INTRODUCTION

Jonathan Darby

Welcome to this week's bumper edition of our Planning, Environment and Property newsletter. We hope that you are all keeping safe and well.

We have put together a diverse range of articles this week: Stephen Tromans QC reflects upon Chris Packham's unsuccessful challenge to the government's decision to go ahead with the High Speed 2 rail project; Rosie Scott provides her thoughts on COVID-19 and Public Rights of Way; John Pugh-Smith considers s. 106s and the "technical traps" submission; Tom van der Klugt looks at COVID-19 and environmental litigation; and Katherine Barnes looks at when is a proposal "in accordance with" the development plan in light of the recent decision of the Court of Appeal in *Cornwall Council v Corbett*.

In other news, the 3rd Edition of Richard Harwood QC's "Planning Enforcement" is available in hard copy from today and as an ebook or pdf from 30th April, published by Bloomsbury Professional. The new edition thoroughly updates the text, dealing with legislative change, particularly in Wales, a

Contents

wholesale replacement of guidance, and caselaw. The Courts have been active, especially on ground (f) enforcement notice appeals, proceeds of crime and injunctions. It also covers the Northern Irish planning enforcement regimes, fully incorporated into the text.

Richard's "Historic Environment Law" and its Supplement have also just been made available in a digital format. Hopefully this will be a great help to those working in lockdown, especially if another member of the team has borrowed the office copy. The book covers listed buildings, conservation areas, monuments, planning and the historic environment and the regulation of objects. "Historic Environment Law" is part of a range of the Institute of Art and Law's publications which are now available electronically.

THE HS2 DECISION: SOME REFLECTIONS

Stephen Tromans QC

On 6 April 2020, in *Packham v Secretary of State for Transport* [2020] EWHC 829 (Admin) the High Court (a Divisional Court comprising Coulson LJ and Holgate J) refused permission to proceed with an application for judicial review brought by the TV presenter and environmental campaigner, Chris Packham, seeking to challenge the government's decision to go ahead with the High Speed 2 rail project. The court also dismissed Packham's claim for an interim injunction to prevent site clearance works affecting ancient woodland.

As with many cases like this, the basis for the decision is heavily fact-specific, making it difficult to distil any general principles. However, it is still possible to learn some lessons.

Remote hearing

The case was heard remotely, and on an urgent basis given the claim for an interim injunction to halt imminent tree felling work. Many journalists requested to join via Skype, which apparently worked satisfactorily. The court made a polite acknowledgement of the clarity of the oral submissions and of the hard work and organisational skills of their judicial clerks, but were somewhat less polite (para. 34) as to the claimant's legal team having included, in the already overlong 786 page bundle, a large amount of wholly irrelevant material, seemingly included for prejudicial purposes.

Promptness

The case provides a timely reminder of the need for promptness in judicial review proceedings, a point taken by the court of its own volition. The decision to proceed with HS2 was taken on 11 February 2020. No pre-action letter was sent until 28 February 2020, and the proceedings were not issued until 6 weeks and 3 days from the decision. The court did not regard that as prompt enough. In particular, the decision had been heavily trailed and would not have come as any surprise to Packham. Further, the challenges to the process followed relied on material and evidence which were available some months before the decision. The court noted that the challenge would have been out of time under the statutory six week period applying to planning decisions. The case therefore reminds prospective claimants of the need to get their ducks in a row for any challenge prior to the decision, and not to rely on the outer limit of 3 months in judicial review cases. A good working rule must be to assume a challenge needs to be brought within 6 weeks.

The limits of JR

To put this aspect in context, it needs to be understood that the works for Phase 1 of HS2 which were under challenge by Mr Packham were lawful, having been authorised by primary legislation in 2017, which had been the subject of public consultation, environmental impact assessment, and petitions to Parliament by members of the public and conservation groups, heard by Select Committees of both Houses. By contrast, the focus of the proceedings was on the 2019 Oakervee Review, which informed the government's decision to proceed: this was a non-statutory review of a very limited nature, with no

statutory provisions or indeed policy bearing upon its terms of reference. The decision in favour of HS2 had already been taken; the Oakervee Review informed the government's decision whether to press the start button. As the court said, in undertaking the review and pressing the button, the Secretary of State was not acting within any statutory process: "the Secretary of State was effectively exercising common law powers which contain no lexicon of matters which must be taken into account" (para. 53). Accordingly, the appropriate standard for judicial review was one of low intensity, i.e. was there irrationality by failing to take into account something which was obviously material. Further, the contention for the claimant that the Secretary of State had started with a blank sheet of paper with the Oakervee Review was unrealistic.

This principle followed through into the detailed consideration of the grounds, which did not sustain such a challenge and indeed in some cases were simply not supported by the evidence. Much of the claim was based on minute criticism of the detailed process followed by the Oakervee Review. Further, the environmental concerns underpinning the claim were not new: they did not arise from the Oakervee Review or from new facts, but had been considered as part of the Parliamentary process in authorising HS2. The Oakervee Review had not been asked to reassess the environmental implications of the project – nor is there any way it could realistically have done so.

Climate change

Any self-respecting environmental JR these days must include a climate change ground, and this one was no exception. The Oakervee Review had been asked to address "the scope for carbon reductions in line with net zero commitments". It had concluded that the project was finely balanced, when setting carbon impacts during construction (the production of concrete in particular) against carbon savings during the operational phases. Which side of the line it came out on would depend on the success of reducing carbon emissions in Phase 2 of construction in particular and in forming part of an integrated strategy by government to encourage use of greener transport modes. The court found the points taken by counsel for Mr Packham to be unarguable. The Oakervee Report had on a fair reading had correctly summarised the issues and was not misleading.

