Contents

Introduction



Celina Colquhoun | Philippa Jackson | Ruth Keating

Welcome to the November issue of our Planning, Environment and Property newsletter. We decided to delay it slightly to pick up on COP26 and, as hoped, the final receipt of Royal Assent for the Environment Act 2021 on 9 November 2021.

Stephen Tromans QC provides an immensely helpful summary and insight into COP26 and what may come next.

Ruth Keating has over the past 3 years been watching, commenting on some of the clauses in the Act and now provides a run down of what is there with some useful highlights.

In addition, we have contributions from across all our practice areas in this edition – aside from the Environment Act 2021 and COP 26 we have an important article co-authored by Marion Smith QC, Joe-han Ho, Philippe Kuhn and Ruth Keating on the recently introduced Practice Direction 57AC (previously published on Chambers' Commercial, Construction and International Arbitration Blog).

Finally, Philippa Jackson highlights a number of recent planning decisions which may be of interest to practitioners.

COP 26

Stephen Tromans QC

COP 26 has come and gone, ending as we know on a somewhat downbeat note after two weeks and 40,000 participants.It's easy to be cynical, but also important to recognize the positives, and the scope to build on them.

The eventual outcome, the "Glasgow Climate Pact"was never going to be greeted with the elation of the 194-nation Paris Agreement after COP 21 in 2015 – that was an exercise in "creative ambiguity", leaving it to nations to come forward with their nationally determined contributions, which as we know fell very short of what is needed for the Paris goal of limiting warming to a relatively safe 1.5 degrees C.

The Glasgow COP 26 instead took the approach of a series of more practical agreements on subjects such as methane, coal, deforestation, finance and so on.These aren't the headline grabbing big deal which the public and media might have been looking for, but in practical terms they will have a significant combined effect and do leave the door open to further positive developments.

The aspect of the Glasgow Pact which attracted probably the most adverse attention was the decision on coal and fossil fuels, weakened by late objections from China and India to refer to "accelerating" efforts towards "phasing down" unabated coal power, and to ending "inefficient" fossil fuel subsidies, though with no timeline.The reality is of course that literally billions of people in the world currently depend totally on unabated coal for their energy needs, and the necessary abatement technology in the form of carbon capture and storage remains in its infancy.

Other disappointments were the rejection of the proposed fund to help pay for loss and damage to most affected nations – rejected by the US, Europe and Australia – and the failure to have met the 2020 target of providing $100 billion a year to

assist developing countries cut their emissions. Both of these are big issues in strategic and diplomatic terms if common cause is to be made between the developed and developing world.

On the positive side, the rules for tradable emissions reduction units (an important part of the so-called "Paris Rule Book") have finally been settled, leading to a jump in EU carbon prices, and there is an expectation on countries to improve on their efforts by the next COP in Egypt in 2022.

So where from here?

Globally

China does appear to be taking decarbonization more seriously, with its 2060 carbon neutrality pledge, but the question is whether it can deploy the trillions of dollars which will be needed and bring about radical transformation of an economy accounting for 30% of global greenhouse gas emissions and where fossil fuels currently comprise 85% of the energy mix.

In the US the Biden administration is seeking to promote important climate legislation in Congress as part of the "Build Back Better" package, with provision for over $550 bn in tackling climate change: this however is no straightforward task politically.

UK

There is of course little or nothing that any of us in the UK can do to affect these massive global developments: we are essentially spectators. However, as UK lawyers we do have roles in how the UK's own international commitments and government policies and ambitions play out. There are now three institutions which can have a role in keeping the Government up to the mark – the Climate Change Committee, the Office for Environmental Protection, and the courts. The CCC has shown itself quite effective in keeping up pressure.The effectiveness of the OEP remains to be seen as it assumes its statutory role. The courts have as yet not delivered any landmark judgments on climate change, despite the UK having what is often hailed as the most advanced legislation in the world on the issue.

It may be that further legislation will be needed to really bite on Governments which may delay or backslide under political or fiscal pressure. The passion of young people on the issue of climate change is striking, at COP 26 and before, and it is to be applauded that in September this year the UN Secretary General published the UN Common Agenda proposal for the Summit of the Future 2023 including a proposal for a Special Envoy for Future Generations, a Futures Lab and a Declaration on Future Generations.

