Contents

Introduction



Celina Colquhoun | Philippa Jackson | Ruth Keating

Welcome to the 'bumper' edition of our Planning, Environment and Property newsletter in time for the Opening of the Legal Year on 1st October 2021. It is all too easy to look back at this time last year, which ushered in further darker days before the relative dawn we have experienced of late and feel that hesitancy again. However, come what may there has been an extraordinary number of interesting cases and a constant feed of proposed legal and policy reforms in the Planning Environment and Property world to keep us occupied! We intend in this new series of Newsletters to provide you with a mixture of commentary on what is in the policy and law reform pipeline, as well as reflecting on the latest cases of note.

In this edition, Stephen Tromans QC and Victoria Hutton consider a landmark recent decision by Fordham J on the duties of the Environment Agency under the Human Rights Act 1998. Daniel Kozelko provides an update on costs at the permission stage, following the Supreme Court's decision in *CPRE Kent v Secretary of State for Communities and Local Government* [2021] UKSC 36. Philippa Jackson considers the vexed question of Low Traffic Neighbourhoods, which have come under the Court's spotlight again in *R (HHRC Ltd) v Hackney Borough Council* [2021] EWHC 2440 (Admin). Celina Colquhoun writes about an enforcement case, *Bansal v SSHCLG* [2021] EWHC 1604, in which Katherine Barnes acted, which highlights the thorny issue of the difference on the one hand of the creation of a dwellinghouse and on the other its 'use' as such in order to establish material change of use to a dwellinghouse for the requisite enforcement immunity period under s.171B.

In addition, Celina Colquhoun picks up from her work on the Independent Review of Administrative Law (IRAL) panel and its recommendations with a short analysis of the implications of the first two clauses of the Judicial Review and Courts Bill which is due to have its second reading in October.

Finally, Ruth Keating gives us a "taster" of a series of articles to come on the progress of the Environment Bill, as it makes its way through the final stages of the parliamentary process.

Looking forwards, other matters to highlight at this stage are of course that we have a new Lord Chancellor and Justice Secretary in Dominic Raab, a role which he is to combine with his role as Deputy PM; as well as Michael Gove as the new Secretary of State for Levelling Up Housing and Communities. The latter, other than getting us used to using the acronym LUHC, has seemingly put back all thoughts of a draft Planning Bill for a while and indeed we are led to believe put away a great deal of the dramatic White Paper Proposals from August 2020. This also seems a very long time ago…

We do however have considerable movement on the suite of Energy NPS which are in the process of review, with the stated aim of designating updated NPSs by the end of 2021. In addition, in August the "National Infrastructure Planning Reform Programme: stakeholder survey" was launched. This runs until December 2021.

COP 26 is almost upon us and is being heralded as the most significant climate change event since the signing of the Paris Agreement in 2015. We will be following developments closely in the newsletter going forward.

Finally, our Pilot Briefings service has proved very popular for all of our clients to use and remains open. To utilise the service, we will require a short email detailing the issues at hand and the

questions you would need addressing. On receipt, a 15-minute time slot will be arranged with a member of our established team of silks, senior juniors and juniors, who will be able to discuss the legal query you have. If you would like to book a Pilot Briefing with one of our Planning, Environment and Property experts, then please contact:

Andrew Poyser
Deputy Senior Clerk
andrew.poyser@39essex.com | 020 7832 1190

or

Elliott Hurrell
Practice Manager
elliott.hurrell@39essex.com | 020 7634 9023

Harmful emissions and human rights duties

***R(oao Richards) v Environment Agency* [20201] EWHC 2501**

Stephen Tromans QC
Victoria Hutton

On 16 September 2021 Fordham J handed down his decision in respect of hydrogen sulphide emissions from Walleys Quarry Landfill Site. The decision has attracted great interest in both the national and specialist environmental press. The judgment relates to the Human Rights Act duties of the Environment Agency as regulator of the site and it does have something of the feel of a landmark case, successfully invoking Articles 2 and 8 of the European Convention on Human Rights.

The claim was brought by Mathew Richards, a five year old boy, living in Silverdale, close to the former quarry and landfill. Local residents are severely affected by odour emissions of hydrogen sulphide gas from the site. Matthew is subject to particular risk. He was born prematurely and suffers from bronchopulmonary dysplasia (BPD). The evidence from a consultant respiratory pediatrician was that continued exposure to hydrogen sulphide was likely to lead to him developing chronic obstructive pulmonary disease (COPD) which would dramatically reduce his life expectancy.

Mathew's case was that in failing to regulate the site so as to deal with this risk effectively, the Environment Agency was in breach of its duties to him under Article 2 (right to life) and Article 8 (respect for home and family life). Before discussing aspects of the case, it is worth setting out the declaration made by the Court:

> "In order for the Environment Agency to comply with its legal obligations, the Agency must implement the advice of Public Health England as expressed in the Fourth PHE Risk Assessment (published 5 August 2021), by designing and applying and continuing to design and apply such measures as, in the Agency's regulatory judgment, will and do effectively achieve the following outcomes in relation to emissions of hydrogen sulphide from Walleys Quarry Landfill Site: (1) the reduction of off-site odours so as to meet, as early as possible and thereafter, the World Health Organisation half-hour average (5PPB); and (2) the reduction of daily concentrations in the local area to a level, from January 2022 and thereafter, below the US EPA Reference Value (1PPB) as the acceptable health-based guidance value for long-term exposure."