Interim relief

Interim relief remains a comparative rarity in environmental JR. However, in this case an interim injunction was sought to prevent tree felling in ancient woodland and disturbance to European protected species. The works, as explained by HS2 in evidence were part of the critical path in constructing the scheme, by creating haul roads, and to be undertaken before the main bird nesting season. All necessary licences had been obtained from Natural England. The court applied the well established test for interim relief: *R (Medical Justice) v. Secretary of State for Home Department* [2010] EWHC 1425 (Admin) at paras. 6-7 and 12. The claim fell at the first hurdle, as no real prospect of success had been shown on any legal ground of challenge. Although the works would involve significant irreversible environmental damage, it was highly significant that those works had been assessed by Parliament and found to be acceptable in the national interest.

Appeal?

It has been reported that Packham is applying for permission to appeal the High Court's decision. This is said to be partly on grounds that the Oakervee Review failed to take into account its greenhouse gas reduction commitments under the UN Convention on Climate Change Paris Agreement, which readers will recall was a successful ground of challenge on appeal by Plan B Earth and Friends of the Earth in respect of the Airports National Policy Statement (see the article by James Burton in the last Newsletter). However, as the court in HS2 correctly pointed out (para. 99) the circumstances of the two case are very different, given that it was common ground in HS2 that account had been taken of the Paris Agreement obligations, in stark contrast to Heathrow.

And another challenge …

There is also a further crowd-funded challenge pending to the HS2 scheme. A resident who lives near the planned route of the line, Ms Hero Granger-Taylor, has obtained permission from Lang J for judicial review in respect of the line's tunnel design near Euston station, which it is argued pose a threat to life and property, in the event of a collapse. Lang J regarded the claim as arguable on the basis of the Human Rights Act 1998 and the Convention rights under Article 8 (right to respect for one's family life and home) and Article 1 and Protocol 1 (right to peaceful enjoyment of their possessions). The basis of the claim is a report by specialist engineers to the effect that the proposed design could cause a 10-metre high, 120-year-old wall to collapse into the new tunnels or onto the existing West Coast main line, causing serious damage to houses in Park Village East, a group of Grade 2* listed buildings.

It seems likely that the case will therefore involve conflicting expert evidence on safety issues and risk. If so, this will raise some interesting evidential issues. Normally of course, expert evidence is rare in judicial review: the process is not attuned to testing such evidence; it may not be truly relevant to the issues which the court has to address; and a decision-maker will normally be entitled to rely on either its own expertise or the expertise of those advising it. However, this appears to be a claim based on human rights. In that regard attention may need to be paid to the nature of the question being addressed. If the issue is one of pure fact, then Article 6 would require assessment by an independent and impartial tribunal: see *Tsfayo v United Kingdom* (2009) 48 EHRR 18. On the other hand where the issues to be decided require some professional knowledge or experience and the exercise of discretion pursuant to wider policy aims, the decision is for the public body: see e.g. *Bryan v United Kingdom* (1996) 21 EHRR 342. Assessment of the degree of risk and the acceptability of risk would seem to fall into the latter category. However, assuming there to be some element of risk such as to constitute an interference with rights to life or property (and plainly no major construction project can be risk free) then there may be a proportionality issue in applying the Convention right in question as to whether that risk is justifiable: see *R (Begum) v Denbigh High School* [2006] UKHL 15; [2007] AC 100. This must be judged objectively and the court's approach to an issue of proportionality under the 1998 Act will have to go beyond that traditionally adopted to judicial review in a domestic setting.

This case may therefore raise some rather more interesting legal and evidential issues than the Divisional Court decision in HS2.

COVID-19 AND PUBLIC RIGHTS OF WAY: SOME THOUGHTS

Rosie Scott

As practitioners may have spotted, Public Rights of Way hearings and inquiries have ground to a total halt since the COVID-19 public health crisis began. In fact, even amongst the general stasis, PROW feels like the unloved child of the PINS family. Whereas, through the activity of the PEBA Working Group (assisted by our own Ruth Keating and James Strachan QC), there have been noises about holding "digital pilots" for certain types of planning matters, no such rumours are spreading about remote hearings for rights of way cases.

PINS says that it is dealing with matters on a "case-by-case" basis. As of 21st April, inquiries and hearings as far in advance as the end of May and early June are being cancelled, although two inquiries have been converted into determinations by written representations (curiously, both in Nottinghamshire) and one has been "postponed".

Three thoughts occur. The first is to prepare your case as if it were not only going to take place on schedule, but also as if it were going to be determined on the basis of written representations. Frontload the preparation and the analysis into the Statement of Case and the Proofs to an even greater extent than usual and, if you were planning

to instruct counsel for the inquiry, consider involving her or him at this earlier stage. Authorities supporting user-based orders should consider seeking to engage earlier and more closely with key users who you hope will provide proofs: instead of the usual brief comments on the user evidence, consider putting a bit more effort in now to assist the witness to expand his or her proof to contain all that lovely evocative detail that (so often) only comes out at the inquiry. Again, involving counsel at this stage – of considering proofs and asking users further questions – is likely to be helpful.