Further to be welcomed is the Private Member's Bill on the Wellbeing of Future Generations introduced into the Lords by Lord Bird of Big Issue fame, which is intended "to make provision for public consultation to inform a set of national wellbeing goals; to require public bodies to act in pursuit of the United Kingdom's environmental, social, economic and cultural wellbeing by meeting wellbeing objectives, publishing future generations impact assessments and accounting for preventative spending; to establish a futures and forecasting report; to establish a Commission for Future Generations for the United Kingdom; to extend the duty of the Office of Budget Responsibility to consider wellbeing and the future generations principle in their work; to add onto a Minister in each government department's portfolio a duty to promote the future generations principle across government policy; and to establish a Joint Parliamentary Committee on Future Generations".

It is to be hoped that the Bill becomes law and joins the Future Generations (Wales) Act 2016 and similar proposed legislation in Scotland. What is needed from Governments is a long perspective which is protective of the future population, not just present-day voters and taxpayers.

The Environment Act 2021

Ruth Keating

Overview

The Environment Act 2021 ("the Act") has received Royal Assent on 9 November 2021 following extensive debate in Parliament. The Act introduces important requirements and changes for planners and developers.

This article does not address each aspect of the Act and chooses some key aspects of the Act to summarise namely: (i) the Office of Environmental Protection ("OEP"); (ii) scope of the Act's provisions; (iii) targets: (iv) policy statement on environmental principles; (v) biodiversity net gain; and (vi) conservations covenants.

Summary of provisions

- **The OEP:** Part 1 of, and Schedule 1 to, the Act establishes the new independent OEP to replace the functions of the European Commission and the European Environment Agency. Wednesday 17 November 2021 marked a significant day for the OEP which was, finally, legally formed. In terms of the remit of the OEP, there will be ongoing discussions with the devolved administrations. However, the OEP's remit extends at this stage to England and Northern Ireland.

- Some of the functions of the OEP will be to provide the Government with advice on any proposed changes to environmental law. Further, as those who have followed the Bill's progress will be aware there has been debate surrounding the OEP's enforcement powers and whether they had 'real teeth'. In its final form the OEP has a range of mechanisms through which to enforce compliance – including information notices, decision notices, environmental review and judicial review.

- It is worth flagging that one future area to watch is the extent to which the OEP avoids any overlap with the Committee on Climate Change. The Committee on Climate Change has advisory and reporting roles – however, it has no enforcement role under the Climate Change Act 2008. This will be one obvious area where overlap can be avoided. However, in the years to come it will be interesting to see whether there is any risk of overlap developing.

- Finally, one of the key changes introduced to the Bill in its final stages was that the Secretary of State can issue guidance to the OEP on enforcement policy and exercising its enforcement policy (as per section 25). Given, the concerns which have been expressed regarding the OEP's perceived and actual independence there were concerns that this could be perceived as an encroachment on the OEP's exercise of discretion.

- **Scope of the Act's provisions:** The majority of the provisions of the Act form part of the law of England and Wales, but apply to England only. Approximately half of the Act's provisions apply to Wales and of course a significant number of provisions extend to all of the UK.

- **Targets:** Section 1 of the Act provides that the Secretary of State must set long-term environmental targets (at least 15 year) by regulations in each of four priority areas, namely: (i) Air quality. (ii) Water. (iii) Biodiversity. (iv) Resource efficiency and waste reduction. Similarly, as per section 2 of the Act the Secretary of State must by regulations set a target in respect of the annual mean level of PM2.5 in ambient air. As per section 4, draft legislation must be laid before Parliament by 31 October 2022.

- The Secretary of State must also set a species abundance target by regulations. However, a longer deadline is provided for the species abundance target with a specified date of 31 December 2030 (as per section 3(2)).

- **Policy statement on environmental principles:** The Secretary of State must prepare a policy statement on environmental principles in

accordance with section 17 and 18 of the Act. As per section 17(5) the "environmental principles" mean the following principle: (a) the principle that environmental protection should be integrated into the making of policies; (b) the principle of preventative action to avert environmental damage; (c) the precautionary principle, so far as relating to the environment; (d) the principle that environmental damage should as a priority be rectified at source; and (e) the polluter pays principle.

