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Celina Colquhoun
Call 1990

Christopher Moss
Call: 2021

Welcome to our January 2025 edition of the Planning Environment & Property Newsletter. A very Happy New Year to you all.

The end of 2024 saw a significant array of development in the realms of planning policy, legislation and consultations and there is a lot more to come!

Lord Banner KC's Independent review into legal challenges against Nationally Significant Infrastructure Projects reported on 28 October 2024 making a series of findings and recommendations aimed at streamlining the process. This was followed by a call for evidence from the MoJ which ran until the end of December 2024.

On 12 December 2024 the new NPPF was published, which should form the foundation of the (now not so new) Government's aim to accelerate economic growth by reforming the planning system to make it more efficient and transparent. Hot off the press, Thomas Hill KC, Peter Village KC, Celina Colquhoun, James Burton, Victoria Hutton provided their views on the implications of the changes in a webinar on 16 December 2024 which can be accessed here.

Lastly, on 19 December 2024 the consultation on Compulsory Purchase Process and Compensation Reforms was opened and will run until 13 February 2025. The consultation seeks views on a range of proposals aimed at implementing technical reforms to the compulsory purchase process to make it cheaper, quicker and fairer.

In addition to these the Government is in the process of publishing a series of working papers on different aspects of planning reform. We are told they are not subject to formal consultation however online responses are encouraged. These cover at the moment Brownfield Passports; Development and Nature Recovery; and Planning Committees. All key stuff.

We kick off this edition with an article by **Stephen Tromans KC** and **Ned Helme** which considers one of the said policy working papers "Planning Reform Working Paper: Development and Nature Recovery" and how the Government's aims of drastically increasing the rate of housebuilding and infrastructure development can proceed whilst also achieving the equally challenging commitments on net zero and ambitions for nature recovery.

We also have a series of articles on other cases and developments from 2024 which have caught our attention:

- **John Pugh Smith** writes on how the ability to deliver BNG can be progressed and developments made truly greener;
- **Stephen Tromans KC**, in his second contribution, addresses the continuing problems posed by contaminated land both for public and private law claims;
- **James Burton** and **Christopher Moss** look at the decision in *Test Valley BC v Fiske* [2024] EWCA Civ 1541, in which James acted for the successful respondent Mrs Fiske, which considers the ambit of s.73 TCPA 1990;
- **Rachel Sullivan** provides her thoughts on the case of *White v Plymouth City Council* [2024] EWHC 2854 (Admin) in which Rachel acted for the claimant who successfully argued that contempt proceedings, brought by the Claimant against the local authority for felling trees,

were an Aarhus Convention claim and thus the Claimant was entitled to costs protection;

- **Daniel Kozelko** considers the case of *Farnham Town Council v SSLUHC* [2024] EWHC 2458 (Admin) which considers whether the court can extend the time for service of a claim under s.288 TCPA 1990;
- Lastly, **Celia Reynolds** covers the case of *Shell UK Ltd v Persons Unknown* [2024] EWHC 3130, the knotty issue of injunctions against "persons unknown", and whether the Aarhus Convention is relevant to the Court's assessment of interferences with the Convention rights of protestors, and the proportionality analysis in the exercise of the court's equitable discretion to grant an injunction.

We hope this provides some food for thought and wish you all a happy, productive and prosperous 2025.

Planning Reform – Development and Nature Recovery

Stephen Tromans KC
Call 1999 | Silk 2009

Ned Helme
Call 2006

Part of the pre-Christmas flurry of activity on Gov. UK was the policy paper, Planning Reform Working Paper: Development and Nature Recovery, published on 15 December 2024.[1] The context of the paper is the conundrum facing the Labour Government of making good its pledge of "getting Britain building again", with what would be a rate of housebuilding not seen in over 50 years. It's of course not just housebuilding – new houses require infrastructure, not least to deliver the clean energy needed to deliver the Government's other equally challenging commitments on net zero. Add into that heady mix the aspirations for nature recovery and there is a Gordian knot that will require some cutting or unpicking.

The paper focuses on the environmental requirements of the Conservation of Habitats and Species Regulations 2017 ("the Habitats Regulations") and other environmental assessment legislation. It envisages a possible "win-win" scenario where, under a more strategic approach, development can proceed apace while funding nature recovery. But how realistic is this and how might it be achieved?

The paper makes the important point that often delays and difficulties in providing housing and infrastructure arise not necessarily because of the impacts of these developments in themselves but because of the poor baseline conditions against which the development is assessed, which arise from other causes: the paradigm case being the restrictions on development arising from advice on nutrient neutrality in some parts of England. Stepping back a little, some practitioners might also comment that another contributing factor is the powerful role occupied by the statutory nature conservation bodies within the planning system which, whilst only doing their job, often tend to apply an ultra-precautionary approach. Be that as it may, it is surely right that the best way to address the question of nature recovery ultimately is through the creation of the necessary environmental headroom to support growth, as the paper envisages. Such recovery will take time, however, and new development cannot be stymied in the interim. The paper suggests that, too often, the status quo sees housing development and nature restoration stall; and it proposes a solution through a more strategic approach.

The Government acknowledges that what it wishes to achieve cannot be attained under the existing legislative framework, and that "targeted

1 Available at: https://www.gov.uk/government/publications/planning-reform-working-paper-development-and-nature-recovery. It should be noted that the paper, while not a formal consultation, nonetheless invites views, in particular on a series of questions set out in its final paragraph.

amendments" to legislation like the Habitats Regulations and the Wildlife and Countryside Act 1981 will be necessary, though importantly the paper commits at para. 11 not to reduce the level of environmental protection provided for in existing law. This approach envisages no change in outcomes achieved under existing legislation, but rather a change in the way those outcomes are achieved. The paper also indicates at para. 12 that the proposals are intended to work together with the new framework of Environmental Outcome Reports to be introduced under Part 6 of the Levelling-up and Regeneration Act 2023.

The proposals involve three steps for which the Planning and Infrastructure Bill will provide the legislative backing:

1. **Moving from multiple project-specific assessments to a single strategic assessment and delivery plan.**

   A few precedents are cited for this approach: District Level Licensing for Great Crested Newts, based on creating new habitat; the provision of Suitable Alternative Natural Greenspace (SANG) as collective mitigation for pressures on protected areas from new residential development; and the Marine Recovery Fund to compensate strategically for new offshore wind developments. It is proposed to build on these precedents by establishing a new legislative route to take consolidated and coordinated action to drive nature recovery.

2. **Moving more responsibility for delivery and implementation of these strategic actions onto the state.**

   The essential corollary of Step 1 is to establish a framework to allow a suitable Delivery Body "to consider which actions are needed to address an environmental impact (or impacts) strategically, for a relevant range of development types, across an appropriate area and for an appropriate period of time" and then secure these actions using funding provided by developers. What is envisaged is a flexible model, capable of addressing a wide range of impacts. It appears that the system would be "modular" in that the Government would be able to identify an issue related to a specific environmental obligation and task a suitable Delivery Body (such as Natural England) with addressing it strategically. That body would then use its judgement and the best available evidence to determine which actions were needed and where. The core common element would be a Delivery Plan produced by the Delivery Body, at the largest spatial scale appropriate.

3. **Allowing developers to make a financial payment towards these strategic actions, so limiting project level assessments to those that are not dealt with strategically.**

   Where there is a robust Delivery Plan approved by the Secretary of State, there will also be a mechanism to secure contributions from developers to fully fund the actions it has identified, to be called the Nature Restoration Fund. A developer would pay into this fund rather than funding project-specific measures. The project would then not be subject to assessment in respect of impacts addressed in this way (though other impacts would remain subject to assessment).

Some questions

There are, as might be expected, a number of questions arising from these proposals.

First, as noted above, the paper envisages only "targeted amendments" to legislation such as the Habitats Regulations, but how targeted will it be possible for the amendments to be while giving rise to the benefits of a strategic approach?