The second is in relation to documents. Normally for PROW matters, supporting documents are sent to PINS in hard copy and another hard copy is deposited at the relevant council offices for parties to inspect and copy. Not only will the inspection element alone be challenging enough at the moment, but PINS has also closed its Bristol offices and are not accepting posted hard copies of documents; the Portal still does not extend to PROW matters, so one cannot upload documents electronically; and even if you can email everything to PINS, PINS has stated that it will only circulate Statements of Case to the parties, it will not circulate supporting documents (even if the party is able to upload them) for fear of not having all parties' email addresses.

This is particularly going to cause difficulties where the order-making authority is not supporting the order (not unusual at the moment, given the large numbers of "directions to determine" recently), and where the applicant driving the matter forwards is a litigant-in-person, who may not have access to scanners, decent broadband capable of uploading large files or even to their documentary evidence or users. Patience is going to be required and authorities should consider contacting such applicants (and objectors, for that matter) and seeking to assist where possible (for example, papers could be posted to the authority who could undertake to scan an applicant's documents).

Another angle to Roxlena?

One of the questions that will doubtless be asked for many years about user evidence for modification applications is "did the COVID-19 pandemic interrupt use of the way in 2020?" Certainly, in the initial days of the crisis, particularly following the announcement of lockdown, there was considerable confusion about what one could do, where one could walk and how far one could drive to get there. To this extent, there may well be interesting parallels with the 2001 foot-and-mouth disease restrictions on the use of rights of way.

This parallel cannot be taken too far, as the public has always been permitted to go outside for daily exercise and particularly now that DEFRA has clarified that landowners are not permitted to obstruct or block PROW, even during the pandemic. It may, however, become an interesting question of fact as to where users did actually go for their daily exercise during this period (particularly if lockdown continues for much longer).

This point looks particularly fruitful in the light of the Roxlena litigation. In the Court of Appeal ([2019] EWCA Civ 1639), one ground of appeal concerned user evidence which claimed uninterrupted use of footpaths during the foot-and-mouth crisis, despite the legal restrictions in place at the time. The PINS Advice Note 15 suggested, however, that "it did not seem that the temporary cessation of use of ways solely because of [measures due to foot-and-mouth] could be classified as an "interruption" under s31(1)" of the Highways Act 1980. At first instance, Kerr J. rejected this view that such interference in use could not amount to an "interruption in use" as a matter of law, and whilst the Court of Appeal did not comment on this specific issue, Lindblom LJ refrained from saying that Kerr J. was wrong and approved Kerr J.'s reasoning more generally.

So there is, at least, this starting point for landowners of the future: restrictions imposed by law on users' ability to move about (like the COVID-19 restrictions on exercise) could, as a matter of law, amount to an interruption of use. Where Rover is taken on his daily walk today, therefore, may well become significant for determining rights of way tomorrow and in the future.

SECTION 106s AND THE "TECHNICAL TRAPS" SUBMISSION

John Pugh-Smith

Introduction

North Norfolk tends to be known more for its saltmarsh, samphire, seals and skies than as a source of planning jurisprudence. Nevertheless, in recent years the District Council has managed to add several cases to practitioner e-libraries including *R (Champion) v North Norfolk District Council & Anor.* [2015] UKSC 52 on the discretion of the courts not to quash planning decisions where there had been some defects in the decision-making process when dealing with a challenge based on procedural error. Now, in a seemingly otherwise unreported decision of Mrs Justice Thornton in *Norfolk Homes Limited v North Norfolk District Council & Norfolk County Council* [2020] EWHC 504 (QB) on 5th March 2020 further jurisprudence appears to be in the making. It concerns proceedings by Norfolk Homes for a declaration that residential development of its land in Holt is not bound by obligations contained in a Section 106 agreement.

As Norfolk Homes had boldly applied for summary judgment the issue before the judge was whether the application gave rise to a short point of law which she could decide upon the presented evidence, and, whether the parties had had an adequate opportunity to address the point in argument. Norfolk Homes submitted that the short point arose from the construction of the Section 106 Agreement which, in leading counsel's words, were as 'plain as a pikestaff'. In short, the obligations in the Agreement were expressly tied to the implementation of an Outline Planning Permission, as readily apparent from the definitions of 'Application', 'Development' and 'Planning Permission', whereas the development being implemented was under a separate and independent planning permission as to which the parties chose not to include the increasingly standard clause to the effect that the s106 obligations were to remain binding. On behalf of the District Council it was submitted that the claim raised a cogent and novel point of law which was not apt for summary judgment. Its counsel submitted that the Supreme Court decision in *Lambeth* (*Lambeth LBC v SSCLG* [2019] UKSC 33) had made clear that a planning document, which includes a section 106 agreement, must be interpreted according to the natural and ordinary meaning of the words in their surrounding context, which includes the planning context. Accordingly, this Section 106 Agreement was to be construed as applying to the outline planning permission as varied. Failing that, these words were to be implied. The available evidence, namely the District Council's approval of reserved matters and the payments made under the Agreement were consistent with the Council's understanding that the Agreement continued to apply to the varied planning permissions.

Refusing the application in favour of the District Council, Mrs Justice Thornton states:

"20. I am not persuaded that the claim gives rise to a short point of law. Some, but not all, of the issues that arise from the claim seem to me to be as follows:

a. To what extent are the legal principles for interpreting a section 106 agreement the same as those for interpreting any other planning document?