There will no doubt be many who as potential claimants or claimant lawyers will wish to rely on the decision as a precedent in cases where they consider that the Environment Agency, local authorities or other regulators are failing to take action to bring to an end serious nuisances from odour, noise or air pollution. Cases where private nuisance claims against landfill operators or other industrial facilities in private nuisance have generally been preceded by many years of fruitless complaint to the relevant regulator. However, it is important to understand that a number of factors came together in this nuanced and carefully considered judgment to result in the successful

outcome. These may not so clearly be present in other cases.

First, the starting point in HRA cases is the victim. A substantial part of the judgment is devoted to considering Mathew's medical condition and prognosis if he continued to be exposed to hydrogen sulphide pollution. In particular he could on the evidence satisfy the test laid down in the European Court of Human Rights jurisprudence to trigger the "positive operational duty" on the Environment Agency under Article 2, the requirement being either that the victim's condition constitutes an inevitable precursor to the diagnosis of disease, or that their current condition is of a life-threatening nature (*Brincat v Malta* Application No.60908/11 (24.7.14) (the Malta Drydocks case)).

Secondly, there was the approach to the evidence. The judge was faced with a clash of expert evidence as to "safe" levels of hydrogen sulphide. For the operator as interested party there was evidence from Professor Sir Colin Berry, a histopathologist and toxicologist, to the effect that he could identify a "good reliable safety level" in relation to potential adverse effects to human health. For the claimant there was evidence from Dr Ian Sinha, a consultant respiratory paediatrician, who effectively said there was no such thing as a safe level. What is particularly interesting is the way that the judge handled that evidence, by subjecting Professor Berry and Dr Sinha to "hot tubbing" to test and understand their evidence by the judge asking agreed questions. It appears that this was a helpful and – importantly – a transparent exercise. A large portion of the judgement is taken up with extremely careful consideration of the evidence. In fact the judge tested the expert evidence against reference levels derived from Environment Agency, World Health Organisation and US sources. He accepted neither expert as correct and, as will be seen from the declaration, relied in particular on the US material as providing health based guidance for long term exposure. Not every Administrative Court judge would have been willing to grapple so meticulously with the evidence.

Thirdly, and related to the second point, the Court had the benefit of a very recent report by Public Health England, the Fourth PHE Risk Assessment, which was the most recent PHE health risk assessment of air quality monitoring results in respect of Walleys Quarry. It was so central to the case that it is worth setting out in full para. 33 of the judgment:

> "The Fourth PHE Risk Assessment, in my judgment, stands as a beacon in this case. It is clear and transparent. It is a coherent, reasoned analysis. It makes clear, assessed choices as to relevant "health-based guidance values". It makes clear, assessed evaluations of 2017-2019 emissions and 2021 emissions. It addresses acceptability and unacceptability. In particular, it identifies two things that really matter in addressing the unacceptable 2021 emissions. First, ongoing exceedances of the WHO half-hour Guideline (5PPB) are not acceptable. Secondly, exceedances after 2021 (beyond day 365) whose daily average is above the US EPA Reference Concentration (1PPB) are not acceptable. The advice, found in the strong recommendation, is therefore twofold. First, that all measures be taken to reduce off-site odours as early as possible so that the WHO half hour guideline (5PPB) currently exceeded for "a considerable percentage of the time" (9%, 12%, 6% and 31%) is met, addressing the undesirable current effects on people's well-being and the symptoms they are experiencing. Secondly, that all measures be taken to reduce concentrations in the local area for 2022 (day 365 and beyond) below the US EPA reference concentration (1PPB), being the acceptable level and health-based guidance value used to assess long-term exposure, returning to the compliance with this level observed for 2017-2019, but having applied the more generous US ATSDR Intermediate Value (20PPB) to emissions during 2021 (up to day 364). These are real and significant changes. It is worth remembering that the odour threshold for hydrogen sulphide is 8PPB. Given the particular

> significance which chronic long-term exposure has in the present case, it is important to recognise that this is what the daily average of 1PPB addresses. In very simple terms, it means that for every time that emissions are at, say, 1.5PPB there would need to be, say, an equivalent time when they are below 0.5PPB. Or for every time they are at, say, 2PPB there would need to be, say, twice as long when they are below 0.5PPB. Otherwise, the average of 1PPB will not be met, as it must be. It matters, if public health is going to be protected. Especially for Mathew."

It is undoubtedly this report which underpinned the decision and the declaration made. The Agency had done the right things in monitoring and in seeking PHE's advice. However that in itself was not enough. As the judge stated at para. 60:

> "… to fail to adopt the clear advice and recommendations of PHE, referable to protective and precautionary health-based standards identified as appropriate by PHE, would be to fail to comply with the positive operational duty. Only recognition, acceptance and implementation of PHE's advice – through the design of effective measures to achieve the outcomes in PHE's advice – could satisfy the positive operational duty given the real, anxious and evidenced health concerns relating to Mathew, a vulnerable child."