One particular issue is compatibility with assimilated EU law, particularly the **Dutch Nitrates case C-293/17 and C-294/17**, which of course is the law behind nutrient neutrality. One aspect of that case is that projects must be subject to an individualised appropriate assessment of their implications for the sites concerned, unless the objective circumstances make it possible to rule out with certainty any possibility that those projects, individually or in combination with other

projects, may significantly affect those sites. The case also establishes that conservation measures may not be taken into account if the expected benefits of those measures are not certain at the time of that assessment.

If these principles are maintained under the proposed targeted amendments,[2] it would place great responsibility on the Delivery Plan to demonstrate its effectiveness with a high degree of certainty and to do so early enough to be legally relevant to assessing projects – otherwise it would be legally vulnerable. If they are not maintained, however, it would arguably give rise to a weakening of the current regime.

To formulate a Delivery Plan would be a daunting task, even for a well-funded Delivery Body, which current bodies are not. Baseline conditions will have to be assessed, actions and their phasing will need to be identified, constraints identified and solutions found (compulsory purchase of land may be necessary, for example), the cost calculated and an apportionment method devised. This seems likely to be a highly controversial process in many cases. It could potentially in itself hold development up for years. However, the Government envisages an early start to the process, with the first Delivery Plans operational for developers to use shortly after Royal Assent of the enabling legislation. A further question is how in a world of limited resources, potential Delivery Plans in different areas of protection and recovery are to be prioritised. Between Christmas and New Year, an editorial in *The Times* criticised the Labour Government's failure to take forward plans developed by its predecessor in 2023 for recovery of English chalk streams, which would have included use of reformed planning powers to designate chalk streams and their catchments "with a bespoke protection appropriate to irreplaceable habitats".[3] It can be readily appreciated why the Government might be unenthusiastic about creating more possible planning constraints on development, but the example shows that areas of nature recovery which are not perceived as providing a hurdle to housing development in particular may potentially be a lower priority.

The provision of the funding to implement Delivery Plans will (in large part) depend on development proposals coming forward and this may be uncertain in timing. How is this to be squared with the level of certainty as to delivery required so as to avoid harm from early projects before the strategic measures are in place and are effective? And how much upfront funding will be required from the Government?

What are the safeguards for developers against Delivery Bodies taking an overly precautionary view and imposing very large financial burdens which might be regarded as disproportionate, or possibly as the developer being asked to contribute to footing the bill for reversing past decline in protected sites, as against dealing with the consequences of their own development? The paper (para. 35) envisages that the aggregate cost to developers will be no greater than the status quo, but is this realistic?

How is the linkage to be made between the specific site or part of the site affected and the strategic solution? If there is no or a limited linkage, numbers of a species or areas of habitat nationally may increase as a result of strategic measures, but the specific site may still be adversely affected, maybe disastrously. However, if the linkage is too strict, gains at a wider level might not be maximised.

How will the mitigation hierarchy operate? The paper envisages (para. 23) that Delivery Plans would "have the flexibility to diverge from a restrictive application of the mitigation hierarchy" where this would deliver better outcomes for nature, but how would this operate in practice, and would it lead to more mitigation being required overall?

2 And assuming they remain post-Brexit, which is not certain given that the approach to interpretation of the Habitats Regulations has been adjusted by the European Union (Withdrawal) Act 2018 and, pursuant to section 6 of that Act, retained EU case law such as the Dutch Nitrates case is not binding on the Supreme Court or certain other courts.

3 *The Times*, 28 December 2024.

How will the legal distinction between mitigation and compensation be addressed? Interestingly the scenarios canvassed at the end of the paper include both mitigation (in relation to nutrient neutrality) and compensation (in respect of a nationally significant infrastructure project which meets the IROPI test but where compensatory measures are problematic for the promoter, or at least would potentially be the cause of long delays). The two scenarios are really quite different, which emphasises the point made in the paper about the need for flexibility. The second example of compensation could in principle be used for a small number of projects, or indeed a single one: the point being that the Delivery Body rather than the developer would be tasked with coming up with the solution – of course working with the developer. That might potentially lead to a more cooperative approach than often happens in DCO procedures currently, where essentially the developer puts forward proposals which the statutory consultees then snipe at.

There are, as is to be expected, a number of tricky questions, of which the above are some. Nevertheless, it is clear something has got to give in the current system and what we have in the paper is a bold attempt – more sensible than anything we saw under the previous government – to cut through the knot. It may not work for all projects, but it does at least represent a chance of delivering sensible outcomes for some.

How green can be my development?

John Pugh-Smith
Call 1977

Introduction

The 1941 film, *How Green Was My Valley*, based on the novel with the same title, tells the story of a mining family facing upheaval with the arrival of the 20th century. Perhaps, cheekily, I now ask a similar rhetorical question with the arrival of a New Year and the overhaul of the planning system under a Labour Government seeking many more built houses and biodiversity net gain (BNG): how green can be my development?

Background Context[4]

It will be recalled that it was the Environment Act 2021 which formally set out the BNG requirement for non NSIP[5] developments and inserted the statutory framework now found in by Schedule 7A of the Town and Country Planning Act 1990. Then, in November 2021 DEFRA publicly committed to launch statutory BNG within two years; though it took until February 2024 (for major developments) and April 2024 (for small developments)[6] for this statutory BNG to come into force.[7] During the intervening period, DEFRA had published its Environment Improvement Plan (January 2023)

4 I am grateful to Westminster Forum Projects for their helpful summary of recent developments, published ahead of their on-line conference on 13 January 2025: https://www.westminsterforumprojects.co.uk/conference/Biodiversity-25 .
This summary (which I have supplemented) forms an endnote to this article.

5 Potentially November 2025

6 A small development means:
- Residential development where the number of dwellings is between 1 and 9 on a site of an area 1 hectare or less, or if the number of dwellings is unknown, the site area is less than 0.5 hectares.
- Commercial development where floor space created is less than 1,000 square metres or total site area is less than 1 hectare.
- Development that is not the winning and working of minerals or the use of land for mineral-working deposits.
- Development that is not waste development.

7 See Paragraph: 001 Reference ID: 74-001-20240214 of the PPG for the relevant BNG regulations: https://www.gov.uk/guidance/biodiversity-net-gain
Note: Paragraph: 003 Reference ID: 74-003-20240214 of the PPG advises:
"While every grant of planning permission in England is deemed to have been granted subject to the biodiversity gain condition, commencement and transitional arrangements, as well as exemptions, mean that certain permissions are not subject to biodiversity net gain.
Biodiversity net gain has only been commenced for planning permissions granted in respect to an application made on or after 12 February 2024. Permissions granted for applications made before this date are not subject to biodiversity net gain.
Biodiversity net gain does not apply to:
- retrospective planning permissions made under section 73A; and
- section 73 permissions where the original permission which the section 73 relates to was either granted before 12 February 2024 or the application for the original permission was made before 12 February 2024.

to halt the decline in biodiversity and achieve thriving plants and wildlife and had highlighted that implementing statutory BNG would be one of the ways the Government would "make further progress" against achieving this "apex goal".

With the implementation of statutory BNG on 12 February 2024, England became the first country in the world to make BNG a legal requirement. DEFRA announced that all major housing developments in England would be required to deliver at least a 10 per cent benefit for nature.[8] However, by May 2024 the National Audit Office (NAO), in its report *'Implementing statutory biodiversity net gain'*, had already concluded that DEFRA had launched BNG without sufficient infrastructure in place to ensure long-term success. The report remarks:

> *"Although it considered that the arrangements it had in place at launch were sufficient, it has a long way to go before it can be confident that damage to biodiversity through development will not be understated and that the benefits of biodiversity enhancements will actually be delivered. For its market-led approach to work, Defra needs the market to scale up to meet demand, and for statutory biodiversity credits to deliver biodiversity when the market fails to do so.*
>
> *Local authorities manage many aspects of statutory BNG through the planning process, including ensuring compliance and enforcement. For now, there is doubt about whether local authorities will be able to discharge these duties effectively. In addition, it is not clear whether Defra will have sufficiently granular monitoring data to assess policy performance. Without these, Defra will not have assurance that its statutory BNG policy is delivering biodiversity outcomes and value for money for taxpayers."*

On facilitating local delivery the NAO recommended that DEFRA should:

- ensure local authorities have sufficient and timely funding certainty to allow longer-term planning;
- use monitoring information on the biodiversity units market to identify any differential regional impacts of the policy, such as local authorities less engaged with the policy, and target support to them; and
- be proactive in co-ordinating opportunities for best practice to be shared and adopted quickly, particularly among local authorities.

