INTRODUCTION

Jonathan Darby

Welcome to the latest edition of our Planning, Environment and Property newsletter. In what is our final edition before Christmas, we include articles from James Burton (on the criteria for ensuring "appropriate separation" when EIA competent authority is also the promoter/developer) and Stephen Tromans QC (on Old Permissions, Master Plans and Estoppel).

Should regular readers be in need of a 'fix' between now and early January when our next edition arrives in your inboxes, then I commend the following:

First, our ongoing webinars, which have continued apace over the past few months. As a result of which, our online archive hopefully now forms

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something of a useful resource for those looking to brush up or reflect on developments. The archive can be accessed via:
www.39essex.com/category/webinars-archive/

Whilst on the topic of webinars, it's worth noting that Series 3 of our '39 from 39' webinars is scheduled to kick off early in the New Year, with a detailed look at the Environment Bill. Booking will, as usual, be possible via:
www.39essex.com/category/webinars/

Second, various members of chambers have also been producing podcasts over the last few months, including a number on topical planning, environmental and property issues, which can be accessed here:
www.39essex.com/category/podcasts/

Third, our news page, which signposts Members' recent activity, which frequently includes 'hot off the press' information about cases:
www.39essex.com/category/news/

As ever, we hope that you enjoy this edition, and wish you all a very Merry Christmas and Happy New Year.

EIA JUDGE BUT NOT JURY: HIGH COURT SETS CRITERIA FOR ENSURING "APPROPRIATE SEPARATION" WHEN EIA COMPETENT AUTHORITY IS ALSO THE PROMOTER/ DEVELOPER

James Burton

What must an authority that is both the competent authority for the purposes of the EIA regime, and also the promoter of the development, do to ensure an "appropriate separation" between those "conflicting functions" for the purposes of the EIA Directive?[1] And has the UK successfully transposed those requirements?

Those were the questions of general application considered by the Hon. Mr Justice Holgate in *London Historic Parks and Gardens Trust Claimant v Secretary of State for Housing Communities and Local Government* [2020] EWHC 2580 (Admin). The Judge answered them by (a) upholding the UK's transposition of (this aspect of) the EIA Directive, and (b) by setting out practical criteria to achieve "appropriate separation".

The practical "appropriate separation" criteria contained in the judgment are relevant to all authorities faced with this not-uncommon problem, and should be capable of application up and down the country with suitable contextual modification.

In the process of arriving at his conclusions, the judgment does shine a hard light on the differential protection afforded environmental rights in EU law, by comparison with fundamental rights. It is moot whether the Environment Bill, presently at Lords Committee stage, and Brexit, will see a material change in this regard if and when it reaches the statute book.

Facts

The facts are relatively unusual. They concern the much-debated proposal for the United Kingdom Holocaust Memorial ("the Memorial"), the called-in public inquiry into which commenced mere days after judgment was handed down on 2 October 2020 (and formally closed on 13 November 2020).

The Secretary of State for Housing, Communities and Local Government ("the Secretary of State") had applied to the local planning authority, Westminster City Council ("Westminster") for planning permission for the Memorial, which was to include a Learning Centre, and an entrance pavilion, and be sited at Victoria Tower Gardens, on London's Millbank.

Given the application site's proximity to the Palace of Westminster and Westminster Abbey UNESCO World Heritage Site, there was no question but that the proposed development was likely to have

1 Directive 2011/92/EU, as amended.

significant effects on the environment. It was required to be the subject of EIA.

The then-Minister of State for Housing "called in" the application pursuant to the power in s. 77 of the Town and Country Planning Act 1990, hence the decision on the application could only be taken by the Secretary of State or a delegate.

There was no challenge to the decision to "call in" (a point that the judgment suggests told against the claimant).

Westminster itself resolved that it would have refused the application had it been left to it for determination.

The Secretary of State had decided that the current Minister of State for Housing would determine the application, having received a report from the appointed Planning Inspector. Reasons would have to be given for the decision ultimately reached, whether to refuse or grant permission, and, by dint of the Regulation 26(2) of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 ("the EIA Regulations"), the Minster would have to express his "reasoned conclusion" on "the significant effects of the proposed development on the environment".

The "handling arrangements" put in place within the Ministry for determination of the application were, in summary, that Ministers or officials who had previously made public pronouncements or have responsibility for the promotion or the delivery of the Memorial were to be excluded from the decision-making process on the planning application.

The challenge

The claimant forswore any argument based on predetermination or bias. Its primary attack was a direct assault on the UK's transposition into English law of the requirements of Article 9a of the EIA Directive.

