INTRODUCTION

Jonathan Darby

Welcome to this week's edition of our Planning, Environment and Property newsletter. It has been another busy week for the group, with the launch of our new webinar series "39 from 39". The inaugural Planning law episode featured Richard Harwood QC, Celina Colquhoun and Daniel Stedman Jones discussing three Supreme Court cases, whilst today's episode featured Damian Falkowski and David Sawtell on the topic of "Exiting the lockdown – property and development disputes and their resolution". They have proven to be very popular and we have found this new format to be an excellent means of connecting with many familiar faces, as well as some new ones. Watch this space (https://www.39essex.com/category/seminars/) for further episodes during the weeks commencing 11th and 18th May. As ever, we very much welcome feedback, as well as suggestions for future topics for discussion.

In this week's edition we have articles from David Sawtell (on recent developments in the law of proprietary estoppel); Rose Grogan (on the impact of lockdown on air quality and some issues that

Contents

may be coming down the line once the current restrictions are lifted); Stephen Tromans QC (first, revisiting his thoughts on the likely rise in waste and other forms of environmental crime resulting from lock-down; second, updating us as to Sizewell C); and Celina Colquhoun (reflecting on where we are with the tilted balance in light of a recent judgment of Mr Justice Holgate). We hope that you enjoy the read!

PROMISES TO KEEP: RECENT DEVELOPMENTS IN THE LAW OF PROPRIETARY ESTOPPEL

David Sawtell

In *Habberfield v Habberfield* [2019] EWCA Civ 890; 22 ITELR 96, Lewison LJ quoted the poet Robert Frost's words in *'Stopping by Woods on a Snowy Evening'*:

> *'The woods are lovely, dark and deep,*
>
> *But I have promises to keep.'*

The point made in that case at [33] was that, *"Underpinning the whole doctrine of proprietary estoppel is the idea that promises should be kept."* The circumstances in which promises are made about the disposition of rights in land outside of a formal legal instrument are protean. Unsurprisingly, therefore, the doctrine has been called upon in cases ranging from the assertion of an easement against a local authority (as in *Joyce v Epsom and Ewell BC* [2012] EWCA Civ 1398, or *Crabb v Arun DC* [1976] Ch 179), a development agreement with echoes of an overage payment on the grant of planning permission (*Yeoman's Row Management Ltd v Cobbe* [2008] UKHL 55; [2008] 1 WLR 1752) or a dispute arising from an invalid option to renew a lease (*Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd, Old and Campbell Ltd v Liverpool Victoria Friendly Society* [1982] QB 133). Recently, however, the law reports have been dominated by its use as an argument in agricultural businesses run by families, following *Gillett v Holt* [2001] Ch 210 and *Thorner v Major* [2009] UKHL 18; [2009] 1 WLR 776. Practitioners should be alive, however, to the trends shown in a number of recent decisions, even where the fact pattern in the instant case they are advising on does not involve a family farm.

One consistent theme is that the courts have been reluctant to impose rigid rules on the application of the doctrine of proprietary estoppel, either in respect of establishing liability or when considering remedies. The Privy Council considered the issue at the end of 2019 in *Mohammed v Gomez* [2019] UKPC 46; 22 ITELR 652. Mr Gomez and others had erected houses on land belonging to Mr Mohammed and his predecessors in title. Even in the absence of an actual spoken promise that the land would be conveyed to them, it was held that they were entitled to a remedy. In standing by in silence and acquiescing in their conduct, the landowner had represented that they had an interest in the land. The Board emphasised at [26] that it was doubtful how possible or useful it was to draw *"fine distinctions"* between different categories of representation: *"once one has moved beyond claims based on specific contractual rights, there may be no clear division between the nature and quality of any alleged verbal assurances, and the conduct of the respective parties in response."* The uncertainty of any assurances given may not necessarily be fatal to a claim.

