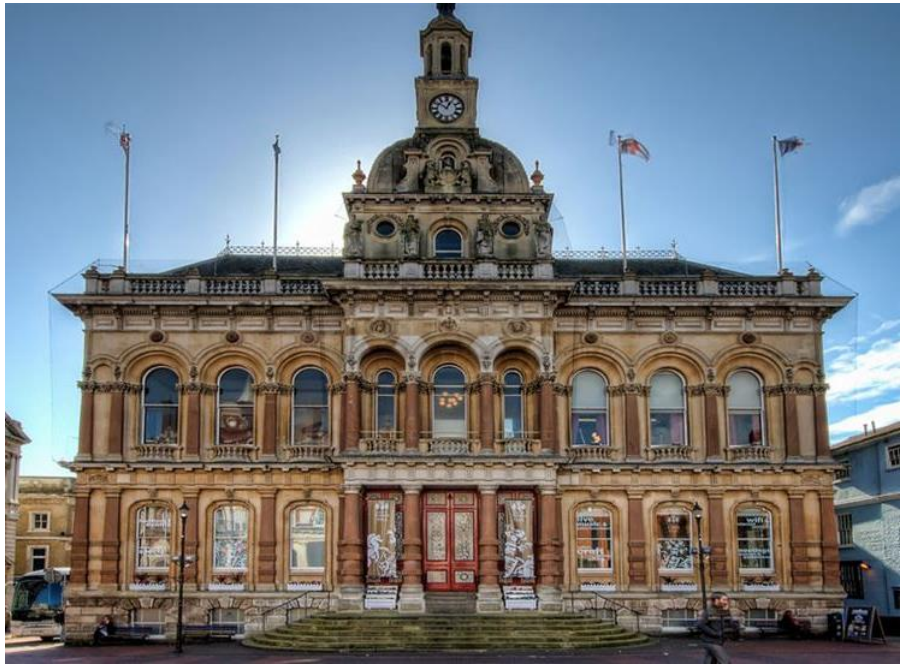
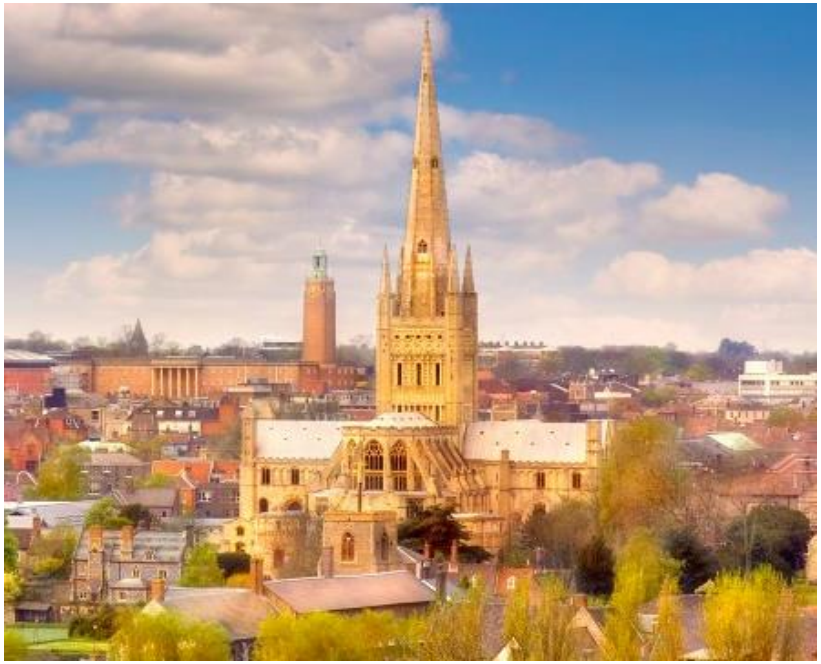
The Cambridge / East of England Planning, Environment and Property Webinar

Starting shortly….



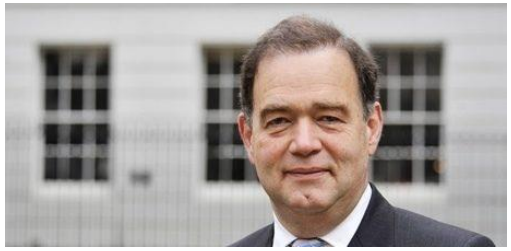


Glad to be remotely here

Please use the Q&A box for questions

The Cambridge / East of England Planning, Environment and Property Webinar

Chair: John Pugh-Smith



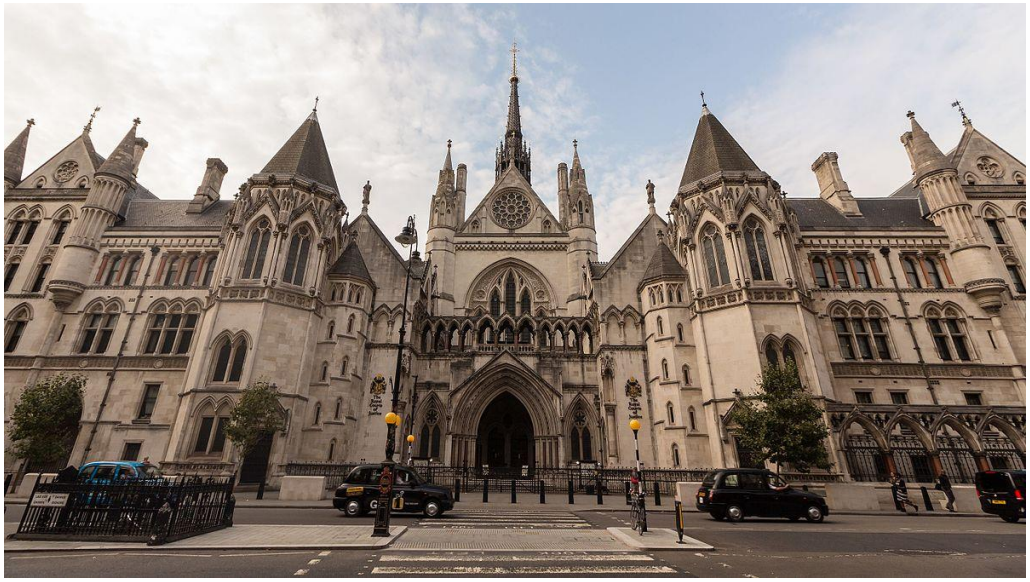
David Sawtell

Jonathan Darby

Katherine Barnes

Case Law Update

Katherine Barnes



Agenda

1. *DB Symmetry Ltd v Swindon BC* [2020] EWCA Civ 1331 – interpretation of planning conditions and lawfulness of conditions imposing public rights of way
2. *Norfolk Homes Ltd v North Norfolk DC* [2020] EWHC 2265 (QB) – interpretation of s.106 agreements
3. *Peel Investments (North) Ltd v Secretary of State for Communities and Local Government* [2020] EWCA Civ 1175 – five year supply: interpretation of para 11d NPPF (when a policy is "out-of-date")
4. *R (Samuel Smith Old Brewery) v North Yorkshire CC* [2020] UKSC 3 – Green Belt policy (meaning of "openness") and material considerations
5. *Dill v Secretary of State for Housing, Communities and Local Government* [2020] UKSC 20 – meaning of a listed "building"

Case 1: *DB Symmetry*

Two issues:

(1) Lawfulness of conditions purporting to require the public to have a right of way over roads constructed as part of a development

(2) Interpretation of planning conditions

Issue (1):

- Confirmation of the principle in *Hall & Co Ltd v Shoreham by Sea Urban DC* [1964] 1 WLR 240
- A condition will be unlawful in so far as it requires a developer to dedicate land which he owns as public highway without compensation
- Principle includes any requirement that the public have a right of way over such land

DB Symmetry

Issue (2): Principles for interpretating planning conditions [59]-[71]

- What a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and the consent as a whole
- No absolute bar on the implication of words, but caution in doing so
- No special set of rules apply to planning conditions, as compared to other legal documents
- Permission to be interpreted in context, with include the applicable legal framework (reasonable reader must be equipped with some knowledge of planning law and practice)
- Where there is a choice between two realistic interpretations, the court will prefer an interpretation which results in the permission being valid

DB Symmetry

Interpretation of condition 39 - did it fall foul of the *Shoreham* principle?