Article 9a of the EIA Directive, which was inserted by amendment in 2014, provides as follows:

> Member States shall ensure that the competent authority or authorities perform the duties arising from this Directive in an objective manner and do not find themselves in a situation giving rise to a conflict of interest.
>
> Where the competent authority is also the developer, Member States shall at least implement, within their organisation of administrative competences, an appropriate separation between conflicting functions when performing the duties arising from this Directive.

Member States had until 16 May 2017 for transposition. The UK sought to do so through Regulation 64 of the EIA Regulations, under the heading "objectivity and bias":

> 1) Where an authority or the Secretary of State has a duty under these Regulations, they must perform that duty in an objective manner and so as not to find themselves in a situation giving rise to conflict of interest.
>
> 2) Where an authority, or the Secretary of State, is bringing forward a proposal for development and that authority or the Secretary of State, as appropriate, will also be responsible for determining its own proposal, the relevant authority or the Secretary of State must make appropriate administrative arrangements to ensure that there is a functional separation, when performing any duty under these Regulations, between the persons bringing forward a proposal for development and the persons responsible for determining that proposal.

Resolution of the questions of general application and the all-important criteria for achieving "appropriate separation"

The Claimant's contention was that Regulation 64(2) failed to properly transpose the second limb of Article 9a. No issue was raised with regard to

the transposition of the first limb of Article 9a.

On that first, and key, issue, Holgate J rejected the challenge.

The Judge accepted the submission made for the Secretary of State that the most analogous case for the purposes of the requirement for "**appropriate** separation between **conflicting** functions" was *Department of the Environment for Northern Ireland v Seaport* Case C-474/10, concerning Directive 2001/42/EC for the assessment of the environmental effects of plans and programmes (the Strategic Environmental Assessment ("SEA") Directive). Just as the SEA Directive did not require the setting up of an entirely independent body for consultation by the authority promoting a plan or programme, where the consultee was a part of that promoting body, so too Article 9a of the EIA Directive. In Seaport the CJEU had accepted that functional separation within the Department would be satisfied by the internal group responsible for acting as consultee having real autonomy, and its own administrative and human resources (however, no detail was given about those aspects). Moreover, although the context for the decision was whether transposition had been adequate, the requirements laid down by the CJEU were not secured or guaranteed by any specific legislative provisions, or legal framework. The arrangements were simply administrative in nature (judgment §84).

The Judge then discussed CJEU jurisprudence and A-G opinions regarding the meaning of independence and objectivity, and the "ladder" or spectrum of the same. Importantly, he held that whilst a "high level of protection" is given to the environment (one of the objectives of the EU, see Article 3(3) of the TEU), competent authorities acting under the EIA Directive and determining planning applications **do not act as guardians of fundamental rights.** Rather, they exercise planning control impartially in the public interest (judgment §90). Therefore, heightened concepts of "independence" did not apply to Article 9a. Rather, Article 9a is focused on the "normal" approach to independence and objectivity summarised by the Advocate General in *Commission v Poland* Case C-530/16:

> [AG 31] "From the general perspective, the Court has already stated that 'in relation to a public body, the term "independence" normally means a status which ensures that the body concerned can act completely freely, without taking any instructions or being put under any pressure'. Thus, independence entails, in essence, that the body in question be insulated from other entities whose action may be driven by other kinds of interests than those pursued by that body. To that effect, the body must enjoy a number of concrete guarantees of independence that protect it against undue interferences that could prevent it from carrying out its tasks and fulfilling its mission."
>
> [AG 35] "It is nonetheless clear that the minimum guarantee applicable to any independent administrative authority worthy of that name is decision-making independence: in the sense of being able to adopt impartial decisions in individual cases, free from the interference of any other entities that have potentially conflicting aims or interests. The members of that authority cannot be bound by instructions of any kind in the performance of their duties. At the same time, however, such minimum independence requirements aimed at impartial decision-making in individual cases do not per se prevent the existence of overall structural or organisational links between the concerned entities, provided that there are clear and robust guarantees that there cannot be any interference in individual decision making."

It was on this basis that Holgate J held that "independence" here required that (judgment§94):

i) **The functions of the competent authority under the EIA Directive be undertaken by an identified internal entity within the authority (including any officials assisting in those functions) with the necessary resources and acting impartially and objectively;**

ii) **The prohibition of any person acting**

or assisting in the discharge of those functions from being involved in promoting or assisting in the promotion of the application for development consent and/or the development;

iii) **The prohibition of any discussion or communication about the Holocaust Memorial project or fund, or the called-in application for planning permission between, on the one hand, the Minister of State determining the application and any official assisting him in the discharge of the competent authority's functions and, on the other, the Secretary of State or any official or other person assisting in the promotion of the project or the called-in planning application or any other member of the government; and**

iv) **The prohibition of any person involved in promoting or assisting in the promotion of the application for development consent and/or the development from giving any instructions to, or putting any pressure upon, any person acting or assisting in the discharge of the functions of the competent authority, or from attempting to do so, in relation to those functions.**

The Judge explained that as he had not received any detailed submissions on the implications of the second limb of Article 9a for the functioning of local planning authorities and their officers, his formulation in (ii) above might need to be considered further in an appropriate case (judgment§95). Equally, it seems clear that (iii) would require adjustment for the particular planning authority.