Unconscionability is central to the doctrine, even if its precise contribution is hard to pin down (see, for example, the discussion by Martin Dixon in 'Confining and defining proprietary estoppel: the role of unconscionability' (2010) 30 Legal Studies 408-420). In *Habberfield*, the claimant had worked on the family farm all her life relying on the assurance that once her parents could no longer run the business it would be passed to her. In 2008, her parents offered to make her a partner in the business. This fell short of her expectation as she would not have overall control. The Court of Appeal rejected the submission that the refusal of this offer meant that her equity was extinguished. There are cases where a claim has failed because of things that have happened since the expectation was created and the detriment suffered: in most of these cases, however, the

claimant received something in exchange for their detriment. Lewison LJ made it plain that promises lie at the foundation of the doctrine. In *Habberfield*, the claimant had not abandoned her expectations and her parents had not changed their position in the belief that she had no further claim upon them. This should be contrasted with the first instance decision in *Horsford v Horsford* [2020] EWHC 584 (Ch). The defendant attempted to assert an equity arising out of proprietary estoppel as a defence to a claim arising out of a partnership agreement that was entered into after the alleged equity arose. Mr M Rosen QC sitting as a Judge of the Chancery Division rejected this. He noted that the effect of a later contract on an earlier promise is a fact-sensitive one, citing *Whittaker v Kinnear* [2011] EWHC (QB) 1479. The agreement in this case specifically dealt with the property where it was alleged the claim to a proprietary estoppel equity had arisen. At [165], he noted that any such rights were extinguished by the contract: *"When a person has rights in respect of property, and then enters into a contract which is inconsistent with the continued existence of those rights, the person is estopped from asserting those rights".*

One further point that emerges from recent case law is the flexibility of the remedy available to the court. Neither reliance nor expectation emerged as the dominant paradigm in Habberfield, where it was noted at [68] that *"there was no clear point of division between different categories of proprietary estoppel claims"*. In March 2020, the Court of Appeal re-affirmed this approach in *Guest v Guest* [2020] EWCA Civ 387, where Floyd LJ at [48] reflected on the academic debate as to the determination of the remedy and the refusal of the courts to engage in it: *"The courts have preferred to identify its aim or task as the fashioning of a remedy that is appropriate in all the circumstances of the case to satisfy the equity that has arisen, and so to avoid an unconscionable result."* In refusing the appeal, he noted at [75] that, *"the courts have asked, in a first stage, whether an equity arises, and then, in a second stage, how the equity is to be satisfied in order to do justice. There is no intermediate stage in which one seeks to define or quantify the precise extent of the equity which arises."* The remedy may not even be proprietary: in *Habberfield and Guest*, as well as the earlier case of *Davies v Davies* [2016] EWCA Civ 463; [2017] 1 FLR 1286, the remedy was money.

Agricultural businesses have been part of the fact pattern for a number of the most recent cases on proprietary estoppel, but they are far from being its only arena. The doctrine operates even though, as Robert Frost wrote, the parties have litigated *"without a farmhouse near"*. Whether the claim is for money or an easement, John Mee's observation in his case comment on Joyce ((2013) 3 Conv. 156-164) as to the *"open-textured nature of proprietary estoppel and the lack of clarity on the question of remedies"* still rings true.

AIR QUALITY AND LOCKDOWN: SHORT TERM HOPE BUT LONG TERM CHALLENGES

Rose Grogan

Over the last few years, much government and judicial time has been devoted to how to achieve compliance with EU limit values for nitrogen dioxide in the shortest possible time (the legal test in Directive 2008/50/EC). The UK is still not compliant with EU limit values for Nitrogen Dioxide (NO2), 10 years after the deadline for compliance. This article looks at the impact of lockdown on air quality and some issues that may be coming down the line once the current restrictions are lifted.

Over the course of 2019, local authorities were looking at how to implement local measures to achieve compliance with EU limit values for Nitrogen Dioxide (NO2). Some local authorities had announced measures, with cities such as Leeds planning to implement their clean air zones by as early as January 2020. Lockdown and pressures on local authorities to divert resources to the front line of the pandemic has caused significant delays to clean air zones.