Roads

The proposed access roads, including turning spaces and all other areas that serve a necessary highway purpose, shall be constructed in such a manner as to ensure that each unit is served by fully functional highway, the hard surfaces of which are constructed to at least basecourse level prior to occupation and bringing into use.

Reason: to ensure that the development is served by an adequate means of access to the public highway in the interests of highway safety.

No: the condition regulated the physical attributes of the roads (ie how they should be constructed) and did not require the roads to be dedicated as public highway (which would have made it unlawful)

Case 2: *Norfolk Homes*

Background

- LPA granted PP in 2012 for erection of 85 dwellings subject to a s.106 agreement requiring 45% affordable housing
- S.73 application granted in 2015 which resulted in a new PP. Not contingent on any further s.106 obligation
- The s.106 agreement from 2012 referred expressly to the 2012 PP (and no other PP)

Issue

- Whether the s.106 agreement from 2012 should be interpreted as applying in circumstances where the developer had chosen to implement the 2015 PP rather than the 2012 PP

Norfolk Homes

Judgment

- Holgate J confirmed orthodox approach to interpretation of s.106 agreements. In other words, they are to be interpreted in accordance with the ordinary rules of contractual interpretation
- Here the wording of the s.106 agreement was clear. It meant what it said, so it only applied to the 2012 PP. Rejected LPA's argument that the SC Lambeth decision (on interpretation of conditions) meant that planning documents should be construed so as to avoid a LPA falling into an alleged "technical trap"
- The test for implying terms into the s.106 agreement such that it would bite on the 2015 PP not met. Not the case that implication of terms was required to give efficacy to the agreement, or that the implication was so obvious that it went without saying
- Therefore, no requirement to provide 45% affordable housing

Case 3: *Peel Investments*

Issues on appeal:

(1) Correct interpretation of "out-of-date" in para 11d NPPF

(2) Proper application of para 11d to policies in development plan which are time-expired and/or lack policy in respect of the strategic issue of housing supply

11. Plans and decisions should apply a presumption in favour of sustainable development.

For decision-taking this means:

[…]

d) where there are no relevant development plan policies, or the policies which are most important for determining the application are ***out-of-date****, granting permission unless […]*

Peel Investments

Issue (1): Interpretation of "out-of-date"

- Policies are "out-of-date" as per para 11d if they have been overtaken by things that have happened since the plan was adopted, either on the ground or through a change in national policy, or for some other reason, so that they are now out-of-date
- Whether a policy is "out-of-date" and, if so, what the consequences are, are matters are pure planning judgement (not dependent on issues of legal interpretation)
- Analysis in *Bloor Homes* of the presumption in favour of sustainable development in para 14 of 2012 NPPF applies in revised terms to para 11d of the 2018 NPPF

Peel Investments

Issue (2): Policies which are time-expired and/or lacking re the strategic issue of housing supply

- "Out-of-date" is different from "time-expired". Nothing in para 11d to suggest polices in a time-expired plan are out-of-date
- Obvious that many policies will survive beyond the plan period
- A plan without strategic housing policies it not automatically out-of-date for para 11d planning
- All depends on application of planning judgement to the particular facts

Case 4: *Samuel Smith*

The issue: meaning of "openness" in para 90 of the 2012 NPPF – does it necessarily include visual impact

*90. Certain other forms of development are also not inappropriate in Green Belt provided they preserve the **openness** of the Green Belt and do not conflict with the purposes of including land in Green Belt. These are:*

- *mineral extraction;*

(Equivalent now in para 146 NPPF 2018)

Application for six hectare extension to a quarry in GB. Planning officer considered landscape impacts (but no express consideration of visual impacts), and found "openness" preserved. Lawful?

Samuel Smith

Openness

- "Openness" was a broad concept. It referred back to underlying aim of GB policy: "to prevent urban sprawl by keeping land permanently open"
- Therefore not necessarily a statement about the visual qualities of the land, though in some cases that might be an aspect of the planning judgement involved
- Para 90 clear that some forms of development, including mineral extraction, could in principle be appropriate and compatible with the concept of openness
- Although a large quarry was not visually attractive while it lasted, the impact was temporary and subject to restoration

Samuel Smith

Material considerations

- An issue is a (mandatory) material consideration, which a decision-maker will err in failing to consider, if:

  (1) It is expressly or impliedly identified as such by the statutory and/or policy framework

  (2) It is "so obviously material" that the decision-maker must consider it (this is effectively a rationality test)

- Visual impact in *Samuel Smith* did not fall within either category above. Therefore decision-maker could have elected to consider it, but not required to (a permissive material consideration)

Case 5: *Dill*

Issues

- (1) Whether a statutory listed building listing was determinative of the relevant item being a “building”
- (2) The criteria to be applied in determined whether an item appearing in its own right on the statutory list was a “building”
- Context: Two lead urns resting on limestone piers which had been Grade II listed in 1986. Removed and sold by owner who had been unaware of the listing