The Agency had on its evidence formulated an action plan which identified 18 actions at the site, with planned completion dates the latest of which is 24 December 2021. However, this did not satisfy the judge that the Agency had complied with its operational duty. The reasons were set out as follows (para. 63:

> "(1) There is a necessary discipline in setting a clear objective, by reference to an accurately articulated understanding of what outcome needs to be secured and by when, and then working out what steps will achieve that objective of that outcome in that timeframe. There is a what, and a when. There is also a who. The discipline involves someone taking responsibility for the exercise of judgment. Someone needs to say: 'I have assessed that these measures will achieve below-1PPB average hydrogen sulphide emissions from January 2022'… (2) The Court has thousands of pages of materials and yet there is no document before the Court which adopts that discipline, or begins to do so. I find it impossible to imagine that the discipline could be performed without some document somewhere reflecting that this was what was being done … if there is a plan, it would have been set out somewhere. (3) There is no reference, anywhere, to the long-term US EPA Reference Concentration (1PPB) average being achieved from January 2022. Yet … that is the clear logic of the Fourth PHE Risk Assessment and the second recommendation, PHE having applied the US ATSDR Intermediate Value (20PPB) for 2021 … That is an important, and a straightforward point. (4) None of the witness statements from the EA tell me that this is what has happened, and it would be easy to say if this were the position."

The Environment Agency sought permission to appeal against para. 63 and the declaration – this was refused, but may be pursued before the Court of Appeal. Whether or not it is, the decision constitutes a remarkably valuable analysis of the case law, a possibly ground breaking approach to the assessment of technical evidence in judicial review cases, and a refreshingly modern approach to scrutiny of regulatory functions. This brings us to the last point where the stars aligned for Mathew and his parents: the luck of the draw as to which judge they got. It has to be said that some judges in the Administrative who might have heard this case would not have been willing to approach it in the way which Fordham J did. It would have been very easy to simply say that unless it misdirected itself in law, the Agency had a wide discretion as to how it dealt with the issue of reducing emissions. As Fordham J acknowledged at para 51 of the judgment:

> "The latitude for judgment and appreciation, on the part of the public authorities charged with

> licensing and supervisory functions in relation to dangerous industrial activity, is extremely important and the Court must never lose sight of it. That latitude is well understood by the judicial review courts. It is clearly recognised in the context of the EA as a specialist regulator: see *R (BACI Bedfordshire) v Environment Agency* [2019] EWCA Civ 1962 [2020] Env LR 16 at §§87-88."

However, Fordham J was able to bring together that latitude with the need for urgent action to safeguard Mathew's life and health. The words of the declaration resolve that tension effectively: "… by designing and applying and continuing to design and apply such measures as, *in the Agency's regulatory judgment, will and do effectively achieve the following outcomes* in relation to emissions of hydrogen sulphide from Walleys Quarry Landfill Site …" There is therefore an obligation of result but an exercise of judgment as to how to achieve it. It is to be hoped that the Agency will now achieve what Fordham J referred to as the "flightpath" to effective reductions. What seems clear is that without this judgment there would have been a risk of matters dragging on for a long time in dispute between the Agency and the operator, leaving Mathew exposed to ongoing harm.

Stephen Tromans QC specialises in environment and energy law and has been involved in many of the leading cases on odour nuisances from landfills, sewage works and industrial sites.

Victoria Hutton specialises in planning, environment and energy law. She has acted in numerous cases involving the environmental permitting regime.

Stephen and Victoria acted for the Secretary of State for the Environment, Food and Rural Affairs in 2020 in successfully defending a claim by Mums For Lungs in respect of urban air pollution and its relationship with the COVID pandemic.

CPRE Kent and costs at the permission stage

Daniel Kozelko

Introduction

In *CPRE Kent v Secretary of State for Communities and Local Government* [2021] UKSC 36 the Supreme Court has handed down an interesting case commenting on costs when permission to commence a statutory review or judicial review is refused. Practitioners will do well to bear Lord Hodge's analysis in mind when advising clients on the costs risk at the permission stage of proceedings.

Facts

This case concerned a costs order arising out of the statutory review of a planning decision (which proceeds under CPR Practice Direction 8C). The Supreme Court accepted that these principles would equally apply to judicial review proceedings under CPR Part 54.

In 2017 Maidstone BC (**Maidstone**) adopted a local plan following an inspector appointed by the Secretary of State for Communities and Local Government (**SSCLG**) finding it sound[1] under the Planning and Compulsory Purchase Act 2004. The plan included a policy (**the Policy)** that a certain site owned by Roxhill Development Ltd (**Roxhill**) would be allocated for mixed employment floorspace.

CPRE Kent challenged the adoption of the Policy. The claim was served on the SSCLG as first defendant, Maidstone as second defendant, and Roxhill as an interested party. All filed acknowledgements of service and summary grounds for contesting the claim. Subsequently, Lang J held that the £10,000 Aarhus cap provided for under CPR Part 45 applied to the claim, but refused permission to proceed. In respect of costs she made an award of £2,879 to the SSCLG, £5,245.50 to Maidstone, and £1,875.50 to Roxhill. This entirely exhausted the £10,000 cap. The costs order was confirmed twice on appeal. The issue then reached the Supreme Court.

1 Subject to some amendments.

Judgment
Giving the judgment of the Court, Lord Hodge first noted that issues of costs will rarely be considered by the Supreme Court. These issues are ones to be addressed primarily by the Court of Appeal, as it is that court which has the speed and sensitivity required to hear more relevant cases over time. However, because it is the Court of Appeal which has responsibility for monitoring developments in practice, it must keep its decisions under review. As such, the Court of Appeal should not treat its rulings on principles of practice as binding legal precedents from which it could not depart.

