow, as the Secretary of State has suggested, that plans will be adopted and updated more quickly.[6] While new incentives have been created, the new NPPF does little to address the hurdles which confront local authorities in the process of updating their development plans.

5 Paragraph 80 provides that the Housing Delivery Test consequences only apply following annual publication of the Housing Delivery Test results, at which point they supersede previously published results.

6 DLUHC, 'The Next Stage in Our Long Term Plan for Housing Update' (Statement, 19 December 2023) <https://questions-statements.parliament.uk/written-statements/detail/2023-12-19/hcws161> accessed 10 January 2024.

Nor does it follow that a larger number of homes will be delivered at a faster pace. As a matter of logic, the disapplication of the titled balance will reduce the number of applications granted for planning permission that would otherwise have been granted if the presumption in favour of sustainable development applied. At the same time, the removal of the 5% and 10% buffers straight forwardly reduces the obligations on local authorities to provide housing through the identification of land suitable for its delivery. It is not immediately clear how removing a buffer intended 'to ensure choice and competition in the market for land' would encourage otherwise. Nor is it clear what is to be gained for housing targets by removing the requirement to provide a 10% buffer to take into account fluctuations in the market.

The changes set out above must obviously be read in conjunction with the accompanying amendments to national policy and wider reforms beyond the NPPF which have not been discussed here. In any case, only time will tell whether the changes made are to the benefit of those seeking to build housing developments. It may be that there are unobserved factors associated with having an up-to-date local plan and removing the requirement to demonstrate a 5YHLS, that encourage the development of housing. For example, reducing the obligations on LPAs may enable planning departments to be better resourced to respond and review applications. However, at present, it seems more likely that the reforms will make the national housing target harder, and not easier, to achieve.

A fundamental conflict? The proper scope of s.73 TCPA 1990

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Introduction

The case law which has grown up around s.73 TCPA 1990 is extensive. Properly understood, a permission granted under that power is a new planning permission with modified conditions. It is well known that limits apply to the power; in *Finney v Welsh Ministers* [2019] EWCA Civ 1868 Lewison LJ referred to the earlier judgment of Sullivan J in *R v Coventry CC, ex parte Arrowcroft Group Plc* [2001] 1 PLCR 7 and held

> *27. Sullivan J upheld the challenge. At [33] he said:*
>
> > *"… the council is able to impose different conditions upon a new planning permission, but only if they are conditions which the council could lawfully have imposed upon the original planning permission in the sense that they do not amount to a fundamental alteration of the proposal put forward in the original application."*
>
> *28. He added at [35]:*
>
> > *"Whatever the planning merits of this new proposal, which can, of course, be incorporated into a new "full" application, I am satisfied that the council had no power under section 73 to vary the conditions in the manner set out above. The variation has the effect that the "operative" part of the new planning permission gives permission for one variety superstore on the one hand, but the new planning permission by the revised conditions takes away that consent with the other."*
>
> *29. It is clear that what Sullivan J meant by the "operative" part of the planning permission was the description of the development, rather than the conditions. These two passages are, in my*

> *judgment, dealing with different things. The first deals with the imposition of conditions on the grant of planning permission. The second deals with a conflict between the operative part of the planning permission and conditions attached to it.*

Finney was an important step forwards in clarifying the scope of s.73.There is now no doubt that the power cannot be used to make a change which conflicts with the operative part of the permission: *'the planning authority cannot use section 73 to change the description of development'*.[7] However, two recent cases[8] from 2023 have come into conflict over whether Sullivan J's *'fundamental alteration'* test set out in *ex parte Arrowcroft Group* at para 33 goes beyond this.

Armstrong

The first is the decision of James Strachan KC (sitting as a Deputy High Court Judge) in *Armstrong v Secretary of State for Levelling Up, Housing and Communities* [2023] EWHC 176 (Admin). On the facts of that case, it was agreed that the proposed modification to the conditions under s.73 did not conflict with the description of development.[9] However, the Secretary of State maintained that the modification must not constitute a fundamental alteration of the overall planning permission. The judge rejected this in a thorough evaluation of the case law, and of *ex parte Arrowcroft Group* held:

> *81. Arrowcroft… involved a direct conflict with the operative part of the planning permission originally granted… That was the context in which Sullivan J referred, at para 29 of his judgment, to the commentary in the Encyclopedia of Planning Law and Practice (looseleaf ed) on a condition being able to modify the development proposed by a planning application, but not so as to constitute a "fundamental alteration". The judge concluded that imposition of a condition of the type being promoted in the section 73 application would have been unlawful at the time when the planning permission was originally granted because of a fundamental inconsistency with the operative part of the planning permission. The variation proposed in the section 73 application had the effect that the operative part of the new planning permission would continue to give permission for one variety superstore on the one hand, whereas the proposed revised condition would take away that consent with the other. The judge was therefore not dealing with a situation where there is no such inconsistency, and so not interpreting the scope of section 73 in respect of such an application.*

On the facts the inspector had gone far further and held that a s.73 application could not go beyond 'minor material amendments'. As such, ultimately the judge held that he would have quashed the inspector's decision whether or not the proper test was conflict with the operational part or a fundamental alteration.

