



EDITORIAL COMMENT

The Editorial Board

Welcome to this month's bumper edition of the group's newsletter, which we hope will provide some fuel for debates and discussions.

First, Richard Harwood QC provides a summary of the changes to planning, compulsory purchase and compensation that are proposed by the Neighbourhood Planning Bill. This issue contains two articles 'hot off the press' from Stephen Tromans QC and Rose Grogan, the first of which considers the liability of local authorities under Part 2A of the Environmental Protection Act 1990 following the decision of the High Court in *Price and Hardwicke v Powys County Council* [2016] EWHC 2596. Stephen and Rose's second article discusses the high profile Client Earth case in the Supreme Court, in which they acted on behalf of the Mayor of London. Sandwiched between those two articles is James Burton's short summary of *Gladman Developments Ltd v Daventry District Council and Secretary of State for Communities and Local Government* [2016] EWCA Civ 1146, in which Thomas Hill QC and Christiaan Zwart acted for the successful respondent. The *Daventry* case marks a further step in the rehabilitation of local plans in the context of the NPPF following the much discussed Suffolk Coastal / Richborough appeal from earlier this year. We hope to include a more detailed consideration of the *Daventry* case and its significance in our Christmas edition. Duncan Sinclair then sets out his thoughts on the potential impact of Brexit on Environmental law in the UK, focusing on climate change issues before Rosie

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Editorial Board

JONATHAN DARBY PHILIPPA JACKSON
 VICTORIA HUTTON DANIEL STEDMAN JONES

Scott discusses the interpretation of section 25 of the Tribunals Courts and Enforcement Act 2007 following *William Hill Organization Limited v Crossrail Limited* [2016] UKUT 274 (LC).

As ever, thanks for your interest.

NEIGHBOURHOOD PLANNING BILL

Richard Harwood OBE QC

On 10th October the Neighbourhood Planning Bill received an unopposed Second Reading in the House of Commons, proposing a modest series of changes to planning, compulsory purchase and compensation.

Neighbourhood planning

Several changes are proposed in respect of neighbourhood plans, firstly in respect of the status of draft plans when planning applications are being considered. From the point that the local planning authority decides to hold a referendum the draft neighbourhood development plan will be identified in the statute as a material consideration in the determination of planning applications (clause 1). A draft plan will be treated as part of the development plan from the time that a referendum decides that it should be made (clause 2). A neater solution to the concern that neighbourhood plans should influence decisions sooner would be for the plan to come into force by its approval in the referendum. Currently the local planning authority has to take a post-referendum decision to make the plan, but in reality has no ability to refuse to do so.

Clause 3 introduces two changes. Firstly local planning authorities will be able to make non-material modifications to neighbourhood development orders by order at any time. At present they can only modify plans to correct errors. Secondly two procedures for the modification of neighbourhood development plan is introduced. In some circumstances the examiner's report on modifications will be binding on the local planning authority – a change from the present position.

Many neighbourhood areas have been established but issues will sometimes arise as to whether they are the right ones. The Bill proposes two changes. Designations will automatically cease if a new parish council is created or a parish's area changes. Additionally powers to modify designations are widened to change boundaries and areas.

Statements of community involvement contain the local planning authority's policies on the involvement of interested persons in making local plans and supplementary planning documents and in development management. Clause 5 proposes to extend SCIs to

explain how the local planning authority will give advice or assistance in making neighbourhood plans and orders. It would not extend to how the parish council or neighbourhood forum goes about preparing such documents. Finally clause 6 allows the Secretary of State to make regulations requiring local planning authorities to review their SCIs.

Planning conditions

Two changes are proposed with respect to planning conditions in a new section 100ZA of the Town and Country Planning Act 1990. Regulations may be made limiting the ability to impose planning conditions by prohibiting the imposition of conditions or allowing certain conditions to only be applied in prescribed circumstances. These regulations may only be made to ensure that conditions are necessary, relevant, sufficiently precise and reasonable. This does not envisage a different usage of conditions: their scope is not widened and any restrictions will simply reflect current policy expectations on the use of conditions.

