INTRODUCTION

Jonathan Darby

Welcome to this week's edition of our Planning, Environment and Property newsletter.

This week's edition includes two contributions from Stephen Tromans QC, the first with Adam Boukraa (on Regulators and legal professional privilege) and the second with Gethin Thomas (the latest article in our series reviewing the Environment Bill). We also feature articles from Richard Harwood QC (on *Dill* in the Supreme Court and what it means for the law relating to listed buildings, a case in relation to which Richard and Catherine Dobson will soon be holding a webinar); Daniel Stedman Jones (on material considerations after *Wright*); and Tom van der Klugt (on the Bonn Convention and migratory species). Finally, John Pugh-Smith reviews the results of recent membership surveys of the Compulsory Purchase Association and the Planning and Environment Bar Association and their successful outworkings particularly in the fields of compulsory acquisition and statutory compensation.

We hope that you all have a great Bank Holiday weekend.

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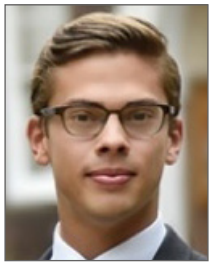

REGULATORS AND LEGAL PROFESSIONAL PRIVILEGE

Stephen Tromans QC and Adam Boukraa

The power of regulators to compel the production of documents is an important issue in many areas of environmental and planning law. In *Sports Direct International Plc v The Financial Reporting Council* [2020] EWCA Civ 177 the Court of Appeal considered the extent to which legal professional privilege ("LPP") protects such documents from disclosure.

The appeal arose after Sports Direct was ordered by Arnold J to disclose certain documents to the Financial Reporting Council ("FRC"). The FRC's responsibilities include regulating statutory auditors and audit work, and its powers are set out in the Statutory Auditors and Third Country Auditors Regulations 2016 ("SATCAR"). They include the power to require certain persons to provide information and documents.

The FRC was conducting an investigation into Sports Direct's former auditors, Grant Thornton, and into an individual who worked at that firm. It issued a notice to Sports Direct, requiring it to provide all emails and attachments to emails in its possession which met certain criteria. While Sports Direct was not the subject of the investigation, it accepted that it was one of the persons to whom a request for documents and information could be made. The company withheld 40 documents in its response, comprising emails and attachments sent to or by its legal advisers, on the grounds that they were covered by LPP. It provided a broad description of the issues on which advice had been sought and gave examples of some of the attachments, but declined to say exactly what they were. Arnold J ordered the company to disclose both the emails and their attachments.

Two main issues arose on appeal. The first was whether the FRC was correct to argue that, although the emails contained material that would ordinarily be regarded as protected by LPP, they fell within a narrow exception in the case law which meant that there would be no infringement of Sports Direct's privilege if they were handed over. Alternatively, the FRC argued that any infringement would be technical only and would be authorised by the SATCAR regime. The second main issue was whether the FRC was right to argue that, even if the emails themselves were protected by LPP, some of the attachments were pre-existing documents and were not protected by LPP simply by being attached to privileged emails.

In order to deal with the first issue, the Court of Appeal undertook a detailed analysis of the case law on LPP and statutory information gathering powers (paras 9-17). Having noted the recent decisions in *Addlesee v Dentons Europe LLP* [2019] EWCA Civ 1600, [2019] 3 WLR 1255 and *The Civil Aviation Authority v (R (oao Jet2.com Ltd)* [2020] EWCA Civ 35, it reviewed the development of the law from Lord Taylor's speech in *R v Derby Magistrates'; Court* [1996] AC 487 (*"Derby Magistrates"*) onwards.

In *Derby Magistrates*, Lord Taylor set out two exceptions to the rule that a document protected by privilege continues to be protected so long as the privilege is not waived by the client. One of these is that LPP can be modified, or even abrogated, by statute. The exception was considered again in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563 (*"Morgan Grenfell"*). There, the House of Lords held that the courts will only find that a statute overrides fundamental human rights – which include LPP – where the intention to do so is stated expressly or appears by necessary implication. The Privy Council reached a similar conclusion in *B and others v Auckland District Law Society and another* [2003] UKPC 38, [2003] 2 AC 736 (*"B v Auckland"*).

These principles presented the FRC with a difficulty. The relevant provisions in SATCAR did not contain any express provision overriding LPP. In fact, there was an express provision dealing with LPP which appeared to confirm its protection and limit the FRC's power. The regulator's solution was to rely on paragraph 32 of Lord Hoffman's speech in *Morgan Grenfell*, in which he expressed doubts as to the reasoning of the Court of Appeal's decision in *Parry-Jones v The Law Society* [1969] 1 Ch 1:

> "32. This is not to say that on its facts the *Parry-Jones* case was wrongly decided. But I think that the true justification for the decision was not that Mr Parry-Jones's clients had no LPP, or that their LPP had been overridden by the Law Society's rules, but that the clients' LPP was not being infringed. The Law Society were not entitled to use information disclosed by the solicitor for any purpose other than the investigation. Otherwise the confidentiality of the clients had to be maintained. In my opinion, this limited disclosure did not breach the clients' LPP or, to the extent that it technically did, was authorised by the Law Society's statutory powers. It does not seem to me to fall within the same principle as a case in which disclosure is sought for a use which involves the information being made public or used against the person entitled to the privilege."