Fiske

The second case is the decision of Morris J in *R (on the application of Fiske) v Test Valley BC* [2023] EWHC 2221 (Admin). In that case it was argued by the Council that the 'operative part' test was actually a subset of the single restriction in the *'fundamental alteration'* test. Morris J rejected this submission and identified the restrictions as separate, relying on the passage of Finney above. He then went on to hold:

> *126. As to whether restriction 2 also exists i.e. a second, wider, restriction i.e. no fundamental alteration to the permission as a whole (even absent a conflict with the operative wording), Finney §29 suggests that there is such a restriction, based on Arrowcroft §33. Moreover, the parties in this case agree that there is such a restriction. In these circumstances, I proceed on the basis that there is a restriction 2, despite the doubts cast on that in Armstrong (and §013 NPPG) and Vue Entertainment and the fact that Reid does not seem to support it.*

7 Finney para 42.

8 Another recent case, *Reid v Secretary of State for Levelling Up, Housing and Communities* [2022] EWHC 3116 (Admin), is also relevant here although it does not directly address this point.

9 Armstrong para 65

On the facts of Fiske it was not necessary to determine this issue as the matter was agreed and, in any event, the judge found that the s.73 application was not within the scope of the power, whether the test was operational part or a fundamental alteration.

Comment

There is a conflict between *Armstrong* and *Fiske* that needs to be resolved by the courts; they adopt opposing interpretations of ex parte *Arrowcroft Group* and *Finney*. However, the outcome of both cases also indicate that this distinction may be impactful in only a limited number of cases. In *Armstrong* the judge held he would have quashed the inspector's decision even if he were wrong on the correct test to apply; similarly, in *Fiske* the judge held that he would have quashed the permission applying either test. That this is the case is not surprising: the fundamentals of a planning permission are typically going to be contained in the operative part; thus a fundamental alteration to a planning permission is often going to be constituted by a conflict with the operative wording. However, that will not always be the case.

Indeed, while the outcome in the High Court in *Armstrong* would have been the same regardless of the test, the underlying issue on the facts may not. The case concerned the amendment of a condition to substitute new plans for the proposed dwelling which significantly altered the design of the dwelling. That design was a relevant planning merit, and it seems might have changed the outcome on permission. As such, this distinction does matter, and practitioners need to take it into account when making s.73 applications.

Given the conflicting interpretations in *Armstrong* and *Fiske*, and the recognition in the latter that much of *Finney* is technically obiter, an approach built strictly on stare decisis is unlikely to resolve this issue. It is instead helpful to go back to the principles underpinning s.73.
Ultimately, the dispute here is one simply of vires. If an application is within the vires of s.73 the application must still be determined on its merits, must still comply with the relevant procedural requirements, and must still ultimately concern conditions and not the operative part. Introducing a further restriction on the bare words of s.73 is an additional (and possibly unneeded) step. As the judge in *Armstrong* explained:

> *78. Fifth, the effect of giving the words used in s.73 their plain and ordinary meaning so as to allow an application to be made for non-compliance with any planning condition which is not in conflict with the operative part of permission does not, of course, dictate the outcome of that application. It simply means that the application can be entertained. Any such application would then fall to be determined on its planning merits. In this case, for example, the Inspector considered there to be a fundamental difference in the proposed aesthetics of the design shown in the drawings identified in Condition 10 and the proposed plans. That may well be the inevitable result of an application made under s.73 . But provided there is no inherent conflict or inconsistency with the "operative part" of the planning permission – in this case the construction of a single dwelling – the planning merits of that proposed change can be assessed on its merits. No such assessment has occurred. As part of that assessment, the decision-maker will be able to consider whether the proposed change (fundamental or otherwise) is acceptable or not in planning terms, taking account of any representations received.*

Ultimately, time will tell which of Armstrong and Fiske will prevail. However, it seems undesirable to use a test of fundamental alteration which introduces a lack of clarity to the scope of s.73. It is far more desirable that the issue of vires be as clear cut as possible so that the local planning authority can get on with the key part of the s.73 application; the exercise of planning judgment on the substantive application. As such, while the outcome is currently unclear, Armstrong has some weight in its favour.

Disposal of multiple buildings and tenant's rights of first refusal under the Landlord and Tenant Act 1987: *FSV Freeholders Limited v GL1 Limited* [2023] EWCA Civ 1318

Rebecca Cattermole
Call 1999

Estates frequently comprise multiple blocks of flats and structures, a situation which adds a further layer of complexity to the myriad array of residential leaseholders' statutory rights. Two common examples are the right to manage and collective enfranchisement. The case of *FSV Freeholders Limited v GL1 Limited* concerns a further example, namely the tenants' right of first refusal under Part I of the Landlord and Tenant Act 1987 which prohibits a landlord from making a relevant disposal without serving an offer notice under s.5 and in accordance with specified requirements under ss.5A to E.