Before the pandemic, poor air quality was one of the more highly publicised and pressing public

health and environmental issues. Even during the pandemic, we are starting to see studies identifying a correlation between poor air quality and worse outcomes for coronavirus victims. So far, three studies have been publicised which identify a correlation between air pollution and high coronavirus fatality rates. The most recent (which has not been peer reviewed) has sought to link air pollution and coronavirus deaths in England. Other studies from the USA and Western Europe show similar results. The studies looked at a number of different pollutants, including NO2 and fine particulate matter (PM). The study in the USA concluded that there was a link between coronavirus fatalities and increases in fine particulate matter concentrations in the years before the pandemic. These studies are brand new, and no causal link has been established. However, for those who know about these things, it seems plausible that people with respiratory conditions caused by poor air quality are at greater risk of becoming seriously unwell from coronavirus. More recently, it has been suggested that air pollution might help to spread coronavirus, as virus particles have been detected on air pollution particles.

Scientists have repeatedly made clear that there is no safe level of air pollution. The EU limit values for NO2 and PM represent a ceiling rather than a "safe level". If there is any kind of causal link between pollution and coronavirus (either spread or outcomes) then this will only serve to put more pressure on governments to act to keep pollution levels as low as possible. However, this is not going to be an easy feat.

At the moment, the UK is obliged to achieve compliance with EU limit values in the "shortest possible time". As the ClientEarth litigation has confirmed, this obligation gives very little room to manoeuvre and there is no scope to trade off economic considerations or proportionality in the English public law sense. However, faced with lockdown and the need to divert staff and resources to dealing with the pandemic, a number of local authorities have had to delay or modify their plans for implementing clean air zones. For example:

- London has suspended the congestion charge and ULEZ to facilitate key workers moving around the capital.
- Birmingham City Council wrote to government at the end of March 2020 to request a delay to implementing its CAZ to end of the year (the CAS was supposed to be in place by the summer). However, the Birmingham CAZ was already running behind due to equipment delays.
- Leeds has suggested a further delay beyond September 2020.
- Oxford's zero-emissions zone has been put on hold, possibly until Summer 2021 (was due in December).

In addition, Local Authorities will be facing difficulties in monitoring for air quality where this is not done automatically.

As things stand right now, air pollution has fallen significantly due to a drastic reduction in traffic in our cities and towns. However this is only temporary and we can already see traffic volumes creeping up as some return to work and lockdown fatigue sets in. It is not clear how a few weeks of drastically reduced traffic will feed in to annual compliance figures. Lockdown-related drops in pollution should not give any grounds for complacency.

Looking a little further down the line, there may be a number of knotty problems for local and central government to deal with.

First there are the delays to clean air zones. Even when the immediate crisis abates, local authorities will be facing increasingly stretched budgets and will still need to divert staff (especially environmental health teams) to coronavirus issues. Previous modelling may well be out of date given changes to traffic flows and patterns of working/commuting when people return to work. Consultations will have to be re-thought and re-designed to cope with social distancing

and ensuring that hard to reach groups can be consulted digitally.

Second, there may be political pressure from air quality sceptics to scale back or abandon current measures on the basis that lockdown has improved poor air quality in some areas. On the other side of the argument, local authorities may face challenges for failing to achieve compliance in the shortest possible time. All of this is likely to give rise to new litigation risks, with the accompanying strain on time and resources and potential to delay the implementation of air quality measures even further.

Third, Central Government may come under pressure to re-think its approach to NO2 and fine particulate matter. The Environment Bill provides the option for the government to set a long-term target for air quality generally and requires the government to set a target for reducing PM2.5 (see clauses 1 and 2). However both of these could have a deadline for compliance of in excess of 15 years. If emerging research supports a causal link between air pollution and coronavirus then this may need some serious re-thinking.

There is, however, room for optimism. The coronavirus pandemic has put public health issues at the forefront of the national consciousness and recent media attention given to air quality will keep it near the top of the political agenda. Local authorities will need revenue and so measures such as road and congestion charging may well be attractive. Social distancing is here for the long term and this is likely to require re-thinking of how we use public space with an increase in active transport (walking and cycling). This crisis may well be an opportunity for renewed and redoubled efforts on all sides.

.

RIVERS OF SEWAGE, BLOATED MARES AND REDUNDANT SEX TOYS – LOCK DOWN BITES?