The FRC argued that this passage represented a further exception to LPP. That is, where a regulator has a statutory power to request documents, then either: i) there is no infringement of LPP when those documents are handed over in response to a request made under that power; or ii) any infringement of LPP is technical only and can be regarded as authorised by the relevant statutory provisions on the basis of a less stringent test than that applied in *Morgan Grenfell* or *B v Auckland*. The FRC accepted that it could not request the disclosure of document in which Grant Thornton was entitled to claim privilege, but argued that it could compel the disclosure of documents in which Sports Direct claimed privilege, because Sports Direct was not the target of the investigation under SATCAR.

The Court of Appeal held that Arnold J had been wrong to accept these arguments. Lord Hoffman's observations in paragraph 32 of *Morgan Grenfell* were not authority for the existence of a no infringement exception to LPP, or for the application of some lower threshold for implying a statutory override on the basis that the infringement would be technical. The court's task was to apply the test set out in *Morgan Grenfell* and *B v Auckland*: looking at the legislation in question to see whether Parliament must have intended to override the privilege. The relevant SATCAR provisions made it clear that that was not the case.

The Court of Appeal went on to undertake a detailed analysis of Lord Hoffmann's comments in *Morgan Grenfell*, as well their interpretation in subsequent cases, to explain why they could only usefully be understood in the context of that case.

As for the second main issue, Sports Direct accepted – having regard to *Ventouris v Mountain* [1991] 1 WLR 607 and *Imerman v Tchenguiz* [2009] EWHC 2902 (QB) – that pre-existing documents are not covered by privilege simply because they are sent to a legal adviser. It attempted to get round this by arguing that the fact of the documents being communicated to a legal adviser, by attaching them to an email, was privileged.

In short, the Court of Appeal found that this argument did not survive the judgment in *Ventouris* and subsequent case law, while noting that there were some factual differences with previous authorities. Cases such as *Ventouris* had been decided in the context of the ordinary civil procedure process, which requires the disclosure of all free-standing documents relevant to the issues in dispute, regardless of whether they have been attached to emails at any point. By contrast, the FRC's statutory notice asked only for emails and their attachments, rather than for free-standing documents.

The court resolved the issue by interpreting the wording of the notice. It found that, on a proper construction, an attachment was to be regarded as meeting the criteria in the notice if it was attached to an email which met the criteria. If the email itself was privileged, that did not confer privilege on the pre-existing document (see *Ventouris*). Accordingly, Arnold J had been correct to conclude that non-privileged attachments should be disclosed.

As reflected by the number of recent appellate decisions, the scope and application of the rules governing privilege has been fertile ground for disputes. *Sports Direct v The FRC* helpfully clarifies the ways in which regulators can, and cannot, override the protection afforded to clients' LPP.

THE ENVIRONMENT BILL: TREADING WATER?

Stephen Tromans QC and Gethin Thomas

Overview

This is the third in a series of articles addressing key aspects of the Environment Bill (the "Bill"). In the preceding two editions of the PEP bulletin, Richard Wald QC and Ruth Keating considered: (i) the new Office for Environmental Protection ("OEP") and (ii) the Bill's environment target provisions. In this article we address the provisions of the Bill that concern water.

Policy background

The Government has stated its aims of the water provisions of the Bill to be to:

a. strengthen the resilience of water and wastewater services by enhancing the water industry's long-term planning regime;

b. reform the process for managing water taken from the environment, linking this more tightly to its 25 Year Environment Plan commitments (which include goals for clean and plentiful water and to reduce the risks of harm from environmental hazards), and;

c. modernise the regulation of water and sewerage companies to make it more flexible and transparent.[1]

Environmental background

It is important to read the provisions of the Bill against the background of a looming water supply crisis which faces the UK. It is a crisis which has been coming for some years, and recent warnings have become increasingly stark. In March 2020 the Environment Agency published estimates showing that England will need more than 3.4 billion litres of extra water every day between 2025 and 2050 to meet demand unless action is taken to control demand, figures published alongside a new national framework for water resources.[2] Emma Howard Boyd, chair of the Environment Agency, was quoted as saying: "If we don't take action many areas of England will face water shortages by 2050."[3] Also in March 2020, the National Audit Office published a report indicating that parts of England could run out of water within 20 years, and was highly critical of the government for abdicating responsibility and effectively placing the onus on the water industry.[4] The NAO concluded there was a critical need to move water between region, but that little progress had been made on co-operative approaches and that the economic regulation system was in not conducive to such long term investment and infrastructure. It is worth setting out in full the NAO's summary:

> Tackling water resource issues is one of the five priority risks the Committee on Climate Change identified in its 2017 climate change risk assessment. If more concerted action is not taken now, parts of the south and south-east of England will run out of water

1 DEFRA, Policy paper: Water Factsheet (part 5) (13 March 2020), available online here: https://www.gov.uk/government/publications/environment-bill-2020/10-march-2020-water-factsheet-part-5.

2 https://www.gov.uk/government/publications/meeting-our-future-water-needs-a-national-framework-for-water-resources.

3 ENDS Report, 29 April 2020.

4 https://www.nao.org.uk/report/water-supply-and-demand-management/

within the next 20 years. Reducing demand is essential to prevent water shortages as water companies are running out of low-cost options for increasing water supply. Defra has left it to water companies to promote the need to reduce household water consumption, and yet it continues to increase. Defra committed to announcing a personal water consumption target by the end of 2018 but has not yet done so, while the introduction of the business retail market has not led to the expected reductions in non-household water usage.