Turning to the case, Lord Hodge referred to *Bolton MDC v Secretary of State for the Environment (Practice Note)* [1995] 1 WLR 1176. In planning cases, that case established the following principles: (i) the Secretary of State will normally be entitled to the whole of their costs when successful in defending a decision; (ii) the developer will not normally be entitled to costs unless there was a separate issue on which they were entitled to be heard or on which their interests require separate representation; (iii) a second set of costs is more likely to be awarded at first instance than on appeal; and, (iv) an award of a third set of costs will rarely be justified, even if in theory there are three or more separate interests.

However, these principles were set out before the introduction of the acknowledgement of service procedure in the CPR in 1999. Crucially, there is now an obligation on defendants or interested parties to file an acknowledgment of service and summary grounds which was not there previously. A person risks losing an entitlement to attend the permission hearing, which might give an opportunity to defeat the claim at an early stage, if this is not done. Further, if a person only attends the substantive hearing, they may be penalised in costs for failing to raise a successful issue earlier at the permission stage. Indeed, nothing excludes costs for the preparation of an acknowledgement of service in the CPR. Paragraph 7.5 of Practice Direction 54A only excludes the costs of attending a permission hearing; this is a separate issue to filing an acknowledgement of service. As such, the rules in Bolton need to be read in light of the new rules in the CPR (which are comparable across Part 54 and Practice Direction 8C). In those circumstances, the question will be whether the costs of the additional parties were reasonable and proportionate. In considering whether the costs are proportionate, replication of another's arguments is, however, relevant to whether costs will be awarded.

Comment
Here the Supreme Court has clarified the rules in Bolton, and explained how they must adapt to properly coexist with the rules on acknowledgements of service and permission hearings. Practitioners would be well advised to explain to potential claimants that, quickly following the service of the statement of facts and grounds, they will be at significant costs risk. Indeed, as in this case, potential claimants benefitting from the Aarhus cap may become liable for the full £10,000 very early on. As to advising defendants and interested parties, practitioners should be careful to avoid the duplication of work of others in an acknowledgement of service and summary grounds.

Low traffic neighbourhoods, the latest…

Philippa Jackson

Low traffic neighbourhoods ("LTNs") introduced in response to the Covid-19 pandemic have proved controversial, to say the least, and have attracted widespread media attention. It is hardly surprising, therefore, that there have now been several attempts to challenge the implementation of LTNs in the Courts, albeit with limited success to date.

In June 2021, Kerr J dismissed a judicial review challenge brought by a disabled resident to the introduction of LTNs in Lambeth through the mechanism of experimental traffic orders ("ETOs"):

see *R (Sheakh) v London Borough of Lambeth* [2021] EWHC 1745 (Admin).

Now we have the judgment of Dove J in *R (HHRC Ltd) v Hackney Borough Council* [2021] EWHC 2440 (Admin), handed down on 6th September 2021, whereby the Court dismissed a judicial review challenge to the adoption by Hackney Council of an Emergency Transport Plan entitled "Rebuilding a Green Hackney – Emerging Transport Plan: responding to the impacts of Covid-19 on the transport network". This included the proposed introduction of LTNs as part of a suite of alternative traffic management measures, although these LTNs had already largely already been created through the use of ETOs made under section 9 **Road Traffic Act 1984** in response to the Covid-19 pandemic.

HHRC argued that, in adopting the ETP, the Council had failed to discharge its traffic management duties under section 16 **Traffic Management Act 2004** and had failed properly to investigate the impact on air quality of the proposals, as well as breaching the public sector equality duty ("PSED") under section 149 **Equality Act 2010** by failing to have due regard to the impact of the proposals on vulnerable groups. Finally, the Claimant argued that there had been a failure to undertake proper consultation.

In relation to the Council's duties under section 16 of the 2004 Act, however, Dove J emphasised the significance of the Covid guidance and the circumstances which prompted the SSoT to act by producing it. The Covid-19 global pandemic created an entirely unprecedented emergency and one which called for prompt action to address a situation for which there was little precedent and no blueprint. Moreover, given the extremity of these circumstances, the guidance clearly contemplated action being taken urgently and within weeks. The ETP's "promotion of temporary and experimental LTNs accompanied by further monitoring and consultation" was held to be entirely consistent with the advice in the statutory guidance.

For the same reasons, it was no breach of the network management duty to adopt the ETP without conducting surveys and modelling of the impact on road users and residents, since the guidance clearly identified a requirement for urgent action which did not allow for the undertaking of extensive further inquiries and investigations. There was also no unlawfulness in implementing the ETOs on a temporary basis, followed by air quality monitoring and evaluation of air quality impacts.

Finally, the Court noted that the LTNs remain experimental and temporary in nature and that there would be an opportunity to examine the effects of the schemes on traffic movements and air quality during the experimental operation of them.

The claim based on alleged breach of the PSED also failed. Applying *Sheakh,* Dove J observed that "it is possible in some circumstances for a form of iterative or progressive assessment of equalities impacts to properly discharge the PSED" and held that this duty had been properly discharged here, bearing in mind that LTNs or similar schemes had been included within earlier policies adopted by the Council, as well as the availability of review of the impacts in the light of further monitoring, consultation and response. As Dove J put it, the ETP "is part of a continuum and its focus upon equality impacts was sufficient and proportionate for the stage within the process which it occupied."

