INTRODUCTION

Jonathan Darby

Welcome to this week's bumper edition of 39 Essex's Planning, Environment and Property newsletter. It has been another fast-moving week, and while Covid-19 clearly presents the development industry with a host of unique challenges, it also appears to have galvanised many innovative and creative ways of ensuring that proposals and projects can still move forward. I note that the Scottish Government has introduced emergency legislation to allow planning permissions that would otherwise lapse during the coronavirus crisis to be extended by a year. Other similar developments appear likely as the sector seeks the tools to respond to the challenge of vacant building sites.

The same also applies with regards to a number of interesting procedural developments. First, the passage of the Coronavirus Act 2020 into law, which – amongst a great many other things – empowers the Secretary of State to make regulations to include remote participation by Councillors and remote voting in relation to Committee meetings. Further to John Pugh-Smith's article last week, it will be interesting to see how, and to what extent, different local authorities embrace this brave new world, which

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is a step beyond the webcasts that are already used by many authorities. Second, the extent to which local authorities will respond to the Chief Planning Officer's call to make amendments to their constitutions to enable delegated decision-making in the short to medium terms. Third, how the Planning Inspectorate will utilise technological solutions to mitigate the impacts (and inevitable back-log) of its earlier announcement of the postponement of all local plan, appeal and NSIP hearings and inquiries until further notice. This is an issue discussed by Gethin Thomas in his summary of PEBA's submissions to the Inspectorate on the same issues. Indeed, in many respects, the Inspectorate need not look too far for a model that has the potential to be adapted to meets it needs; namely, the courts and tribunals system, which has long embraced telephone hearings for interlocutory and case management matters and which is now attempting to embrace further technology as a means of ensuring that substantive hearings can take place, despite the parties and their representatives having to access justice remotely. There is clear potential for 'shared learning' in many respects, not least in terms of which platforms can enable multi-party hearings to be managed efficiently, along with document handling solutions. In this regard, Stephanie David discusses her recent experiences with a remote judicial review hearing alongside Richard Harwood QC.

It seems to me that practicalities of broadband connections and the like aside, the clear priority must surely go beyond the mere facilitation of meetings, hearings and inquiries to avoid back-logs, but for them to take place effectively and, most crucially of all, in a manner that remains fair to all participants and stakeholders. Ensuring fair and informed access to information, documents, meetings and hearings will perhaps be our greatest challenge over the coming months.

Other contributions this week include an article on executing documents remotely which has been co-authoredw by David Sawtell and Gethin Thomas, while Richard Wald QC and Tom van der Klugt look at the challenges faced by the regime controlling international trade in endangered species in the age of Covid-19. In a welcome break from Covid-19, James Burton's article discusses the 2016-based household projections and transitional Local Plans.

In other news, Planning Magazine's annual law survey has ranked a number of 39 Essex Chambers' barristers highly. Richard Harwood OBE QC, Peter Village QC, Stephen Tromans QC, Thomas Hill QC, James Strachan QC and Andrew Tabachnik QC were ranked as top rated planning silks. Richard Wald, Philippa Jackson, Rose Grogan, Victoria Hutton, Jonathan Darby, Katherine Barnes and Gethin Thomas are ranked as top planning juniors. As ever, we remain indebted to our valued clients and colleagues for their recognition.

Today also sees the launch of our free "Quarantine Queries" initiative to assist solicitors, planning consultants, architects and surveyors who are now working in isolation. Our established team of silks, senior juniors and juniors will be available for a 15 minute timeslot throughout the day to take any legal query you may have, which is time we would ordinarily spend travelling to and from court hearings/planning inquiries. Should you have a COVID-19 related question or any planning, environmental or property query you would like to discuss, but do not have your colleague to ask at the coffee machine, please contact Michael Kaplan, Andy Poyser or Elliott Hurrell to book a slot with one of our experts.

PLANNING INSPECTORATE CORONAVIRUS UPDATE

Gethin Thomas

Overview

On 1 April 2020, the Planning Inspectorate issued an update as to how it is working through the coronavirus pandemic. As readers will be aware, all casework events in the near future including site visits, hearings and inquiries have been postponed. The Planning Inspectorate are currently reviewing the use of technology to enable it to continue running planning inquiries and hearings online. The Planning Inspectorate update explains that it is:

"exploring methods like video conferencing for events. We are working to arrive at a solution that enables casework to continue in an open, fair and impartial way. We want to ensure everyone involved including local communities can participate fairly and that this different way of conducting our work does not undermine confidence in the planning system."