Water companies' long-term progress on tackling leakage and reducing water consumption has stalled over the past five years, and companies are only now starting to develop bulk water transfer solutions at the scale required. The government has been grappling with these issues for more than a decade but rapid progress is now vital for Defra to deliver on its objective of a resilient water supply. Defra has taken positive steps to give a more strategic focus to water resource planning. But it must make sure that its new national framework and Ofwat's new funding for companies to develop strategic solutions produce the collaboration and prompt action from water companies that is now needed. Defra will not be able to achieve value for money unless it provides stronger leadership across government, and a much clearer sense of direction to water companies, the water regulators and water consumers.

Draft provisions of the Bill relating to water

The proposed changes contained in the draft provisions, set out in part 5 of the Bill, would largely take effect through amendments to three statutes (all enacted in 1991): (i) the Water Industry Act 1991, (ii) the Water Resources Act 1991 and (iii) the Land Drainage Act 1991. These Acts were part of a recasting and consolidation exercise following privatisation of the water industry in 1989. Given the massive changes and challenges in the intervening three decades, it is striking that there has been no wholesale rethinking of this legislation. The Environment Bill is unfortunately very far from providing such a rethink. In summary, the draft measures provide:

a. **Water resources management:** clause 75 would introduce provisions into the Water Industry Act 1991 conferring two secondary legislation making powers on the Secretary of State (in England) and the Welsh Ministers respectively (referred to in the Bill interchangeably as the "Minister"), in relation to the the water resources planning process.
   i. First, the Minister would have the power to make regulations about the procedure for preparing and publishing: (a) a water resources management plan, (b) a drought plan, and (c) a joint proposal, including any revised plans or proposals. These regulations may provide for the sharing of information and, in particular, may require a water supply licensee to share such information with a water undertaker as may be reasonably requested. Such regulations could empower the Minister to make provision by enforceable directions, which must be complied with by the water undertaker to whom a direction applies.
   ii. Secondly, the Minister would also have the power to give a direction to two or more water undertakers to prepare and publish 'a joint proposal', defined as a proposal that identifies measures that may be taken jointly by the undertakers for the purpose of improving the management and development of water resources. The Government has stated it wishes to promote more effective collaboration between water companies to manage supply and demand, deliver resilience against droughts and facilitate environmental improvement.[5]

b. **Drainage and sewerage management plans:** clause 76 would impose a duty on all sewerage undertakers to prepare, publish and maintain a drainage and sewerage management

5 DEFRA, Policy paper: Water Factsheet (part 5) (13 March 2020), available online here: https://www.gov.uk/government/publications/environment-bill-2020/10-march-2020-water-factsheet-part-5.

plan, by way of a further amendment to the Water Industry Act 1991. A 'drainage and sewerage management plan' is defined as a plan for how the sewerage undertaker will manage and develop its drainage system and sewerage system so as to be able, and continue to be able, to meet its obligations. Sewerage undertakers would also be obliged to undertake period reviews of their plans, and report their conclusions to the Minister. A regulation making power would be conferred on the Minister to prescribe the procedure for preparing and publishing a drainage and sewerage management plan.

c. **Regulation of water and sewerage undertakers:** clauses 77 to 79 also amend the Water Industry Act 1991 in the following three ways.
   i. First, clause 77 would confer a power on the Water Services Regulation Authority ("Ofwat") to require a water or sewerage undertaker, or a water supply or sewerage licensee to provide information to it, in accordance with its duty to keep their activities under review.
   ii. Secondly, clause 78 changes the process for modifying water and sewerage company licence conditions. Under the current provisions, Ofwat could modify licence conditions only where the company consents, or following a reference made to the Competition and Markets Authority ("CMA"). The CMA can report as to whether there are any matters relating to the functions of companies which adversely effect the public interest, and that could be remedied or prevented by modifications of their licence conditions. Under clause 77, Ofwat would be empowered to make modifications to licence conditions, in accordance a process that prescribes notice requirements in detail. Companies are conferred a right of appeal to the CMA against a decision by Ofwat to modify licence conditions.
   iii. Thirdly, clause 79 modernises the requirement for service of documents required or authorised to be served under the Water Industry Act 1991, so that electronic means constitutes valid service. Electronic service cannot be effected on a consumer unless that person has consented in writing to receipt of documents by electronic means.

d. **Abstraction:** clause 80 amends the Water Resources Act 1991 to enable the Secretary of State to revoke or vary a permanent abstraction, without liability for compensation where: (i) the change is necessary having regard to an environmental objective, or to protect the 'water environment' (being any inland or underground waters or strata, including any dependent flora or fauna), or (ii) the licence is consistently under-used (measured during a 12 year period).

e. **Water quality:** clauses 81 to 83 would empower the Secretary of State in England, the Welsh Ministers and the relevant government department in Northern Ireland (respectively) to amend or modify any legislation for the purpose of: (i) making provision about the substances to be taken into account in assessing the chemical status of surface or ground water, and (ii) specifying standards in relation to those substances, or chemical status of the water. The existing powers to update those provisions (contained in section 2(2) of the European Communities Act 1972) will be revoked at the end of the transition period.