*b. Should the section 106 agreement be construed in accordance with its ordinary and natural meaning; the statutory and planning context (including the subsequent section 73 permissions) (**Lambeth** paragraph 19) or should it be construed according to the principles of contractual interpretation set out in **Arnold v Britton** (in particular principle iv) that the contract should be construed according to the facts and circumstances at the time of the contract)?*

*c. To what extent is the case of **Lambeth v Secretary of State** relevant to the present case?*

d. *Can the Council be said to have fallen into a 'technical trap' of the sort envisaged by Court in **Lambeth v Secretary of State**? To what extent, if at all, should the Courts intervene to protect the Council from any 'technical trap'?*

e. *Can the case of **Lambeth** be said to establish the principle that developers should not be able to evade obligations by relying on technical traps.*

f. *The legal relevance, if any, of the payments made under the section 106 agreement in 2016/2017.*

g. *The legal relevance, if any, of the implications of the developer's case being inconsistent with a key planning priority for the Council (the provision of affordable housing).*

21. *I am not persuaded that the Council has no real prospect of successfully defending the claim given the wording of the relevant s73 permission and wider planning context and given the absence of authority directly on point in relation to some of the issues raised.*

22. *Mr Lockhart-Mummery urged me to grasp the nettle and determine the claim given there is no evidential complexity and the parties have had an adequate opportunity to address the legal points raised. I decline the request. The nature of the application meant there was insufficient opportunity to consider the above mentioned issues."*

While an unsurprising outcome to a summary judgment application the Judge's seeming acknowledgement, as part of her identification of seven issues, that the concept of the "technical trap" could be applied now to the interpretation of section 106 obligations does raise more serious concerns. Accordingly, this article seeks to explore the inherent difficulties with this concept ahead of the return of this particular case for a substantive hearing on the merits, perhaps, later this year.

The Necessary Starting Point

What is the legal status of "S106s" for the purposes of their interpretation? As Lord Dyson MR reminds in *Newham LBC v Ali* [2014] EWCA Civ 676 @ para. 16 they are commercial contracts, albeit in a public law context, and enforceable through statutory powers:

*"It is not in dispute that planning obligations entered into under section 106 of the 1990 Act are contractual obligations: see, for example, **R (Millgate Development Limited) v Wokingham Borough Council** [2011] EWCA Civ 1062, [2012] 3 EGLR 87 at para. 22(e) and **Stroude v Beazer Homes Ltd** [2005] EWHC 2686 (Ch), [2006] 2 P& CR 6. The mechanism for enforcement is provided by section 106(5): "[a] restriction or requirement imposed under a planning obligation is enforceable by injunction".*

Accordingly, it has been long recognised by the Courts that the normal principles of interpretation of deeds should be applied. After 20 years of consideration both by the House of Lords and the Supreme Court, most recently in *Chartbrook Limited v Persimmon Homes Limited* [2009] AC 1101, *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900, Arnold v Britton [2015] AC 1619 and *Wood v Capita Insurance Services Limited* [2017] 2 WLR 1095, those rules of construction are clear. In short:

1) The primary task of the Court (and of any dispute resolver sitting in a quasi-judicial capacity) is to ascertain the objective meaning of the language in which the parties have chosen to express their agreement in its final, concluded and signed form, and, as a whole.

2) Evidence of negotiations and evidence of the parties' subjective intentions are inadmissible.

3) Even where a corrective interpretation is invoked this is only where something has gone wrong with language of the contract as opposed to something having gone wrong with the implementation of the bargain, or the mistaken failure to exercise a power. It cannot be used, for example, to supply a whole clause which the parties have mistakenly forgotten to include.

4) The Courts are entitled to prefer the construction of a contractual term which is consistent with business common sense and to reject any other construction.

Given the seeming two-tier approach being suggested in the *Norfolk Homes* case I also draw particular attention to what Lord Neuberger stated in his speech in *Arnold v Britton* (@ para.20 and as endorsed by Lord Hodge in *Woods v Capita* @ para.11):

> *" … The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed.* ***Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party."***
>
> [Emphasis in bold added]

Although each S106 has the status of a public document requiring inclusion and publication on a council planning register it has still been made contractually with the relevant planning authority, and, usually after negotiations. Accordingly, the principles of interpretation remain applicable in their essential features, for example, the need to focus on the meaning of the relevant words in their documentary, factual and commercial context; the application of an objective test; and the relevance of commercial common sense (see, for example, *R (Robert Hitchins Ltd) v Worcestershire County Council & Worcester City Council* [2015] EWCA Civ 1060) where Lord Justice Richards cited the principles from the then most recent case, *Arnold v Britton*).

With regard to the "public element" within a section 106 agreement, it is not so much in the court's approach to the meaning of words but in the range of material that it can take into account in determining that meaning where that factor needs to be borne in mind. As Lord Justice Lewison remarked, when the *Lambeth* case was at the Court of Appeal stage ([2018] EWCA Civ 844):