Stephen Tromans QC

Previous issues of the Newsletter have speculated on the likely rise in waste and other forms of environmental crime resulting from lock-down and closure of household waste and other waste recycling facilities, coupled with constraints on regulators to monitor and to investigate possible offences.

It appears sadly, that such is the case.

Despite the expressed wish by the Government for recycling centres to open, it is plain that the vast majority of local councils and operators are not currently doing so – partly because of the view that a trip to the local recycling centre is not "essential" and partly because of concerns as to the difficulty of ensuring social distancing. The most recent survey evidence suggests that 92% have closed their sites. ENDS Report has noted that both local government surveys and anecdotal evidence are showing significant rises in waste crime. The National Rural Crime Network, which includes police and crime commissioners as well as groups such as the National Farmers Union, the Countryside Alliance, and Neighbourhood Watch has written to the Environment Secretary to make clear its concerns.

In one tragic case, it was reported that horses which had gorged themselves on large amounts of fly-tipped grass cuttings had suffered bloating and had to be destroyed.

Another story in ENDS this week concerns the discharge by Thames Water of sewage from Chesham Sewage Works into the River Chess Chalk Stream every day from 28 February until 18 April. The discharge is said to have been caused by infiltration of groundwater into the sewerage network. The discharge was originally spotted by the local river interest group. Given the absence of

monitoring by the Environment Agency as a result of the crisis it may be problematic to see what degree of environmental damage has resulted. It will also be interesting to see – in a case which in normal times one suspects would have most likely led to a prosecution, how the enforcement plays out.

Finally, on a lighter note *The Times* (27 April 2020) has reported a plague of discarded sex dolls in Germany, giving rise to both a growing nuisance and mistaken murder crime scenes. Sightings of the very lifelike latex mannekins in woodland, canals and rivers have "triggered particularly elaborate and tense salvage operations". German authorities have warned that sex-doll dumping is wasting police time and can lead to prosecution. The newer latex models are – presumably – more difficult to discard than the "blow up" predecessors beloved of stage and hens parties. The incidents appear to refer to 2019, and one can only speculate that a positive effect of lock down may be that the proud owners will wish to hang on to their sex doll, perhaps leading to a lull in this scourge?

TILTED[1]?

Celina Colquhoun

This is clearly a time for reflection for many of us in the midst of the C19 lockdown and there seems therefore no better time to look back at one of the most central features of the planning world the National Planning Policy Framework (NPPF) which was finally published back in March 2012. This hugely significant document acted to replace the great raft of Planning Policy Statements and Circulars that had guided planning decisions hitherto but also sought to change the way those decisions were made as a response to need to help seed an economic recovery after 2008 .

The central thought in this paper is where did we think we were going with the NPPF and where have we ended up by comparison and also to ask whether the Government might perhaps turn to the NPPF once more to help the UK economy recover from the pandemic?

The draft NPPF, published in July 2011 for consultation, stated the following in its Introduction as being the Coalition Government's intentions at the time (not forgetting it was the then Chancellor of the Exchequer George Osbourne who had announced the forthcoming draft):

> *"16.The Government's top priority in reforming the planning system is to promote sustainable economic growth and jobs... The Chancellor* ***made clear in this year's Budget the Government's expectation that the answer to development and growth should wherever possible be 'yes', except where this would clearly conflict with other aspects of national policy.***
>
> *17. The* ***presumption turns this expectation into policy*** *– a policy that works with the existing plan-led approach, by* ***emphasising the role of up-to-date development plans*** *in identifying and accommodating development needs. Where those* ***plans are not up-to-date,*** *or* ***do not provide a clear basis*** *for decisions,* ***the policy establishes the clear presumption that permission should be granted, provided there is no overriding conflict with the National Planning Policy Framework as a whole.****"* [emphasis added]

With regard to the issue of housing demand going unmet it is also interesting to note at the time the view expressed was that it was the *"system of bureaucratic, top-down housing targets"* which had not only *"failed"* but had *"created opposition to the very idea of housing growth"*.[2]

In addition, the original draft para 14 (which is now amended and encompassed in para 11 of the revised 2019 NPPF) was as follows:

1 Not to be confused with Christine & Queens' 2015 hit of the same name!

2 NPPF Consultation Document para 28

"Local planning authorities should plan positively for new development, and approve all individual proposals wherever possible. Local planning authorities should:

Prepare Local Plans on the basis that objectively assessed development needs should be met, and with sufficient flexibility to respond to rapid shifts in demand or other economic changes.