f. **Solway Tweed river basin district:** clause 84 makes specific provision relating to the Solway Tweet river basin district, which straddles the border between Scotland and England.

g. **Land drainage:** finally, clauses 86 to 89 make amendments to the Land Drainage Act 1991. The Secretary of State (in England) and the Welsh Ministers would be empowered to make regulations for the provision of the value of other land in an internal drainage district, and moreover, for the calculation of the annual value of agricultural land and buildings. In addition, clause 89 permits an officer of the valuation

office of Her Majesty's Revenue and Customs to disclose information to the Secretary of State or Welsh Ministers, as well as, for example, an internal drainage board, the Environment Agency, and Natural Resources Wales, for the purpose of exercising functions in relation to the expenses of internal drainage boards and drainage rates. The Government has explained that the purpose of these amendments to address a *"technical barrier preventing existing internal drainage boards from expanding and new ones being established, where there is local support to do so."*[6]

Devil in the detailed regulations

Save for: (i) the provisions which modernise the way in which water and sewerage undertakes are regulated by Ofwat, and (ii) the amendments to the abstraction regime in respect of permanent licenses, the primary effect of Part 5 of the Bill is to confer broad powers to make secondary legislation on the respective ministers in England, Wales (and where relevant) Northern Ireland. As such, without the content of those regulations, or of management plans, for example, there is an incomplete picture. In its current form, the ambition indicated in the Bill is modest.

In particular, the Bill itself does not set any management targets generally, nor does it specifically address water usage efficiency. Whilst the Government's 25 year environment plan sets out an ambition to reduce individual water use, and refers to setting a personal consumption target, the opportunity to make provision for reducing water usage has not been taken. As the plan notes, an individual uses 140 litres of water a day, on average.[7] For example, Water UK[8] have lamented the failure to introduce a mandatory national labelling scheme for water appliances like dishwashers and washing machines, coupled with minimum standards.[9]

In addition, the Bill fails to increase the stringency of obligations on water companies, or other organisations, in respect to water resource management. In particular, there are no measures addressing leakage. The Environment Agency have identified that over 3,000 million litres are lost through leakage in England, which is approximately 20% of water into supply, and *'are large enough to have a noticeable effect on the total demand for water.'*[10]

The Government have stated that the water quality and land drainage measures will help to *'keep pace with the latest scientific and technical knowledge'*, but (as with other provisions of the Bill) the devil will be in the detail.

Impact of Brexit

The legislative framework governing water is derived, to a significant extent, from EU Directives. As such, the impact of Brexit upon the regulation of water (as well as on the environment more generally) is inevitably significant.

The Bill addresses the impact of Brexit in respect of water quality, to a limited extent, by replacing the secondary legislation making powers under section 2(2) of the European Communities Act 1972. However, in order to prevent the UK from falling behind the pace of scientific and technical knowledge, the governments of England, Wales and Northern Ireland will need to take a consistently proactive approach to the updating of its water quality standards.

Moreover, the regulation of water quality is currently consistent across all four of the UK

6 DEFRA, Policy paper: Water Factsheet (part 5) (13 March 2020), available online here: https://www.gov.uk/government/publications/environment-bill-2020/10-march-2020-water-factsheet-part-5.

7 UK Government, 25-year Environment Plan (January 2018), p 70 (available online here: https://www.gov.uk/government/publications/25-year-environment-plan).

8 Water UK represents major water and wastewater service providers in England, Scotland, Wales and Northern Ireland.

9 Water UK, Environment Bill – Recommendations (6 November 2019). (Available online here:) https://www.water.org.uk/publication/environment-bill-recommendations-by-water-uk/.)

10 Environment Agency, *The State of the Environment: Water Resources* (May 2018), p 11.

nations, due to application of EU law. Without it, and under the Bill's provisions, there may be scope for creeping and possibly significant divergences by the implementation of different standards as to water quality in England, Wales or Northern Ireland.

Conclusion

Climate change, as well as a growing population, will increasingly pile pressure on water resources.[11] Urgent action is required to increase supply, cut down on demand, and reduce waste. The Bill lamentably fails to address these issues head on.

The Government's 25-year environment plan has committed it to the goal of achieving 'clean and plentiful water.' As noted above, one if the key aims of Part 5 of the Bill is to reform the process for managing water taken from the environment, so as to link it more tightly to its 25 Year Environment Plan commitments. Whilst the modernising provisions are welcome so far as they go, the true measure of the Government's ambition, and its ability to meet this objective, is yet to be determined. Time is unfortunately not on the Government's side.

SUPREME COURT RULES ON THE MEANING OF LISTED BUILDING

Richard Harwood QC

The Supreme Court has ruled whether a Planning Inspector is able to determine whether an item which has been designated as a listed building is in fact a building. Giving the Court's judgment in *Dill v Secretary of State for Communities and Local Government*, [2020] UKSC 20 Lord Carnwath has ruled definitively on the meaning of 'listed building'. The case also has important implications for the rights of persons to challenge decisions affecting their rights, the scope of the listed building regime and the sale of works of art.

The case concerned two lead urns (originally finials) attributed to the Dutch sculptor John van Nost dating from around 1700, and the circa 1730 limestone piers upon which they rest. The items were originally at Wrest Park, but taken by their owners when the property was sold in 1939. They moved with the family through three further properties before being placed at Idlicote House in 1973. In 1986 the urns and piers were made listed buildings in their own right. The family were unaware of the listing, and in 2009 the then owner, Marcus Dill, had them sold at auction, believing they were not listed.