- As per section 19(1), Ministers of the Crown must when making policy, have "due regard" to the policy statement on environmental principles currently in effect. Previously in draft form this only to a requirement to have "regard". However, notably the language of have "due regard" to is relatively undefined and does not, arguably, impose a very high threshold on Ministers. There are further limitations on the force of this requirement. Notably, as per section 19(3) section 19(1) does not apply to policy so far as relating to: (a) the armed forces, defence or national security: (b) taxation, spending or the allocation of resources within government; or (c) Wales.

- It will be interesting to see how these principles develop in practice. For example, the UK-EU trade and co-operation agreement includes "level playing field" commitments to prevent either party seeking a competitive edge in various regulatory areas including the environment and climate change. This includes not regressing on the levels of environment and climate protection in place at the end of the transition period (Article 7.2 of Chapter seven, Title XI of Heading One of Part Two).

- **Biodiversity net gain:** Part 6 of the Act sets out the much anticipated provisions for planners on the new 10% biodiversity net gain requirement. In essence, this imposes a new condition on all planning permissions in England that a biodiversity gain plan must be submitted and approved before development can commence (as per section 98 and Schedule 14 of the Act).

- In terms of details, as per section 100 the Secretary of State may by regulations make provision for and in relation to a register of biodiversity gain sites. This will be relevant for those sites where on site biodiversity net gain is not possible. Further, for those sites where on site biodiversity net gain is not possible section 101 makes provision for biodiversity credits whereby pursuant to section 101 the "Secretary of State may make arrangements under which a person who is entitled to carry out the development of any land may purchase a credit from the Secretary of State for the purpose of meeting the biodiversity gain objective".

- Finally, as per section 102 the general duty of public authorities to have regard for the conservation of biodiversity under the Natural Environment and Rural Communities 2006 is extended to both conserving and "enhancing" the biodiversity objective.

- **Conservation covenants:** Part 7 of the Act provides for the introduction of conservation covenants. As per section 117, a conservation covenant *"is an agreement between a landowner and a responsible body where— (a) the agreement contains provision which— (i) is of a qualifying kind, (ii) has a conservation purpose, and (iii) is intended by the parties to be for the public good".* To be of a qualifying kind a conservation covenant must: require a landowner to do, or not to do, something on land in England specified in the provision in relation to which the landowner holds a qualifying estate specified in the agreement for the purposes of the provision; allow the responsible body to do something on such land; or require the responsible body to do something on such land. A landowner, for the purposes of the provisions, must hold a 'qualifying estate' in land i.e. freehold or a leasehold granted for a fixed term of more than 7 years (and that term has not expired).

- In terms of the period for which the conservation covenant applies, unless the parties agree to a shorter period, an obligation under a conservation covenant has effect for the 'default period' which is: (i) indefinitely where the relevant qualifying estate is freehold; or (ii) where the qualifying estate is leasehold the remainder of the term. The purpose, therefore, of conversation covenants is to conserve the natural environment and heritage assets for the public good and to ensure these benefits can be maintained in the long-term. Importantly, therefore, conservation covenants bind successors in title and so this prevents the conservation covenant having no effect if the land is sold or passed on.

- Sections 124-126 of the Act deal with breach and enforcement of conservation covenants and specify that in proceedings for enforcement of a conservation covenant the available remedies are: (a) specific performance; (b) injunction; (c) damages; and (d) order for payment of an amount due under the obligation. Schedule 18 sets out requirements relating to the discharge or modification of obligations under conservation covenants. Therefore, it is intended that conversation covenants will allow a certain degree of flexibility where needed. However, the tone is very much to ensure that conservation covenants are protected in the long term and that they offer meaningful protection by having a number of enforceable remedies.

Concluding remarks

There was disagreement, to the end, on some of the proposed amendments to the Bill. Notably this included proposed Amendment 1[1] which was rejected outright. This amendment proposed that a clause be inserted which would explicitly state that the *"purpose of this Act is to address the biodiversity and climate emergency domestically and globally"*. It is reflective of the tone of some of the final provisions of the Act that nothing to this effect was included and some have criticised the Act as lacking ambition.