However, there was no reflection of the NAO's findings in the wording of the update to DEFRA's Guidance, *"Biodiversity net gain: what local planning authorities should do"* (published November, 28, 2024). That was only a minor change to the section 'Working with developers who wish to buy statutory biodiversity credits'; and while the updater for its (hyperlinked) related guidance *'Enter a legal agreement for biodiversity net gain'* (October 4, 2024) advised that there was now an added clarification was that "enhancement works" can include stopping normal maintenance works as well as, or instead of, positive actions to enhance habitat, that was hardly a radical shift.

Biodiversity net gain has not been commenced yet for planning permissions which have been granted through other routes to permissions. These include:

- Local development orders;
- Simplified Planning Zones;
- Neighbourhood development orders;
- Successful enforcement appeals; and
- Deemed planning permission.

The grant of permission in principle is not within the scope of biodiversity net gain (as it is not a grant of planning permission), but the subsequent technical details consent (as a grant of planning permission) would be subject to the biodiversity gain condition.

The approval of reserved matters for outline planning permissions is not subject to the biodiversity gain condition (as it is not a grant of planning permission).

There are specific exemptions from biodiversity net gain for certain types of development. The exemptions are set out in paragraph 17 of Schedule 7A of the Town and Country Planning Act 1990 and the Biodiversity Gain Requirements (Exemptions) Regulations 2024."

8 https://www.gov.uk/government/news/new-housing-developments-to-deliver-nature-boost-in-landmark-move

N.B. Potentially more than 10 per cent if specified in local plans.

The replacement NPPF

So, given the "serious plan" pledges of the Labour Party's Manifesto (June 2024) to build 300,000 homes a year and to deliver for nature and meet Environment Act targets one would have expected some reference in their replacement National Planning Policy Framework (NPPF), finally published on Thursday, December 12, 2024. However, carrying out both a quick word search of "biodiversity" as well as a comparison exercise between the previous NPPF (December 2023) and its successor revealed that, on the face of the document(s), there are still no specific references.

The Working Paper

Nonetheless, could any hints about the future administration of BNG be found in the subsequent joint MHCLG and DEFRA policy paper with the snappy title: *'Planning Reform Working Paper: Development and Nature Recovery'* officially published on Sunday, 15 December 2024. The short answer was "no". Unusually, the publication date happened not only to be a Sunday but also the same date as a joint article appearing, exclusively, in the Sunday Times, under the names of the relevant ministers, Steve Reed and Angela Rayner, with the headline: *"The Tories pitted housing against nature. Labour will help both"* They wrote: *"Our bill will require developers to pay into a nature restoration fund that will pay for large-scale environmental improvements to nature, water and air quality. This approach will restore nature, habitats and species across entire communities".* Noble objectives, and, with regional concerns such as nitrate neutrality, a sensible objective; but it seemingly proposes an additional requirement to mandatory BNG, paragraph 27 of the Working Paper read as follows:

> *"These proposals are not expected to have any substantive impact on the implementation of mandatory Biodiversity Net Gain (BNG), which is a widely applicable planning obligation in England. BNG incentivises nature positive choices on development sites, with a developing private marketplace for off-site biodiversity units which the government continues to fully support. This means that where a developer engages with the Nature Restoration Fund to address a specific environmental impact, the biodiversity gain requirement will continue to apply. This ensures developments are incentivised to reduce their biodiversity impact on site and secure future residents' and / or local people's access to nature. As we continue to develop this model, we will seek to identify opportunities to support the ongoing roll out and implementation of BNG."*

So, was BNG consciously excluded from the Working Paper because its implications are too complicated or too much of a visible constraint to the outworkings of the current Starmer/Rayner narrative? It also needs to be borne in mind that a "working paper", unlike a "white paper", is not the subject of formal consultation.

Current Practical Considerations

For now, and, probably for the foreseeable future, the outworking of BNG will follow current practices, though hopefully some could improve with familiarity as well as resourcing over time. For example, BNG delivery has required a combination of onsite and offsite habitat creation and enhancement to meet the objectives set out in the 2021 Act, and, capable of being managed and monitored for a minimum of 30 years. Indeed, while the objective is that BNG is provided on-site, the absence of sufficient on-site opportunities, will mean that off-site provision will continue to be required; but where and in what appropriate habitat form?

Indeed, where there has been an over-demand by LPAs for on-site provision situations have lead, particularly with small developers, to the necessary use of habitat banks; though incentivising off-site solutions, again, arguably contradicts the biodiversity gain hierarchy that requires BNG to be delivered onsite as a priority. Nonetheless, as with the SANG land acquisition solution from the early 2000s, the establishment and use of more registered habitat banks could release more housing development and, thereby, the thrust of the Working Paper could be facilitated.

Nonetheless, there remain the logistical difficulties of LPAs:

a) having insufficient resources, (not just officers but also ecological and legal advisers) to monitor/take enforcement action over BNG provision (or its lack) over the next 30 years even though its requirement has been secured via a section 106 agreement and/or a planning condition;

b) the administrative willingness to do so. Indeed, with Labour's further devolution proposals (English Devolution White Paper published December 16, 2024),[9] that reluctance to take on this long-term responsibility could become that much greater, certainly in the short to medium term.

While, as a last resort alternative, statutory biodiversity credits are available if on-site and off-site options are not possible, these statutory credits are available to buy only once planning permission has been granted and other options have been exhausted. They are also intentionally expensive.

Finally, it needs to be remembered that where BNG requirements are secured by a Section 106 agreement rather than a condition the hard edge provisions of Section 106A will apply i.e. that there is no ability to modify for the first five years save with the express agreement of the local planning authority or such consent is *Wednesbury* unreasonably withheld.[10] Even then, established case law confirms that modification or discharge can only occur if the obligation no longer serves a useful purpose,[11] which seems inapplicable here with a 30 year time horizon.

Accordingly, it is for these types of reasons that some landowners have been approaching "responsible bodies" to enter into conservation covenants. These are private, voluntary agreements to conserve the natural or heritage features of the land, including buildings on that land.[12] While their likely cost may often be greater, they can be entered into more quickly, and, are the type of commercial trade-off decision that is having to be made right now. That cost, however, gets passed on in higher biodiversity unit prices.[13] Further, while LPAs other public sector bodies, eNGOs and other private sector organisations can become designated "responsible bodies",[14] and, while the number of designations is increasing[15] it remains opaque as to how their activities are and will be monitored, how they are held to account, and, the transparency of that monitoring, which cannot be undertaken by Natural England (NE) which is, itself, a responsible body. Coupled with weak "conservations covenants", the potential for judicial review from third parties of planning permissions may not diminish despite the "developers versus blockers" line of current political rhetoric.

These are all matters which DEFRA and MHCLG need to address in taking forward the aspirations of their Ministers' Working Paper. While further funding will be required, surely, it is where Governmental priorities truly lie that will determine whether LPAs will receive more resources; for if they are to manage the demand for BNG in terms of assessing developer biodiversity gain plans, securing BNG habitat (where applicable via a

9 https://assets.publishing.service.gov.uk/media/676028c9cfbf84c3b2bcfa57/English_Devolution_White_Paper_Web_Accessible.pdf

10 *R (Batchelor Enterprises Ltd) v North Dorset District Council* [2003] EWHC 3006.