The Planning Inspectorate and the Planning and Environment Bar Association ("PEBA") are working together to look at ways of keeping casework moving through the system. PEBA have published three papers addressing the scope and technology for virtual planning appeal hearings and inquiries to continue in the wake of the coronavirus pandemic.

Virtual hearings

PEBA's view is for greater use to be made of remote technology such as video-conferencing and live streaming for hearings and planning inquiries in particular. PEBA make the following specific observations in relation to relevant factors which require consideration for each type of casework:

a. Hearings: the hearing process lends itself straightforwardly to video-conferencing and live streaming. PEBA note that there should be practical measures to ensure the smooth running of any video-conferencing methodology such as a single source from PINS for the details of the video-conferencing forum, invitations, numbers to call in the event of difficult and for timetabling of sessions. Moreover, it will be particularly important to ensure that third parties interests are properly protected. For example, third parties wishing to speak on a topic could be asked to notify the relevant case officer in advance, provide a speaking note in advance and then participate using relevant technology. Sensible timetabling, planning and case management will also facilitate the participation of third parties.

b. Planning Inquiries: In addition to the considerations set out above in relation to hearings, PEBA identify two further matters which arise specifically in the inquiry context which require particular consideration: (i) the presentation of oral evidence through evidence in chief and cross-examination, and (ii) the presentation of opening and closing submissions, and in particular, whether these can be provided in writing rather than delivered orally or whether a summary of a closing submission should be given orally with the remainder provided in writing.

c. Enforcement inquiries: PEBA's view is that these inquiries present more complex issues, given the need for sworn evidence from potentially numerous witnesses including third parties.

d. Local Plan Examinations: Oral hearings of Local Plans present the greatest challenge where numerous parties wish to participate. The sheer numbers of potential representators present a significant management and timetabling challenge to achieve such hearings remotely. PEBA suggest that the focus should initially be on Local Plans which have attracted low levels of public participation.

There are a number of technical options identified by PEBA, including Zoom and Skype for Business/ Microsoft Teams, as well as other platforms such as Pexip and Google Hangouts. Zoom is the platform endorsed by PEBA. It has become a popular choice for the conduct of remote court hearings in other jurisdictions.

Amendments to procedural rules?

It is recognised that whilst there is no legal impediment to conduct hearings or planning inquiries via videolink technology. Neither the Town and Country Planning (Hearings Procedure) (England) Rules 2000 SI No 1626, nor the Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000 SI No 1625, would require amendment. The language of both statutory instruments provides sufficient flexibility to enable the inspector and persons who wish to 'appear' to do so remotely, rather than requiring physical presence at a particular venue. PEBA note, however, that some of the measures may require amendments to PINS Guidance and the PPG.

The work currently underway

The Planning Inspectorate and PEBA have recorded a joint video message on the work underway, which was also published on 1 April. The Planning Inspectorate are prioritising virtual events across different kinds of casework, but emphasise the importance of ensuring the process is fair and robust. Public confidence has to be maintained in the system. In the video message, the representatives of PEBA and the Planning Inspectorate highlighted that all participants in the planning system wish to maintain integrity in the decisions and the process.

To that end, the Planning Inspectorate has set up a project group to consider rights, equality and access, alongside the legislative requirements for each kind of casework. The Planning Inspectorate is hoping to identify and pilot virtual events, but there are not yet specific details as to when this will happen, and what kind of events will be used as pilot processes. Progress is being made behind the scenes to get the planning system back on track, so watch this space!

A REMOTE SUBSTANTIVE HEARING: THE PRACTICAL, THE INEVITABLE, AND THE FUTURE?

Stephanie David

Richard Harwood QC and I made a 'virtual' appearance for a local planning authority in a judicial review matter concerning development plan policies and flooding risk last week. The hearing was before Mr Justice Dove.

Our headline point is that the court system is making a concerted and commendable effort to make sure hearings proceed and go ahead as smoothly as possible. It is the sort of effort and ingenuity which will get us through this.

Before we run through some considerations, there is now a protocol regarding remote hearings, which we strongly recommend reading and can be accessed online[1].

We have pulled together a list of considerations, which are hopefully useful:

1) **The practical:**
   a. **How are you going to communicate with your client during the hearing?** We found a combination of WhatsApp and a Skype chat were very useful, although it might be that you want to learn how to turn the notifications off if you are in the middle of your submissions.
   b. **How are you going to take instructions before the hearing and during any adjournments for lunch or otherwise?** We spoke to our clients via a Skype voice call before the hearing started, during the lunch break and after the hearing. It was an easy an effective way of taking instructions. For smaller team, you could also consider using a voice call on WhatsApp, given the limit to the number of people involved in the call.
   c. **How do you ensure your conversation is as far as possible confidential?** Each time I set up a new group I asked everyone to verify who they were and their job title.