Dill

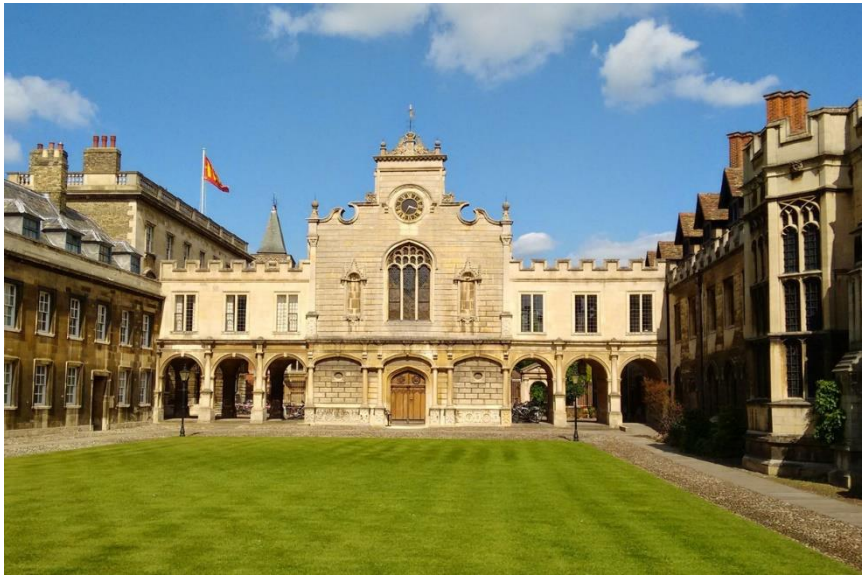
Issue 1

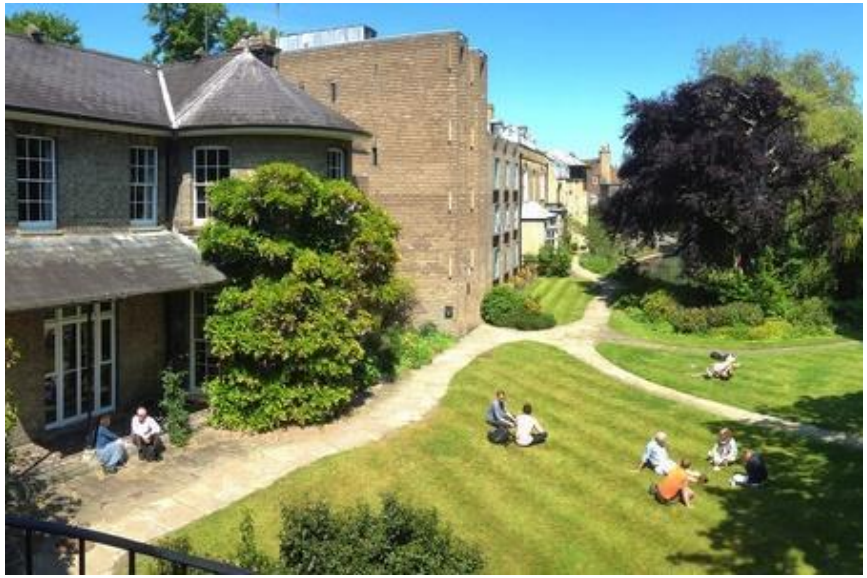
- No reason that on appeal against a listed building enforcement notice, the matter of whether the item was a “building” could not be raised
- Just like in a planning enforcement appeal, the Inspector well placed to consider this issue, which may involve difficult questions of factual judgment
- If the argument was successful, such that the item was found not to be a building, the SS had the power to deal with the matter by removing the item from the list

Issue 2

- Application of the test in *Skerritts of Nottingham Ltd v SSETR* [2000] 2 PLR 102
- Also called for guidance re free-standing structures

Property law - review

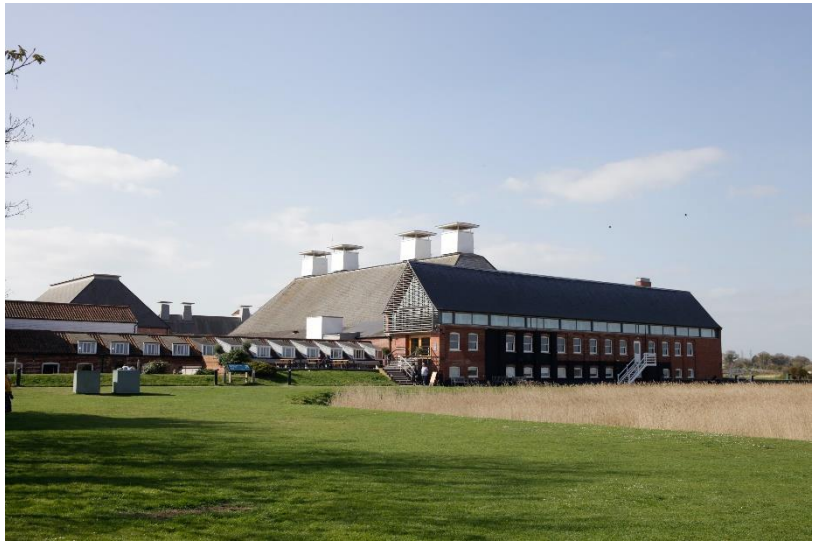


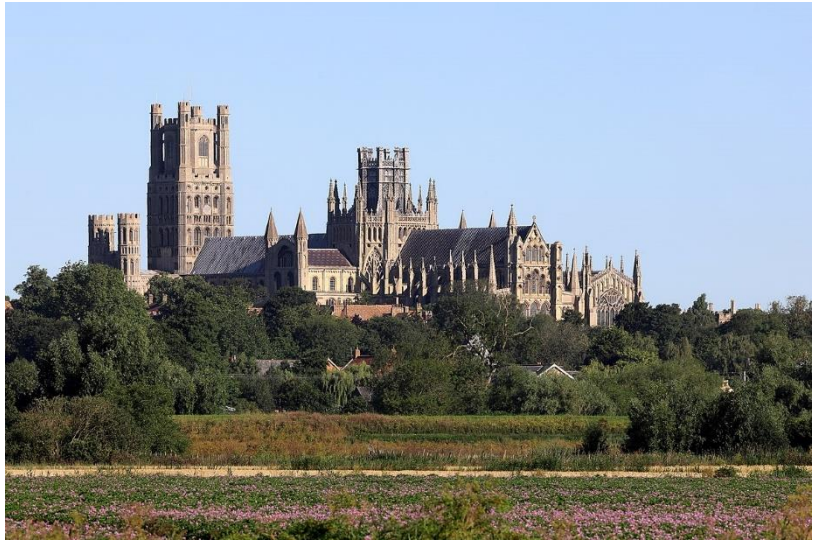


Property law - review

- Rights of entry under leases for inspection and works: *Rees v Earl of Plymouth* [2020] EWCA Civ 816
- Nuisance and remedies update