In 2015 the local planning authority raised the listing with Mr Dill and having refused his application for consent, issued a listed building enforcement notice. On appeal before a Planning Inspector Mr Dill argued that the items were not buildings on the applicable property or planning law tests and so could not be listed buildings. The Inspector decided that the status of the items as buildings could not be questioned on appeal and those submissions were therefore irrelevant.

The High Court and Court of Appeal upheld the Inspector's decision.

In one of his final judgments, with which the rest of the Court agreed, Lord Carnwath JSC ruled that Mr Dill's appeal should be allowed.

On the ability to raise the 'building' issue on appeal before an Inspector, he followed *Boddington* holding that it was "the rule of law that individuals affected by legal measures should have a fair opportunity to challenge these measures". Since by section 1(5) of the Planning (Listed Buildings and Conservation Areas) Act 1990, a listed building means "a building which is … included in [the] list …" it could be contended in a listed building enforcement notice appeal or a prosecution for carrying out unlawful works to a listed building that the item was not a building, and so no listed building consent was required.

11 Environment Agency, *The State of the Environment: Water Resources* (May 2018), p 9.

The Court went onto consider what the legal meaning of building was. Section 1(5) of the 1990 Act provides:

> "In this Act 'listed building' means a building which is for the time being included in a list compiled or approved by the Secretary of State under this section; and for the purposes of this Act –
>
> a) any object or structure fixed to the building;
>
> b) any object or structure within the curtilage of the building which, although not fixed to the building, forms part of the land and has done so since before 1 July 1948,
>
> shall … be treated as part of the building."

Lord Carnwath held that under the extended definition of building in paragraphs (a) and (b) whether an object or structure 'forms part of the land' depended on the property law approach "of two tests: (1) the method and degree of annexation; (2) the object and purpose of the annexation". Applying that test he said that, in his view, "a statue or other ornamental object, which is neither physically attached to the land, nor directly related to the design of the relevant listed building and its setting, cannot be treated as a curtilage structure and so part of the building within the extended definition".

The urns and piers at Idlicote had been listed in their own right. Lord Carnwath held that whether something was a building in the opening words of section 1(5) was not governed by the property law tests but by the approach in planning cases to what is a building: a three-fold test, albeit imprecise, of size, permanence and degree of physical attachment (see *Skerritts of Nottingham Ltd v Secretary of State for the Environment, Transport and the Regions* (No 2) [2000] JPL 1025). He referred to:

> "the purpose of listed building control, which is to identify and protect buildings of special architectural or historic interest. It is not enough that an object may be of special artistic or historic interest in itself; the special interest must be linked to its status as a building. … The historic interest must be found not merely in the object as such, but in its "erection" in a particular place."

Lord Carnwath observed:

> "most ordinary forms of garden vases or seats would be unlikely to have become part of the land in real property terms, nor would they naturally be regarded as "buildings" under any of the tests considered above."

In the present case the Court noted that there were arguments both ways as to whether the items were buildings, but observed that the "vases" were physically separate and could not have been buildings if considered on their own. Those issues would fall to be considered again by an inspector. Lord Carnwath concluded:

> "There is as I understand it no suggestion that [Mr Dill] acted other than in good faith in disposing of items which he believed to be his own disposable property, and had been so treated by his family for several decades. Since this problem was first drawn to his attention by the local authority in April 2015 he has been attempting to obtain a clear ruling on that issue. On the view I have taken, that opportunity has been wrongly denied to him for five years. Even if his appeal were ultimately to fail, the practicability of restoring the vases to their previous location in the grounds of Idlicote House is uncertain. Accordingly, this court's formal order for remittal should not prevent the respondents from giving serious consideration to whether in all the circumstances it is fair to Mr Dill or expedient in the public interest to pursue this particular enforcement process any further."

The Supreme Court's judgment is here: https://www.supremecourt.uk/cases/docs/uksc-2019-0001-judgment.pdf

Richard Harwood QC and Catherine Dobson appeared for Mr Dill, instructed by Simon Stanion and Rajwinder Rayat of Shakespeare Martineau.

MATERIAL CONSIDERATIONS AFTER *WRIGHT*

Daniel Stedman Jones

When planners address material considerations for the purposes of s. 70 (2) of the Town and Country Planning Act 1990 (TCPA 1990) and s. 38 (6) of the Planning and Compulsory Purchase Act 2004 (PCPA 2004), two crucial questions arise. Firstly, what is a material consideration and, secondly, how much weight should be given to any such consideration in a given application?

While the second of these questions is very much a matter for the planning judgment of the local planning authority or planning inspector, the first question is a matter for the courts. The Supreme Court recently revisited the question of what is a material consideration In *R (Wright) v Forest of Dean DC* [2019] UKSC 53; [2019] 1 WLR 6562.

The Facts

Wright concerned an application for a wind turbine in the Forest of Dean. As part of the application, the developer agreed to contribute 4% of the annual turnover from the development to a community benefit fund. The funds would be distributed to community projects by a panel of local people. The developer advanced the community benefit fund as a material consideration in reliance on policy guidance from the department of energy and climate change, as well as in the NPPF, which encourages community-led renewable energy projects.