[1] https://www.judiciary.uk/wp-content/uploads/2020/03/Civil-court-guidance-on-how-to-conduct-remote-hearings.pdf

d. **Does everyone have the relevant login details for the hearing itself and know the start times?** There was a little bit of confusion as to which number to call, but with an incredibly helpful court clerk, we successfully all joined the call.

e. **Can everyone access the relevant documents and authorities?** Our fantastic solicitor circulated electronic copies of both bundles so that everyone had access to the relevant material. For documents provided last minute, I could share them through the Skype group chat.

f. **It goes without saying but…**those who are not speaking need to make sure that they are on mute. At one point, we heard some slightly aggressive (or heavy-handed) typing (the keyboard warriors in all their glory).

g. **Who is speaking?** Hearings are easier than a telephone conference in this regard because of the rigid structure they follow, however it might still be worth flagging who you are before you speak.

h. **How to organise the papers?** There are virtues in not having a judge to look at. Your speaking notes can be up on your screen without being a barrier to advocacy and you can edit them on the go. Seeing electronic notes from the team and sending questions back is easier than the scrawl on a post-it.

i. **Importantly, what do you wear?** When Richard appeared towards the end of the hearing in the Skype video, I was saddened to see that he was not wearing his wig and robed. More seriously though, it is probably worth wearing something that is smart, casual on the basis that you can inadvertently turn the camera on (maybe also check what is behind you in the room and/or consider a green screen).

j. **Anything else?**
   i. We all remember when two children barged into the room when Professor Robert Kelly was being interviewed by BBC News about South Korea (if not, you can watch it again online[2]). Again, this is obvious advice, but it is probably good to make sure that family/co-habitees know that you are on a hearing;
   ii. Stop all the clocks. There is a reason why the clocks in the only RCJ courtroom don't strike the hour, and even ticking might be off putting
   iii. Finally, don't accidentally take a screenshot up your senior barrister's nose during a Skype video call and share it with your solicitor and the clients… [now deleted – Ed]

2) The inevitable:

a. **Individuals will drop in and out of the call** (as this YouTube "A Video Conference in Real Life"[3] so effectively captures), but keep calm and carry on. It probably isn't a strategy deployed by your opponent to put you off your game.

b. **The line might break up** – Richard helpfully flagged at the start of his submissions that we should say if he could not be heard. Our clients raised the issue on Skype and the judge did too. It seems that speaker phone can result in a worse connection, as can certain rooms in a flat. It might also be useful to try a landline if you have one.

3) The future?

Whilst current tragic circumstances have forced the current arrangements upon us, remote hearings in at least some cases could be the future; and we have to say, whilst we will miss the itchy wigs and gowns sliding off our shoulders, there are benefits:

a. It encourages us to go paperless, by the use of screens instead.

b. It improves communication with our clients.

c. It matters to an even greater extent how our points are articulated.

[2] https://www.youtube.com/watch?v=Mh4f9AYRCZY

[3] https://www.youtube.com/watch?v=JMOOG7rWTPg

CORONAVIRUS AND EXECUTING DOCUMENTS REMOTELY

David Sawtell and Gethin Thomas

We have received a number of queries concerning the sealing and signing of formal document in the current remote working period, including:

a. the kinds of documents that have to be legally sealed;

b. whether the law allows local authorities to electronically seal legal agreements;

c. whether there are any protocols/procedures in place for electronic sealing and signing of documents which need to be observed.

This note considers the legal position generally as to the electronic execution of formal documents, and also specifically addresses some of the particular challenges in the real property context and land registration.

The general rules on the electronic execution of documents

Overview

The common law has been flexible as to what constitutes a 'signature'. Section 4 of the Statute of Frauds 1677 requires a memorandum or note of a guarantee to be 'signed', while section 30(1) of the Limitation Act 1980 required an acknowledgement to be 'signed'. There are numerous cases dealing with what constitutes a 'signature'. The test is whether the name of a party has been applied with the intent of authenticating the instrument.[4] A name applied to a telex[5] or an email[6] has been held, on the facts of each case, to constitute a signature. In the Good Challenger, the Court of Appeal endorsed the following statement made by the judge at first instance:

> *As a matter of general principle, in my view a document is signed by the maker of it when his name or mark is attached to it in a manner which indicates, objectively, his approval of the contents. How this is done will depend upon the nature and format of the document. Thus in the case of a formal contract which prints the names of the parties and leaves a space under each name for the parties to write their names, the document will not have been signed by a party until he writes his name in the space provided. Conversely, with a telex, where there is no such facility, the typed name of the sender at the end of the telex not only identifies the maker but leads to the inference that he has approved the contents: the typed name, therefore constitutes his signature. Thus in my judgment each of the telexes relied on by the Claimant was signed by the sender typing in its name, or his name, at the foot of the document.*

The leap from telexes and emails to electronic signatures is a short one. An electronic signature is capable in law of being used to execute a document, including a deed, as long as: (i) the person signing the document intends to authenticate the document and (ii) any formalities relating to execution of that document are satisfied.[7] An electronic signature is admissible in evidence in legal proceedings.[8] The Law Commission has also recently reported on the electronic execution of documents.[9] As they pointed out, there is a distinction between something being just sufficient to be a signature, and its potential evidential weight if there is a dispute about the identity of the party signing the document or its content.[10] In that respect, some of the reported cases serve as much as cautionary tales as to wisdom of providing an unimpeachable signature as they do authorities for what lies on one side or the other of validity.

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4 *Caton v Caton* (v 1867) LR 2 HL 127; *Mehta v J Pereira Fernandes SA* [2006] 1 WLR 1543.

5 *Good Challenger Navagante SA v Metaleexportimport SA ('The Good Challenger')* [2003] EWCA Civ 1668, [2004] 1 Lloyd's Rep 67,

6 *Golden Ocean v Salgoacar* [2012] EWCA Civ 265, [2012] 1 WLR 3674.

7 Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC ("eIDAS") Article 25(1), Article 3(10) and Recital 49.

8 Electronic Communications Act 2000, s 7.

9 'Electronic execution of documents', (2019, Law Com. No. 386). On 3 March 2020, the government welcomed the findings of their report: 'Government response to the Law Commission report Electronic Execution of Deeds: Written statement ' (3 March 2020, HCWS143).

10 Ibid, para 2.28.

In *Bassano v Toft* [2014] EWHC 377 (QB), Popplewell J observed (at para 42) that:

> *Generally speaking a signature is the writing or otherwise affixing of a person's name, or a mark to represent his name, with the intention of authenticating the document as being that of, or binding on, the person whose name is so written or affixed. The signature may be affixed by the name being typed in an electronic communication such as an email: see Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd [2012] 2 All ER (Comm) 978 at [32]. Section 7 of the Electronic Communications Act 2000 recognises the validity of such an electronic signature by providing that an electronic signature is admissible as evidence of authenticity.*

Recently, in *Neocleous v Rees* [2019] EWHC 2462 (Ch), HHJ Pearce granted an order of specific performance of an alleged contract of compromise which involved a disposition of an interest in land. The Defendant argued that the contract failed to comply with section 2 of the 1989 Act, as the putative contract was contained in a string of emails. The purported signature of the solicitor on behalf of the Defendant was by "automatic" generation of his name, occupation, role and contact details at the foot of an email. HHJ Pearce concluded as follows (at paras 55 to 57):

> ***55.*** *In such circumstances, it is difficult to distinguish between a name which is added pursuant to a general rule set up on an electronic device that the sender's name and other details be incorporated at the bottom from an alternative practice that each time an email is sent the sender manually adds those details. Further, the recipient of the email has no way of knowing (as far as the court is aware) whether the details at the bottom of an email are added pursuant to an automatic rule as here or by the sender manually entering them. Looked at objectively, the presence of the name indicates a clear intention to associate oneself with the email – to authenticate it or to sign it.*
>
> ***56.*** *It is important to bear in mind the policy behind the 1989 Act, as set out by Peter Gibson LJ in the passage cited at paragraph 43 above. There is good reason to avoid an interpretation of what is sufficient to render a document " signed " for the purpose of Section 2 where that interpretation may have the effect of introducing uncertainty and/or the need for extrinsic evidence to prove the necessary intent.*
>
> ***57.*** *In my judgment, no such difficult arises if the email footer here is treated as being a sufficient act of signing:*
>
> *i) It is common ground that such a footer can only be present because of a conscious decision to insert the contents, albeit that that decision may have been made the subject of a general rule that automatically applied the contents in all cases. The recipient of such an email would therefore naturally conclude that the sender's details had been included as a means of identifying the sender with the contents of the email, since such a footer must have been added either as a result of a conscious decision in the particular case or a more general decision to add the footer in all cases.*
>
> *ii) The sender of the email is aware that their name is being applied as a footer. The recipient has no reason to think that the presence of the name as a signature is unknown to the sender.*
>
> *iii) The use of the words " Many Thanks " before the footer shows an intention to connect the name with the contents of the email.*
>
> *iv) The presence of the name and contact details is in the conventional style of a signature, at the end of the document. That contrasts with the name and contact address of Mr Hale, the person alleged to have signed the letter in Firstpost , whose name and address appeared above the text of the letter, in the conventional manner of inserting the addressee's details.*