Rights of entry under leases for inspection and works

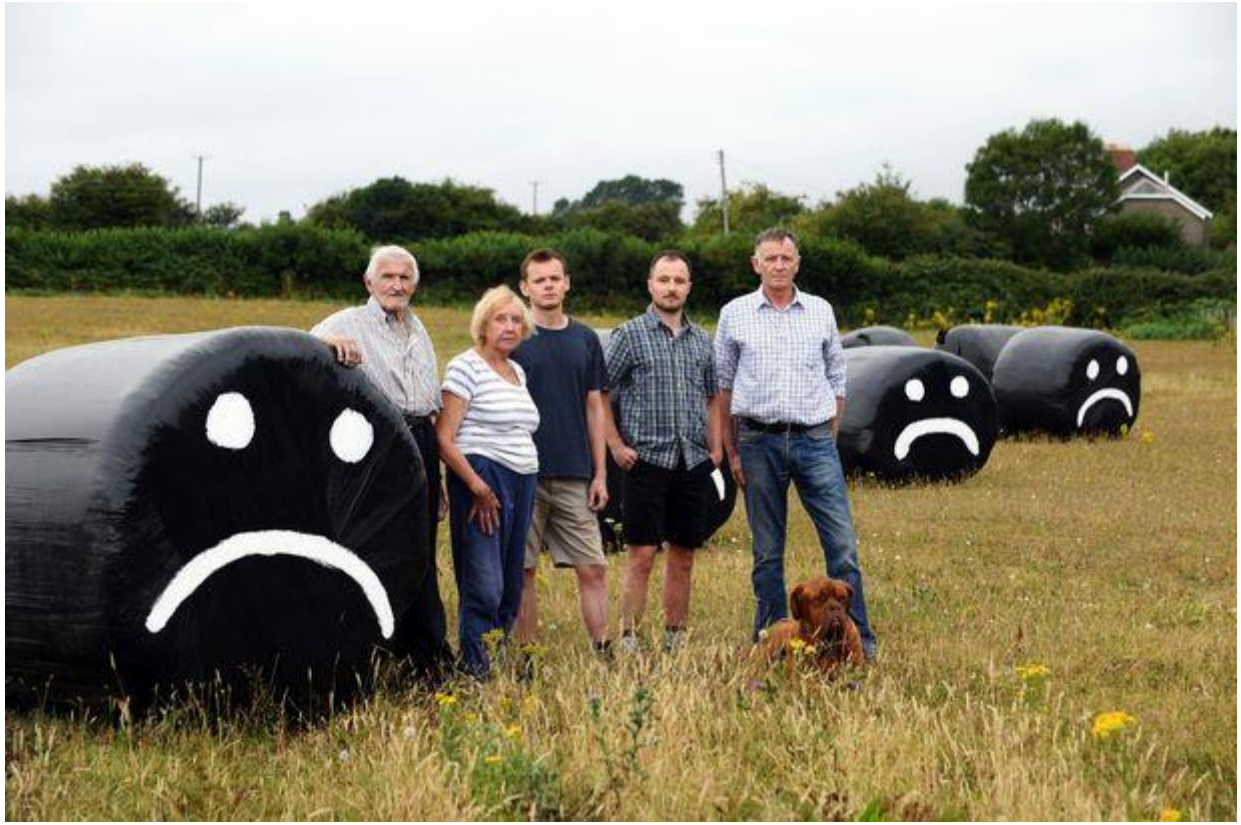




Rights of entry

- Carry out inspections pursuant to repair obligations
- Undertake surveys pursuant to development of land
- Carry out works of improvement

Rees v Earl of Plymouth
[2020] EWCA Civ 816, [2020] 4 WLR 105



- Wales Online: “The family turfed off the land they've farmed for 50 years by the relentless expansion of Cardiff”, 27 July 2018. URL: https://www.walesonline.co.uk/news/wales-news/family-turfed-land-theyve-farmed-14961026

Rees v Earl of Plymouth
[2020] EWCA Civ 816, [2020] 4 WLR 105

- Lease of farm under two tenancy agreements
- Landlords wish to undertake further surveys of the farm to comply with planning requirements

Rees v Earl of Plymouth
[2020] EWCA Civ 816, [2020] 4 WLR 105

- Lease of farm under two tenancy agreements
- Landlords wish to undertake further surveys of the farm to comply with planning requirements

Rees v Earl of Plymouth
[2020] EWCA Civ 816, [2020] 4 WLR 105

1965 tenancy agreement: reservations

- Right of entry to carry away timber (clause 4)
- Right of entry (clause 7):

"*Right for the Landlord and his consultant and others authorised by him with or without horses, carriages and other vehicles to enter on any part of the farm lands and premises at all reasonable times for all reasonable purposes*."

Rees v Earl of Plymouth

[2020] EWCA Civ 816, [2020] 4 WLR 105

1968 tenancy agreement:

"*the Landlord may at any time and at all times during the said tenancy enter upon the said premises with Agents Servants Workmen and others for the purpose of inspecting the same or for making roads sewers or drains or for any other purpose connected with his estate*."

Rees v Earl of Plymouth
[2020] EWCA Civ 816, [2020] 4 WLR 105

- Landlords issue claim that they and their authorised agents had rights of entry to the farm and applying for a quia timet injunction against the defendant tenants, Jenkin Thomas Rees and Phillip Rees, prohibiting them from obstructing access to the farm

- Interim injunction granted, restraining the tenants from interfering with the exercise of the claimed rights of access until trial or further order

Rees v Earl of Plymouth
[2020] EWCA Civ 816, [2020] 4 WLR 105

First instance - Judge Keyser QC sitting as a judge of the Chancery Division - ([2019] EWHC 1008 (Ch), [2019] 4 WLR 74) – dismissed the claim for an injunction and held that the landlords could carry out some surveys

Tenants appeal to the Court of Appeal

Rees v Earl of Plymouth
[2020] EWCA Civ 816, [2020] 4 WLR 105

Lewison LJ:

"14. In Investors' Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896 Lord Hoffmann famously declared that: "Almost all the old intellectual baggage of 'legal' interpretation has been discarded".

15. At times I thought that we were being asked to carry that baggage again."

Rees v Earl of Plymouth
[2020] EWCA Civ 816, [2020] 4 WLR 105

- Issue is the derogation from grant principle

"you cannot take away with one hand what you have given with the other" (*Molton Builders Ltd v Westminster City Council* (1975) 30 P & CR 182, 186; *Johnston & Sons Ltd v Holland* [1988] 1 EGLR 264, 267; *Platt v London Underground* Ltd [2001] 2 EGLR 121, 122)

Rees v Earl of Plymouth
[2020] EWCA Civ 816, [2020] 4 WLR 105

- *Lyttleton Times Co Ltd v Warners Ltd* [1907] AC 476, 481 Lord Loreburn :

"If A lets a plot to B, he may not act so as to frustrate the purpose for which in the contemplation of both parties the land was hired. So also if B takes a plot from A, he may not act so as to frustrate the purpose for which in the contemplation of both parties the adjoining plot remaining in A's hands was destined."

Rees v Earl of Plymouth
[2020] EWCA Civ 816, [2020] 4 WLR 105

- *Johnston & Sons Ltd v Holland* [1988] 1 EGLR 264, *per* Nicholls LJ:
- *"In a case such as the present, that exercise involves identifying what obligations, if any, on the part of the grantor can fairly be regarded as necessarily implicit, having regard to the particular purpose of the transaction when considered in the light of the circumstances subsisting at the time the transaction was entered into."*

Rees v Earl of Plymouth
[2020] EWCA Civ 816, [2020] 4 WLR 105

- *Johnston & Sons Ltd v Holland* [1988] 1 EGLR 264, *per* Nicholls LJ:
- *"…the conclusion I have reached on the application of the derogation from grant principle is, I should emphasise, not dependent on that highly technical conveyancing notion. I have sought to indicate the broad, common sense rationale of the principle which bears the title of 'derogation from grant'."*

Rees v Earl of Plymouth

[2020] EWCA Civ 816, [2020] 4 WLR 105

Lewison LJ:

- wary of interpreting documents such as the tenancy agreements by reference to strict rules applicable to particular classes of document
- commercial and common-sense approach to interpretation of practical documents

Rees v Earl of Plymouth
[2020] EWCA Civ 816, [2020] 4 WLR 105

Lewison LJ: reviewed cases about rights of entry:

- *Heronslea (Mill Hill) Ltd v Kwik-Fit Properties Ltd* [2009] EWHC 295 (QB); [2009] Env LR 28 Sharp J, [43]
- "Such significant inroads into the tenant's right to enjoy the premises free from interference is not a result it seems to me that the parties would have contemplated when executing the lease. If such had been the intention of the parties to a commercial lease, one would expect to find much clearer words or indication to that effect within it."

Rees v Earl of Plymouth [2020] EWCA Civ 816, [2020] 4 WLR 105

Lewison LJ: reviewed cases about rights of entry:

- *Century Projects Ltd v Almacantar (Centre Point) Ltd* [2014] EWHC 394 (Ch) Nugee J
- "The landlord cannot say that as the tenant took the demise subject to his repairing obligation, the tenant has to put up with the landlord's works, however unreasonably they are carried out. But, equally, the tenant cannot say that having given the covenant for quiet enjoyment, the landlord cannot carry out any work unless it is shown to cause the least possible interference with the tenant's business. Both positions are too extreme. The way the two provisions fit together is that the landlord can carry out work provided he acts reasonably in the exercise of his right."