As to the alleged failure to consult, it was common ground that there was no express statutory duty to consult under section 16 of the 2004 Act. Nor was there a common law duty to consult upon the ETP itself, bearing in mind the Covid-19 guidance produced to deal with the conditions created by the pandemic, which envisaged in relation to Covid-19 related traffic management initiatives that consultation would take place alongside and at the same time as experimental implementation. So, where does this leave legal challenges to LTNs introduced in response to the pandemic? While each case will need to be considered on a case-by-

case basis, it is clear that the Covid-19 guidance and the wholly exceptional circumstances of the pandemic provide considerable protection to Local Planning Authorities seeking to introduce LTNs through the mechanism of ETOs. The temporary nature of ETOs and the fact that they allow for 'real time' monitoring and evaluation, as well as further consultation in due course, were also factors to which Dove J gave considerable weight.

Nonetheless, it remains to be seen whether the evidence supports making LTNs a permanent fixture. As recently as 19th September 2021, Ealing Council announced that it plans to abolish seven of its LTNs, due to widespread public opposition and a lack of evidence of any positive impact on either traffic congestion levels or local air quality. At the stage of making LTNs permanent, we can expect heightened scrutiny of the evidence in support of and against their creation and, perhaps, a greater willingness on the part of the Courts to review the lawfulness of such decisions.

Establishing Change of Use to Dwellinghouse post Subdivision of Unit

Bansal v SSHCLG [2021] EWHC1604

Katherine Barnes
Celina Colquhoun

This case involved an appeal under s.289 of the Town and Country Planning Act 1990 ('the 1990 Act') against an Inspector's decision dismissing an Enforcement Notice appeal under-ground (d) of s.174(2). The central issue revolved around the fact that a single property had been sub divided to create 2 dwelling units and that it was accepted there was sufficient evidence to show that one of the units had been continuously used as a dwellinghouse for the requisite 4 years but not the other. On that basis the Inspector had upheld the enforcement notice.

It goes back to the often thorny issue of the difference on the one hand of the creation of a dwellinghouse (when is a house a house?) and on the other its 'use' as such in order to establish material change of use to a dwellinghouse for the requisite 4 year immunity period from enforcement under s.171B.

Mrs Justice Lang in her judgment back in June 2021 went back over the established cases in this context i.e. *Doncaster MBC and Van Dyck v Secretary of State for the Environment* (1993) 66 P & CR 61 together with *Impey v Secretary of State for the Environment* (1984) 47 P & CR 157 as well as *Welwyn Hatfield Council v Secretary of State for Communities and Local Government* [2011] UKSC 15 which centre on how operational development effects change of use. This then was contrasted with the need under s.171B to show continuous residential use or occupation as per the judgment in *Swale BC v FSS & Less* [2005] EWCA Civ 1568.

Impey established the importance and relevance of the 'physical state' of a building when deciding if a material change of use had taken place, in particular its conversion to a dwelling albeit that *"it is not decisive…These matters have to be looked at in the round."* This was approved by the Supreme Court in **Welwyn Hatfield** (the 'infamous' haybarn that was a house case) which concluded that, far from a material change of use of the barn having occurred, the barn had been built as a dwelling from the start. This was contrasted with the conclusions in **Swale** which looked specifically at the need to show continuity of the unlawful use (in that case the residential **use** of a barn) for the relevant period in order to meet the immunity test on appeal under s.174(2)(d) of the 1990 Act.

The nature of the breach in **Bansal** involved the conversion of a single dwelling unit into two dwellings units which it was clear had occurred more than the requisite 4 years prior to the notice. However, the fact that one of those units was **not** continually occupied despite the continued existence of the 2 dwellings as dwellings was considered key to the failure to meet the immunity test.

The breach alleged in the enforcement notice was *"use of* [the property] *as two self-contained flats"*. The Inspector upheld the notice on the basis that the evidence in respect of one if the flats showed it had *"been occupied continuously for more than four years"* but that the evidence in respect of the other did not show that *"when the notice was issued, no enforcement action could be taken in respect of the breach of planning control"*.

Notably the Inspector made no findings as to the date on which the operational development leading to the conversion from one to two units had taken place only that it had occurred and stated that it was for the Appellant to show that the material change of use of the property ie *"to two self-contained flats ('the use') took place at least 4 years before the issue of the enforcement notice, that the use was continuous for 4 years thereafter and that the use was not subsequently lost[sic]"*.

The Appellant, represented by Katherine Barnes of 39 Essex Chambers, challenged the decision under s.289 on 2 grounds:

1) that the Inspector's finding that the Appellant had failed to establish the use of one flat for the requisite period was irrational, given his findings in relation to the other and
2) that the inspector had failed to have regard to a relevant consideration, namely, whether the internal physical changes to the building were in themselves indicative of a change of use and limited his assessment unlawfully by looking solely at occupation instead of considering the broader concept of use itself which was informed by physical works.

Lang J rejected the Appellant's challenge and upheld the Inspector's approach. She concluded in particular that in the light of the judgments in *Thurrock and Swale,* it was rational for the Inspector to require the Appellant to establish that both flats had been occupied as separate dwelling houses throughout the four-year period, so as to demonstrate that the Council would have been able to take enforcement action during that time and did not.