However, there is still some scope for ambition. The purpose of much of the Act is to enable future regulations and policymaking.As is clear from the above, there is still much clarity that is needed around some of the fundamental aspects of the Act – not least the target provisions. In terms of air quality and PM2.5 it is only relatively recently, in December 2020, that the inquest into Ella Adoo Kissi-Debrah's death concluded that she died of asthma contributed to by exposure to excessive air pollution. In November 2020, the government's independent Air Quality Expert Group launched a call for evidence on modelling PM2.5 concentrations in England and this work will inform the modelling process for developing the new PM2.5 concentration target and long-term air quality target. It is hoped that over the coming weeks and months ambitious and meaningful targets are set.

Much of the success of the Act will lie in landowners and policymakers understanding its provisions. For example, the biodiversity net gain requirements and provisions on conservation covenants provide a basis for optimism. If the provisions are used creatively and effectively, they will change the legal environmental and planning landscape for the better.

1 Reasons for rejecting the amendments were provided to the Lords: https://bills.parliament.uk/publications/43109/documents/802

How is Practice Direction 57AC bedding down: reform or revolution?

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As many readers will be aware, on 6 April 2021, a new Practice Direction 57AC came into force in the Business and Property Courts – applying to all trial witness statements signed on or after that date. The reforms have wide impact for those who use the Business and Property Courts and it is important to be aware of the changes which have been brought into place.

Several months ago when practitioners were anticipating the changes there was widespread discussion that the changes would represent a fundamental reform to the way factual witness evidence is collected and presented. It is important for lawyers and clients to alike to reflect on the ways in which witness evidence may need to be collected and statements drafted, in light of the new changes.

However, with the benefit of some recent cases opining on Practice Direction 57AC it is clear that courts want to emphasise that PD 57AC should be seen as repeating and buttressing existing rules rather than introducing radical reform. The key areas to watch in the coming months in the case law are the way in which the courts will consider the recently introduced:

- Statement of Best Practice.
- Witness's Certificate of Compliance.
- Legal Representative's Statement of Compliance.

The below article considers some of the guidance which has already been given by the courts.

I. Introduction

Six months in, and we now have guidance as to the approach the Commercial Court and the TCC will take to the new PD 57AC. In this article we will look at the answers to the 5 questions addressed so far:

- What is the purpose of PD 57AC?
- What documents should be listed under PD 57AC paragraph 3.2?
- What do you do if you want to use a third party to take a witness statement under PD 57AC?
- When and how should you raise concerns about the other party's compliance with PD 31.2 and PD 57AC?

II. Current High Court guidance

The guidance comes from two cases considering applications for redaction of witness statements under PD 57AC paragraph 5.2 and CPR 32.1.

The first in time is the decision in the Commercial Court of Sir Michael Burton in *Mad Atelier International BV v Manes* [2021] EWHC 1899 (Comm).

The impugned passages in the Claimant's witness statements all dealt with quantum. The witnesses gave hypothetical evidence, addressing what would or could have happened if joint venture parties had continued to develop an international franchise. In addition to considering PD 57AC, Sir Michael Burton carried out a useful review of the authorities dealing with the circumstances in which a fact witness can give opinion evidence.

The second is the decision in the TCC of O'Farrell J. in *Mansion Place Ltd v Fox Industrial Services Ltd* [2021] EWHC 2747 (TCC).

In this case the Claimant also applied for a revised certificate of compliance by the Defendant's legal representatives under PD 57AC paragraph 4.4 (*Mansion Place* at [19] – [20]).

The central issue was whether an oral agreement was made in a telephone call between the Defendant's managing director and the Claimant's director. Both were going to give evidence at the trial. Each party intended to call one further witness. The Defendant intended to call its Claims Consultant who had also taken the initial drafts of the Defendant's managing director's statement. The Claims Consultant was experienced and well-qualified. He had a law degree, had passed the LPC, was a chartered QS, and was a member of the RICS, the CIOB and the CIArb. He took the initial drafts of the statement as it had been more convenient and cost-effective for him to do so.

III. What is the purpose of PD 57AC?

The purpose of PD 57AC is **not** to change the law as to the admissibility of evidence at trial or to overrule previous authorities as to what may be given in evidence: *Mad Atelier* at [9] – [10] and *Mansion Place* at [37].Instead, its purpose is to eradicate the improper use of witness statements as vehicles for narrative, commentary and argument: *Mansion Place* at [37].