Rees v Earl of Plymouth
[2020] EWCA Civ 816, [2020] 4 WLR 105

Lewison LJ: reviewed cases about rights of entry:

- *Timothy Taylor Ltd v Mayfair House Corpn* [2016] EWHC 1075 (Ch); [2016] 4 WLR 100, [24]:
- "In a case like the present, the landlord's reservation of a right to build in a way which, but for that reservation, would constitute either a breach of the covenant for quiet enjoyment or a breach of the implied covenant not to derogate from the grant should be construed as entitling the landlord to do the work contemplated by the reservation provided that in doing that work the landlord has taken all reasonable steps to minimise the disturbance to the tenant caused thereby; …."

Rees v Earl of Plymouth
[2020] EWCA Civ 816, [2020] 4 WLR 105

[66] "… But even where the derogation principle does apply, all it does is to militate against an interpretation which would result in a substantial or serious interference with the tenant's use and enjoyment of the leased property; or frustrate the purpose of the letting. It does not require the court to give a right of entry the narrowest possible interpretation.

Rees v Earl of Plymouth
[2020] EWCA Civ 816, [2020] 4 WLR 105

[66] In my judgment it is in every case a question of interpreting the clause in question in its context. Part of that context will be the fact that the purpose of the contract is to confer on the tenant the right to exclusive possession of the subject matter of the letting on the terms of the lease or tenancy for the contractual term."

Rees v Earl of Plymouth
[2020] EWCA Civ 816, [2020] 4 WLR 105

Endorsed the following principles:

- An exception or reservation will, if possible, be construed in such a manner as to preserve its validity
- court will, where it is possible to do so, construe an exception or reservation as restrictively as is required to avoid a derogation from grant or a conflict with the covenant for quiet enjoyment
- There is no further rule that a reservation is to be construed restrictively against a landlord

Rees v Earl of Plymouth
[2020] EWCA Civ 816, [2020] 4 WLR 105

Endorsed the following principles:

- Court will expect that substantial qualifications of the rights to exclusive possession and quiet enjoyment of the demised premises will appear clearly from the lease
- Apparently broad and unqualified words in reservations may, on closer examination, be found to have a more restricted meaning when read in their immediate or wider textual context

Rees v Earl of Plymouth

[2020] EWCA Civ 816, [2020] 4 WLR 105

Endorsed the following principles:

- The *contra proferentem* rule operates only if the exception or reservation is ambiguous, in the sense that the court is unable to decide on its meaning by the use of the materials usually available for interpretation

Rees v Earl of Plymouth

[2020] EWCA Civ 816, [2020] 4 WLR 105

What does the right of entry mean?

- The right of entry is not a right to enter for entry's sake. It is a right to enter for a particular purpose
- The interpretation of the right cannot be considered in the abstract
- The right of entry must work sensibly
- If the landlord wishes to carry out more intrusive works, the degree of intrusion would have to be balanced against the reasonableness of the purpose
- The Anabats' installation on trees for a few days at a time was within the scope of the right to enter and inspect

Piechnik v Oxford City Council [2020] EWHC 960 (QB)

Piechnik v Oxford City Council
[2020] EWHC 960 (QB)

- Plowman Tower - residential tower block in Headington, Oxford
- 15-storey building made up of 85 flats
- 16 flats sold under the Right to Buy Scheme

Piechnik v Oxford City Council
[2020] EWHC 960 (QB)

- 2012 and 2016 – OCC developed a plan of remedial and other works to its housing stock
- January 2016 - OCC served a service charge consultation notice in respect of the Major Works. Estimated service charge was £44,462.04 per flat
- 2017 – 2018: FTT determined a substantial part of the works was not works of repair or maintenance and were not therefore recoverable as service charges under the long leases

Piechnik v Oxford City Council
[2020] EWHC 960 (QB)

- November 2016 - OCC begin the works
- OCC argue that Dr Piechnik is required under the Lease to give access to the premises for part of the works
- 5 July 2017 – OCC issued proceedings in the Oxford County Court

Piechnik v Oxford City Council [2020] EWHC 960 (QB)

Defendant's case:

- OCC not have any right to enter the premises to carry out the works
- The works were carried out in breach of the terms of the Lease and the covenant of quiet enjoyment
- Suffered loss, damage, injury, distress and inconvenience

Piechnik v Oxford City Council
[2020] EWHC 960 (QB)

Question 1: "*Whether the Lease of 57 Plowman Tower, Westlands Drive, Headington OX3 9RA ("the Property") dated 18 February 2003 can be construed so as to give the Lessor the right to enter the Property (a right of access) for the purpose of carrying out works of improvement which are not works of repair, further or alternatively whether it contains an implied term of covenant to that effect*".

Piechnik v Oxford City Council
[2020] EWHC 960 (QB)

- 31 July 2019 - Mr Recorder Berkley QC heard the trial of the preliminary issues and handed down a written judgment on 25 September 2019.
- *"(1) The answer to Question One is that the Lease does give the claimant the right to enter the premises for the purpose of carrying out works of improvement which are not works of repair, to the extent set out in the reasoned judgment."*

Piechnik v Oxford City Council
[2020] EWHC 960 (QB)

- Defendant appeals to the High Court
- Tipples J:

"….*it will be for the trial judge to make factual findings to determine the nature of the Disputed Works and whether the claimant has any right to enter the defendant's premises and carry out them out. For my part, I do not think these two questions are preliminary issues at all* …."

Piechnik v Oxford City Council
[2020] EWHC 960 (QB)

- The lease – granted to conform with Parts I and III of Schedule 6 of the Housing Act 1985
- "(b) to make the dwelling-house subject to all such easements and rights for the benefit of other property as are capable of existing in law and are necessary to secure to the person interested in the other property as nearly as may be the same rights as at the relevant time were available against the tenant under or by virtue of the secure tenancy or an agreement collateral to it, or under or by virtue of a grant, reservation or agreement made as mentioned in paragraph (a)."

Piechnik v Oxford City Council
[2020] EWHC 960 (QB)

- The lease – granted to conform with Parts I and III of Schedule 6 of the Housing Act 1985

- Held – only affects rights to the access of light and air

Piechnik v Oxford City Council
[2020] EWHC 960 (QB)

- The lease – granted to conform with Parts I and III of Schedule 6 of the Housing Act 1985

- Paragraph 14 of Part VI -
- Imposes repair obligations on the landlord
- Question whether there is an implied right of access

Piechnik v Oxford City Council
[2020] EWHC 960 (QB)

- The lease itself -
- Clause 7.3 – landlord's covenant to maintain the building:

"The Council will at all times during the term maintain… in good and substantial repair and condition"

- The landlord's duty to perform these functions is accompanied by an implied right of access

Piechnik v Oxford City Council
[2020] EWHC 960 (QB)

- Fourth Schedule – rights of access:
- "8. To permit the Council and its Surveyor or agents with or without workmen and other upon 2 days previous notice in writing (except in the case of emergency) at all reasonable times to enter into and upon the whole or any part of the premises to view and examine the state of repair and condition of the same…"

Piechnik v Oxford City Council
[2020] EWHC 960 (QB)

- Fourth Schedule – rights of access:

12. To permit the Council and its Surveyor or Agent and (as respects work in connection with the premises and any neighbouring or adjoining premises) their lessees or tenants with or without workmen and others at all reasonable times during the term on giving 2 days previous notice in writing (or in the case of emergency without notice) to enter into and upon the whole or any part of the premises

[1] for the purposes of repairing any part of the said building or any other adjoining or contiguous premises

Piechnik v Oxford City Council
[2020] EWHC 960 (QB)

- Fourth Schedule – rights of access:

12. To permit the Council and its Surveyor or Agent and (as respects work in connection with the premises and any neighbouring or adjoining premises) their lessees or tenants with or without workmen and others at all reasonable times during the term on giving 2 days previous notice in writing (or in the case of emergency without notice) to enter into and upon the whole or any part of the premises

[1] for the purposes of repairing any part of the said building or any other adjoining or contiguous premises

Piechnik v Oxford City Council
[2020] EWHC 960 (QB)

- Recorder decided - under a secure tenancy a landlord might have an implied right to enter the demise to carry out works to avoid injury

(McAuley v Bristol [1992] QB 134 and Lee v Leeds CC [2002] 1 WLR 1488, CA)

- Held that this limited right is impressed upon the grant of the lease (paragraph 2(2)(b) of the Schedule 6 to the HA 1985)

Piechnik v Oxford City Council
[2020] EWHC 960 (QB)

- Recorder decided - under a secure tenancy a landlord might have an implied right to enter the demise to carry out works to avoid injury"

(McAuley v Bristol [1992] QB 134 and Lee v Leeds CC [2002] 1 WLR 1488, CA)

Piechnik v Oxford City Council
[2020] EWHC 960 (QB)

- Defendant accepted that paragraph 12 of the Fourth Schedule does include an “Express Right of Access”, however argued that this right is qualified by the covenant of quiet enjoyment in clause 7.1
- Tipples J: disagreed. the demise of the premises is subject to the claimant's rights of access in paragraph 12 of the Fourth Schedule and defendant's covenant to provide such access is expressly cross-referred to and recognised in clause 7.1. Not a derogation from grant.

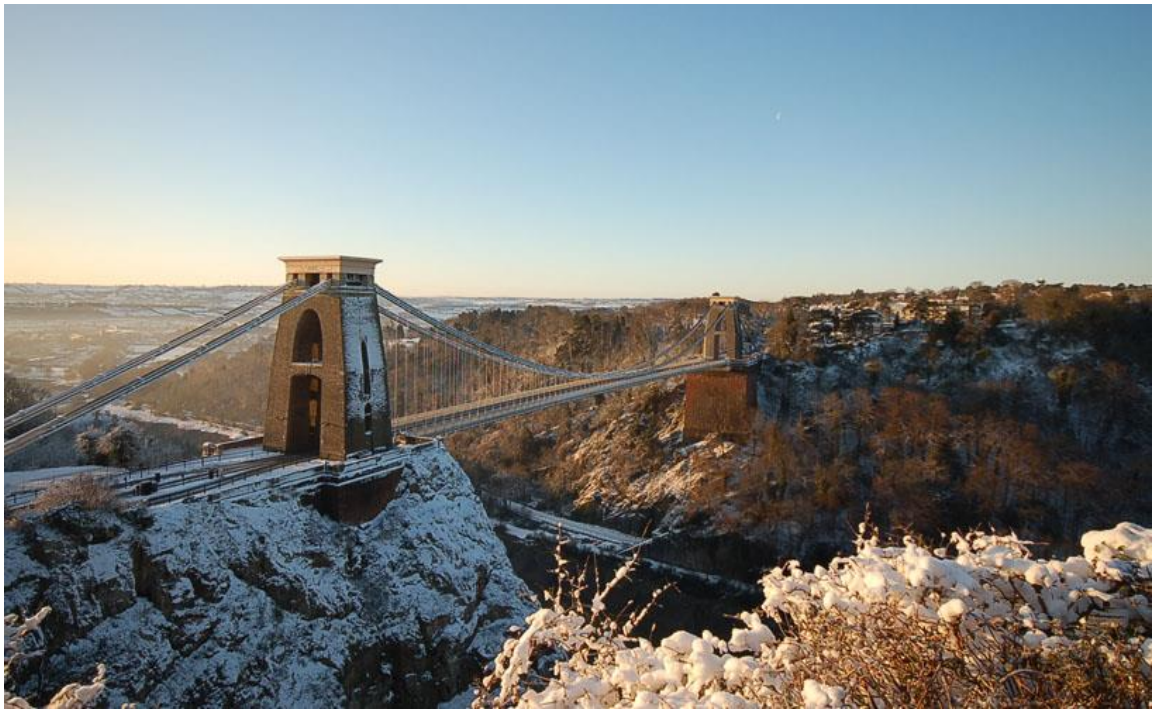
Piechnik v Oxford City Council
[2020] EWHC 960 (QB)

- Is there an extended right of access implied by the lease on account of danger to health?
- Tipples J: disagreed. No implied right by virtue of the HA 1985, para 2(2)(a) of Part 1 of Schedule 6.

See also:

- Bright, S. (2019). Do Landlords Have a Right to Enter Flats?. Available at: https://www.law.ox.ac.uk/housing-after-grenfell/blog/2019/10/do-landlords-have-right-enter-flats
- Bright, S. (2020). How limited is the Landlord's Right to Enter Flats?. Available at: https://www.law.ox.ac.uk/housing-after-grenfell/blog/2020/05/how-limited-landlords-right-enter-flats

Nuisance and remedies update



Fearn and others v Board of Trustees of the Tate Gallery

[2020] EWCA Civ 104, [2020] 2 WLR 1081

https://www.dailymail.co.uk/news/article-7995139/Owners-luxury-2m-flats-overlooked-Tate-Modern-gallery-lose-latest-battle.html

Fearn and others v Board of Trustees of the Tate Gallery
[2020] EWCA Civ 104, [2020] 2 WLR 1081

- Flats in a development that was adjacent to an art gallery
- A new walkway overlooked their living areas
- Brought claims against the defendant in (*inter alia*) nuisance

Fearn and others v Board of Trustees of the Tate Gallery

[2020] EWCA Civ 104, [2020] 2 WLR 1081

- Mere overlooking from one property to another was not capable of giving rise to a cause of action in private nuisance

Fearn and others v Board of Trustees of the Tate Gallery
[2020] EWCA Civ 104, [2020] 2 WLR 1081

- Mere overlooking from one property to another was not capable of giving rise to a cause of action in private nuisance

Fearn and others v Board of Trustees of the Tate Gallery
[2020] EWCA Civ 104, [2020] 2 WLR 1081

- Cited *Williams v Network Rail Infrastructure Ltd* [2019] QB 601 (CA):

  (1) private nuisance is a violation of real property rights - a property tort

Fearn and others v Board of Trustees of the Tate Gallery
[2020] EWCA Civ 104, [2020] 2 WLR 1081

- Cited *Williams v Network Rail Infrastructure Ltd* [2019] QB 601 (CA):

(2) The three types ((1) nuisance by encroachment on a neighbour's land; (2) nuisance by direct physical injury to a neighbour's land; and (3) nuisance by interference with a neighbour's quiet enjoyment of his land) are merely examples.

Fearn and others v Board of Trustees of the Tate Gallery
[2020] EWCA Civ 104, [2020] 2 WLR 1081

- Cited *Williams v Network Rail Infrastructure Ltd* [2019] QB 601 (CA):

(3) “damage” is an elastic notion, and not always required e.g. may be damages for loss of amenity (such as noise or smell)

Fearn and others v Board of Trustees of the Tate Gallery
[2020] EWCA Civ 104, [2020] 2 WLR 1081

- Cited *Williams v Network Rail Infrastructure Ltd* [2019] QB 601 (CA):

(4) nuisance may be caused by inaction or omission as well as by some positive activity

Fearn and others v Board of Trustees of the Tate Gallery
[2020] EWCA Civ 104, [2020] 2 WLR 1081

- Cited *Williams v Network Rail Infrastructure Ltd* [2019] QB 601 (CA):

(5) broad unifying principle in this area of the law is reasonableness between neighbours

Fearn and others v Board of Trustees of the Tate Gallery
[2020] EWCA Civ 104, [2020] 2 WLR 1081

- “81 Unlike such annoyances as noise, dirt, fumes, noxious smells and vibrations emanating from neighbouring land, it would be difficult, in the case of overlooking, to apply the objective test in nuisance for determining whether there has been a material interference with the amenity value of the affected land.”