It was not sufficient in her view for the Appellant to establish that the Property had been physically converted into two flats, nor that one alone was occupied throughout the four-year period. This was because in her view *"that would not have enabled the Council to take enforcement action against the Appellant in respect of the entire Property, for a material change of use from a single dwelling house to two dwelling houses".* In other words, Lang J seems to have been saying that the internal works to the property (which as we know are not development per se under s.55(2)) even if 2 dwellings had been created thereby without **use of both** and continuously meant that in those periods when only one was in use no material change of use could have been shown.

This of course would have been consistent with the fact that the property had been a single dwelling so its previous and subsequent use would have been highly relevant to judging the materiality of the change. It is also clearly consistnet with the specific advice in s55(3) which confirms that "[f]*or the avoidance of doubt it is hereby declared that for the purposes of this section—*

> *(a) the use as two or more separate dwellinghouses of any building previously used as a single dwellinghouse involves a material change in the use of the building and of each part of it which is so used";*

The slightly tantalising question that arises though is, despite what the judgment in Swale confirms about the importance of actual 'use', whether the same conclusions could be drawn if the property in Bansal had originally been non- residential use and then been subdivided to make 2 flats. It would be difficult to make the same point about the absence of a material change of use in the face of the creation of the two dwellings even if only one or even neither had been occupied continuously for 4 years. Swale was itself also focused on continuous residential use of a barn but where the barn itself had not physically become "a dwelling house".

It is interesting as ever to see what gets thrown up by enforcement cases.

Judicial Review & Courts Bill – Suspended and Prospective Quashing Orders and the Future of Ouster Clauses

Celina Colquhoun

On 21 July 2021 the Government published the Judicial Review and Courts Bill in the House of Commons. The then Lord Chancellor, Robert Buckland QC, in introducing the Bill, said that he saw himself as a *"constitutional plumber"* in his approach to the Bill. However as some, including in particular the Chair of the Bar, Derek Sweeting QC, have put it is difficult to find a *"leaking tap"* to plumb.

This is taken to be a reference in particular to what is often called 'judicial overreach' and what this and other Governments have often expressed concern about when they see the Courts appearing to step squarely into the terrain of politics and policy making in the course of judicial review cases. The case most often cited is the controversial Brexit related 'Miller 2'[2] *"prorogation case"* of course.

As Lord Faulks however said,[3] who headed up the panel of which I and Vikram Sachdeva QC (also of 39 Essex Chambers) formed part, the report of the Independent Review of Administrative Law (published in March 2021) (IRAL), having addressed directly the sorts of constitutional concerns which had been raised as a consequence of 'Miller 2', concluded that *"it was very much a one-off and an unreliable basis on which to conclude that there was something structurally awry with judicial review, which is a vital ingredient in the rule of law"*.

We know that the Government's response to the IRAL report flagged up a number of initiatives that went further than the report's recommendations and also created a debate about what the report actually concluded about judicial overreach. Those additional suggestions related in particular to the wider or general use of ouster clauses to prevent judicial review being available in certain circumstances but also in respect of limiting the effect of a successful claim for judicial review either by suspending it for a short while or by making the 'remedy' prospective only.

The former was a recommendation of IRAL and the latter was not. In addition, with regard to ouster clauses IRAL carried out a detailed analysis.[4] It approached the issue at [2.89] of the report *"on the assumption that the doctrine of Parliamentary sovereignty means that Parliament has the power to legislate in such way as to limit or exclude judicial review" but urged caution stating that the "wisdom of taking such a course and the risk in doing so are different matters. Indeed, the Panel considers that there should be highly cogent reasons for taking such an exceptional course."*

Judicial Review is obviously a fundamental part of how planning decisions are tested both at a local level and thereafter when the Secretary of State decides a planning or enforcement appeal on a statutory basis under s288 and 289 of the Town and Country Planning Act 1990. It also forms the basis to test the lawfulness for example of local plans (see s113 of the Planning and Compulsory Purchase Act 2004); Development Consent Orders (see s118 Planning Act 2008; CPO's (see s23 Administrative Law Act 1981).

Many of us wondered what would ultimately come forward in the proposed Bill however when it was published it was clear that the great majority of it addressed certain procedural aspects and that the Judicial Review related aspects, set out in Clauses 1 and 2 of the Bill, are relatively limited compared with what had been trailed by the Government.

The Bill is due to have its second reading in October 2021 so I have set out below a short

2 *R (oao Miller) v The Prime Minister* [2019] UKSC 41

3 Hansard Col 18 May 2021 Queen's Speech debate 489 - 490

4 Chapter 1 and 2 under the broad topics of *Codification* and *Non-Justiciability* respectively and Chapter 3 under the heading *Moderating Judicial Review*

analysis of the proposals and highlight what I think planners, local government and environmental lawyers and practitioners might need to look out for.

Clause 1 – Suspended Quashing Orders ('SQOs') and Prospective Quashing Orders (PQOs)

The key recommendation of the IRAL report in respect of SQO at [3.64] was to give *"the courts the freedom to decide whether or not to treat an unlawful exercise of public power as having been null and void ab initio. Doing this would have the advantage of allowing the courts to issue suspended quashing orders in response to the unlawful exercise of public power".* It then recommended this be done by amending section 31 of the Senior Courts Act 1981 ('the SCA 1981')suggesting specifically the enactment of a *"new subsection (4A), which would read, "On an application for judicial review the High Court may suspend any quashing order that it makes, and provide that the order will not take effect if certain conditions specified by the High Court are satisfied within a certain time period."*

This was because of the debate about nullity and the effect of 'extending the life' of an act that has been found to be void[5] as well as the difficulties and unfairness which arise with the suggestion of prospective orders (e.g. the absence of a remedy for party who successfully brings a challenge) and the appropriateness of such an approach outside of cases which essentially address the legislative issues as opposed to where individual administrative decisions are found to be unlawful.