Parties and their legal representatives should use the Statement of Best Practice as a checklist to ensure that the witness statements they produce for trial are the evidence that the witness would give as oral evidence in chief: *Mansion Place* at [38].

IV. What documents should be listed under PD 57AC paragraph 3.2?

Under PD 57AC paragraph 3.2 the witness statement must list *"what documents, if any, the witness has referred to or been referred to for the purpose of providing the evidence set out in their trial witness statement"*.

O'Farrell J. has confirmed that this does not require the witness statement to list every document which the witness has looked at during the proceedings.

The purpose of the rule is to provide transparency in respect of documents used to refresh the memory of the witness so that the court and the other side can understand the extent to which, if at all, the witness might have been influenced by the contemporaneous documents, including those not seen at the time: *Mansion Place* at [59].

V. What do you do if you want to use a third party to take a witness statement under PD 57AC?

O'Farrell J. confirmed that there is no prohibition on a draft witness statement being taken by a non-solicitor (*Mansion Place* at [47]). This has long been the case. In *Aquarius Financial Enterprises Inc. v Lloyd's Underwriters (The Delphine)* [2001] 2 Lloyd's Rep 542 Toulson J. (as he then was) said at [50] that the task of taking a witness statement could properly be delegated by a solicitor to another person: *"who can be relied upon to exercise the same standard as should apply if the statements were taken by the solicitors themselves"*.

But in *Mansion Place* it was "inadvisable" for a factual witness to prepare the draft statement of another witness. The key issue turned on what was or was not said by two individuals in a telephone call and the credibility and reliability of their factual accounts was critical: *Mansion Place* at [47].

However, the judge was satisfied that there were sufficient safeguards, against tainted evidence, in place to allow the matter to go to trial without any amendment to the certificate of compliance. The safeguards appear to be these:

- Before the Claims Consultant started to prepare the witness statements, the Defendant's solicitor by telephone explained the approach to be adopted. In particular the statement must be in the witness's own words, be confined to the facts and avoid argument or submission and any detailed commentary on the documents: *Mansion Place* at [44].
- The Claims Consultant's first drafts of both his and the Managing Director's statements were reviewed by solicitor and counsel by

email, telephone and remote meetings with the two witnesses: *Mansion Place* at [42]

- The Managing Director's statement was revised before service to set out the words he had used rather than any paraphrasing: *Mansion Place* at [47].
- Both witnesses would be tendered for cross-examination at trial so their recollection of events could be challenged: *Mansion Place* at [47].

VI. When and how should you raise concerns about the other party's compliance with PD 57AC?

O'Farrell J gave clear guidance in *Mansion Place*.

- First, raise the concern with the other side and attempt to reach agreement.
- Then, where agreement is not possible, seek the Court's assistance by an application for determination on the documents or at a hearing.

The application to the court should be at a time and in a manner that *"does not cause disruption to trial preparation or unnecessary costs"*. Satellite litigation, disproportionate to the size and complexity of the dispute, is not encouraged. Often the trial judge will be best placed to determine specific issues of admissibility of evidence when the full bundles and skeletons are before the court: *Mansion Place* at [49].

VII. Conclusion

So far, no surprises. PD 57AC is seen as repeating and buttressing existing rules rather than introducing radical reform.In summary:

- PD 57AC's purpose is not to change the law as to the admissibility of evidence at trial.
- Existing case law on admissibility remains good law.
- PD 57AC's purpose is to eradicate the improper use of witness statements as vehicles for narrative, commentary and argument.
- When preparing the list of documents, be transparent about the documents used to refresh the memory of the witness.
- The court and other parties are entitled to understand the extent to which, if at all, the witness might have been influenced in the witness taking process by the contemporaneous documents, including those not seen at the time.
- In principle, a third party can be used to take a witness statement under PD 57AC.Whether or not it is advisable to do this depends on the particular facts. If you do use an appropriately qualified third party consider the safeguards needed to avoid tainting the evidence.
- Raise concerns about the other party's compliance with PD 31.2 and PD 57AC initially with the other side, and failing agreement with the Court in a cost and time effective way. It may be that the appropriate judge to rule is the trial judge.