Fearn and others v Board of Trustees of the Tate Gallery
[2020] EWCA Civ 104, [2020] 2 WLR 1081

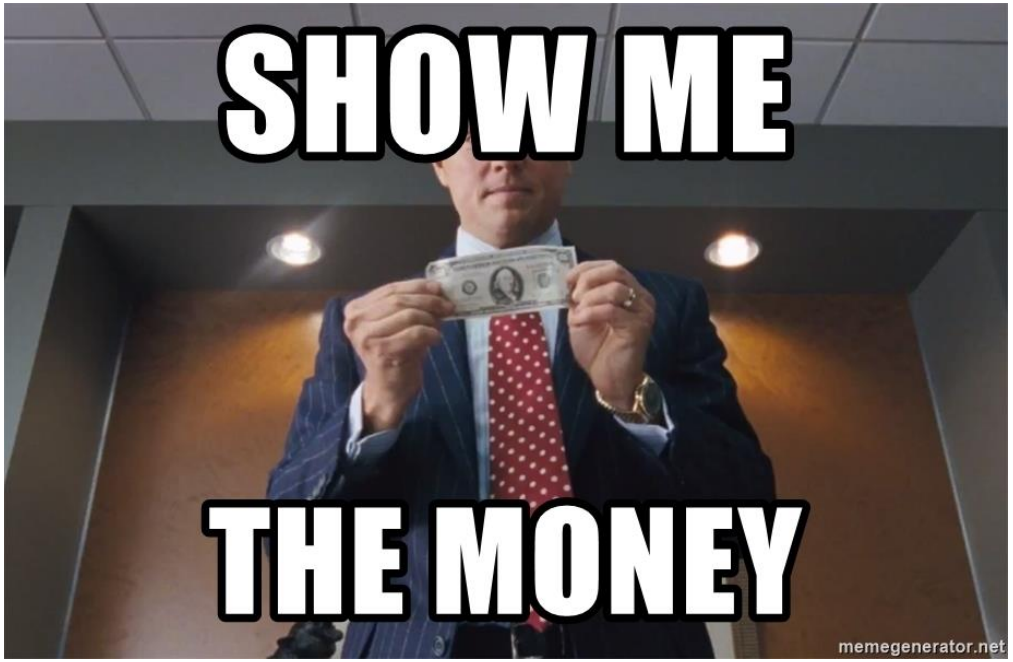
- (Contrast - *Alexander Devine Children's Cancer Trust v Housing Solutions Ltd* [2020] UKSC 45)

Reading further

- https://www.39essex.com/land-use-conflict-supreme-court-rules-on-the-discharge-of-restrictive-covenants-alexander-devine-childrens-cancer-trust-v-housing-solutions-ltd-2020-uksc-45/

- https://www.39essex.com/david-sawtells-analysis-of-the-development-implications-of-the-recent-court-of-appeal-decision-in-fearn-and-others-v-board-of-the-trustees-of-the-tate-gallery-2020-ewca-civ-104/

Remedies



Unwired Planet International Ltd v Unwired Planet International Ltd
[2020] UKSC 37

"*the appeals raise a more general question as to the circumstances in which it is appropriate for an English court to grant a prohibitory injunction or to award damages instead*"

Unwired Planet International Ltd v Unwired Planet International Ltd
[2020] UKSC 37

"*the appeals raise a more general question as to the circumstances in which it is appropriate for an English court to grant a prohibitory injunction or to award damages instead*"

Unwired Planet International Ltd v Unwired Planet International Ltd [2020] UKSC 37

- Was an injunction proportionate ,where the claimant's only interest was in obtaining reasonably royalties?
- Damages in lieu of an injunction under s 50 of the Senior Courts Act 1981 : *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20; [2019] AC 649

Unwired Planet International Ltd v Unwired Planet International Ltd [2020] UKSC 37

- In *Lawrence v Fen Tigers Ltd* [2014] UKSC 13; [2014] AC 822, damages were considered to be a more appropriate remedy, in the circumstances of that case, than an injunction to prevent the continuation of a nuisance

Unwired Planet International Ltd v Unwired Planet International Ltd [2020] UKSC 37

- Court's power to award damages in lieu of an injunction involves a classic exercise of discretion

Unwired Planet International Ltd v Unwired Planet International Ltd
[2020] UKSC 37

- Here – discretion not exercised
- Would have to offer fair, reasonable and non-discriminatory terms of a licence to enforce
- Affect claims against other potential infringements

Ruby Triangle Properties Ltd v Jesus Sanctuary Ministries Ltd [2020] EWHC 2247 (Ch) (Master Teverson)

- Claim for unlawful eviction
- Awarded general damages for loss of amenity, nuisance and distress and inconvenience
- as a limited company, JSM is precluded by the decision of the Court of Appeal in *Eaton Mansions (Westminster) Ltd v Stinger Compania De Inversion SA* [2013] EWCA Civ 1308 from recovering aggravated damages

Ruby Triangle Properties Ltd v Jesus Sanctuary Ministries Ltd [2020] EWHC 2247 (Ch) (Master Teverson)

- Court does have power to award exemplary damages where the defendant's conduct has been calculated to result in a profit for itself which might exceed the compensation payable to the Claimant. (Lord Devlin in *Rookes v Barnard* [1964] A.C. 1129)

Ruby Triangle Properties Ltd v Jesus Sanctuary Ministries Ltd [2020] EWHC 2247 (Ch) (Master Teverson)

- Category has been applied to cases where a potential profit has been made available to a landlord by the departure, tortuously engineered, of a protected tenant

Ruby Triangle Properties Ltd v Jesus Sanctuary Ministries Ltd
[2020] EWHC 2247 (Ch) (Master Teverson)

"*62. In taking possession without a court order I have no doubt that RTP and its agents regarded itself as taking a calculated risk. …*

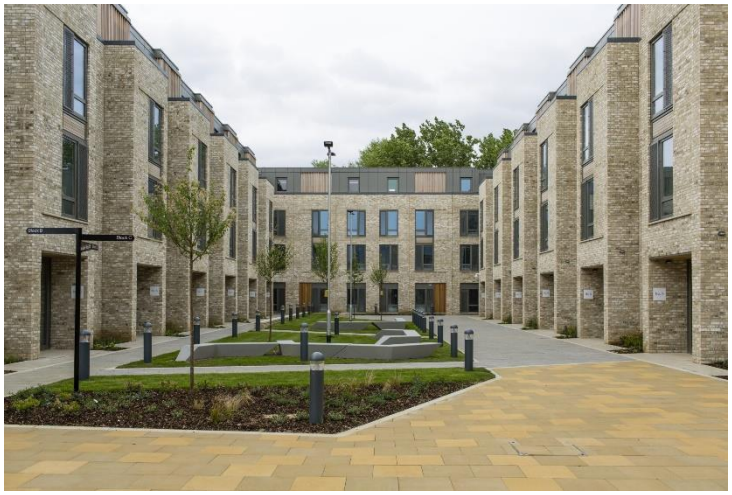
63. There was at least in part a profit motive behind the decision. It may not have been the sole motive. …"