Approve development proposals that accord with statutory plans without delay.

Grant permission where the plan is absent, silent, indeterminate or where relevant policies are out of date.

All of these policies should apply unless the adverse impacts of allowing development would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole."

As we all know the wording of NPPF 2012 [14] changed quite considerably prior to its publication in March 2012. With regard to decision taking it stated -

"14. At the heart of the National Planning Policy Framework is a presumption in favour of sustainable development, which should be seen as a golden thread running through both plan-making and decision-taking.

…

For decision-taking this means: (10)

- *approving development proposals that accord with the development plan without delay; and*
- *where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:*
  - *any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or*
  - *specific policies in this Framework indicate development should be restricted.(9)"*

In addition, NPPF 2012 [47 and 49] gave emphasis to ensuring a significant increase in housing land supply and set out the effect that failure to demonstrate a 5 year housing land supply has, namely that it would operate such that *"relevant policies for the supply of housing should not be considered up-to-date"*.

And the rest is (legal) history.

Out of the many cases which sought the Court's view as to the proper application of the presumption(s) contained in NPPF 14, the notion of the 'tilted balance' gained firm hold as a way to describe the process of its application, most notably in Lord Carnwath's judgment in *Hopkins Homes Ltd. v Secretary of State for Communities and Local Government* [2017] 1 W.L.R. 1865 at [54] in which he stated *"the primary purpose of paragraph 49 [of the NPPF] is simply to act as a trigger to the operation of the "tilted balance" under paragraph 14"*.

In 2018 and 2019 revisions were made and we now have NPPF 2019 [11] in place of NPPF 2012 [14]. This refers simply to the application of *"a presumption in favour of sustainable development"* and makes no reference to any *"golden thread"*. In terms of decision taking [11] states .

"…. this means:

c) approving development proposals that accord with an up-to-date development plan without delay; or

*d) where there are no relevant development plan policies, or the **policies which are most important for determining the application are out-of-date** (7), granting **permission unless:***

i. the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed(6); or

*ii. **any adverse impacts** of doing so would **significantly and demonstrably outweigh** the benefits, when assessed against the policies in this **Framework taken as a whole**."* [emphasis added]

In addition, the effect or the trigger previously contained in NPPF 2012 [47 and 49] has now been encapsulated in footnote 7 to NPPF 2019[3].

The first time the Courts considered the application of NPPF 2012 [14] was in a case where the presumption had resulted in the grant of permission for 1000 + housing units on unallocated farm land, contrary to the local plan, in the face of the absence of a 5 year supply of housing ('5YHLS') *R. (oao Tewkesbury BC) v Secretary of State for Communities and Local Government* [2013] J.P.L. 1166; [2013] 9 E.G. 92 (C.S.);[2013] P.T.S.R. D33. The challenge was based around an argument that such an approach wrongly displaced a Council's plan making duties i.e. allowing significant strategic planning decisions to be imposed upon it before a Council had had time to make them itself through the plan led system.

The Hon Mr Justice Males described the circumstances as they stood pre NPPF with PPS3 and then post NPPF as follows and in effect concluded there was nothing very new [20-21]:

> *"20…. both before and after the issue of the NPPF, the need to ensure a five year supply of housing land was of significant importance. Before the NPPF the absence of such a supply would result in favourable consideration of planning applications, albeit taking account also of other matters such as the spatial vision for the area concerned. After the NPPF, if such a supply could not be demonstrated, relevant policies would be regarded as out of date,* ***and therefore of little weight*** *[sic], and there would be a* ***rebuttable presumption in favour of the grant of planning permission****. All of this would have been well understood by local planning authorities. An authority which was not in a position to demonstrate a five year supply of housing land would have recognised, or ought to have recognised, that on any appeal to the Secretary of State from a refusal of permission there would be at least a real risk that an appeal would succeed and permission would be granted.*
>
> *21. That is* ***not to say****, however, that the* ***absence of a five year housing land supply*** *would be* ***conclusive in favour*** *of the grant of planning permission.* ***It may be that*** *the NPPF, with its emphasis in paragraph 47 to the need "to boost significantly the supply of housing",* ***placed even more importance on this factor than PPS 3 had done****, but whether or not that is so, in both regimes the absence of such a supply* ***was merely one consideration required to be taken into account, albeit an important one****."* [emphasis added]

There was of course no reference to a 'titled balance' at that stage.