11 *R (Mansfield District Council) v Secretary of State for Housing, Communities and Local Government* [2018] EWHC 1794 (Admin)

12 For further details, see DEFFRA's guidance: https://www.gov.uk/guidance/getting-and-using-a-conservation-covenant-agreement (last updated 6 February 2024) and the LGA/DEFRA/NE presentation: https://www.local.gov.uk/sites/default/files/documents/PAS%20Conservation%20Covenants%20Presentation%2002%20Aug%202023_v2.pdf

13 See further DEFRA blog: https://defraenvironment.blog.gov.uk/2024/04/22/conservation-covenants-putting-environmental-commitments-into-law/ (22 April 2024)

14 https://www.gov.uk/government/publications/conservation-covenants-apply-to-become-a-responsible-body/conservation-covenants-criteria-for-being-a-responsible-body

15 See: https://www.gov.uk/government/publications/conservation-covenant-agreements-designated-responsible-bodies
These stood at 21 in the last published update on 12 December 2024 .

planning condition, Section 106 or a conservation covenant agreement), enable landowners to provide biodiversity units off-site on habitat banks and, generally, getting BNG to truly "work", then systemic changes will need to occur. Here, the role of responsible bodies should (and, hopefully, will) become increasingly important in sharing that load; but it is only LPAs that can sign Section 106 agreements and allow planning permissions to be published so the administrative weight will still fall on the relevant council body.

Some Concluding Thoughts

Accordingly, it is the view of this author that delays in the actual commencement of development will still lead to the type of housing supply stalemate in 2025/26 that the NPPF and the Working Paper optimistically seek to overcome unless further steps are taken.

As well as the foregoing suggestions, perhaps, incentivisation for LPAs to "sign and deliver" Section 106s could be through a BNG performance equivalent of the housing delivery grant; though that cost would inevitably fall back on the private sector to underwrite. Equally, Central Government could require an equivalent of an annual housing monitoring report and penalize under-performing LPAs from meeting their set BNG targets.

Another practical way might be for the circles of negotiation to be squared through the greater deployment of dispute resolution procedures. Variously, this could be via neutrally chaired meetings, neutral evaluation, mediation and expert determination alone or in combination. These steps could be enshrined within protocols, practice guidance, heads of terms, section 106 and/or management agreements and conservation covenants.

However, experience has shown that they will require not only Government endorsement and active support (particularly by MHCLG/DEFRA officers in dialogue with their LPA/NE counterparts) but also a firmer approach being taken by the Planning Inspectorate, the Judiciary, and, neutral determiners against unreasonable behaviour or unmeritorious litigation by rejecting such applications and making costs awards, where applicable and appropriate.

Only in these ways can, I suggest, the ability to deliver BNG be truly progressed and developments can be made truly greener.

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Endnote

A checklist of contextual BNG publications:

- *Autumn Budget 2024* – published by HM Treasury in October 2024, with:
  - £400m for peatland restoration and tree-planting across 2024-26.
  - £70m over 2025-26 for infrastructure and housing development, including boosting nature recovery.
  - £14m for the Nature Restoration Fund to offset the environmental impact of development, with a developer contribution.
  - £13m to expand Protected Sites Strategies.
- *30by30 on land in England: confirmed criteria and next steps* – published by Defra in October 2024, with the Government committing to protecting 30% of land and sea for nature by 2030 through plans to integrate and streamline 30by30 into existing mechanisms, such as Environmental Land Management schemes and Biodiversity Net Gain.
- *Biodiversity net gain: what local planning*

authorities should do – guidance published by Defra in November 2024, outlining what is required for developers and land managers to achieve BNG.

- *UK Biodiversity Indicators 2024* – published by JNCC in December 2024, highlighting a significant lack of improvement in many indicator measures in the short-term, despite around half improving in the long-term.
- *Reflections on Biodiversity Net Gain: 9 months after going live* – published by DEFRA (Rachel Fisher), November 2024.
- *Nationally Significant Infrastructure Projects: Advice on Habitats Regulations Assessments* – guidance published by the Planning Inspectorate September 2024 on applicant and decision maker obligations.
- *Implementing statutory biodiversity net gain* – report published by NAO in May 2024, concluding that Defra launched BNG without sufficient infrastructure in place to ensure long-term success.
- *Special Representative for Nature appointed in landmark first* – announced by the Government in October 2024, with the appointment of Ruth Davis OBE.
- *Change: Labour Party Manifesto 2024* – published in June 2024, including pledges to deliver for nature and meet Environment Act targets.
- *Biodiversity net gain* – DEFRA guidance (updated 15 March 2024).
- *Irreplaceable Habitat – How biodiversity net gain (BNG) applies to irreplaceable habitat* – DEFRA Guidance (published February 2024; updated September 2024).
- *Biodiversity Net Gain is live* – published by DEFRA (Rachel Fisher), 12 February 2024.
- *New housing developments to deliver nature boost in landmark move* – announced by DEFRA in February 2024, with all major housing developments in England required to deliver at least a 10% benefit for nature.
- *State of Nature 2023* – report published by the State of Nature Partnership in September 2023, claiming that 'the UK is now one of the most nature-depleted countries on Earth'.
- *Biodiversity net gain* – DEFRA guidance (published 21 February 2023)
- *Environmental Improvement Plan 2023* – published by Defra in January 2023, detailing the previous government's plans for the environment, including implementing BNG.
- *Environment Act 2021* – received Royal Assent in November 2021 and set out the BNG requirement for planning permissions.

Contaminated land – continuing to bubble up?

Stephen Tromans KC
Call 1999 | Silk 2009

Author: Contaminated Land (3rd edition, 2018)

To say that Part 2A of the Environmental Protection Act 1990 has been a disappointment in terms of generating work for environmental lawyers would be a gross understatement. Since it came into effect, almost a quarter of a century ago, there have been few decided cases, and those which have been decided have hardly been conducive to dealing with the situation where contamination occurred long ago and where the original polluting entity has long since vanished into the legal afterlife.[16] There has been a conspicuous lack of activity in identifying contaminated land and serving remediation

16 See *R (National Grid Gas Plc (formerly Transco Plc) v Environment Agency* [2007] UKHL 30 on nationalised industries and *Powys County Council v Price* [2017] EWCA Civ 1133 on local authority reorganisation.

notices by local authorities, though the legal duties are explicit. This can be attributed to a number of factors: the sheer complexity of the legislation and the onerous requirements to establish land is "contaminated", resulting in serious legal risks for local authorities;[17] the likelihood that no Class A person will be found, resulting a fraught situation where notices may have to be served on local home-owners; and perhaps most importantly the simple lack of financial resources available to local councils since austerity kicked in around 2008.

However, all this doesn't mean that contaminated land has gone away as a problem. Often of course it may get more or less adequately addressed when land is developed, but there is an awful lot of land which is affected by long term persistent contaminants, or by polluting discharges from old mine workings. Government advice updated 31 October 2024 appears quite reassuring in beginning, "There is very limited data linking any health effects with land contamination in England and Wales."[18] Not everyone however will be so reassured.

It is therefore interesting to note that on 21 November 2024, Laing J granted permission for a judicial review of Havering Council's decision not to designate an illegal landfill site at Launders Lane in Rainham as contaminated land in proceedings brought by Ruth Kettle-Frisby, a Havering resident and co-founder of Clear the Air in Havering. The illegal landfill site is said to be affecting air quality and residents' lives with constantly smoking underground fires. Residents also say that local GPs attribute high levels of respiratory and lung diseases in the area to the site, and there are also concerns about surface water runoff from it. Smoke from the site has affected local schools, and the site is classified as one of the highest methane emitting sites in the UK. In July 2024 Havering Council decided not to identify the land as "contaminated". The judge found there were arguable grounds meriting consideration at full hearing and categorised the case as "significant" under Planning Court rules. The case is one to watch as it is the first time a local council's failure to identify land has been subject to legal challenge. The partner at Mishcon de Reya acting for the claimants is reported as having said that the grounds of challenge raise important points of law on how public authorities approach decision making in relation to environmental and public health issues, especially around air pollution and contaminated land.[19]

It may also be noted that there has been long running litigation in Scotland as regards "the Watling Street development" in Motherwell, where housing was built on land used as an iron and steel works from 1912-1939 and then during and after World War II by the Ministry of Supply to deal with clothing and surplus equipment from demobbed soldiers. This involved use of solvents, as did later use up to the 1980s by a light engineering company. Outline planning permission for the site was granted to the Scottish Development Agency in the 1980s. It was suspected that the former uses of the site meant that the ground was contaminated, and a condition was imposed that the applicant was required to conduct an investigation of the soil conditions over the entire site and then remove or render harmless any areas of contamination.