The second element is the proposed section 100ZA(5) that "*Planning permission ... may not be granted subject to a pre-commencement condition without the written agreement of the applicant to the terms of the condition.*"

Regulations may provide that this requirement does not apply in prescribed circumstances and the need for written agreement will not apply to outline planning permissions. Pre-commencement conditions are those which must be complied with before operational development or a material change of use is begun. In such cases the local planning authority have to provide a list of pre-commencement conditions to the applicant before granting permission. The question in practice will be what happens next? If the applicant declines to agree it may be that revised conditions can be agreed. In those cases the authority could decide that some details are unnecessary or that they can be dealt with by a particular stage following commencement. However, if the authority still insists on pre-commencement conditions which the applicant does not accept, then it will ultimately have to refuse permission. The applicant will know that if it holds out it could face a refusal on the basis that conditions have not been agreed. Both parties would have to decide whether they are prepared for the cost (and in the developer's shoes, the delay) of an appeal.

There is a curious element of the current appeal process that whilst it is possible to appeal against the grant of permission subject to conditions, the whole merits of the application are then put in issue. Permission could be refused. As Bob Neill MP suggested in the Parliamentary debate, one way of fast-tracking the resolution of conditions disputes would be to provide that where permission has been granted, any appeal would solely consider the conditions imposed. A developer would therefore have the permission banked and could then argue about conditions. Those conditions appeals could be dealt with quickly on the same basis as householder and minor commercial appeals.

The planning register

Prior approval applications and notifications under the General Permitted Development Order are now to be on the planning register.

Compulsory purchase and compensation

Various of the proposals in the government's February 2016 *Consultation on further reform of the compulsory purchase system* are included in the Bill. The most important is to codify the assessment of compensation in the 'no scheme world'. When land is compulsorily acquired, the scheme underlying the acquisition is disregarded when assessing the value of the land taken. The compensation received is not reduced because the land has been blighted by the scheme but conversely the landowner does not receive a bonus because of the higher value caused by a project which relied on compulsory purchase powers. This approach, known in caselaw as the *Pointe Gourde* principle is easy to state but often very difficult to apply in practice. As Sajid Javid rightly said the 'no scheme world is a mixture of obscurely worded statute and over 100 years of sometimes conflicting case law'. An attempt to supplement it in sections 6 to 9 of the Land Compensation Act 1961 has proved to be entirely useless.

Drawing on work by the Law Commission, the common law and statutory rules on the 'no scheme world' are to be replaced by the Bill.

The other major change is to introduce a power to compulsorily occupy land on a temporary basis. Temporary occupation is often required for big

schemes, either as working areas or compounds, or for accommodation works. No power to compulsorily take possession on a temporary basis is presently available for compulsory purchase orders. Temporary powers are regularly included in hybrid Bills, such as High Speed 2, and sought in development consent orders for nationally significant infrastructure projects. Part 2 of the Bill includes a new regime for compulsory purchase orders to set out land which can be temporarily occupied for the project.

Other changes include improving compensation for businesses with short tenancies, interest being paid if advance (i.e. interim) payments of compensation are delayed and allowing the Greater London Authority and Transport for London to acquire land for joint purposes.

The compulsory purchase and compensation changes are a further stage in seeking to modernise the system. However they will reinforce the need to codify and consolidate the legislation, which will now be spread over more Acts, and to update the language which dates back to Sir Robert Peel's government.

The Local Plans Expert Group report

The Local Plans Expert Group had reported in March 2016 on a comprehensive set of reforms to local plan making. Sajid Javid said he agreed '*with the central thrust of the Local Plans Expert Group's recommendations in this area. We need more co-operation and joint planning. The requirement to have a plan should not be in doubt, and the process for putting a plan in place needs to be streamlined. As the expert group set out, most of those changes can and should be made through national policy and guidance, rather than through primary legislation. Should primary legislation be required, I look to use this Bill as the vehicle for it.*

PLANNING LIABILITY OF LOCAL AUTHORITIES UNDER PART 2A

Stephen Tromans QC and Rose Grogan

Cases on the contaminated land regime under Part 2A of the Environmental Protection Act 1990 are rare, so the decision of the High Court in *Price and Hardwicke v Powys County Council* [2016] EWHC 2596 (HHJ Jarman QC) is worthy of note.