Jump forward 7 years to last month – on 6 March, when most of us were only beginning to come to grips with the extraordinary notion that the communities across the whole world were going to have to treat themselves as being under siege, a judgment was handed down by Mr Justice Holgate President of the Upper Tribunal (Lands Chamber) and Planning Liaison Judge in the case of *Gladman Developments Ltd v SSHCLG & Corby BC & Uttlesford DC* [2020] EWHC 518 (Admin) ('Gladman 2020').

This is the most recent exposition of the application of the 'tilted balance' by the Courts and, once again, in the context of the absence of a 5YHLS. It is recommended reading for anyone heading to the Planning Court soon for a number of practical reasons but it also serves to illustrate where we have got to with the NPPF.

3 This includes, for applications involving the provision of housing, situations where the local planning authority cannot demonstrate a five year supply of deliverable housing sites (with the appropriate buffer, as set out in paragraph 73); or where the Housing Delivery Test indicates that the delivery of housing was substantially below (less than 75% of) the housing requirement over the previous three years. Transitional arrangements for the Housing Delivery Test are set out in Annex 1.

The first reason the Holgate J's judgment is useful is that, whilst ostensibly it is about how decision makers should apply NPPF 2019 [11] (d)(ii)[4] it provides a helpful 'ready reckoner' for the relevant authorities on the interpretation of policy and when the Court's will or will not intervene [73].

As set out in that passage these are reflected in Holgate J's earlier judgment in *Monkhill Limited v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 1993 (Admin) at [39] to the SC's judgment in *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] UKSC 3 at [32]) is added.

In short, the meaning of policies must be considered objectively, having regard to the full range of circumstances in which they may be applied, and not through the lens or prism of a party which has been unsuccessful in a planning decision. Holgate J also reminded parties and advocates of the continued warnings of the Courts against excessive legalism, especially in relation to alleged misinterpretations of policy

Secondly, it does the same for the key principles to date on the presumption in favour of sustainable development by reference to the judgment of Lindblom LJ in *East Staffordshire Borough Council v Secretary of State for Communities and Local Government* [2018] PTSR 88 at [10] to [23] and [34] to [35] and which Holgate J summarised as follows [80]:

> *"Where paragraph 11(d)(ii) of the NPPF 2019 is triggered because of a shortage of housing land, it is a matter for the decision-maker to decide how much weight should be given to the policies of the development plan. It is common ground between the parties that this also applies to the "most important policies" referred to in the Framework. But the presumption in favour of sustainable development is not irrebuttable and planning permission may still be refused. This is the territory of planning judgment into which the court may not go save to apply public law principles (approving* ***Crane v Secretary of State for Communities and Local Government*** *[2015] EWHC 425 (Admin) at [70] to [74]).*

Thirdly, with regard to the central issue, namely how decision makers should apply the exercise under NPPF 2019 11 (d) once triggered, the judgment addresses the Claimant's particular arguments that the NPPF required a 2 stage process. That process it was submitted meant carrying out the NPPF 2019 [11 (d)] balance first and then carrying out the exercise under s.38(6) of the Planning and Compulsory Purchase Act 2004 second, namely, assessing whether the application accorded with the development plan and if not only granting permission where material considerations indicate otherwise. Significantly the Claimants argued that when it came to applying NPPF [11(d)(ii)] the decision maker should not take account of development plan policies.