> *"23. … . As Lord Hodge pointed out in* ***Trump*** *[****Trump International Golf Club Ltd v Scottish Ministers*** *[2015] UKSC 74] at [33]:*
>
> *'There is a modern tendency in the law to break down divisions in the rules on the interpretation of different kinds of document, both private and public, and to look for more general rules on how to ascertain the meaning of words. In particular, there has been a harmonisation of the interpretation of contracts, unilateral notices, patents and also testamentary documents.'*
>
> *24.* ***Where a public document differs from cases of that kind is not so much in the court's approach to the meaning of words, but in the range of material that it can take into account in determining that meaning, as Lord Hodge went on to explain in the same paragraph,***
>
> *'Differences in the nature of documents will influence the extent to which the court may look at the factual background to assist interpretation. Thus third parties may have an interest in a public document, such as a planning permission or a consent under section 36 of the 1989 Act, in contrast with many contracts. As a result, the shared knowledge of the applicant for permission and the drafter of the condition does not have the relevance to the process of interpretation that the shared knowledge of parties to a contract, in which there may be no third party interest, has. There is only limited scope for the use of extrinsic material in the interpretation of a public document, such as a planning permission or a section 36 consent.'*
>
> *25. But having regard to the more limited range of material that can be taken into account in ascertaining the meaning of words in a public document, the ultimate question is still the*

same, namely:

> *'… what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense.'*

26. *Agreeing with Lord Hodge, Lord Carnwath said at [66]:*

> *'I do not think it is right to regard the process of interpreting a planning permission as differing materially from that appropriate to other legal documents.'*

[Emphasis in bold added]

Furthermore, regarding the scope of the Court's powers Lord Justice Lewison advised as follows:

"56 ***In the contractual context, a corrective interpretation cannot be used to supply a whole clause which the parties have mistakenly forgotten to include: Cherry Tree Investments Ltd v Landmain Ltd*** *[2012] EWCA Civ 736; [2013] Ch 305 at [131] and [144].* ***As the quotation from Lord Hoffmann demonstrates, a corrective interpretation can only be invoked where something has gone wrong with the language of the contract, as opposed to something having gone wrong with the implementation of the bargain, or the mistaken failure to exercise a power: Honda Motor Europe Ltd v Powell*** *[2014] EWCA Civ 437; [2014] Pens L.R. 255 . Although the Decision Notice probably did not achieve the result that Lambeth wanted it to achieve, I do not consider that it can be said that the result is arbitrary or irrational. Nor, in my judgment, has anything gone wrong with the language of the Decision Notice. What went wrong was Lambeth's failure to exercise a power that it had under the Act."*

[Emphasis in bold added]

The Lambeth context

So, where do matters of interpretation of S106s now stand since Lambeth in the Supreme Court?

First, the scope of the single judgment by Lord Carnwath was specifically upon the question of interpreting planning permissions by the use of implied conditions i.e. implying words into a public document such as a planning permission. Furthermore, it is was one of those cases which was highly fact-specific. Indeed, Lambeth's decision notice had undoubtedly been poorly drafted badly. It is also notable that the decision of the Supreme Court did not overtly overturn established case law or otherwise break new ground, as had seemingly arisen from *Trump* and only rejected the approach taken by the lower courts in respect to the interpretation of the actual wording used in the decision notice in question. Accordingly, it determined that a reasonable reader would have read the section 73 consent as being a simple variation of the original permission and, implicitly, subject to the conditions attached to that permission.

Secondly, what was the technical trap that, if any, was being considered? Giving the sole judgment, Lord Carnwath uses this term, once, and only under the heading "The Court of Appeal's reasoning", and, in the following descriptive context:

"20. … Having set out the planning history and the terms of the section 73, Lewison LJ (paras 19-22) identified what he saw as the problem. While he acknowledged that it was "clear what Lambeth meant to do in a very broad sense", he said:

> *"But that is not the question. The question is: what did Lambeth in fact do? The application was an application for the variation of a condition attached to the 2010 permission …*
>
> ***… the technical trap, into which it is said that Lambeth fell, is that approval of an application under section 73 requires the grant of a fresh planning permission, rather than merely a variation of an existing one …***

> *It follows from this that the decision notice must be read as a free-standing grant of planning permission. However, it failed to repeat any of the conditions imposed on the previous planning permissions and, more importantly, failed to express the new description of the use as a condition, rather than as a limited description of the permitted use …"*
>
> (Emphasis in bold added)

Therefore, whether as a turn of phrase or term of art it was actually describing only how the Court of Appeal viewed the process by which this Section 73 determination came to be outworked by the relevant local planning authority.

Should there be a "technical trap" argument?
Settled case law and resulting judicial guidance has been clear from somewhile as to what is the status of a section 73 determination. Indeed, in *Lambeth* (@ para.9) Lord Carnwath sets out those well-established principles starting with *Pye v Secretary of State for the Environment, Transport and the Regions* [1998] 3 PLR 72 in which Mr Justice Sullivan (as he then was) remarked:

> *"While section 73 applications are commonly referred to as applications to 'amend' the conditions attached to a planning permission, a decision under section 73(2) leaves the original planning permission intact and un-amended. That is so whether the decision is to grant planning permission unconditionally or subject to different conditions under paragraph (a), or to refuse the application under paragraph (b), because planning permission should be granted subject to the same conditions"*
>
> *In the former case, the applicant may choose whether to implement the original planning permission or the new planning permission; in the latter case, he is still free to implement the original planning permission. Thus, it is not possible to 'go back on the original planning permission' under The original planning permission comprises not merely the description of the development in the operative part of the planning permission ... but also the conditions subject to which the development was permitted to be carried out ..."*

This passage was approved by the Court of Appeal in ***Powergen United Kingdom plc v Leicester City Council*** *[2000] JPL 1037, para 28, per Schiemann LJ"*

Lord Carnwath also endorsed Mr Justice Sullivan's recommendations in *Reid v Secretary of State for Transport* [2002] EWHC 2174 that local planning authorities should, as good practice, restate all the conditions to which the new planning permission will be subject and not left to the process of cross-referencing.