Electronic seals

A seal can also be executed electronically. Section 7A(1) of the Electronic Communications Act 2000 provides that, in any legal proceedings:[11]

a. *an electronic seal incorporated into or logically associated with a particular electronic communication or particular electronic data, and*

b. *the certification by any person of such a seal, shall each be admissible in evidence in relation to any question as to the authenticity of the communication or data, the integrity of the communication or data, or both.*

What constitutes an 'electronic seal' is left broadly defined as follows:

(2) For the purposes of this section an electronic seal is so much of anything in electronic form as –

a. *is incorporated into or otherwise logically associated with electronic communication or electronic data; and*

b. *purports to ensure the origin and integrity of the communication or data.*

For example, providers of electronic signature software services, such as 'DocuSign' also offer electronic seal abilities. As such, electronic seals could be used relatively straightforwardly, with the right software. To ensure certainty and minimise the risk of challenge, electronic seal software is preferable, as they generally work by encoding data which itself attests to its origin and integrity.[12]

An electronic seal incorporated into or associated with a particular electronic email (such as an email) or particular electronic data must be certified (whether before or after the making of the communication) by a statement confirming that: (a) the seal, (b) a means of producing, communicating or verifying the seal, or (c) a procedure applied to the seal, is (either alone or in combination with other factors) a valid means of ensuring the origin of the communication or data, the integrity of the communication or data, or both.[13]

Execution of deeds

Overview

Deeds are less straightforward to execute under quarantine conditions due to the requirement of a witness. Under section 1(3)(a)(i) of the Law of Property (Miscellaneous Provisions) Act 1989, an instrument may only be validly executed as a deed if it signed by the individual *'in the presence of a witness who attests the signature'*.

In its recent report on the electronic execution of documents, the Law Commission has concluded that this requires a witness to be physically present at the signing of the deed.[14] There is dicta in a Court of Appeal authority which suggests otherwise. Pill LJ explained (in a case concerning the operation of an estoppel of real property (at para 30):

> *I can detect no social policy which requires the person attesting the signature to be present when the document is signed. The attestation is at one stage removed from the imperative out of which the need for formality arises. It is not fundamental to the public interest, which is in the requirement for a signature.*

At best, there is some uncertainty as to whether or not a witness needs to be physically present. It may be that, in the current circumstances, some flexibility as to who witnesses are is required (permitting witnesses to be spouses or family members). Equally, it may also potentially be sufficient to witness the execution of a deed if the entire process of signing the document is witnessed via videolink. It is suggested, however, that to avoid potential future disputes that the Law Commission's more conservative approach of actual physical presence (at an appropriate distance and with suitable precautions) might be preferred.

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[11] Inserted by the Electronic Identification and Trust Services for Electronic Transactions Regulations 2016 SI No 696.

[12] European Union Agency for Network and Information Security ("ENISA"), *Security guidelines on the appropriate use of qualified electronic seals: Guidance for users (December 2016).*

[13] Electronic Communications Act, 2000 s 7A(3).

[14] The report did not consider registered dispositions under the Land Registration Act 2002, which is being dealt with by HM Land Registry's project on electronic conveyancing and registration.

Land registration

In any event, HM Land Registry continue require a wet ink signature, and a conservative approach to compliance with witness attestations will also be required. The Law Society have recently issued guidance to solicitors in light of the current circumstances, and have expressed the following view that electronic signatures:

- *can be used to sign contracts to sell/buy unless the contract is being executed as a deed*
- *cannot be used for deeds*
- *probably cannot be used where a signature* needs to be witnessed unless the witness was present when the electronic signature was affixed – in which case a wet ink signature could have been used
- *cannot be used where a wet ink signature is required, for example, for documents for HM Land Registry and some lenders.*[15]

Moreover, it is unlikely that HM Land Registry will adapt that their requirements, given that their insistence that a strict approach is designed to counter fraud. If a document is to be lodged at the Land Registry, it is advised that a wet ink signature or equivalent should be adopted so as to avoid it being rejected.