The predecessor councils to Powys had operated a landfill site from the early 1960s until 1993 on farm land owned by the applicants under a series of leases. Waste ceased to be tipped by Brecknock Borough Council in 1992 and the site was then restored to agricultural land. Powys was the successor to Brecknock under local government reorganisation in 1996. Powys managed the system for treating leachate from the site, but in 2013 took the view that it was not liable to do so, and was not an "appropriate person" under Part 2A. This was on the basis of the decision of the House of Lords in the *Bawtry* case: *R (National Grid Gas) v Environment Agency* [2007] 1 WLR 318. Part 2A was not brought into force in Wales until 2001, five years after the transfer.

The applicants sought a declaration that the "liabilities" transferred to Powys included liability for acts of its predecessor so that Powys was an appropriate person on that basis, should the site ever be identified as contaminated land. It relied on provisions of the Local Government (Wales) (Property, etc) Reorganisation Order 1996 which states (Article 4) that "*all the property, rights and liabilities of the old authority shall ... vest in that successor authority*".

The issue was whether "liabilities" included a liability which arose for the first time only by subsequent legislation. The judge distinguished *Bawtry* and held that while it would be a very wide construction of "liabilities" it was justified by the tenor of the Order. He relied in particular on the decision of Woolf J in *Walters v Babergh District Council* (1983) 82 LGR 235:

"The whole tenor of the order is designed to ensure that the reorganisation would not affect events which would otherwise have occurred further than is absolutely necessary because of that reorganisation. That the public should be able to look to the new authority precisely in respect of those matters which it could look to the old authority; that the public's

position should be no better or no worse."

The judgment also deals with the issue of declaratory relief. Powys argued that it was not appropriate to make a declaration as the land might never be identified as contaminated at all, and if it was there was a specific appeal mechanism to deal with disputes over liability. The judge however found that there was a real and present dispute and that the appeal mechanism would not assist the applicants until a remediation notice was served.

The case obviously has wide ramifications for local authorities, particularly given the fact that local authorities operated landfill sites until the Environmental Protection Act 1990 required this to be done by arm's length companies.

Stephen Tromans QC and Rose Grogan acted for Powys County Council.

THE RISE AND RISE AGAIN OF THE STATUTORY DEVELOPMENT PLAN AND NPPF [215] AND [47]

James Burton

It now seems safe to say that as a matter of practical application the decision of the Court of Appeal in *Suffolk Coastal District Council v Hopkins Homes Ltd & Secretary of State for Communities and Local Government and Richborough Estates Ltd v Cheshire East Borough Council & Secretary of State for Communities and Local Government* [2016] EWCA Civ168 marked a turning point in the internecine struggle between the statutory development plan and national policy. Paragraphs [42-47] of the judgment of Lindblom LJ there not only re-affirmed the statutory priority to be given to the development plan but, more importantly, that development plan policy is not automatically to be given reduced weight because of inconsistency with the NPPF, that weighting point remaining for the decision-maker in the particular circumstances.

Gladman Developments Ltd v Daventry District Council and Secretary of State for Communities and Local Government [2016] EWCA Civ 1146, in which Thomas Hill QC and Christiaan Zwart acted for the successful respondent, marks a further step in the rehabilitation of local plans in the context of the NPPF. The Planning

Inspector there had taken an approach to the statutory development plan's saved policies which was, effectively, that because they were old, they were out of date for the purposes of the NPPF. He had failed to consider their consistency, or otherwise, with the NPPF in reaching that view. In so doing, the Inspector had failed to carry out the careful assessment exercise required by NPPF [215].