Stonewater (2) Ltd v Wealden District Council v Secretary of State for Housing, Communities and Local Government [2021] EWHC 2750 (Admin) & *Tewkesbury BC v Secretary of State for Housing, Communities and Local Government* [2021] EWHC 2782 (Admin)

Philippa Jackson

In *Stonewater (2) Ltd v Wealden District Council v Secretary of State for Housing, Communities and Local Government* the High Court has provided a clear reminder of the legally binding nature of s106 agreements, which social housing developers will do well to bear in mind when looking to acquire sites for development. The case also emphasises the importance of providing clear evidence demonstrating a commitment to social housing when seeking relief from the Community Infrastructure Levy (CIL).

Facts

The Claimant, Stonewater, is one of the UK's leading providers of social housing.They challenged Wealden District Council's decision that a 169-house development did not qualify for social housing relief from CIL. Stonewater had acquired the site in September 2020 with the benefit of outline planning permission for 169 houses to be built. The permission was subject to a s106 agreement stating that 35% of the properties shall be affordable and the Council had also determined that a sum of £3,066,609 in CIL would be payable on the development.

The Claimant explained that it regularly acquires sites which are subject to a s106 agreement that secures a relatively low level of affordable housing with a view to increasing affordable housing delivery to 100% when they come to develop. The Court was told that this is a common approach taken by social housing developers. Upon acquiring the site in September 2020, in line with their aim to provide 100% social housing at the site, the Claimant immediately applied for social housing relief for all 169 units in the development and further asserted this relief was necessary for the development to be viable.

On 21 December 2020 the Council refused the application, in short, on the basis that the s106 agreement controlled the amount of affordable housing on the site and limited it to 35%. The Claimant re-applied for relief on 18 January 2021, again on the basis that all 169 dwellings were to be provided as affordable housing alongside a statement further detailing the Claimant's proposals and their view that the s106 agreement merely provided a base line level of affordable housing. In light of this, the Claimant declined to enter into a new s106 agreement binding them to provide 100% social housing as they believed such an agreement was unnecessary.

On 5 February 2021 the Council again refused the Claimant's application on the basis that (1) they had not provided sufficient evidence to demonstrate that all 169 houses provided would be affordable so as to qualify for CIL relief, and (2) that in any event the s106 agreement provided for affordable housing at a level of 35%, no higher or lower. The Claimant sought judicial review of the Council's decision primarily on the basis that it had been wrong to consider the s106 agreement as relevant to whether or not the CIL relief should be granted and/or by concluding the agreement limited the amount of affordable housing which could be provided. They also alleged the Council had improperly placed weight on its own interest in obtaining additional money under the levy.

Judgment

Mrs Justice Thornton dismissed the Claimant's arguments on all grounds, finding that it was entirely rational and lawful for the Council to refuse the Claimant's application on the basis of insufficient evidence. Whilst noting that the Claimant was correct that a s106 agreement is not *legally* required to obtain CIL Relief, Mrs Justice Thornton stated that where there is an existing s106 agreement in place, its *evidential value* is highly relevant.

She went on to find that the existing s106 agreement meant that the Claimant's assertion that they would provide 100% affordable housing would not actually be a proposition that could be lawfully relied upon, unless and until the Council agreed to a fresh s106 agreement or to vary the existing one. Given the Claimant's refusal to enter into a new s106 agreement, which would have resolved the issue, Mrs Justice Thornton said it was entirely rational and unsurprising that the Council was not satisfied that sufficient evidence had been provided to obtain relief from CIL.

Mrs Justice Thornton emphasised that neither her judgment nor the Council's decision was based on the proposition that, as a matter of law, all applications for social housing relief must be accompanied by a legal obligation to carry out the proposed scheme. Social housing relief from CIL is mandatory where the relevant conditions are met, in this case through being able to demonstrate that 100% of the properties would be affordable. Where an existing s106 agreement sets a limit on the number of affordable properties at a level below that required for the social housing relief sought the judge concluded that it is logical, if not inevitable that a council would conclude the relevant conditions cannot be met – absent variation of the s106 or further agreement.