Tenants living in the development were said to have suffered neuropsychiatric symptoms as a result of exposure to vapours contaminated by solvents. They brought a claim against Scott Wilson Scotland Limited, the company responsible for investigating the site. Lord Clark in the Outer House of the Court of Session considering the claim found there to be a duty of care to future tenants in terms of proximity. However, on the facts the defendant had relied upon the Regional Chemist to interpret the significance of the industrial history and had followed the approach recommended by the Regional Chemist. As such

17 For example, the Willenhall Gasworks appeal (2017) APP/CL/15/03.

18 https://www.gov.uk/government/publications/use-of-potentially-contaminated-residential-land-gardens-and-allotments/contaminated-land-in-residential-settings-factsheet

19 https://www.lexology.com/library/detail.aspx?g=50c404e8-5ca9-4af4-9187-c40f23f3b815

it was not in breach of the duty. In addition, the pursuers did not identify in evidence what actual measures or steps the defender ought to have taken in any review of the site investigation or remediation strategy and it was not clear from the evidence precisely what targeted investigation the pursuers were suggesting ought to have been either recommended or carried out.[20] This illustrates how difficult such claims can be. The action had initially been brought against the main developers (City Link Development Co), their landlords (North Lanarkshire Council) and Scott Wilson Scotland. On 13 January 2016 the cases against the developers and the landlords were dismissed.[21] The dismissals were reclaimed, but that against City Link was abandoned and, on 14 February 2017, the appeal against the landlords was refused.[22]

Further proceedings by different residents against Scott Wilson Scotland have only recently been disposed of in August 2024 when the Inner House of the Court of Session brought the proceedings to an end.[23] As with other claims, this one had been stayed pursuant to a Practice Direction pending resolution of the claim against Scott Wilson Scotland. The stayed claim was dismissed on grounds of res judicata, as stated by Lord Carloway:

> "The Lord Ordinary [in *McManus*] determined that the defenders did owe certain duties to the occupiers, notably to use the appropriate skill and competence of environmental engineers, but that they had not breached their duty. They had acted in accordance with the common and accepted practice at the time. That was what was litigated and determined. The pursuer is trying to re-litigate that issue; that she cannot do as it is *res judicata*…the manner in which the pursuer seeks to circumvent the plea is to make additional averments about particular solvents which should have been looked for and how they might have been dealt with. These issues were all canvassed in *McManus* and dealt with by the Lord Ordinary. Adding additional detail to the pursuer's pleadings does not change the essence of what was litigated; the grounds of action remain the same."

In yet another claim, dating back to 2013, 36 individuals brought actions against Lanarkshire Housing Association Ltd alleging personal injury due to contaminants in the soil of the development. The claim was based on the statutory requirement in section 113 of the Housing (Scotland) Act 1987 and section 27 of the Housing (Scotland) Act 2001 that houses will be kept in all respects reasonably fit for human habitation. There was evidence that the claimants experienced a "strong, unpleasant, sweet and gassy or oil" smell and had various adverse medical symptoms such a headache, lethargy, inflammation of the eyes and throat, stomach problems, and skin conditions.

In June 2024 the Outer House of the Court of Session found that the pursuers had failed to prove that the properties were unfit for human habitation or posed a risk to human health due to contamination.[24] The decision is a useful one at a number of levels, dealing with the need for proof of actual cause of harm and causation, finding that the Part 2A threshold for contamination was not determinative of breach of duty, and stressing the importance of reasoning in expert evidence and the requirement of evidence in order to draw

20 *Angela McManus and Robert McManus v Scott Wilson Scotland Ltd* [2020] CSOH 47.
https://www.scottishconstructionnow.com/articles/civil-engineering-firm-did-not-breach-duty-of-care-to-tenants-of-contaminated-housing-development
https://www.casemine.com/commentary/uk/duty-of-care-in-environmental-consulting:-scottish-court-of-session-in-angela-mcmanus-v-scott-wilson-scotland-ltd/view

21 McManus v City Link Development Co [2016] Env LR D1).

22 2017 Hous LR 84.

23 Laura McClusky v. Scott Wilson Scotland Limited [2024] CSIH 26.
https://www.scottishlegal.com/articles/inner-house-dismisses-attempt-to-revive-litigation-against-company-involved-in-contaminated-housing-project

24 *Simon Pelosi v Lanarkshire Housing Association Limited* [2024] CSOH 56

inferences as to causation. In particular Lord Clark rejected the inference by expert witnesses for the pursuers that there was a likelihood that further hotspots of contamination existed within the site. It was noted that there was a lack of research, and hence evidence, into what the effects of chronic exposure to low level solvent fumes from contamination might be. Secondly it was unknown what concentrations of and exposure to any particular contaminant might be. Thirdly there was no medical evidence that the symptoms experienced were as a matter of fact caused by contamination.

The cases show that claims for bodily injury caused by certain types of contaminants will face serious problems of proof and causation, where (unlike, say, asbestos) there is no known medically proven link. It may be of course that medical science will develop over the years on this point, but at present the hurdles are formidable.

The ambit of s.73 TCPA – *Test Valley BC v Fiske* [2024] EWCA Civ 1541

James Burton
Call 2001

Christopher Moss
Call: 2021

Introduction

Section 73 of the Town and County Planning Act 1990 ("TCPA 1990") enables a person to make an application to a local planning authority ("LPA") in respect of an extant planning permission granted subject to conditions, for the grant of a new permission with different or no conditions. Some restrictions on s.73 are well established; in *Finney v Welsh Ministers* [2019] EWCA Civ 1868 the Court of Appeal held that the "operative" part of a planning permission granted under s.73 cannot differ from the "operative" part of the original permission. Necessarily so, as s.73 gives an authority power to vary only the conditions. In Fiske the Court of Appeal considered the extent of an authority's power to impose new conditions under s.73, and in particular whether conditions imposed under s73 be unlawful if:

1) they are inconsistent in a material way with the operative part of the original permission ("restriction 1");
2) they involve a "fundamental alteration" of the development permitted by the original permission, reading that permission as a whole ("restriction 2").

The Court of Appeal, the lead judgment given by Holgate LJ, held that restriction 1 applies to s.73, but that (albeit agreed between the parties) restriction 2 does not, and also provided welcome clarification on what LPAs can/cannot do when imposing conditions on planning permissions under s.73 or s.70, as well as what is encompassed by "the operative part" of a permission.

Background

In 2017, Test Valley BC ("the LPA") granted planning permission for a solar farm. The permission included a 33kV substation but did not include the provision necessary to connect to the 132kV electricity grid that ran through the site. The description of the development referred to a grant of permission for, inter alia, a "substation", which was the 33kV substation, and stated that permission was granted "in accordance with the approved plans listed below" and then listed the approved plans (which included the 33kV substation plan). The position of the 33kV substation was later fixed towards the centre of the site through discharge of conditions.

After one failed attempt to obtain a s.73 permission for the sizeable distribution network operator 132kV substation compound also required to connect to the 132kV grid (the purported s.73 permission was quashed by

consent), in 2021 the LPA granted planning permission for the installation of a 132kV substation in the centre of the solar farm site covered by the 2017 permission. In December 2021 the developer made a s.73 application to vary the conditions of the 2017 permission so that the new s.73 permission would be fully consistent with, and could be carried out in conjunction, with the 2021 permission. In particular, by precluding development of the central part of the site (the area occupied by the 2021 permission). This was granted by the LPA in April 2022 and challenged by Mrs Fiske.