FSV concerned the disposal by the landlord of the freehold title of five blocks (Blocks A to E) on an estate in Liverpool ('the Entire Property'). Two offer notices were served: one in relation to a single block, Block A, and the other in respect of Blocks B, C and E. The offer notices were said to be in accordance with the requirements of s.5A. It was common ground that Pt I of the 1987 Act did not apply to Block D. No acceptance notices were served by qualifying tenants in response to the offer notices.

Section 5A applies to an offer notice where the disposal consists of entering into a contract to create or transfer an estate or interest in land. By s.5A(2), the notice must contain particulars of the principal terms of the disposal proposed by the landlord, "including in particular (a) the property, and the estate or interest in that property, to which the contract relates; and (b) the principal terms of the contract (including the deposit and consideration required)".

The 1987 Act does not make express provision for multiple blocks being disposed of together. However, s.5(3) does state that:

> "Where a landlord proposes to effect a transaction involving the disposal of an estate or interest in more than one building (whether or not involving the same estate or interest), he shall, for the purpose of complying with this section, sever the transaction so as to deal with each building separately."

Difficulties typically arise where qualifying tenants in each block have rights over communal grounds and roads on an estate (see *Kay-Green v Twinsectra Ltd (No.1)* [1996] 1 W.L.R. 1587; *Denetower Ltd v Toop* [1991] 1 WLR 945; [1991] 3 All ER 661. In *Long Acre Securities Ltd v Karet* [2004] EWHC 442 (Ch), [2005] Ch 61, it was held that a building could include more than one structure in some limited circumstances where there were integrated developments with appurtenant premises in common use and thus a single notice was held to be valid in that case. It is usual, however, for a cautionary approach to be adopted and notices are served in respect of each building.

In *FSV*, it will be noted that only two notices were served by the landlord. As to whether Blocks A, B, C and E formed one, two or more buildings, and thus whether the two notices were valid, remains to be determined. The issue before the Court of Appeal was whether the s.5 offer notices needed to set out the proposed terms in relation to the purchase of the Entire Property.

The s.5 offer notices for Block A had specified consideration for Block A notice as being £350,000, and in relation to Blocks B, C and E, £1,050,000. It was contended by the appellant company (formed by qualifying tenants for the purposes of acquiring the freehold) that the notices should have stated the contractual price of £1.6 million, that a deposit of £80,000 was required and that the terms of the sale were

conditional upon obtaining the sealed court order authorising the sale at the agreed price.

The Court of Appeal rejected that argument. Asplin LJ with whom Jackson and Arnold LLJ agreed, held that s.5 of the 1987 Act must be read as a whole and in context. The mandatory requirement is on the landlord to serve the offer notice on the qualifying tenants of the flats contained in the premises. It is that offer notice which is capable of being accepted by the service of an "acceptance notice" by the requisite majority of qualifying tenants of the constituent flats (s. 6(1) - (3)). Section 5 must be interpreted in that context; the offer notice must be capable of acceptance.

Where s.5(3) applies (i.e. disposal of an estate or interest in more than one building), it is necessary to serve a notice containing particulars of the property in the sense of the separate building and the estate or interest in that separate building to which the contract relates and the principal terms of that contract. That is the effect of the mandatory requirement in section 5(3) upon the requirements set out in section 5A. Thus, references in s.5A(2) to the "disposal" by entering into a "contract" should be interpreted by reference to each separate building; the reference to "property" should be construed to mean the building in question; and the reference to the "contract" must be interpreted to refer to the contract in relation to the building in question.

Such a construction is consistent with s.5A(3) which provides that the notice must state that it constitutes an offer to enter into a contract on those terms. As the qualifying tenants only have a right of first refusal in relation to the estate or interest in the building which is the subject of the disposal of which their flat forms part, it is natural that the terms in the offer notice should relate to that building. Conversely, if a landlord were only required to give details of the principal terms of the contract in relation to the disposal of an entire site, the qualifying tenants would not know what terms they were being offered which they could accept. If s.5A requires a notice to refer only to the principal terms of the overall contract, the tenants would be provided with the headline price (in this case, £1.6 million) which would be of no assistance to them. Likewise, the failure to mention the sealed court order and deposit in the offer notice did not render the notices defective. In any event, it was held the sealed court order was not a "principal term" of the main contract for sale of the Entire Property. It was merely part of the machinery for completion.

To conclude, where a landlord proposes to dispose of an interest in land that comprises more than one building, the offer notice to qualifying tenants must contain particulars of the estate or interest and the contract terms concerning the separate building in which the relevant flat forms part, and which is capable of acceptance by them. It is not a requirement that the principal terms of a disposal of an entire site which includes other buildings must be specified to render the notice valid.

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