On the Claimant's third ground, Mrs Justice Thornton held that 'absent a very specific justification' the Court would not go behind the reason for refusal of the application which had been given by the Council. The reason provided had been sufficient to refuse the application, regardless of whether there may have been other reasons.

Comment

Mrs Justice Thornton has confirmed the importance of s106 agreements as part of the evidential context of a development and her judgment provides a clear warning for developers to remember they will be automatically bound by any pre-existing s106 agreements.

Read in the converse, Mrs Justice Thornton's judgment that the levels of affordable housing set in a s106 agreement are effectively conclusive evidence in terms of CIL relief, can be seen to provide support for the idea that where a s106 contains a commitment to 100% affordable housing the grant of social housing relief from CIL would also be logical if not inevitable. Here the Claimant had been encouraged to enter into a new or varied s106 which would support that but they declined to do so.

It is thus important for social housing developers and their advisers who are anticipating high level of CIL relief in respect of social housing to be mindful now of the evidence that will be expected and in particular the nature of any existing s 106 agreements in place in respect of a site which they intend to develop out. This approach would minimise the amount of other evidence required and help to ensure they will not be struck by an unwelcome and higher CIL bill.

Tewkesbury BC v Secretary of State for Housing, Communities and Local Government [2021] EWHC 2782 (Admin)

The long-running issue of whether previous oversupply of housing should be taken into account in calculating a local authority's five-year housing land supply when determining a planning application for residential development remains without a definitive answer following the judgment in *Tewkesbury BC v Secretary of State for Housing, Communities and Local Government* [2021] EWHC 2782. Mr Justice Dove in this case found that whether housing oversupply should be taken into account is a matter of planning judgment, absent an answer from the Government or in the NPPF on how the issue should be approached.

Facts

On 25th October 2019 the interested party, the Developers, applied to the Claimant, Tewkesbury BC, for outline planning permission for 50 dwellings. On the 16th June 2020 this application was refused and the interested parties appealed collectively. On the 12th January 2021, following

a public inquiry, outline planning permission was granted by the Inspector. The Claimant sought to quash this decision with the argument primarily coming down to the extent of Tewkesbury Borough Council's housing land supply shortfall.

A key issue was the local authority's obligation under the NPPF to demonstrate a five-year housing land supply. The Council argued they had a supply of 4.37 years if the oversupply of previous years was taken into account, whereas the Developers argued the supply was in fact only 1.84 years. The Inspector had concluded that there was no requirement in the NPPF to take previous oversupply into account and that she had deep concerns about the trajectory of Tewkesbury's housing land supply. In these circumstances she found that the planning balance fell in favour of granting permission for the development.

The Council challenged the Inspector's decision on two primary grounds. (1) That the NPPF should be interpreted as requiring past oversupply to be taken into account and (2) alternatively, that the oversupply was obviously a material consideration such that it was irrational of the Inspector not to take it into account.

Judgment

Mr Justice Dove rejected the Council's claim on both grounds. Notably, he found that the NPPF was silent on what account, if any, should be taken of oversupply in previous years. and he saw no warrant for the court to draw such an inference (or, if such an inference was to be drawn, how this exercise should be approached). He also found that the Council was not assisted by the PPG's advice at ID: 68-031 and 032, which provides advice on offsetting past undersupply. Dove J concluded it was a matter of planning judgment as to how this issue should be determined.

Dove J further rejected the Council's contention that taking into account oversupply was a binary question of whether it should be considered at all or not. Rather, he noted that there might be several broad policy approaches to how past-oversupply might be taken into account and that adopting a prescriptive approach would be contrary to the practical need for flexibility.

The Council's second ground of irrationality also failed. Mr Justice Dove held that reading the Inspector's decision fairly and as a whole, it was apparent that she was aware of the previous oversupply as a material consideration but that she correctly concluded it was a matter forher planning judgment as to how it should be dealt with. The concern she raised about the Council's trajectory for future housing supply was thus reflected in the limited weight she gave to the prior oversupply and this was an entirely rational approach.