Holgate J rejected this approach. This was on the principal basis that it is to s. 38(6) to which the decision maker must turn and which [81] *"lays down the legal principle that the decision on a planning application is to be governed by the development plan, read as a whole, unless other material considerations indicate otherwise (see e.g. City of Edinburgh at pp. 1449-50 and 1458-9). The policies in the NPPF do not have the force of statute. Under the statutory scheme a policy in the NPPF is relevant to a planning decision as an "other material consideration", to be weighed in the balance under s.70(2) of TCPA 1990 and s.38(6) of PCPA 2004 (****BDW Trading Ltd v Secretary of State for Communities and Local Government*** *[2017] PTSR 1337 at [21]). The policies in that Framework have to be understood in the context of the development plan led system. Moreover, the NPPF cannot, and does not purport to, displace or distort the primacy given by the presumption in s.38(6) to the statutory development plan (Hopkins at [21])."*

4 ie how to weigh the adverse impacts of granting permission against the benefits and whether those adverse impacts would significantly and demonstrably outweigh the benefits *"when assessed against the policies in this Framework taken as a whole"*.

He went on at [82] –

> *"82. When a decision-maker judges that development plan policies are out-of-date it is still necessary for him to consider the weight to be given to that conclusion and the relevant development plan policies bearing upon the proposal. Likewise, where policy 11(d)(ii) is triggered because a 5 year supply of housing land cannot be demonstrated, the decision-maker will still need to assess the weight to be given to development plan policies, including whether or not they are in substance out-of-date and if so for what reasons. In these circumstances the NPPF does not prescribe the weight which should be given to development plan policies. The decision-maker may also take into account, for example, the nature and extent of any housing shortfall, the reasons therefor, and the prospects of that shortfall being reduced (see e.g.* ***Crane v Secretary of State for Communities and Local Government*** *[2015] EWHC 425 (Admin))."*

The conclusions drawn by Lord Carnwath in Hopkins at [54] to [56] in respect of the operation of the tilted balance in 2012 NPPF [14] still applied to 2019 NPPF [11] in that it had to apply to all forms of development and development plan policy not just to housing and that the weight to be given to development policies under paragraph 14 (i.e. in the tilted balance) was a matter of judgment for the decision-maker. This meant that the whilst both [14] and now [11] refer to the tilted balance being *"assessed against the policies in this Framework as a whole"* without explicit reference to development plan policies, Holgate J made it clear that *"the courts have made it plain that the weight to be attached to development policies, whether telling in favour of or against a proposal, was a matter to be assessed in that balance."*

There was also no double counting which arose or needed to be avoided by applying the 2 stage process advocated by the Claimants.

Holgate J added a helpful note as to the three scenarios when 2019 NPPF paragraph 11(d)(ii) should operate [94]:

> *"(1) There are no relevant development plan policies;*
>
> *(2) The policies which are most important for determining the application are* ***assessed*** *by the decision-maker as being out-of-date;*
>
> *(3) A shortfall in the requirement for a 5 year supply of housing land triggers the application of paragraph 11(d)(ii) by* ***deeming*** *those policies important for the determination of the application to be out-of-date."*

A fourth aspect of this judgment to highlight is an issue that often arises in respect of claimed benefits from a housing scheme as a material consideration. The Claimant argued that the Inspector in one of the 2 decisions had wrongly taken into account an immaterial consideration by giving the economic benefits of house-building and occupation reduced weight on the basis that they are benefits of all housing development and which are not 'unique'.

Holgate J concluded that taking into account the presence or absence of a unique quality about a development's benefits was lawful and that, if a decision-maker does so, it is for him to determine the weight to be attached to the presence or absence of that quality. In the circumstances the judge noted, the Inspector had given this factor moderate weight in any event.

There is a fifth aspect to the judgment which is the very firm discouragement of the submission of further witness statement evidence in statutory planning challenges which in effect provide a further explanation or submission. In this case the WS provided an analysis of a number of previous Planning Inspectors' decision letters. This view from the Planning Liaison judge is clearly to be heeded by practitioners as well!

So where are we then with the NPPF and the earlier ambitions of the Government to bring forward economic growth through the planning regime by making *"the answer to development and growth wherever possible be 'yes', except where*

this would clearly conflict with other aspects of national policy" as well as removing 'top down' housing number requirements ?