The local planning authority took the community benefit fund expressly into account in its decision to grant planning permission. Mr Wright challenged the decision on the basis that the community benefit fund should not have been a material consideration in the decision. Dove J quashed the permission in the High Court and the judge's order was upheld in the Court of Appeal, the leading judgment given by Hickinbottom LJ.

What was the Supreme Court's view? Lord Sales JSC gave the lead judgment upholding the courts below on the basis of three key principles, two familiar and a third, if not exactly new then nevertheless clarified in response to a novel submission.

Newbury Reaffirmed

The first, well-established, principle is that what is a material consideration is to be determined by reference to the criteria set out in relation to planning conditions by Viscount Dilhorne in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578, 599. Material considerations, like planning conditions, must be for a planning purpose, be reasonably related to the development proposed, and not be so unreasonable that no reasonable local planning authority could have imposed them.

This tripartite test was subsequently also applied to the assessment of the lawfulness of plan policy by Lord Scarman in *Westminster City Council v Great Portland Estates plc* [1985] AC 661. In *Wright*, at [34], Lord Sales explained that:

> *"The equation of the ambit of material considerations with the ambit of the power to impose planning conditions is logical, because if a local planning authority has power to impose a particular planning condition as the basis for its grant of permission it would follow that it could treat the imposition of that condition as a material factor in favour of granting permission."*

Lord Sales JSC further cited Lord Scarman referring to Lord Parker CJ in *East Barnet Urban District Council v British Transport Commission* [1962] 2 QB 484 to the effect that a planning purpose was one relating to the *"character of the use of the land."*

No radical departure then, but a useful reaffirmation of familiar law.

Materiality, not a Market

The second principle reiterated by Lord Sales in Wright was that planning permissions must not be bought and sold. There should be no market

for consents. On the particular facts in *Wright*, Lord Sales JSC held, at [39], that *"a condition or undertaking that a landowner pay money to a fund to provide for general community benefits unrelated to the proposed change in the character of the use of the development land does not have a sufficient connection with the proposed development as to qualify as a material consideration in relation to it."*

The court here was revisiting another of its recent decisions, *Elsick Development Co Ltd v Aberdeen City and Shire Strategic Development Planning Authority* [2017] PTSR 1413, in which a planning obligation to fund transport infrastructure around Aberdeen was held to have been insufficiently related to the use of the land being applied for.

Critically, the question when considering materiality was not whether the proffered benefits were desirable, but whether in planning terms they were material and whether they satisfied the *Newbury* criteria.

Is Material Consideration a Dynamic Concept?

The third principle was articulated by Lord Sales JSC in response to a novel submission by the developer, who argued that the concept of material considerations should be seen as dynamic. It was a concept which changes over time to reflect the development of planning policy and guidance. The Secretary of State lent support, suggesting that the *Newbury* criteria should be updated.

Lord Sales JSC rejected this argument. Crucially, in the court's view:

> *"Statute cannot be overridden or diluted by general policies laid down by central government (whether in the form of the NPPF or otherwise), nor by policies adopted by local planning authorities."* [42]

And:

> *"what qualifies as a "material consideration" is a question of law on which the courts have already provided authoritative rulings. The interpretation given to that statutory term by the courts provides a clear meaning which is principles and stable over time."* [45]

Importantly, perhaps, local plan policies, in particular, are protected by their statutory primacy within both the TCPA and PCPA 2004 tests. However, the lawfulness of any plan policies, if challenged, are also likely to be determined against the *Newbury* criteria to preclude unhelpful or confusing divergence between (stable) law and (ever-evolving) policy.

Conclusion

Two key practical points to emerge from *Wright* therefore are:

- Scheme design must be sufficiently anchored in the development proposed if beneficial.elements are to be material to any determination.
- Developers and communities alike must not get carried away from the *Newbury* criteria by agreement.

MIGRATORY SPECIES: WHERE ARE WE HEADED?

Tom Van der Klugt

Celebrating migratory birds

Last Saturday, 9 May, was World Migratory Bird Day, an annual awareness-raising day designed to highlight the need for the conservation of migratory birds and their habitats.

It has been running since 2006, when it was initiated by the Secretariat of the Agreement on the Conservation of African-Eurasian Migratory Waterbirds (AEWA) in collaboration with the Secretariat of the Convention on the Conservation of Migratory Species of Wild Animals (also known as the Convention on Migratory Species, "CMS", or the Bonn Convention).

Like many such international awareness days this year, it perhaps carried additional poignancy because the various events planned around

the world had to take place online rather than physically, and because of the renewed focus that coronavirus has placed – in some quarters at least – on the international environmental governance framework.

This article takes a brief look at the landscape for migratory species and international governance.

Anatomy of the Convention on Migratory Species

CMS is a UN environmental treaty.[12] Effective since November 1983, it is served by a Secretariat located in Bonn, and a Scientific Council. 129 states are party to the convention.

The convention is structured around "Range States", defined (at Article I) as states that exercise jurisdiction over any part of the range of a migratory species, or states whose flag vessels are engaged, outside national jurisdictional limits, in 'taking' migratory species. This defined broadly, to mean taking, hunting, fishing, capturing, harassing, deliberate killing of such species, or attempts to engage any such conduct.