The operative part of the 2022 s.73 permission repeated the wording of the original 2017 permission describing the development, including reference to "substation", but its list of "approved plans listed below" differed, and by condition 2 requiring that development be carried out only in accordance with the approved plans, its effect was to prohibit a substation (as none was shown on the approved plans). Indeed, condition 2 prohibited anything else not shown the approved plans.

At first instance, Mrs Fiske's primary argument was that the 2022 permission was ultra vires s.73 TCPA 1990 on the basis that the operation of condition 2 meant that the 33kV substation was prohibited, directly contradicting the grant of the original 2017 permission, contrary to the statutory wording and the decision of the Court of Appeal decision in Finney, the Court of Appeal's earlier decision in *Cadogan v Secretary of State for the Environment* (1993) 65 P. & C.R. 410 and the first instance decision of Sullivan J (as he then was) in *R v Coventry City Council ex parte Arrowcroft Group Plc* [2001] P.L.C.R. 7. She argued that all of those decisions supported a principle that went beyond s.73: that the conditions to a planning permission cannot take away from the words of grant, as there can be no giving with one hand, taking with the other.

At first instance Morris J, [2023] EWHC 2221 (Admin), agreed with Mrs Fiske and held that:

> The power under s73 to impose conditions on the new permission is ultra vires if they are inconsistent in a material way with the operative part of the original permission ("restriction 1");
>
> Conditions under s73 will also be ultra vires if they make a "fundamental alteration" of the originally permitted development, reading that permission as a whole ("restriction 2"); and
>
> He concluded that because condition 2 of the 2022 permission prohibited the carrying out of the development with a 33kV substation, that permission was inconsistent with the operative part of the 2017 permission. Further, that the omission of the 33kV substation was a fundamental alteration of the 2017 permission and also ultra vires on this basis.[25]

Mrs Fiske had also argued that the LPA had misunderstood that the effect of granting the 2022 Permission would be to preclude the 33kV substation, and Morris J would have upheld that ground also, had it been necessary to do so.

The LPA appealed against the decision. As regards s.73, it argued that the power to impose conditions under s.73 is subject only to restriction 2, in other words whilst the operative parts of the extant permission and the s.73 permission must be the same, the conditions of the new permission may alter that grant, so long as that alteration is not "fundamental". Mrs Fiske argued that s.73 was subject to both restrictions. It remained common ground that restriction 2 existed, so that point was not the subject of oral submissions.

The Court of Appeal decision

Necessarily, the Court of Appeal's focus was on whether restriction 1 existed. However, it did not confine itself to that point.

Holgate LJ gave the lead judgment, with which Dingemans LJ and William Davis LJ agreed. In addition to considering the statutory wording, the judgment extensively considers the case law on

25 Considered by Daniel Kozelko in the January 2024 edition of this newsletter: https://www.39essex.com/information-hub/insight/planning-environment-and-property-newsletter-winter-2024-edition s

s.73 at [69] – [128] before concluding that s.73 is indeed subject to restriction 1. The Court held at [123] that this accords with the language, and purpose of s.73 as explained in Finney, and is also consistent with the principle that the operative part of a s.73 permission may not differ from the operative part of the extant permission which is to be varied. Importantly, the Court's reasoning extends also to the use of conditions under s.70. Conditions cannot materially depart from the "operative" part of the permission, thus at [73] Holgate LJ noted *"it would be unlawful in a decision notice granting planning permission expressly for 10 houses to impose a condition prohibiting the erection of any more than 9, or just 1 house. Such a condition would derogate from or negate the consent granted by the operative part of the decision notice. It would not reasonably relate to the planning permission granted."*

In respect of the existence of restriction 2, as noted the parties had agreed this (that conditions under s.73 would be ultra vires if they made a fundamental alteration to the originally permitted development). This point was therefore not argued before the Court of Appeal.

Despite the lack of argument, the Court of Appeal reached a contrary decision, and held that s.73 is not subject to restriction 2, approving 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); [2023] PTSR 1148 at [73] to [89].[26]

Holgate LJ explained why restriction 2 did not apply: at [129] he cited the absence of support in the statutory langue for this construction, and at [118] and [126] set out that the *Wheatcroft* bar on a condition substantially altering a live s.70 application is a procedural one and not one that relates to s.73.

Accordingly, the key message from the judgment on the scope of s.73 is contained at [130] *"the restrictions upon the power to impose conditions in a s.73 permission are those set out in s.73 itself, the Newbury tests and the requirement that those conditions must not be inconsistent with the operative part of the earlier planning permission."*

The judgment also effectively confirms Mrs Fiske's argument that the "operative part" of a permission is not merely the words that state what is being authorised, but also the familiar words that generally follow that, to the effect of "in accordance with the approved plans listed below" or similar, as here, and then that list of plans itself. Hence Holgate LJ's comments at [37] that "at first sight' the fact the 2022 permission changed that list of approved plans, and did so materially by "clearing" the central part of the 2017 permission solar farm site, offended against the principle established by *Finney*, that the LPA cannot alter the operative part of the permission under s.73.

The judgment arguably goes further, at least suggesting that in the case of a "full" permission, the "operative part" will include the plans and drawings in any event, whether expressly referred to or not, given the principle explained by Keene LJ in *Barnett v Secretary of State for Communities and Local Government* [2009] EWCA Civ 476; [2010] 1 P & CR 8.

Lastly, the Court confirmed that whilst a *de minimis* alteration of the operative part of a permission by s73 may not be ultra vires, referring to the judgment of Lane J in *R (Atwill) v New Forest National Park Authority* [2023] EWHC 625 (Admin); [2023] PTSR 1471 at [64], the concept "only refers to trifling matters which are ignored by the law" [130] of *Fiske*.

It is understood that the Council has applied to the Court of Appeal for permission to appeal to the Supreme Court.

26 Also considered by Daniel Kozelko in the above article and by Celina Colquhoun in the Spring 2023 edition of this newsletter: https://www.39essex.com/information-hub/insight/planning-environment-and-property-newsletter-spring-2023-edition

Comment

This is a judgment of great importance for s.73, but which goes well beyond s.73, to a point of fundamental importance for planning permissions under s.70 also.

As regards s.73, for some time now, some have sought to use s.73 to make material physical alterations to full permissions by variation of the conditions, and there has been uncertainty as to whether, and to what extent, that is permissible. Assuming this judgment stands, whether that is now possible to any extent at all is debatable.

We suggest the decision on restriction 1 is a welcome one, rectifying the longstanding industry confusion as to the restriction(s) on s.73, given first instance judgments pulling both ways, including that of the late Mrs Justice Patterson in the s.70 case of *Kevin Stevens t/a KCS Asset Management v Blaenau Gwent County Council* [2015] EWHC 1606. It is now, however, clear that a condition, whether through s.70 or a s.73 application, cannot be used to limit the scope of a permission in a way that derogates from or fundamentally conflicts with the grant itself.

It is perhaps unfortunate that argument was not heard on restriction 2. That would have allowed for (i) consideration of the apparent anomaly that, in theory, one could therefore lawfully impose a condition on a s.73 application that could not be imposed on the s.70 original application; (ii) full consideration of the procedural arguments in favour of s.73 restriction 2, similar to those that support the *Wheatcroft* bar on s.70 applications, given the light-touch that the Development Management Procedure Order takes to s.73 applications, and what might be a reasonable public expectation that the development itself would not be changed (though does engage with the procedural points [129(4)]).

All that said, in reality there is precious little practical scope for a condition altering the development under s.73, when it cannot materially depart from the operative part, and when the full extent of the "operative part" is appreciated.

The Court's implicit acceptance of the contention that the operative part of the permission also includes the words to the effect of "in accordance with the approved plans listed below" ties in neatly with the dicta of Holgate J (as he then was) in *R (OAO Dennis) v Southwark* LBC [2024] EWHC 57 (Admin) at [26] where he noted that the description of development is contained in the "operative part of the planning permission" i.e. the description is not the sum of the operative part. At the very least, then, the operative part will, in a modern permission with wording similar to those here, include the plans and drawings.