It may be trite to say so, but planning decisions are inevitably about tensions and more often than not about political tensions. Attempts by Government to give overriding primacy to allowing development to proceed because it is key to economic growth will always be held in check by environmental harm and other social and economic issues both perceived and real. This is perhaps the inevitable clash which led to the initial expressions of the draft NPPF being in effect watered down.

Males J's judgment in 2013 clearly was correct in his analysis that there was not in fact a huge difference between the days of PPS3 and the new NPPF, albeit that the weight in favour of a housing scheme as a consequence of the planning authority failing to meet its housing figures became encapsulated in a new format ie that it would act to reduce the weight to be attached to policies acting to prevent that development. It is interesting to note that Males J suggested that rendering relevant policies out of date meant they would have *"little weight"* – this however was not a conclusion that was maintained in subsequent decisions. In addition as we see from Holgate J's judgment in *Gladman 2020*, there is no primacy to be given to the NPPF policies.

To that end, is there really a 'tilted' balance at all or are we not in reality or more simply firmly in the realms of the operation of s.38(6) with the NPPF being a material consideration and merely guidance?

It should be noted that the claimant in *Gladman 2020* has applied to the Court of Appeal so we may yet see this debate again. If in future however (if the decision is upheld) the Government turns its eye upon the planning system actively to increase development as a response to post Covid 19 economic issues, it is reasonable to suggest the Government may have to consider changes to legislation, as opposed to changes to policy, to ensure that increase is brought about.

SIZEWELL C, OPPOSITION AND PLANNING PROCESS

Stephen Tromans QC

It is expected that EDF will shortly submit its application for a development consent order to build two nuclear reactors at Sizewell C in Suffolk. The proposal seems likely to face strong and high-profile, judging from a letter by almost 60 signatories in The Times on 28 April, including actor Bill Nighy, artist Maggi Hambling, Bill Turnbull the broadcaster, the CEO of Adnams Brewery and the founders of Hopkins Homes and Foxtons estate agents. Their claim is the unsuitability of the site, within protected landscapes, in proximity to RSPB Minsmere, and on an unstable coastline. These are of course exactly the issues that will need to be tested in the DCO process. The concern of the objectors is that the timing of the application, with COVID-19 restrictions and constraints, may mean that the robustness of the process will be compromised. Of course, even if the application was made now, hearings would be some months down the line. However, inevitably the ability of objectors to marshall evidence and scrutinise the massive suite of application documents will be affected. The project is likely therefore to be an intriguing test of how the DCO system will work in a time of crisis.

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.

Celina Colquhoun

celina.colquhoun@39essex.com

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.

David Sawtell

david.sawtell@39essex.com

David specialises in substantial real property, construction and development disputes, as well as insolvency, commercial and company law work related to the same. His work frequently has an international edge, involving cross border and overseas transactions and disputes, and has a growing appellate practice. He appears regularly in the Chancery Division, Upper Tribunal, and the First Tier Tribunal (Property Chamber) in respect of both residential leases and land registration, and has considerable experience of commercial leasehold disputes. He is instructed as leading junior counsel by a core participant in the Grenfell Tower inquiry. To view full CV click here.

Rose Grogan

rose.grogan.barnes@39essex.com

Rose has an extensive practice spanning planning, environmental and public law. She regularly acts for local authorities and developers in public inquiries and high court litigation. Rose is highly regarded across a number of practice areas: she is ranked in Chambers and Partners for environmental law and local government law and regularly features in industry lists of top rated junior counsel (Legal Week's Stars at the Bar, Planning Magazine top juniors under 35, The Planner's women of influence). She is one of the go-to counsel for air quality issues, having acted for the Mayor of London in ClientEarth No2. Rose is fast developing an impressive environmental practice. She has particular expertise in contaminated land (she acted as junior counsel to Stephen Tromans QC in *Price and Hardwicke v Powys CC* [2017] EWCA Civ 1133). Rose also has extensive experience of advising on issues arising out of the birds and habitats directives, in particular marine habitats and protected species. She has also advised on European Commission infraction proceedings for breach of the Habitats Directive. Rose appears in the criminal courts as prosecution and defence counsel in planning enforcement and environmental crime. She is a member of the Attorney General's B Panel of Counsel. 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.

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