Article II sets out the fundamental principles underpinning CMS. These are expressed in broad and non-prescriptive terms. The Parties acknowledge the importance of migratory species being conserved and of Range States agreeing to take action to this end whenever possible and appropriate (Article II(1)), and the need to take action to avoid any migratory species becoming endangered (Article II(2)).

Article II(3) then provides that the parties should promote, co-operate in and support research relating to migratory species, endeavour to provide immediate protection for migratory species included in Appendix I, and endeavour to conclude agreements covering the conservation and management of migratory species included in Appendix II.

Pursuant to Article III, Appendix I of CMS lists migratory species that are threatened with extinction. Pursuant to Article IV, Appendix II lists migratory species which have an unfavourable conservation status and which require international agreements for their conservation and management, as well as those which have a conservation status which would significantly benefit from the international co-operation that could be achieved by an international agreement. The species covered in the two appendices include not just birds, but also land and marine mammals, fish, reptiles and insects.

Article V then sets out guidelines for agreements concluded between Range States pursuant to CMS. Numerous instruments have been concluded in this way. Three examples are:

- The Agreement on the Conservation of Populations of European Bats (EUROBATS), which covers over 50 species of bat and seeks to counter threats posed by loss of habitat due to agriculture and forestry; loss of food supplies due to insecticides; and direct persecution due to human prejudice;
- The Agreement on the Conservation of African-Eurasian Migratory Waterbirds (AEWA), which covers 254 species and 554 populations of birds ecologically dependent on wetlands for at least part of their annual cycle;
- The Agreement on the Conservation of Small Cetaceans of the Baltic, North East Atlantic, Irish and North Seas (ASCOBANS) which seeks to tackle threats posed by by-catch, acoustic disturbance, competition with fisheries, collisions with shipping and marine pollution.

As can be seen, CMS functions as a framework convention, under which states are encouraged to conclude global or regional agreements. These can range from legally binding agreements to more informal Memorandums of Understanding. Unlike some other international conservation agreements, for example the Convention on International Trade in Endangered Species of Wild

12 Text of CMS can be found here: https://www.cms.int/sites/default/files/instrument/CMS-text.en_.PDF

Fauna and Flora (CITES), CMS does not itself seek to set out a framework for regulating international trade, economic activity or other actions taken by states in relation to migratory species.

Direction of travel

February 2020 saw the thirteenth conference of the parties to the CMS, which took place in Gandhinagar, India. It concluded on 22 February 2020, just a month before a nationwide lockdown was ordered due to coronavirus in India.

A number of themes emerged from the conference, which may at least hint at the direction of travel for governance regimes around migratory species:[13]

- **Ecological connectivity:** the conference adopted the 'Gandhinagar Declaration'.[14] This calls on parties, other governments and relevant stakeholders to *"promote the importance of ecological connectivity and functionality"* and to address this in other relevant international processes, that being the protection and restoration of important geographical areas that together support migratory species during the different phases of their natural lifecycles, such as breeding and feeding (as well as the migratory species themselves in the narrow sense);
- **Animal culture and social complexity:** proposals were presented to delegates as to how animal culture (i.e. the learning of non-human species through socially transmitted behaviours, for example with regards to optimal migration routes) can be linked to conservation actions. These were in relation to conservation measures for the Eastern Tropical Pacific Sperm Whale and the nut-cracking Chimpanzee.
- **Integrating migratory species concerns into policy and law:** the conference called for guidance and implementation tools to mitigate the impacts of linear infrastructure such as roads and railways on migratory species, and a new draft decision to integrate biodiversity and migratory species considerations into national energy and climate policy to promote wildlife-friendly renewable energy.

CMS COP13 expressed the Gandhinagar Declaration as a direct message to negotiators working in advance of the UN Biodiversity Conference (the Conference of the Parties to the Convention on Biological Diversity) scheduled to take place in Kunming, China in October of this year, with the intention of agreeing a new global biodiversity strategy for the next decade (the "Post-2020 Global Biodiversity Framework").

Due to the coronavirus pandemic, it has been postponed, with new dates yet to be announced.[15] But as with so many other areas of environmental law and policy, while the coronavirus pandemic is disrupting activity, it may also provide a renewed focus once it resumes, and it will be interesting to see how (and if) the themes above become more deeply embedded in law and policy.

13 The closing press release can be found here: https://www.cms.int/en/news/cms-cop13-concludes-india-major-new-actions-migratory-species

14 The text of the declaration can be found here: https://4post2020bd.net/wp-content/uploads/2020/02/Gandhinagar-Declaration-on-CMS-and-the-Post-2020-Global-Biodiversity-Framework.pdf

15 https://www.cbd.int/cop/

HOW ADR DOES HELP TO "DO BETTER"

John Pugh-Smith

In my article *"Doing Different & Doing Better: How, more creatively, to ease 'The Lockdown' in a Planning Context"*,[16] following the publication of the MHCLG's *Coronavirus (COVID-19) Planning update* and associated guidance on 13 th May 2020.[17] I explained that there are a number of tried and tested mechanisms, both statutory and through Government initiatives, by which we can now "do different" as we ease the land-use planning system out of the effects of The Lockdown". At its recent evidence session, held online, on 4 th May 2020, the All Party Parliamentary Group on Alternative Dispute Resolution heard from a number of expert witnesses, including myself, on the subject *"Land-use assembly, planning, compensation and ADR: lessons learned and next steps"*:[18] As well as drawing from my experiences, not only as instructed counsel but also as the neutral dispute resolver, I was able to draw from the results of recent membership surveys of the Compulsory Purchase Association and the Planning and Environment Bar Association. These necessarily overlapping surveys took place earlier this year and prior to the start of the March "Lockdown". It also heard from two CPO specialists, David Baker of Baker Rose, Chartered Surveyors, and David Holland of Squire Patton Boggs, Solicitors about their experiences, particularly acting for claimants.