Although the decision does not go as far as to say that where a full permission necessarily incorporates all the application plans and drawings those should also be taken as forming part of the "operative part", it certainly leans that way.

However, if ever LPAs needed an incentive for listing the approved plans in the operative part in order to ensure control over development, this is it. In any event, whether motivated by control or not, LPAs and developers will need to give greater thought as to how development is described and what exactly they wish to incorporate into the permission as this judgment makes clear that s.73 offers far less of a 'safeguard' for correcting mistakes, or enabling alterations, than some may have thought. Note, though, that new s.73B would not be so constrained.

James Burton acted for the successful Respondent, Mrs Fiske.

White v Plymouth City Council [2024] EWHC

Rachel Sullivan
Call 2015

This case concerned contempt proceedings brought by the Claimant against the local authority arising from the felling of trees in March 2023. The application for contempt of court (based on the Council's conduct leading up to the decision to undertake works, and an alleged breach of an injunction restraining further works) was dismissed, but the High Court considered whether the proceedings was an 'Aarhus Convention claim' within the meaning of CPR r46.24.

CPR r46.24(2) defines an Aarhus Convention claim as "a claim brought by one or more members of the public by judicial review or review under statute which challenges the legality of any decision, act or omission of a body exercising public functions, and which is within the scope of Article 9(1), 9(2) or 9(3)" of the Convention.

The High Court held that the application for an injunction fell within the scope of Article 9(3) of the Convention, as the Claimant sought to challenge an alleged contravention of domestic law relating to the environment by the Council. Although chronologically the injunction had been granted and then judicial review proceedings issued, it was a condition of the order granting the injunction that proceedings were issued and the injunction was made in anticipation and contemplation of judicial review proceedings. Accordingly, "[w]hen CPR Rule 46.24 refers to an Aarhus Convention claim as being one that involves a claim for judicial review, that must sensibly be read to include interim injunction proceedings that are made in anticipation of and in contemplation of judicial review proceedings. To hold otherwise would mean that the United Kingdom Government, as a Party to the Aarhus Convention, was not giving proper effect to that Convention when setting out its cost protection rules" (at [74]).

This conclusion was bolstered by Articles 9(4) and (5) of the Convention itself, which require Parties to the Convention to "provide adequate and effective remedies, including injunctive relief as appropriate" and to "consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice". The requirement to provide adequate and effective remedies must include injunctive relief that preceded, but is conditional on, the lodging of a claim for judicial review (at [75]). By the same token, contempt proceedings to enforce such an injunction fall within the scope of the Convention: '[i]f an order for an injunction made by the Courts in, or in anticipation of, judicial review proceedings alleging a contravention of environmental laws, cannot be enforced then the remedies available will not be "adequate" or "effective" as required by Article 9(4)" (at [75]). The application for contempt therefore fell within the scope of CPR r46.24 and the Claimant was entitled to Aarhus costs protection.

Farnham Town Council v Secretary of State for Levelling Up, Housing & Local Communities

Daniel Kozelko
Call 2018

May a court extend the time for service of a claim under s.288 TCPA 1990 using CPR r3.1(2)(a)? That was the question before the High Court in *Farnham TC*. Falling prey to a trap for the unwary, solicitors for the Claimant did not notice that a statutory review under s.288 required that a claim be both filed **and served** within the six-week beginning the day after the decision letter. This is unlike judicial review, where CPR r54.7 permits seven days for service following the claim being issued. On the facts of this case the claim form was issued in time but served four days out of time.

The first thing Mr Tim Smith (sitting as a High Court Judge) had to determine was whether the Court was bound by the decision in *Corus UK v Erewash BC* [2006] EWCA Civ 1175. That case concerned a statutory challenge under s.287 (which the Judge recognised was 'substantially similar' to s.288). In that case the Court of Appeal held that time for service could be extended under CPR r3.1(2)(a) and that the requirements for extensions of time to serve need not meet the stringent requirements of r7.6.

The judge concluded he was not so bound, due to changes to the CPR since the early 2000s. In *Corus* Laws LJ concluded that CPR rr7.5 and 7.6 only referred to a four- or six-month period for service. At that time there was no provision modifying these rules for s.288 challenges, and Laws LJ considered he could not rewrite the rules to insert the six-week time limit and then apply them. In contrast, the judge in *Farnham TC* considered para 4.11 of PD 54D (which was not in place at the time of *Corus*) changed things. It provides: '[t]he claim form must be served within the time limited by the relevant enactment for making a claim for planning statutory review set out in para 1.2'. Further, s.288 challenges must be brought by the Part 8, and PD 54D modifies that procedure as appropriate.

As a result of these provisions, the judge concluded that *Corus* could be distinguished. He also noted that Laws LJ in *Corus* was asked to consider simply whether r7.6 applied (and not whether it should apply by analogy). In contrast, the more recent case of *R (Good Law Project) v Secretary of State for Health and Social Care* [2022] EWCA Civ 355 had considered whether r7.6 should be applied **by analogy** to r3.1(2)(a) when extending time for service in judicial review. The Defendant asked the judge to apply *Good Law Project* in this statutory challenge context.

The judge agreed. Following the reasoning in *Halton Borough Council v Secretary of State for Levelling Up Housing and Communities* [2023] EWHC 293 (Admin), he concluded there was no good reason to draw a distinction between the approach to extension of time to serve a claim in judicial review versus a statutory review. Indeed, the judge considered that statutory challenges are intended to hold claimants to a higher standard than those embarking on the common law remedy of judicial review. That is why the statute is so clear: six weeks means six weeks. As a result, he accepted that the parallel approach in *Good Law Project* should be adopted, and the stringent requirements of r7.6 applied by analogy.

On the facts, the Claimant had accepted that it could not meet the requirements of r7.6 if they were properly to be applied by analogy. As a result, the answer to the question whether time for service could be extended was no.

This case is another which marks out: (1) the stringent approach taken to extensions of time to serve in statutory challenges; and, (2) the subtle differences between judicial review and statutory challenge. Both are a trap for the unwary which practitioners must be aware of when advancing these types of claims.

Shell Uk Ltd V Persons Unknown [2024] EWHC 3130

Celia Reynolds
Call 2022

The law on protests, in particular injunctive relief, has undergone rapid change in the past few years. The Supreme Court most recently considered injunctions against "persons unknown" (i.e. persons unidentifiable at the time the injunction is granted) in the case of *Wolverhampton City Council v London Gypsies and Travellers* [2023] UKSC 47.

Such injunctions, if granted, will *"be effective to bind anyone who has notice of it while it remains in force, even though that person had no intention and had made no threat to do the act prohibited*

at the time when the injunction was granted and was therefore against whom, at that time, the applicant had no cause of action" (*Wolverhampton* at §238). As a consequence, they raise a variety of issues of principle, such as notice, service, and the extent to which a 'person unknown' can be described without referring to the conduct sought to be enjoined. For example, if the injunction is sought merely against persons who commit a particular act, then the persons become parties to proceedings *only* at the point they infringe the injunction. If an injunction is sought against 'persons unknown', then the entire world falls within the description and could potentially be parties and subject to proceedings – or in contempt of court.

Shell follows the Supreme Court's decision in *Wolverhampton*, as well as the recent environmental protest case of *Valero Energy Ltd and others v Persons Unknown* [2024] EWHC 134 (KB). In *Valero*, three petrochemical companies were successful in obtaining injunctions against unknown protestors to prevent them from trespassing on oil refinery and oil terminal sites and causing public and private nuisance.