Ruby Triangle Properties Ltd v Jesus Sanctuary Ministries Ltd [2020] EWHC 2247 (Ch) (Master Teverson)

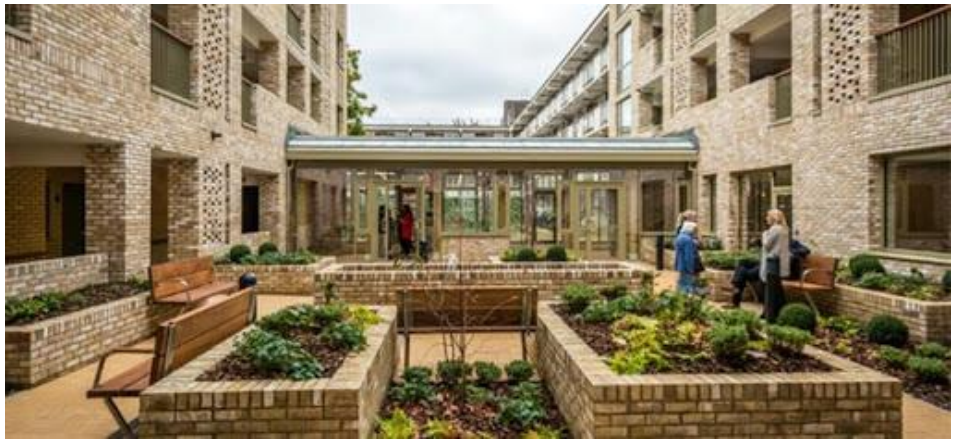
- HELD: "*relatively modest award of exemplary damages*"
- Sum was calculated at 3 months' rent

Conclusions

David Sawtell
david.sawtell@39essex.com



Rectory Homes
and its implications



Jonathan Darby

The “essence”

[2020] EWHC 2098 (Admin)

“26. …that the use of the word “dwellings” in the affordable housing policy, CSH3, of the SODC’s Core Strategy could only refer to a dwelling in the C3 Use Class. Because it was agreed between the parties that the entirety of the proposed development fell within the C2 Use Class, the Claimant contended that it had to follow that no part of the development could fall within the C3 Use Class and so could not amount to a “dwelling” under policy CSH3 triggering a requirement to provide affordable housing (likewise policy H8 of the TNP).”

Ten “principles of interpretation”

See paras 43 – 45:

1. Policies interpreted objectively in accordance with language used, read in its proper context
2. Not to be interpreted as if statutory or contractual provisions
3. Intended to guide or shape practical decision-making
4. Applied and understood by planning professionals and by the public to whom they are primarily addressed
5. Decision-makers entitled to expect policies to be as “*clearly and simply stated as it can be*” and *“however well or badly it may be expressed, the courts to provide a straightforward interpretation of such policy”*

Ten “principles of interpretation”

6. Reading a policy in accordance with the language used and its proper context means reading the plan as a whole, or at least the relevant parts of it (Phides Estates)

7. The supporting text of a Plan is an aid to the interpretation of its policies… BUT supporting text does not form part of the policy and cannot override it (R (Cherkley Campaign)

8. Where development plan policies intended to implement national guidance, that guidance forms part of the relevant context to which regard may be had when interpreting those policies (Tesco)

9. The public is in principle entitled to rely on the public document as it stands, without having to investigate its provenance and evolution” (R (TW Logistics)), i.e. avoid “forensic archaeology”

10. If particular difficulty, extrinsic material may be examined (Phides)

The policy in question

Policy CSH3:

"40% affordable housing will be sought on all sites where there is a net gain of three or more dwellings subject to the viability of provision on each site"

The policy in question

- Policy operated by:

(1) setting a threshold for its application, simply expressed as a “net gain of three or more dwellings” and

(2) requiring 40% of the accommodation proposed to be affordable.

- Context was that:
  - Terms “dwelling”, “house”, “unit” and “home” were used frequently and interchangeably.
  - BUT not used in a technical or restrictive manner (e.g. use of “house” did not exclude a dwelling in the form of a flat)

Meaning of “dwelling”

- “Well-established” that the terms “dwelling” or “dwelling house” in planning legislation refer to a unit of residential accommodation which provides the facilities needed for day-to-day private domestic existence (*Gravesham*)

- “Dwelling house” not a term of art confined to C3 Use class, i.e. “properties having the physical characteristics of a “dwelling” may be used as a dwelling in more than one way”

The outcome

"63. Where the units in an extra care scheme physically amount to dwellings, it really does not matter what alternative language a developer chooses to describe them. They still remain dwellings.

…

65. In summary, there is no reason why a C2 development or scheme may not provide residential accommodation in the form of dwellings. That possibility is not precluded by the operation of the C3 Use Class and its interaction with the C2 Use Class. Thus, the language of the Order does not support the Claimant's argument that the extra care accommodation proposed could not represent dwellings and therefore could not trigger the application of policy CSH3."

The outcome

"79. … For the reasons I have given the term "dwelling" in policy CSH3 is not limited to property falling within the C3 Use Class.

…

81. The housing chapter of the Plan is concerned with the delivery of new homes to meet a range of housing needs, including market housing, affordable housing and specialist needs. There is nothing in the Plan to suggest, nor any reason to think, that the word dwelling, whether in Policy CSH3 or elsewhere, is confined to residential accommodation the use of which falls wholly within the C3 Use Class."

What does it all mean?

- Guidance on interpretation of policies
  - What do they say?
  - What do they mean?
  - How should they be applied?

What does it all mean?

- Implications for affordable housing
  - An opportunity?
  - Greater emphasis on viability?

- Specialist provision
  - Possible unintended consequences?

Chairman's

Own Supplementary Contributions by way of Other Reading and Listening

- **Newsletter**: https://1f2ca7mxjow42e65q49871m1-wpengine.netdna-ssl.com/wp-content/uploads/2020/10/PEPNewsletter_8October2020.pdf (Article discussions of *Norfolk Homes* and *Rectory Homes* cases)
- **Podcast**: https://www.39essex.com/that-technical-traps-submission-john-pugh-smith/

- **Newsletter**: https://1f2ca7mxjow42e65q49871m1-wpengine.netdna-ssl.com/wp-content/uploads/2020/10/PEPNewsletter_8October2020.pdf (Article discussion of the three Higher Court cases on Green Belt openness: *Samuel Smith, Hook* and *Liverpool Open Spaces* and their practical implications)
- **Podcast:** https://www.39essex.com/openness-in-a-year-of-lockdowns/

Questions?

Thank you for attending

- Please also remember our past and future series of webinars presented by 39 Essex Chambers on property, construction and related areas, and, podcasts:

❖ https://www.39essex.com/category/webinars/

❖ https://www.39essex.com/category/podcasts/

39 Essex Chambers Planning, Environmental & Property Winter Festival 2020, in support of MIND

Join us for our inaugural “Winter Festival”, in support of **MIND** on the 7th, 8th and 9th December

Over three morning sessions our team of star barristers will be bringing you some fun and festive legal cheer: decking the halls with topical issues; hosting interactive case law updates as well as giving you the chance to enter various Christmas contests.

For full details, see our website:

https://www.39essex.com/39-essex-chambers-planning-environmental-property-winter-festival-2020-in-support-of-mind/