Perhaps of greater note, the judgment of Sales LJ (with which Richards and Patten LJ agreed) contains important passages, strictly obiter but highly persuasive, concerning the interpretation of NPPF [47] and its effect on the NPPF [215] assessment, which has been the subject of some dispute at first instance. The relevant paragraphs are at judgment [47-49].

Sales LJ agreed, first, with Lindblom LJ's statement in *Oadby and Wigston Borough Council v Secretary of State for Communities and Local Government* [2016] EWCA Civ 1040 at [34] that NPPF [47] 'relates principally to the business of plan-making' whilst NPPF [49] 'relates principally to applications for planning permission... But it must of course be read in the light of the policy requirement in paragraph 47'.

He then held that the first, third, fourth and fifth bullet points of NPPF [47] relate sole to plan-making and not to decision-taking (judgment [48]).

Finally, though, the second bullet point of NPPF [47] is not solely confined to plan-making, as the requirement to 'update annually' the five year housing supply inevitably involves activity outside the local planning authority's plan-making function. That second bullet point is tied to the deeming provision in NPPF [49] and creates 'a continuing obligation on a local planning authority to check that its housing supply is in fact in accordance with the standard there set out'. If not, then the second bullet point 'has similar force for decision-making' as, for example, NPPF [7]. However, if the standard set out in the second bullet of NPPF [47] is being complied with then it has no implications for decision-taking and does not, in circumstances where an authority can demonstrate a five-year supply, constitute 'more recent guidance' of the kind discussed by Lord Clyde in *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 WLR 1447, HL, at 1458C-1459G, such as might justify a planning

inspector treating local plan policies as out of date or inconsistent with NPPF [47] for the purposes of the assessment required under NPPF [215] (judgment [49]).

GOVERNMENT AIR QUALITY PLAN FOUND UNLAWFUL

Stephen Tromans QC and Rose Grogan

In April 2015 the Supreme Court required the Government to publish a plan to achieve compliance with EU air quality standards for nitrogen dioxide in the shortest possible time in accordance with Article 23 of the Air Quality Directive (2008/50/EC). The Government, in purported compliance with the Supreme Court's Order, published a plan in December 2015. ClientEarth, who had brought the initial proceedings, supported by the Mayor of London, have successfully challenged the plan: *ClientEarth (No. 2) v Secretary of State for the Environment, Food and Rural Affairs* [2016] EWHC 2740 (Admin). The plan had the goal of achieving compliance with annual mean standards for nitrogen dioxide by 2020 in England and 2025 in London. Outside London, the government relied on the creation of "clean air zones" in five cities (Leeds, Southampton, Birmingham, Derby and Nottingham), and in London on a broader package of measures, central to which was the ultra-low emission zone created by the previous Mayor.

In the preparation of the plan, Defra had relied on emissions factors to calculate the likely pollution generated by diesel vehicles. These factors have in the past proven to be unreliable and at the time the plan was created, the government's own research was suggesting that they were too conservative. Alongside this, while Defra sought to identify and evaluate appropriate potential measures to achieve compliance, the Treasury was carrying its 2015 annual spending review of departmental budgets, in which the Treasury pushed Defra and DfT to provide the "least cost pathway to compliance".

ClientEarth and the Mayor of London argued that the plan was unlawful because it did not achieve compliance as soon as possible, as the Directive requires. The dates for compliance of 2020 and 2025 were arbitrary and the government had wrongly considered cost when ruling out measures which would have achieved compliance sooner, or increased the probability of compliance. The government argued that it was entitled to take

into account proportionality when drawing up its plan, including cost effectiveness of measures.

In his judgement, Garnham J considered the correct interpretation of Article 23. Whilst accepting that the provision gives some discretion to the Member State, he found it plain that the discretion was “narrow and greatly constrained”. In terms of cost, there could be no objection to a Member State having regard to cost when deciding between two equally effective measures, or in deciding which organ or government should bear the cost. But cost was not relevant to fixing the target date for compliance, in which respect the determining consideration was effectiveness, not cost. Reference in case law to measures being “proportionate” did not refer to cost, but rather to doing more than was required, or to taking measures which had disproportionate effects on the public (e.g. an immediate ban on all vehicles in city centres). The judge accepted the submission of ClientEarth that the Secretary of State must aim to achieve compliance by the earliest date possible, and the further submission for the Mayor that she must choose a route to that objective which reduces exposure of the public to pollution as quickly as possible.