However, in the author's view the criteria provide an excellent starting point for local planning authorities that are both EIA competent authority and promoter. Authorities can expect to be challenged if they do not adhere to its principles, if not its letter.

As to whether EU law required the criteria identified above to be expressly stated in domestic law, or put another way, whether Regulation 64 of the EIA Regulations went far enough (noted at judgment§42 as the major difference between the parties), the Judge found that EU law did not so require, and that Regulation 64 was essentially a "copy out" of Article 9a, with no requirement to legislate further: the "appropriate" separation could be left to administrative arrangements (judgment§111).

Hence the Claimant's case on its primary challenge failed (judgment§115).

Other matters

The Claimant did enjoy some greater success on its further challenge, to the actual "handling arrangements" regarding determination of the planning application (though the Judge rejected the Claimant's criticism that the Secretary of State, or Permanent Secretary, involved in promoting the development should have had nothing to do with deciding on the "handling arrangements"). In a nutshell the Judge considered that the "handling arrangements" were helpful, but did not go far enough in relation to his criteria set out above, requiring inter alia a specific statement that collective ministerial responsibility did not apply, and various other amendments. Nor was it appropriate that the handling arrangements had not been published (judgment§§126-139). With those adjustments, the "handling arrangements" would be compliant with Regulation 64(2), but without them they would not (judgment§143).

Key takeaway

Planning authorities that find themselves wearing two hats, as EIA competent authority and promoter of the development in question, must pay close regard to the "appropriate separation" criteria set out by Mr Justice Holgate. Whilst the Judge was careful to note that the criteria might require further consideration in the case of local planning authorities, authorities that do not follow the principles set out in the criteria place themselves at obvious risk of legal challenge. At time of writing there is presently no indication that the judgment is subject to an appeal.

FRIENDS REUNITED: OLD PERMISSIONS, MASTER PLANS AND ESTOPPEL – THE LAW REVIEWED

Stephen Tromans QC

As one gets older, it is nice sometimes to be reminded of cases from the 60s, 70s and 80s that were once familiar old friends. A bit of a reunion took place in the Court of Appeal in *Hillside Parks Ltd v Snowdonia National Park Authority* [2020] EWCA Civ 1440.

The case concerned a planning permission granted in 1967 for 401 dwellings. The application had incorporated a plan referred to as the "Master Plan", perhaps an early example of that now familiar term, showing the proposed siting for each of the dwellings was shown on the plan along with a proposed internal road network, and detailing different types of dwelling. It was granted subject to only one condition, that water supply be agreed before work commenced. Over the years various applications were made for departures from the Master Plan, and the relevant permissions granted, effectively varying the permission (though at that time no statutory procedure for varying a permission existed).

In 1985 a dispute over the permission had been tried before Drake J, who made a series of declarations, including in particular that the development permitted by the permission had begun and that it could lawfully be completed at any time in the future. In 2017, the planning authority contacted the developer, stating that, in its view, the 1967 permission could no longer be implemented because the developments carried out in accordance with the later planning permissions rendered it impossible to implement the original Master Plan. The authority required that all works at the Site should be stopped until the planning situation had been regularised.

The developer then sought declarations that authority was is bound by the judgment and declarations of Drake J in 1987, that the 1967 planning permission was a valid and extant permission, and that the planning permission could be carried on to completion.

The case raised the thorny issue of res judicata, or issue estoppel, which from time to time arises in planning law, for example (enter old friend) in *Thrasyvoulou v Secretary of State for the Environment* [1990] 2 AC 273. Contrary to the submission of the appellant developer, the Court of Appeal held that it was not a question of whether Drake J's decision in 1985 had been right or wrong: rather the point was that things had moved on both factually and in law since 1985.

Specifically, because of the way in which the permission had been implemented, it was no longer physically possible to build it out in accordance with the Master Plan. In answer to that fundamental point, the developer had tried to rely on a case almost as old as the permission: (enter rather forgotten and unusual old friend) *F. Lucas & Sons Ltd v Dorking and Horley Rural District Council* (1966) 17 P & CR 111, in fact actually decided by Winn J in 1964. In that case, in 1952, planning permission was granted to develop a plot of land by the erection of 28 houses in a cul-de-sac layout. Later the plaintiffs applied for permission to develop the same plot by building six detached houses, each on a plot fronting the main road. Permission for this later development was granted in 1957 and two houses were built in accordance with it. Later, however, the plaintiffs proposed to proceed in reliance on the earlier permission from 1952 by building the cul-de-sac and the 14 houses on undeveloped land on the southern side of it. The plaintiffs sought a declaration that the earlier permission was still effective and entitled them to carry out the proposed development on that part of the site where it could still take place. Winn J concluded that the 1952 permission was not to be regarded in law as a permission to develop the plot as a whole but as a permission for any of the development comprised within it. Accordingly, it authorised the "partial" development proposed