Indeed, even for the distracted planning officer the MHCLG's national Planning Policy Guidance (Paragraph: 040 Reference ID: 21a-040-20190723) makes clear:

> *"The original planning permission will continue to exist whatever the outcome of the application under section 73. … For the purposes of clarity, decision notices for the grant of planning permission under section 73 should set out all the conditions imposed on the new planning permission, and restate the conditions imposed on earlier permissions that continue to have effect."*

Likewise, current Welsh Government advice in its Circular: *The Use of Planning Conditions for Development Management* advises in similar terms.

Therefore, the procedural position is clear with regard to Section 73 determinations and should provide no "wriggle room".

Nonetheless, should the planning oversights by local authorities be judged more leniently by the Courts, given the potentially adverse effects on the wider public interest, for example, the loss of affordable housing or new sports facilities, when it comes to S106s?

In the *Norfolk Homes* case the limited facts given in the judgment reveal that the parties had chosen, for undisclosed reasons, not to include the increasingly standard clause to the effect that the planning obligations within the original Section 106 Agreement were to remain binding. Consequently, the Council should be absolved from the legal consequences of an undoubted oversight. However, as with all local authorities the Council retained 'custody and control' of the contents of the initial and the subsequent Section 73 decision notices, and, the requirement for any related S106 variations, substitute or continuation of relevant planning obligations.

Secondly, both Parliament and the Courts have taken a consistently "hard edged" approach towards the application and enforceability of S106s. This is well charted. Even during the more indulgent days of the 1990s Lord Hoffmann still remarked in *Tesco Stores Limited v SOSE* [1995] 1 WLR 759 @ 779 as follows:

> *" … once the condition has been satisfied, the planning obligation becomes binding and cannot be challenged by the developer or his successor in title on the ground that it lacked a sufficient nexus with the proposed development."*

Despite the ability to apply for modification or discharge after five years under Section 106A such cases as *R (Millgate Developments v Wokingham BC* [2011] EWCA Civ 1062 and *R (Mansfield DC) v SSHCLG* [2018] EWHC 1794 (Admin) demonstrate that the Courts will continue to uphold local authorities' demands that the developer should be held to the planning obligations it contracted to discharge even if circumstances have subsequently changed.

Accordingly, why should there be a change of judicial direction now? Despite the effects of financial austerity on local government budgets the drafting of S106s is one area where the legal costs of preparation are usually borne largely if not exclusively by the applicant. Equally, while many authorities may now have to use shared or out-sourced legal services the same quality of provision, dating back to the principles enshrined by the House of Lords in the seminal case of *Hedley Byrne & Co Ltd v Heller & Partner Ltd* [1964] AC 465, should apply despite the lack (or paucity) of remuneration. Surely, it would now drive the proverbial "coach and horses" through the applicable principles were a two-tiered" approach now to be taken?

Concluding Remarks

While the strangest of justified changes can happen these days in the interests of expediency, even in North Norfolk, it is to be hoped that in a post- Pandemic world well-established principles of construction and interpretation of S106s will not be one casualty. If otherwise, then the planning world as we now know it will be forever changed and not necessarily for the better.

JOHN PUGH-SMITH FSA FCIArb is also a member of the RICS President's appointment panel. He has acted as an arbitrator, independent expert and dispute facilitator on a variety of references concerning the interpretation of section 106 and development agreements.

EARTH DAY 2020, COVID-19 AND ENVIRONMENTAL LITIGATION

Tom van der Klugt

Yesterday saw the fiftieth anniversary of Earth Day.

The event has been celebrated every year since 1970, when 20 million people took to the streets in the US following increasing public outcry over oil spills, air pollution, damage to rivers, and other environmental issues.

It helped spark the modern environmental movement, not least a wave of new environmental laws in the US and globally, and the development of increasingly sophisticated public interest and strategic litigation in the environmental sphere.

Earth Day 2020 is also the fourth anniversary of adoption of the Paris Agreement on climate action by the UN.

While Earth Day has previously brought millions of people together physically across the globe, this year it is entirely digital in light of COVID-19. It seems a good moment to take stock of commentary on the relationship between COVID-19 and the environment, and what this may mean for environmental litigation.

Why Earth Day is more important than ever

The UN Environmental Programme (UNEP) has recognised the poignancy of Earth Day 2020 in a statement on *"Why Earth Day is more important than ever"*,[1] describing the pandemic as:

> *"…a stark reminder of the vulnerability of humans and the planet in the face of global scale threats. Unchecked damage to our environment must be addressed…Marking its half-century anniversary, and selecting climate action as its theme, Earth Day 2020 was already poised to be a historic event. An occasion planned to bring people physically together across a series of events, COVID-19 has now prompted a dramatic shift to completely digital and virtual platforms…As the world rushes to plan for a post-pandemic recovery, UNEP and other parts of the United Nations system see this as opportunity to call attention to the need to "build back better." April 22 is a timely reminder to embrace the opportunities of the natural world for green jobs, sustainable economic stimulus, for urgently taking action to protect ourselves against unsurvivable global heating and for securing healthy, dignified futures."*

In its statement on COVID-19,[2] the UNEP recognises that:

> *"The immediate priority at this time is to protect people by limiting the spread of COVID-19. Recognizing that the virus requires a sound environmental response, we stand ready to support Member States and frontline UN partners in providing technical expertise on chemicals and hazardous waste management as they seek to address the increase in waste necessitated by the medical response to the crisis…"*

However, it goes on to observe that:

> *"…the health of people and the health of our planet are intimately connected…Human activity has altered virtually every corner of our planet, from land to ocean. And as we continue to relentlessly encroach on nature and degrade ecosystems, we endanger human health. In fact, seventy-five percent of all emerging infectious diseases are zoonotic, i.e. viruses originating from the transfer from animals, whether domesticated or wild, to humans…It is precisely because of the interconnected nature of all life on this planet, that an ambitious post-2020 biodiversity framework matters greatly, and we remain committed to efforts to make this happen."*

1 https://www.unenvironment.org/news-and-stories/story/why-earth-day-more-important-ever

2 https://www.unenvironment.org/news-and-stories/statement/unep-statement-covid-19

Shared responsibility, global solidarity

This concern with the wider and longer-term impacts of COVID-19 is also reflected in the UN's report, *"Shared responsibility, global solidarity: responding to the socio-economic impacts of COVID-19"* published last month.[3] The report makes a clear link between COVID-19 and the 'environmental health' of the planet:

> *"Had we been further advanced in meeting the Sustainable Development Goals and the Paris Agreement on Climate Change, we could better face this challenge – with stronger health systems, fewer people living in extreme poverty, less gender inequality, a healthier natural environment, and more resilient societies…*

The report goes on to consider the equivocal (but ultimately negative) impact that COVID-19 may have in relation to the environment:

> *"The impact on the environment…is likely to be positive in the short term, as the drastic reduction in economic activity brought about by the crisis has reduced CO2 emissions and pollution in many areas. Such improvements are destined to be short-lived, unless countries deliver on their commitment to sustainable development once the crisis is over and the global economy restarts.*
>
> *However, because of the size, scope and pace of the pandemic, and the sizable capital outflows from developing countries, there is currently a significant risk that most political capital and limited financial resources be absorbed by the response and diverted away from the implementation of the Nationally Determined Contributions to achieve climate targets and the Sustainable Development Goals. It is vital that in the response to the crisis, countries keep the sustainable development goals and climate commitments in focus to hold on to past gains, and in the recovery, to make investments that propel us toward a more inclusive, sustainable and resilient future…*
>
> *…This crisis also has brought into sharp focus the inadequacy of the global response to the climate and biodiversity emergencies. Despite committing to hold the increase in global temperature to 1.5 degrees Celsius, the world remains on a dangerous 3 degrees pathway. Even at present levels of warming, the world is witnessing unprecedented super charged tropical storms, record-breaking temperatures, accelerated deforestation, droughts and wildfires and ever more grim predictions of sea level rise. This has resulted in significant loss of lives and livelihoods, and hundreds of billions in damage with the poorest and most vulnerable bearing a disproportionate burden.*
>
> *The irony that the current crisis is resulting in lower emissions and cleaner air is not lost on anyone – not least because deforestation, pollution, biodiversity loss are all contributory factors to the spread of the virus. Governments should not respond to the COVID-19 crisis by making policy and investment decisions that exacerbate existing crises such as air pollution and the climate emergency. The New Climate Economy report estimates that investing in bold climate action could deliver at least 26 trillion USD in net global economic benefits between now and 2030, including creating more than 65 million new jobs. While these figures may be adjusted on account of the impact of the pandemic, the prospects of this opportunity must be seized in stimulating the recovery. This year remains crucial for making progress on the climate emergency and in halting the loss of biodiversity."*[4]
>
> *The report's conclusion makes clear that the UN regards COVID-19 as a transformative moment, describing it as the "greatest test that we have faced since the formation of the United Nations" but taking the view that "With the right actions, the COVID-19 pandemic can mark the rebirthing of society as we know it today."*

3 https://unsdg.un.org/sites/default/files/2020-03/SG-Report-Socio-Economic-Impact-of-Covid19.pdf

4 p22-23.

Biodiversity, air pollution and waste management
While the UN statements do not pull any punches in describing the overarching challenges posed by COVID-19, commentary is also emerging on more specific issues, for example on the challenge posed to waste management processes, both in terms of dealing with medical waste arising from the COVID-19 pandemic itself[5] and for authorities providing routine waste management systems while 'lockdown' measures are in place.

Another example is air pollution, which has been the subject of considerable media attention and legal action in recent years.[6] There is increasing evidence that there may be a relationship between air pollution and coronavirus deaths.[7] Conversely, the coronavirus lockdown appears to have significantly reduced air pollution levels in some areas.[8] These trends could lead to an increased focus, and new evidential bases, for environmental litigation in this area.

There has also been commentary on the causal relationship between loss of biodiversity and habitat destruction and the outbreak of COVID-19. UNEP's video "*A message from nature: coronavirus*"[9] notes that, on average, one new infectious disease emerges in humans every four months, and that 75% of these emerging diseases come from animals. A healthy ecosystem therefore helps protect humans from disease because a diversity of species makes it difficult for pathogens to spread rapidly.

This empahsises the importance of international regulatory systems such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) which endeavour to protect biodiversity. Again, COVID-19 may lead to developments and changes in these areas (although this will of course be very contingent on political will). It will certainly alter the wider discourse around regulatory frameworks, leading to new enforcement challenges for public bodies and new compliance challenges for commercial actors.