The membership surveys were undertaken to ascertain the varying degrees of experience of ADR which, in the case of the CPA, engages solicitors, barristers and surveyors and with PEBA, just barristers. Overall, a 20% response rate was achieved[19] to a series of questions seeking the use and experiences from those acting in one or more of the following capacities: Mediator; Independent Expert/Adjudicator/Evaluator; Arbitrator; Neutral 'chair'; Facilitator (i.e. intermediary); Advocate; Expert Witness. The first question posed was as follows: *"Within the last five years, in relation to compensation, land-use, and/or community issues (e.g. party walls, rights to light, boundary disputes) have you acted in the following capacities (more than one can be answered)?"* Unsurprisingly, for professional associations, 43% of respondents confirmed that they had acted as advocates in CPO matters and 41% in planning. As expert witnesses in CPO matters 40% had so acted and 10% had done so in planning ones. As independent experts 12% of respondents had acted in that capacity in CPO and 8% in planning matters. As mediators, nearly 10% had so acted in connection with planning matters and 8% with CPO issues followed, as facilitators, by just over 5% equally for CPO and planning matters. Another question asked was: *"Where used, how did the parties perceive the process?"* In reply, where the outcome was successful, 33% of respondents stated that it had been positive, of which 12% had been impressed and 17% relieved. Even where the ADR process failed while 13% had negative perceptions, 5% remained positive; and in 27% of cases opinions varied between the parties as to the outcome. Finally, in the context o this article, when respondents were then asked to rank *"the drivers required to change behaviours in relation to ADR"*, 38% of them placed, first, legislation followed by professional guidance (28%), then procedural requirements (14%), then educating clients (13%) and training at 7%. Procedural requirements received the second highest ranking at 35% followed by professional guidance at 32%.

While the cynic may quip that statistics, like a drunk leaning against a lamp-post, are there provide more necessary support than illumination these results as well as their timing

16 https://www.39essex.com/planning-environment-property-newsletter-14th-may-2020/ https://www.localgovernmentlawyer.co.uk/planning/318-planning-features/43677-doing-different-and-doing-better

17 https://www.gov.uk/guidance/coronavirus-covid-19-planning-update https://www.gov.uk/guidance/coronavirus-covid-19-compulsory-purchase-guidance#dealing-with-claimants

18 The Session recording and the slides can be viewed on the following link: https://www.ciarb.org/policy/uk-appg-on-adr/appg-projects/.

19 136 replies of which 39 were both PEBA as well as CPA members

are further demonstrations that facilitated non-confrontational dialogue can and does lead to equal and even better outcomes. Indeed, perhaps, the greater positivity to use ADR may, in part, now be due to the CPA's own Compensation Protocol[20 21] which requires *"that in all cases parties should give due consideration to any opportunity to avoid a Reference or narrow the issues between them by using alternative dispute resolution advocate the use of ADR"*. This expectation is also to be found in the current Practice Directions for the Upper Tribunal (Lands Chamber);[22] and it is my understanding that there is likely to be an even greater expectation stated in the forthcoming replacement version.

So, while the flexibility and pragmatism encouraged by the MHCLG's May 2020 Covid-19 guidance is welcome it fails to make any mention of ADR techniques even in the context of helping to speed up compensation payments. Given the real and tangible benefits arising from the use of ADR as well as the clear steer from the Upper Tribunal (Lands Chamber) surely Central Government, particularly MHCLG and DfT, could reap greater benefits including both the earlier delivery of projects and savings in their costs of physical achievement if that steer was to be rearticulated at Ministerial level, and, soon. Now is the time to start actively seizing these various opportunities both from the "top down" and "bottom up" if we are going to achieve those lasting beneficial changes that we all desire from the far reaching effects of this Pandemic.

20 http://www.compulsorypurchaseassociation.org/land-compensation-claims-protocol.html (October 2018)

21 http://www.compulsorypurchaseassociation.org/files/ADR.pdf

22 Rule 2(1) of the 2010 Rules provides: *"The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly". Rule 3 encourages the Tribunal to seek, where appropriate*

(a) to bring to the attention of the parties the availability of any appropriate alternative procedure for the resolution of the dispute; and

(b) if the parties wish and provided that it is compatible with the overriding objective, to facilitate the use of the procedure."

The Practice Directions 2010, in relation to stays of proceedings, state:

"1) Parties may apply at any time for a short stay in the proceedings to attempt to resolve their differences, in whole or in part, outside the Tribunal process …" (para. 2.1)

In the context of costs Para. 2.2, as to ADR, supplemented by the main costs considerations in Ppara. 12.2, provide that: the conduct of a party will include conduct during and before the proceedings; whether a party has acted unreasonably in pursuing or contesting an issue .

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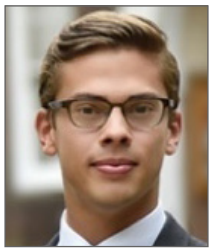

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