by the plaintiffs. Winn J was influenced by the argument that Parliament

> "… cannot have intended to leave individual owners of separate plots comprised in the contemplated total housing scheme dependent upon completion of the whole of the scheme by the original developer, or by some purchaser from him, so that they would be vulnerable, were the whole scheme not completed, separately to enforcement procedure which might deprive them of their houses and of the money which they would have invested in those houses, whether or not they built them themselves".

The case was later described (enter slightly more recent old friends) by the Divisional Court in *Pilkington v Secretary of State for the Environment* [1973] 1 WLR 1527 and the Court of Appeal in *Hoveringham Gravels Limited v Chiltern District Council* (1978) 35 P & CR 295 as a rather exceptional case.

The Court of Appeal at para. 88 itself, though not overruling Lucas, cast doubt on its strength as an authority, using the rather damning coded expression of "having been decided on its own facts":

> "… *Lucas* was a highly exceptional case. It has never been approved by an appellate court. It has never been followed or applied, so far as counsel have been able to show us, by any court since. Furthermore, it was described as being an exceptional case by Lord Widgery CJ (a judge with immense experience in the field of planning law) in *Pilkington*. Both this Court and the House of Lords have had the opportunity in the many decades since Lucas to consider whether it should be regarded as setting out a general principle or not."

The Court accepted that, as observed in (enter much newer friend) *Singh v Secretary of State for Communities and Local Government and Another* [2010] EWHC 1621 (Admin) by Hickinbottom J, as he then was, it is conceivable that, on its proper construction, a particular planning permission does indeed grant permission for the development to take place in a series of independent acts, each of which is separately permitted by it. However, the Court of Appeal went on to suggest that it was unlikely to be the correct construction of a typical modern planning permission for the development of a large estate such as a housing estate:

> "Typically there would be not only many different residential units to be constructed in accordance with that scheme, there may well be other requirements concerning highways, landscaping, possibly even employment or educational uses, which are all stipulated as being an integral part of the overall scheme which is being permitted. I doubt very much in those circumstances whether a developer could lawfully "pick and choose" different parts of the development to be implemented."

At the hearing there was an interesting debate about a point which ultimately the Court of Appeal did not need to resolve. That issue was whether all the development which had already taken place, apparently in accordance with the old permission, was rendered unlawful simply by virtue of the fact that subsequent operations had taken place, perhaps pursuant to another permission, which was inconsistent with the first. The Court observed that would have the consequence that there could be enforcement action, and potentially criminal liability, in relation to the development that has already taken place, even though it was at the time apparently in accordance with a valid planning permission. Whilst perhaps in such circumstances it would be unlikely that enforcement action would be taken in practice, but even so it would mean that whether or not enforcement action was taken would be a matter of discretion rather than law. The Court, in the absence of full argument, preferred to express no view.

The view of Winn J in *Lucas* perhaps harks back to a simpler time of planning, and judicial attitudes based on a view of planning as something of an incursion into individual rights of property.

Singh and Hillside Parks present a more modern, "holistic" view. As the inconclusive discussion on enforcement illustrates however, that view is not without its potential difficulties.

At any rate, the lessons for developers are obvious: one cannot necessarily rely safely on previous judicial decisions on the same permission; and in the case of extensive permissions implemented over many years, it will be important to scrutinise whether the development has in fact been carried out in accordance with the permission and any incorporated documents.

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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.

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James specialises in environmental, planning, and related areas, including compulsory purchase and claims under Part 1 of the Land Compensation Act 1973. He acts for both developers and local authorities, as well as national agencies such as Natural England and the Marine Management Organisation. Recent notable cases/inquiries include *Grafton Group UK plc v Secretary of State for Transport* [2016] EWCA 561; [2016] CP Rep 37 (the successful quashing of a CPO promoted by the Port of London Authority after a five week inquiry), *Mann & ors v Transport for London* [2016] UKUT 0126 (LC)R (a successful group action under Part 1 of the Land Compensation Act 1973 and the 1-3 Corbridge Crescent/1-4). James successfully appeared on behalf of the London Borough of Tower Hamlets in the two week tall Building Proposal at the Oval inquiry. James has also appeared frequently in Committee (both Commons and Lords) in relation to HS2. James was named Environmental and Planning Junior of the Year at the Chambers Bar Awards 2015. To view full CV click here.

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