ClientEarth was successful in two main criticisms of the Plan. First was the use of 5-yearly intervals in modelling. This was Defra’s previous practice. While it might have been sensible and pragmatic for routine modelling, the judge found that it should not have been allowed to become a determinative factor in selecting the date for compliance and as such was inconsistent with the need to achieve compliance in the shortest possible time. This was a flaw which “tainted the whole exercise”. Selection of 2020 or 2025 for London was an error of law. This was done “for little more than administrative convenience” and deprived the Secretary of State of the opportunity to discover what was necessary to effect compliance by an earlier date and whether a faster route to lower emissions might have been devised.

Secondly, the approach was flawed by the choice of modelling method, using the optimistic assumption that diesel cars subject to the Euro 6 standard would emit 2.8 times that standard, when real world tests suggested much greater exceedance. Sensitivity analysis showed that an increased level of emissions would result in

far more zones being non-compliant. The judge found that Defra had recognised that they were adopting an optimistic forecast. Continuing to adopt the approach it did in those circumstances was “markedly optimistic” and did not ensure that the compliance period would be kept as short as possible.

The judge made a declaration of failure of the plan to comply with the Directive. The precise form of relief is to be determined but seems likely to be that the current Plan must continue to be implemented until a compliant Plan is in place, with a time limit for production of that plan.

Plainly the Government will have to re-think its approach to modelling and the scope and nature of measures needed, given the true position on emissions from Euro 6 vehicles. The decision can also be expected to have ramifications for expansion at Heathrow, given the difficulties of compliance with air quality standards presented by a third runway.

Stephen Tromans QC and Rose Grogan represented the Mayor of London.

ENVIRONMENTAL LAW AND BREXIT: CLIMATE CHANGE TARGETS, RENEWABLE ENERGY SUBSIDIES AND ENERGY EFFICIENCY

Duncan Sinclair

This article deals with certain aspects of the impact of an UK exit from the EU (‘Brexit’) on Environmental law in the UK, focusing on climate change issues. It is important to recognize that different considerations apply to other environmental issues not treated in this article (for instance the law relating to habitats, bathing water, clean air measures, waste disposal and so on); some of the key features of those issues will be covered in a future article.

The referendum on 23 June 2016 and developments since have introduced uncertainty in many areas of law. Much of this uncertainty is driven by the ‘known unknown’ of future political decisions/negotiations, with the terms “hard” and “soft” Brexit encompassing not a binary set of outcomes, but a range of possible results.¹

¹ The implication, for the purposes of this article, of the ruling in *R. (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 is that Parliament will need to consider legislation to repeal the EC Act 1972 (see [86]-[88]).

Climate change targets and the related renewable energy subsidies and energy efficiency measures are areas law in which many of the key legal instruments are both EU and domestic, indeed some are international – Treaties agreed under the auspices of the United Nations.²

This article outlines the key relevant legislation below, with the conclusions that, first, the UK ‘direction of travel’ in this area is unlikely to change significantly as a direct result of Brexit but in some instances the legal instruments may change. Secondly, those benefitting from existing arrangements will typically be protected by the legal principle against retrospective effect and the protection of property rights under Article 1 Protocol 1 of the ECHR as given force through the Human Rights Act 1998.

Climate Change Targets – UK and International

The UK Parliament³ led the world in enacting, through the Climate Change Act 2008 (the ‘CCA 2008’)⁴ the first national⁵ long-term legally binding targets for reducing greenhouse gas emissions. Those targets are ambitious, long term (80% by 2050 against a 1990 baseline) and supported by subsidiary obligations to set regular caps (‘carbon budgets’), promote energy efficiency, promote low carbon energy and waste disposal (waste disposal is subject to broader legal issues and beyond the scope of this article).