Rather than take up IRAL's suggestion directly , Clause 1 (1) instead proposes inserting a new s29A into the SCA 1981; Clause 1(2) amends s31 of the SCA; and Clause 1(3) amends s 17 of the Tribunals, Courts and Enforcement Act 2007.

Draft S.29A is to be headed *"Further provision in connection with quashing orders"*. S29 of the SCA 1981 gives the High Court the jurisdiction to make orders including quashing orders and what is intended is thereafter s.29A will allow for the effect of a quashing order to be suspended ('SQO') i.e. made on the basis that the QO will not *"take effect until a date specified"* (s29A (1)(a)). Alternatively ss(1)(b) proposes a QO may be made on the basis that it removes or limits *"any retrospective effect of the quashing"* and are obviously **prospective** orders ('PQOs').

In terms of how SQO's are to work, draft s29A(3) confirms that the impugned act will be allowed to 'live on' *("remains upheld")* until the QO finally takes effect. This is subject to any conditions on the suspended QO which can be imposed under s29A(2). In addition, draft s29A(5) makes it plain that for the duration of that suspended period prior to the QO taking effect the impugned act *"it is to be treated for all purposes as if its validity and force were, and always had been, unimpaired by the relevant defect"*. S29A(6) makes it plain however that once the QO does come into effect it can have full retrospective effect from the point at which the QO was first made but temporarily suspended.

In terms of how the PQOs are to work it may also be made subject to conditions (ss2) and is to operate again to allow the impugned act (or aspects of the impugned act) to 'live on' and remain upheld in respect of previous acts or decision which would have been made in reliance on a previous understanding of the lawfulness then of the now impugned act.

The retrospective effects of changes to the law or indeed a fresh interpretation of the law are of course by and large limited in any event. The question therefore is whether such a power might be used where the consequential effects of an unlawful act or decision and which have already occurred might prevent a successful claimant ultimately from obtaining any remedy. That said this is to some degree already a facet of the Courts powers already through the innate discretion to decide whether to make a QO at all.

The other part of draft of s29A deals with a list of factors (ss(8)) that the Court *"**must** have regard to"*

5 (see *Ahmed v HM Treasury (No.2)* [2010] UKSC 5)

when deciding *"**whether** to exercise"* the 2 types of QO. Thereafter ss9 compels the Court to make one of the 2 types of QO when making any QO if *"it **appears to the court**"* that one such QO *"would, as a matter of substance, offer adequate redress in relation to the relevant defect"*. The Court may however decline to do so if *"it sees good reason not to do so"* (emphasis added).

The list of mandatory factors in ss8 (which also has a sweep up at the end of *"(f) any other matter that appears to the court to be relevant"*) are notable first because they are mandatory but also because they go beyond all the circumstances of the case and refer specifically to *"(b)..any detriment to good administration that would result"* and the **interests** of people outside of the claim itself.)

With regard to the former, whilst 'good administration' is obviously a well-used term in public law it is not one that is fully defined. It may attract debate about its meaning and indeed the detriment that arises in the context of SQO or PQO decision. This is especially so as a further separate mandatory factor is to have regard *"so far as appears to the court to be relevant"* to *"any action taken or proposed to be taken, or undertaking given, by a person with responsibility in connection with the impugned act" (ss8(e).* This would appear to some extent to be a subset of *"good administration"* and again raises questions as to how far the Court might be expected to go in this regard in light of the expectations and interests of a successful claimant.

With regard to the interests of people outside of the claim, reference is made to the *"interests or expectations"* of persons who might any *"benefit from the quashing of the impugned act"* or of persons *"who have relied on the impugned act"*.

The overall implications of these mandatory factors under ss(8) would appear to be to limit the wider or knock on consequences of a successful challenge to an impugned act.

It does however also suggest that these new powers are aimed at findings of legislative defects (in particular regulations and other statutory schemes) rather than individual local or indeed central government decisions such as planning related ones

In addition it should be noted that ss(10) draws specific attention to *"anything within"* ss(8)(e) as a factor for the Court to consider when deciding whether a ss(1) QO offers "adequate redress" under ss(9).

A key area of debate that has arisen is the fact that these powers raise a statutory presumption in favour of exercising the s29A(1)powers. It does however appear as a limited presumption with the Court asking in itself in the first instance whether a SQO or PQO *"adequate redress"* (taking into account ss(8)(e)[6] in particular) and then, even if the concludes that is so whether there is *"good reason"* **not to** exercise the s29A(1)powers.

The questions which follow from this of course is what is meant by *"adequate redress"* albeit it must surely be based upon the circumstances of the case before the Court.

It also appears that there is clear potential that the proper application of these provisions will require additional and specific evidence to be provided beyond what would normally be relevant to the claim itself. In addition satellite litigation could well arise as to the final nature of a QO, including the conditions that may be imposed upon such an Order and indeed when those conditions are perhaps breached or amendments (e.g. a longer period is sought to allow new or amended legislation to be brought about).