Local authorities

Section 234 of the Local Government Act 1972 provides that documents may be signed on behalf of the authority by the Proper Officer.[16] Under subsection (2), any document purporting to bear the signature of the proper officer of the authority shall be deemed, until the contrary is proved, to have been duly given, made or issued by the authority of the local authority. It is specifically provided that *'the word "signature" includes a facsimile of a signature by whatever process reproduced.'*

There are no specific provisions in the Local Government Act 1972 which govern the use of a local authority's seal. However, a local authority's standing orders frequently require the affixing of its seal to be attested by the chairman, vice-chairman or other elected member, and also by the clerk or his or her deputy. As such, the procedure for the use of an electronic seal will be governed by each local authority's constitution. It may be that the individual person required to fix the seal is to be the person responsible for carrying out an electronic sealing of a document, but subject to delegated authority in accordance with a given constitution, it may also be possible to have others undertake the process of electronically sealing documents.

Finally, section 74(1) of the Law of Property Act 1925 makes specific provision for the execution of instruments by or on behalf of corporation aggregates, such as local authorities, in respect of instruments conveying a disposition in land. It states that:

In favour of a purchaser an instrument shall be deemed to have been duly executed by a corporation aggregate if a seal purporting to be the corporation's seal purports to be affixed to the instrument in the presence of and attested by –

a. *two members of the board of directors, council or other governing body of the corporation, or*

b. *one such member and the clerk, secretary or other permanent officer of the corporation or his deputy.*

A similar issue therefore arises here as with the physical presence of witness attesting deeds. A local authority's standing orders frequently require the affixing of its seal to be attested by the chairman, vice-chairman or other elected member, and also by the clerk or his or her deputy.[17] A purchaser of land or property that must be effected by deed may well insist that the authority seal the deed in accordance with its constitution.[18]

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15 Law Society – residential conveyancing and COVID-19 - https://www.lawsociety.org.uk/support-services/advice/articles/covid-19-and-residential-conveyancing-transactions/ (dated 25 March 2020).

16 Usually under Delegated Powers this is the Head of Legal Services or the Director of Law and Governance.

17 Local Government Act 1972, sections 135 and 234.

18 See also the Land Registry's Practice Guide 8, at paragraph 5.1.1.

Before adopting any flexible approach to signatures and witnessing, it is advised that local authorities should carefully consider their own constitutions. In particular, a section 106 agreement must be executed by deed.[19]

INTERNATIONAL TRADE IN ENDANGERED SPECIES: CITES & CHALLENGES IN THE AGE OF CORONAVIRUS

Richard Wald QC and Tom van der Klugt

While it may be far from a household name, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is one of the longest-standing and largest international agreements on conservation.

Its aim is to ensure that international trade in specimens of wild animals and plants does not threaten their survival.

Drafted following a resolution by the members of the International Union for the Conservation of Nature in 1963, it opened for signature in 1973 and entered into force in 1975. It now has 183 parties.

The trade it regulates is enormously diverse, and includes both live animal and plant specimens, and products derived from them, such as food and medical products, leather goods, timber, musical instruments and furniture and tourist curios.

A very wide range of commercial and non-commercial actors may therefore have reason to interact with it, from large multi-nationals to museums, galleries and touring musicians.

Structure of the CITES regime

At a very high level, the CITES regime works by listing species in a number of periodically updated Annexes, sorted by the level of threat posed to the animal or plant specimen:

- Appendix I lists species threatened with extinction;
- Appendix II contains species not necessarily threatened with extinction, but where trade must be controlled in order to ensure their survival;
- Appendix III contains species that are protected in at least one country that is party to CITES, and which has asked other CITES parties for assistance in controlling trade in that species.

The CITES regime then imposes a number of trade controls in relation to listed species. Most importantly, import, export and re-export of listed species must be authorised through a system of permits, with the details of this regime, and a number of exceptions to it, varying according to which Annex a species is listed in.

Each party to CITES must also designate a 'management authority' in charge of administering this system. In the UK, this is the Animal and Plant Health Authority (APHA).

CITES is implemented uniformly across the EU via a number of regulations. The principal regulation is EU Regulation 338/97, which sets out the framework for the uniform implementation of the CITES regime. EU Regulation 939/97 was enacted to lay down detailed rules concerning the operation of the regime within the EU, and in particular conditions and criteria for the consideration of permit and certificate applications, and for the issue, validity and use of such documents. EU Regulation 939/37 has subsequently been superseded by EU Regulation 865/2006.