Comment

The lack of a definitive approach to this contentious issue will undoubtedly be frustrating for planning authorities and developers alike. The approach of the Inspector, as approved by Mr Justice Dove, in considering the Council's future housing trajectory suggests that Councils seeking to have previous oversupply taken into account, especially as an offsetting measure against current undersupply, should first and foremost ensure their plan for future delivery is clear and achievable. The decision is also yet another reminder of the difficulty of succeeding on an irrationality challenge to the exercise of planning judgement. Mr Justice Dove's dismissal of this ground was nothing if not robust, concluding that it was without any substance.

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Marion specialises in complex, high-value commercial and construction disputes in the UK and internationally. She has extensive experience as counsel before domestic courts and tribunals as well as in international arbitration. She has been appointed as sole, chair and party appointed arbitrator and as an adjudicator. Marion is ranked in Chambers and Partners and The Legal 500 for Construction and Professional Negligence and in Chambers Global and The Legal 500 Asia Pacific for Construction, where she is described as *"An amazing, first-class barrister who is organised and excellent at managing teams of lawyers and experts."* Marion is a Fellow of the Chartered Institute of Arbitrators, Deputy Chair of the Chartered Institute's Board of Trustees and Deputy Chair of the International Committee of the Bar Council of England and Wales. She is also a Master of the Bench of Gray's Inn. To view full CV click here.

Celina Colquhoun

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Celina regularly acts for and advises local authority and private sector clients in all aspects of planning and environmental law. She also regularly appears in the High Court and Court of Appeal in respect of statutory challenges and judicial review. She undertakes both prosecution and defence work in respect of planning and environmental enforcement in Magistrates' and Crown courts. She specialises in all aspects of compulsory purchase and compensation, acting for and advising acquiring authorities seeking to promote such Order or objectors and affected landowners. Her career had a significant grounding in national infrastructure planning and highways projects and she has continued that specialism throughout. *"She has a track record of infrastructure matters"* Legal 500 2019-20. To view full CV click here.

Philippa Jackson

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Philippa undertakes a wide range of planning and environmental work, including planning and enforcement appeals, public examinations into development plan documents, and challenges in the High Court. She is recommended as a leading junior in planning, environmental and aviation law by the directories and she has been consistently rated as one of the top planning juniors by Planning Magazine. Recent cases and appeals of note in 2020/2021 include successfully acting (as junior to Thomas Hill QC) for Stansted Airport in its appeal against the refusal of permission for its expansion proposals and (as sole counsel) in *Gluck v Secretary of State for Housing Communities and LocalGovernment* [2020] EWCA 161 Admin. To view full CV click here.

Joe-han Ho

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Joe-han practises across the full spectrum of commercial disputes. He has a particular focus on contractual, insolvency, construction, civil fraud, and financial services disputes. He has appeared in the Court of Appeal, the High Court (including as sole counsel against Queen's Counsel in the Commercial Court), and the County Court. He also appears before international arbitral tribunals. Previously, Joe-han practised as a solicitor at Cleary Gottlieb Steen & Hamilton LLP where he focused on international arbitration and commercial litigation. He also held teaching positions at King's College London (trusts & equity) and Durham University (contract law). He is regularly published on a range of commercial law matters. To view full CV click here.

Ruth Keating

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Ruth is developing a broad environmental, public and planning law practice. She has gained experience, during pupillage and thereafter, on a variety of planning and environmental matters including a judicial review challenge to the third runway at Heathrow, protected species, development and land use classes, enforcement notices and environmental offences. Last year Ruth was a Judicial Assistant at the Supreme Court and worked on several environmental, planning and property cases including R (on the application of Lancashire County Council); R (on the application of NHS Property Services Ltd) (UKSC 2018/0094/UKSC 2018/0109), the Manchester Ship Canal Company Ltd (UKSC 2018/0116) and London Borough of Lambeth [2019] UKSC 33. She is an editor of the Sweet & Maxwell Environmental Law Bulletins. To view full CV click here.

Philippe Kuhn

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Philippe has a broad and international practice specialising in commercial, public, mixed civil (including property) and employment disputes. He has a particular interest in commercial matters with an international dimension (including arbitration, civil fraud, energy, construction, banking, insolvency, jurisdiction and choice of law and insurance disputes) and cases at the intersection of private and public law (in particular procurement and Human Rights Act damages claims). This builds on his international background, growing up in Switzerland and Sri Lanka, before reading law at the LSE and Oxford and qualifying as a barrister in England. To view full CV click here.

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