Clause 2 – Reversal of SC's decision in 'Cart' Judicial Reviews

The IRAL recommendation to reverse the Supreme Court's decision in the case of Cart,[7] relating as it

6 *(e) so far as appears to the court to be relevant, any action taken or proposed to be taken, or undertaking given, by a person with responsibility in connection with the impugned act;*

7 *R (Cart) v The Upper Tribunal; R (MR (Pakistan)) v The Upper Tribunal (IAC)* [2011] UKSC 28

does to immigration appeals and the reflection of that in Clause 2, which seeks to make decisions of the Upper Tribunal final, including those refusing permission to appeal from the Lower Court, does not, at first blush, seem relevant to planning, environment and property law however the Clause's nature as an ouster clause is important to note.

It is not so much its contents but what was said **about** the Clause by the former Lord Chancellor when he introduced the Bill[8] that is interesting. What he said was that *"it is expected that the legal text that removes the Cart judgment will serve as a framework that can be replicated in other legislation"* i.e. other ouster clauses. The notes to the Bill also go on to assert "*This will draw a line under decades of uncertainty and confusion as to their proper use"*.

When looked at in detail however the clause appears to be directed to the very specific circumstances applying to the UT's decisions in respect of application for permission to appeal against certain decisions of the First-Tier Tribunal. It also does not in reality 'oust' the jurisdiction of the Courts entirely from considering challenges to executive decision making just that of the High Court (and higher) in these circumstances and allows for exceptions.

There are already in existence effective ouster clauses equally specific to their circumstances, most notably as an example is of course s288(4B) of the TCPA Act 1990 which provides the 6 week guillotine for challenges to Inspectors/Secretary of State's planning decisions or orders. This has been treated by the Courts as an absolute bar to such claims subject only to very limited exceptions.

The Government in its response to IRAL sought views on a proposal for more general ouster clauses in respect of judicial review claims. That has not come forward and it is difficult to view Clause 2 as truly providing a form of template for that suggestion. That does not however mean that the Government will not come back to the idea of further ouster clauses in the future and that is perhaps the main takeaway for practitioners.

We will as ever be watching this space to see what our new Lord Chancellor may say about this.

The Environment Bill – the Trailer

Ruth Keating

The Environment Bill was first proposed in July 2018. The Bill has endured a long and protracted passage through Parliament. It has been included in three parliamentary sessions and two Queen's speeches.

It has continued as a Bill; through Brexit and it has been delayed by a pandemic. It now seems it is on the final stretch, set to receive Royal Assent later this year. It seems likely that the majority of the features that are present in the Bill will appear in much the same form in the final Act. However, given the increasing focus on the environment and climate change daily in the news, there is still time for some changes to be made and the Bill will likely attract attention as it moves through the final stages of the parliamentary process.

Amendments have already been tabled, indicating the areas where further clarification or ambition is being sought. Over the coming week in our newsletter Ruth Keating will flag amendments to the Bill and its final progress through Parliament.

8 https://www.gov.uk/government/news/new-bill-hands-additional-tools-to-judges

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.

Philippa Jackson

philippa.jackson@39essex.com

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 Local Government* [2020] EWCA 161 Admin. To view full CV click here.

Victoria Hutton

victoria.hutton@39essex.com

Victoria has extensive experience in planning, environmental and property law. She has consistently been rated as one of the top planning juniors under 35 by Planning Magazine. Victoria acts in a wide range of planning and environmental law matters for developers, local authorities and other interested parties. She is also a qualified mediator and is able to mediate between parties on any planning/ environmental dispute. Her work in 2016/17 includes: representing a major housing developer in objecting to the Silvertown Tunnel DCO (junior to James Strachan QC), representing Natural Resources Wales at a 20 week inquiry into the diversion of the M4 (with Richard Wald), acting for the Secretary of State for Communities and Local Government in a number of statutory challenges and representing a developer in relation to multiple retail schemes across the country including those at appeal. Victoria was appointed to the Attorney General's C Panel of Counsel in 2016. 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.

Ruth Keating

ruth.keating@39essex.com

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.

Daniel Kozelko

daniel.kozelko@39essex.com

Daniel has a mixed practice incorporating planning, environmental, and public law. His instructions have included: acting in proceedings to obtain a certificate of lawfulness of existing use or development; advising on material changes of use of land in the context of retail developments; and, work on matters involving damage to utilities and highways. Daniel has also recently returned from a secondment at the Supreme Court of the United Kingdom, where he was judicial assistant to Lord Carnwath and Lady Arden. In the course of that secondment Daniel worked on a number of cases raising planning and environmental issues, including *R (on the application of Samuel Smith Old Brewery (Tadcaster) and others) v North Yorkshire CC* [2020] UKSC 3 and *Dill v Secretary of State for Housing, Communities and Local Government and another* [2020] UKSC 20. To view full CV click here.

KEY CONTACTS

Andrew Poyser
Deputy Senior Clerk
andrew.poyser@39essex.com
Call: +44 (0)20 7832 1190
Mobile: +44 (0)7921 880 669

Elliott Hurrell
Practice Manager
elliott.hurrell@39essex.com
Call: +44 (0)20 7634 9023
Mobile: +44 (0)7809 086 843