Compliance challenges

The complexity of the CITES regime – and the way that it interacts with the powers of domestic public law bodies – can pose significant challenges for parties where there is a failure to comply with the regime as a result of an 'innocent' administrative error or oversight.

[19] Town and Country Planning Act 1990, section 106(9). They are not, however, usually registered at Her Majesty's Land Registry. A section 106 agreement is usually registered as a local land charge and must be entered on the planning register. They are occasionally, however, registered at the Land Registry by way of a notice under section 32 of the Land Registration Act 2002.

For example, although a valid import permit is required to import protected animals or plant specimens, EU management authorities have the power to issue retrospective import permits under Article 15 of Regulation 865/2006 where a valid import permit is not in place. However, retrospective permits can only be issued in specified, and very narrow, circumstances. The management authority has no discretion over such a decision. This means that once a non-compliant import has physically occurred, it is hard to retrospectively bring it into compliance, and goods may be seized by the UK Border Force.

However, when it comes to actually seeking to recover goods seized by the UK Border Force for non-compliance with CITES, parties have considerably more room for manoeuvre.

S152 of the Customs and Excise Management Act 1979 provides that the UK Border Force "may, as they see fit" restore forfeited goods. The breadth of this discretion has been emphasised in a number of cases, in particular *Smouha v Director of Border Revenue* [2015] UKFTT 147 (TC), [2015] 4 WLUK 136 at [100]-[102].

A route of appeal lies to the First-tier Tribunal (Tax Chamber) and the exercise of the UK Border Force's discretion is subject to normal English public law principles – although the Tribunal does not have the power to substitute its own decision, but only to order to the UK Border Force to consider its decision again.

For example, in the recent case of *Selectron-UK Ltd v Revenue and Customs Commissioners* [2020] UKFTT 133 (TC), [2020] 3 WLUK 274, the Tribunal found the UK Border Force had been Wednesbury unreasonable in certain aspects of its decision not to restore a number of electric guitars manufactured from Rosewood, and ordered the UK Border Force to carry out a further review of its decision.

Further, there is considerable scope to make arguments around the overall proportionality of the UK Border Force's decision in relation to a restoration application.
Nonetheless, the regime remains a complex one for parties in this situation to navigate.

CITES and coronavirus
Recent weeks have seen considerable media comment about possible links between biodiversity loss and increased pandemic risk.

The CITES Secretariat released an official statement in relation to COVID-19 on 17 March. The statement emphasises the fact that CITES is concerned with regulating international trade, and that matters concerning zoonotic diseases are therefore beyond its mandate. It continues:

"The CITES Secretariat is aware of the media commentary that is suggesting the possible links between the human consumption of pangolins (or other wild animals) and COVID-19. All species of pangolin are included in CITES Appendix I, which means that international commercial trade is generally prohibited under the Convention. Exchange for non-commercial purposes, such as conservation or law enforcement, can be authorized by CITES Parties."

The statement also notes that at the request of the CITES Management Authority of China, the CITES Secretariat has issued a 'notification to parties' stating that "China's Standing Committee of the National People's Congress adopted a Decision to eliminate the consumption for food of wild animals to safeguard people's lives and health".

One of the criticisms that has been levelled at CITES over the years is that it operates by 'negatively' seeking to ensure that trade does not become unsustainable for a limited list of species, rather than 'positively' promoting sustainable trade and biodiversity in relation to the entire global ecosystem.

No doubt this is in part due to the very different times in which the CITES regime was originally conceived. In light of coronavirus, it will surely (and

hopefully) be the case that regimes such as CITES will receive increased focus and attention – and this may also bring new challenges for those using them.

Richard Wald QC and Tom van der Klugt are currently advising a commercial client on issues relating to the CITES regime, its EU implementing legislation and the powers of domestic bodies in relation to those regimes.

THE 2016-BASED HOUSEHOLD PROJECTIONS AND TRANSITIONAL LOCAL PLANS

James Burton

Those involved in Local Plan examinations over the last few years will be familiar with the issues thrown up by the publication of the 2016-based household projections by the ONS in September 2018.

On a broad brush basis, the 2016-based household projections, which were foreshadowed by the 2016-based sub-national population projections published in May 2018, marked a drop, for some local authorities a significant drop, in the demographic starting point for calculation of objectively assessed housing need ("OAHN") by comparison with the 2014-based household projections published by DCLG (as it was then) in July 2016. The nature of the 24 January 2019 cut-off for transitional local plans means that a great many transitional plans submitted for examination were prepared on the basis of OAHN calculated using the 2014-based household projections as the starting point. Of course, the household projections are only the starting point, and rarely will OAHN not reflect further adjustments, but the starting point is of prime importance.