In three separate but connected claims, the claimant oil companies in *Shell* sought final injunctions against named protestors and persons unknown. Relying on the judgment of Ritchie J in *Valero Energy Ltd v PU* [2024] EWHC 3130 (KB), Dexter Dias J pulled together a fifteen factor 'checklist' for considering whether it is "just and convenient" to exercise the court's discretion in favour of granting the injunction. Those factors were as follows (at §59):

1. Cause of action was clearly identified.
2. Full and frank disclosure by claimant.
3. Sufficient evidence to prove claim.
4. No defence (or realistic defence where no defence filed).
5. Balance of convenience/compelling justification or need.
6. Proportionate interference with ECHR rights.
7. Damages not adequate remedy.
8. Clear identification of defendants:
   a) Named defendants identified in claim form and injunction order by tortious acts prohibited;
   b) Plus capable of being identified and served.
9. Terms of injunction:
   a) Sufficiently clear and precise;
   b) Only prohibiting lawful conduct where no other proportionate means to protect claimant's rights.
10. Correspondence between terms of injunction and threatened tort.
11. Clear and justifiable geographical limit.
12. Clear and justifiable temporal limit.
13. Service: all reasonable steps taken to notify defendants.
14. Right to set aside or vary.
15. Review.

Ultimately, the court considered it necessary and proportionate to grant the Claimant's injunction. For brevity's sake, this note does not intend to provide a summary as to how each factor was considered by the court in respect of the three claims. Rather, it is worth focussing on the findings made by the court in respect of the Aarhus Convention, which may only arise in the environmental context. Two named protestors, appearing in person, requested the court to consider whether *"peaceful acts contrary to the law and the rights of others under the civil law are protected by the Aarhus Convention, and if so, in what way"* (at §6). The named protestors further submitted that the Aarhus convention protects environmental defendants from "excessive use of the law", suggesting that *"the simultaneous use of criminal and civil proceedings"* was oppressive (at §133).

The question of the legal relevance of international treaties that are not incorporated directly into law was considered by the Supreme court in *R (SG) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449 (SC). The Supreme Court determined that when considering Convention rights under the ECHR, regard may be had to international law conventions.

In Shell, the Court first observed as follows (at §158):

> "Relevance or applicability cannot amount to surreptitious incorporation. What cannot happen is for the common law to be used to incorporate otherwise unincorporated international conventions "through the back door" (*A v Secretary of State for the Home Department* (No 2) [2005] 1 WLR 414 (CA)). That is because the court cannot do what Parliament declined to do: give direct effect to an international treaty that remains, in its relevant provisions for these purposes, unincorporated."

Nevertheless: *"while the United Kingdom has not incorporated Article 3(8), nor has it disowned it. This country continues to be a signatory to Aarhus. Thus, it must be taken to respect its terms and all of them save for any reservations."* Accordingly, even though the Aarhus Convention had not been incorporated, the High Court accepted that the Aarhus Convention was:

- A relevant treaty in the sphere of environmental rights and protest about environmental issues;
- A relevant treaty to the interpretation of substantive rights under the ECHR, and particularly the rights under ECHR Article 9, 10 and 11.

However, in the context of 'civil disobedience' there was *"no basis within Aarhus that authorises environmental defenders to deliberately break or flout the law or materially violate the lawful rights of others"* (§165). On the other hand, the court did consider that Aarhus might be engaged in other contexts, such as *"the putative case of arrests and prosecutions or the granting of an injunction to prohibit entirely peaceful protesters such as those who have regularly gathered with placards near to Shell infringing any of Shell's rights."*

The court concluded that the Aarhus Convention was relevant to the court's assessment of interferences with the Convention rights of protesters under the ECHR and the proportionality analysis in the exercise of the court's equitable discretion to grant an injunction. This conclusion suggests that there is an added layer of analysis to be applied in the context of final injunctions obtained against persons unknown in environmental protest cases.

CONTRIBUTORS

Stephen Tromans KC

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 Pugh-Smith

Call 1977

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 Colquhoun

Call 1990

Celina regularly acts for and advises local authority and private sector clients in all aspects of Planning and Environmental law including the Community Infrastructure Levy (CIL) regime, Highways Law, Sewers and Drains and National Infrastructure. She appears in Planning Inquiries representing appellants; planning authorities and third parties as well as in; the High Court and the Court of Appeal in respect of statutory review challenges and judicial review cases. She also undertakes both prosecution and defence work in respect of planning and environmental enforcement in Magistrates' and Crown Courts as well as Enforcement Notice appeals. She specialises in all aspects of Compulsory Purchase and compensation, acting for and advising acquiring authorities seeking to promote such Orders or objectors and affected landowners. Her career had a significant grounding in national infrastructure, airports and highways projects and she continues those specialisms today – *"dedicated, very analytical and keen for precision… She is very much considered to be a leading figure in the legal planning world."* Chambers Directory 2023. She was awarded Legal 500 Planning and Land Use Junior of the Year 2024.

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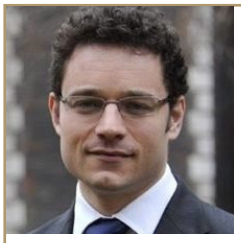

James Burton
Call 2001

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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Ned Helme
Call 2006

Ned specialises in planning, environment, energy, administrative and public law and associated areas. He acts for developers, landowners, local government and other public bodies, individuals and interest groups. He has been recommended in the directories for a number of years and is currently ranked as a leading junior in The Legal 500 for both planning and environment. He has extensive court experience, including in the Supreme Court, Court of Appeal and High Court and he also appears regularly in inquiries, hearings and local plan examinations. He has a background in the biosciences and is particularly interested in cases involving scientific, environmental and other technical issues, including those relating to climate change, biodiversity and habitats, environmental assessment, energy and natural resources and strategic infrastructure. He is on the Board of the Journal of Environmental Law and is a General Editor of the Sweet & Maxwell Environmental Law Bulletin

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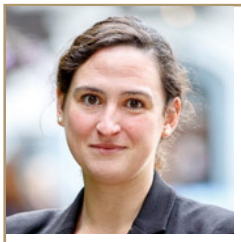

Rachel Sullivan
Call 2015

Rachel has a broad public law practice, with a particular interest in education and healthcare law. She also has a busy inquiries practice, and is currently instructed as junior counsel to the Grenfell Tower Inquiry. She also practises planning and environmental law. She regularly appears in the High Court, Court of Protection and County Courts as well as the appellate courts, on behalf of individuals, central and local government, NHS bodies and companies. Rachel is also on the Attorney General's C Panel of counsel.

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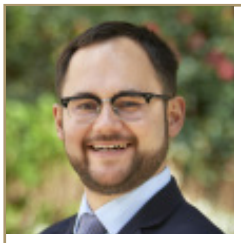

Daniel Kozelko

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.

In 2019-2020 Daniel was a judicial assistant to Lord Carnwath and Lady Ardenat the Supreme Court of the United Kingdom. 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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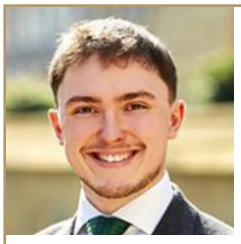

Christopher Moss

Call: 2021

Christopher has a particular interest in planning and environmental work and is ranked as one of the top 20 junior planning barristers under 35. He recently worked with Jonathan Seitler KC advising a local authority on potential challenges to the tabling of a commercial offer to purchase a significant parcel of land. He was recently led by Daniel Stedman Jones acting for the Claimant in *R (Pennine House Limited) v Bradford MDC* [2024] EWHC 608 (KB) where the Defendant Local Authority's Environmental Impact Assessment was found to be unlawful on rationality grounds. He has advised claimants and local authorities on matters including rights of way and related issues, breach of condition enforcement proceedings, and local authorities' powers in relation to restricting advertising of 'high carbon' products.

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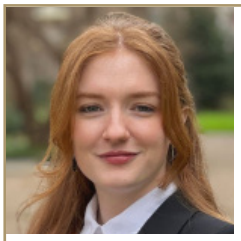

Celia Reynolds

Call 2022

Celia accepts instructions across all areas of Chambers' practice, and is keen to grown a practice in public, planning and environmental law. She is currently being led by Daniel Stedman Jones in respect of an appeal against the refusal of a planning application for the development of 580 dwellings. She has also been instructed to advise and draft pleadings for judicial review in relation to other environmental law matters.

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