What does this mean for the future?
The statements from the UN in relation to COVID-19 bring home the extent to which the pandemic is likely to transform the political, legal and policy backdrop against which environmental litigation takes place.

In relation to specific areas, COVID-19 may result in novel trends and new bodies of evidence which may provide grounds for environmental litigation and regulatory or legislative change.

The UN statements also highlight very clearly the interconnectedness of the COVID-19 pandemic with the wider 'environmental health' of the planet, both causally and in terms of its impact. Could this translate into a stronger nexus between public interest litigation in relation to public health, and environmental litigation?

5 See for example: https://www.unenvironment.org/news-and-stories/story/healthcare-waste-what-do-it

6 See for example: https://www.clientearth.org/you-have-a-right-to-breathe-clean-air/

7 https://www.theguardian.com/environment/2020/apr/21/preliminary-study-links-air-pollution-to-coronavirus-deaths-in-england; https://www.theguardian.com/environment/2020/apr/07/air-pollution-linked-to-far-higher-covid-19-death-rates-study-finds

8 https://www.theguardian.com/environment/2020/mar/27/coronavirus-uk-lockdown-big-drop-air-pollution

9 https://www.unenvironment.org/news-and-stories/video/message-nature-coronavirus

WHEN IS A PROPOSAL "IN ACCORDANCE WITH" THE DEVELOPMENT PLAN?

Katherine Barnes

The recent decision of the Court of Appeal in *Cornwall Council v Corbett* [2020] was concerned with a grant of planning permission for the extension of a caravan park within a designated area of great landscape value ("AGLV") which had been quashed by the High Court (Mr CMG Ockelton sitting as a Deputy High Court Judge). The primary question for the Court of Appeal was when a proposal will be "in accordance with the development plan" for the purposes of s.38(6) of the Planning and Compulsory Purchase Act 2004.

The difficulty in *Corbett* was that the development plan contained two relevant conflicting development plan policies. On the one hand, Policy 14 of the Local Plan had the effect of preventing developments that would cause harm to AGLVs. It did not contain any exceptions. On the other hand, Policy 5 of the Core Strategy supported new tourism facilities. When the Council considered the application for planning permission it concluded, with reliance on Policy 5, that the proposal was in accordance with the development plan. However, this decision was quashed by the High Court in light of the conflict with Policy 14.

The Court of Appeal (Lindblom LJ) allowed the appeal against the quashing on the basis that the development plan here pulled in different directions and that it was a question of planning judgment for the decision-maker whether, overall, there was a conflict. In exercising such judgment, regard should be paid to the relative importance of the relevant policies and the extent of the compliance or breach (*R v Rochdale Metropolitan Borough Council, ex parte Milne* [2000] EWHC 650 (Admin)). Ultimately, however, a decision-maker's conclusion in this regard may only be challenged on a Wednesbury basis.

Nonetheless, despite accepting the Council's view that in the circumstances of that case the proposal accorded with the development plan, the court did not rule out the possibility that the breach of a single policy could give rise to a breach of the development plan overall.

Corbett is therefore a useful reminder of the broad discretion enjoyed by decision-makers in deciding whether a proposal is in accordance with the development plan. Indeed, even if proposal is in clear breach of a strongly worded policy, it may still be the case that, overall, the proposal complies with the development plan.

CONTRIBUTORS

Stephen Tromans QC

stephen.tromans@39essex.com

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

John Pugh-Smith

john.pugh-smith@39essex.com

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

Jonathan Darby

jon.darby@39essex.com

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

Rosie Eleanor Scott

rosie.scott@39essex.com

Rosie practises in all areas of public, planning and environmental law. Led by Justine Thornton QC, she acted for Southern Water at a public inquiry into its dispute with the EA over abstraction licences in March 2018. Recently, Rosie has acted in judicial review and s.289 TCPA challenges; appeared in an 8-day enforcement inquiry relating to land in an AONB; acted for the order-making authority at a number of rights of way inquiries under WCA 1981; and appeared in both the Magistrates and the Crown Court in relation to environmental offences and proceedings under POCA 2002.y. To view full CV click here.

Katherine Barnes

katherine.barnes@39essex.com

Katherine practises in all areas of planning and environmental law, including the specialist areas of town and village greens, assets of community value and highways. Her clients include developers, local authorities, NGOs, community groups and individuals. She is listed as one of the 'Highest Rated Planning Juniors Under 35' by Planning Magazine. To view full CV click here.

Tom van der Klugt

tom.vanderklugt@39essex.com

Tom accepts instructions across all of chambers' practice areas. Before transferring to the Bar, Tom trained as a commercial solicitor at Freshfields, qualifying into the firm's litigation practice with a specialism in environmental, product liability and regulatory disputes. He worked on a number of major corporate investigations and class actions, as well as general commercial litigation and advisory pieces. During pupillage Tom assisted on a number of environmental law matters and, including advice in relation to the CITES regime. To view full CV click here.

Chief Executive and Director of Clerking: Lindsay Scott
Senior Clerks: Alastair Davidson and Michael Kaplan
Deputy Senior Clerk: Andrew Poyser

clerks@39essex.com • DX: London/Chancery Lane 298 • 39essex.com

LONDON
81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

MANCHESTER
82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

SINGAPORE
28 Maxwell Road #04-03 & #04-04
Maxwell Chambers Suites
Singapore 069120
Tel: +65 6320 9272

KUALA LUMPUR
#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur, Malaysia
Tel: +(60)32 271 1085