The question that the publication of the 2016-based household projections invited, and one asked by examining Inspectors, was whether those OAHN calculations should be re-done as a result, in light of 2012 Framework para. 158 (the need for Local Plans to be based, inter alia, on 'up to date' evidence) and the PPG guidance concerning, in particular, HEDNAs. The ONS, unsurprisingly, commended the methodological changes that distinguished the 2016-based projections from their predecessors, whilst offering no particular view on the question.

An additional ingredient was added to the mix by the Government's publication, in October 2018, of a technical consultation on the "standard methodology". Although the standard methodology had and has nothing to do with transitional plans, some parties to examination sought to rely on the Government's rejection of the 2016-based household projections for the standard methodology as an argument in favour of their rejection for transitional plans. Albeit in its February 2019 response to that consultation, the Government made clear its support for the methodology behind the 2016-based projections.

The response from examining Inspectors varied. For example, in Guildford, where the change 2014-based to 2016-based was a drop of over 30% to the demographic starting point, the 2016-based projections were adopted. In Wycombe, where the change was a drop of over 40%, they were not. The High Court (Mrs Justice Lang on 18 March 2020) has now granted leave for a s.113 challenge at which the issue will be tested, in *Keep Bourne End Green v (1) Wycombe DC (2) SSHCLG & ors,* where the claimant challenges the examining Inspector's rejection of the 2016-based household projections for the Wycombe Local Plan. The Secretary of State has said he will play an active role, given the wider importance of the issue, and the hearing has been marked as "significant" by Mr Justice Holgate.

The substantive hearing may be expected later this year, and probably after the Court of Appeal has heard the appeal in *R (Oxton Farms) v Harrogate & Noble* [2019] EWHC 1370 (Admin), where the issue arises obliquely (the case concerns a challenge to a grant of planning permission, where a key issue is whether the LPA should have had regard to the 2016-based household projections when considering its five year housing land supply).

James Burton represents the claimant in Keep Bourne End Green.

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Richard regularly acts for and advises local authority and private sector clients in all aspects of planning and environmental law. High Court, Court of Appeal and Supreme Court work includes statutory challenges and judicial review. He undertakes both prosecution and defence work in respect of planning, environmental and health & safety enforcement in Magistrates' and Crown courts. He also acts for landowners and acquiring authorities on all aspects of compulsory purchase and compensation at inquiry and in the Lands Chamber of the Upper Tribunal. He is ranked by Chambers & Partners and the Legal 500 for both Environmental Law and Planning Law. Prior to taking silk he was rated by Planning Magazine Legal Survey as amongst the UK's top planning juniors for over a decade. To view full CV click here.

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James specialises in environmental and planning law and civil liability, along with related areas (such as CPO, Part I Land Compensation Act 1973, energy and aviation). His work often involves the overlap between his practice areas, such as nuisance, Part I claims, and EIA/Habitats. James' work is both domestic and international. Internationally, he has specific expertise in large scale toxic torts and the differing tort regimes across Europe in particular. He also has considerable Parliamentary experience, having appeared on numerous occasions for various petitioners before both the Commons and Lords' Select Committees for the High Speed 2 Bill. To view full CV click here.

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David specialises in substantial construction and property disputes, as well as commercial dispute resolution. He is frequently instructed in cases involving the development and use of land, buildings and property, as well as matters involving serious commercial, insolvency and company law issues. His work frequently has an international edge, involving cross border and overseas transactions and disputes. David speaks regularly at seminars and conferences on both construction and property law. He is also frequently published in leading practitioners' journals. In 2017, along with Richard Hayes, he wrote 'A Practical Guide to the Landlord and Tenant Act 1954: Commercial Tenancies'. To view full CV click here.

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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.

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Gethin is developing a broad planning and environmental law practice. His recent instructions include acting as junior counsel to Richard Wald, on behalf of Natural Resources Wales, in a successful 4 week inquiry concerning proposed byelaws to protect salmon and sea trout stocks in Wales. He was also instructed by the Government Legal Department in the judicial review challenge to the Heathrow third runway. He regularly advises on a diverse range of planning and environmental issues. For example, he has advised in relation to the Environmental Information Regulations, on the prospects of appealing a refusal of planning permission to develop a site within the Green Belt, and in relation to issues arising from the removal of permitted development rights by planning conditions. Gethin has been instructed in relation to judicial review claims as sole and junior counsel. Gethin also has experience of enforcement matters. To view full CV click here.

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