The focus in the CCA 2008 is thus on achieving greenhouse gas reductions primarily through (i) increased deployment of low carbon/renewable energy generation, low carbon transport and (ii) increasing energy efficiency by users (including households, industry and in waste disposal). This reflects a well-established approach (seen at the EU level and under the UN environmental programs on tackling climate change), based on the facts that:

- fossil fuels are by far the largest single cause of greenhouse gas emissions (both in energy production

and transport – though non-energy industrial output, buildings and waste disposal are not insignificant contributors); and

- a reduction in use of fossil fuels and other sources of emissions can be achieved by (i) promoting the use of renewable sources of energy/transport (a predominantly ‘supply side’ approach) and/or (ii) by increasing efficiency in use of energy/other sources of emission (from increasing technological efficiency, to building efficiency and waste disposal measures – a predominantly ‘demand side’ approach).

The CCA 2008 established the Climate Change Committee to monitor and report on progress on an ongoing basis.

The EU legal framework and interaction with UK law and policy

The Treaty for European Union contains powers (notably in Articles 3(3), 191 and 194) relating to sustainable development, climate control and energy policy. The EU Commission has used these powers to adopt a range of legal measures which combine in setting a framework for three climate and energy targets to be reached before 2020: a 20% reduction in greenhouse gas emissions, 20% of energy derived from renewables and a 20% increase in energy efficiency (the “20-20-20” targets). In particular, this includes:

- The Renewable Energy Directive⁶ which places a binding target across the EU of a 20% renewable energy use, with the UK having the target of achieving 15% of energy production from renewables by 2020 (and a separate target for transport) – a “supply side” measure.
- The Energy Efficiency Directive.⁷ This sets the framework for measures to promote energy efficiency across the EU and help the EU reduce its energy consumption/increase efficiency by 20% – a

2 Notably the 1997 Kyoto Protocol with effect from 2005 up to 2020, as amended by the Doha amendment, and the subsequent Paris Agreement 2015 which came into force on 4th November 2016 – Treaties to which both the EU and the UK are party and, in respect of the latter, the UK ratified the Paris Agreement in November 2016, a firm sign of its commitment to reducing greenhouse gas emissions post-Brexit.

3 Not merely the (Labour) Government of the day – the legislation had broad cross-party support.

4 The Climate Change (Scotland) Act 2009 replicates, for Scotland, the 80% emissions reduction target for 2050.

5 Notably the Kyoto Protocol with effect up to 2020, as amended by the Doha amendment, and the subsequent Paris Agreement which came into force in November 2016 – Treaties to which both the EU and the UK are party and, in respect of the Paris Agreement, this was ratified by the UK in November 2016).

6 Directive 2009/28/EC.

7 Directive 2012/27/EU.

“demand side” measure.

- EU Regulations establishing the EU Emissions Trading System (EU ETS).⁸ The EU ETS works by capping overall emissions from high-emitting industry sectors and power stations, with a yearly decrease in the level of the cap. Within this cap, companies can buy and sell emission allowances as needed. This “cap-and-trade” approach system has no domestic equivalent but, combined with the above measures, is intended to achieve a 20% reduction in emissions.

It can be seen that the above are all consistent with the CCA 2008. Indeed, just as the EU measures require National Action Plans to be notified to the EU Commission, and progress against them monitored and reported, so too does the UK Climate Change Committee report on national carbon budgets and progress against them under the CCA 2008. Indeed, its view is that the UK’s own national carbon budgets to date (and the trajectory extending to 2050) are more demanding than those set at EU level such that post-Brexit there will be no need to change the national carbon budgets. Further, the UK ‘budgets’ contain detailed actions and targets across a range of areas, including the contribution of renewable energy sources and a range of energy efficiency measures.

As regards renewable energy generation, specific legal mechanisms such as the Feed-in Tariff scheme, the Electricity Market Reform and the Contracts for Difference (CfD’s) regime under it are now well-established UK measures for encouraging investment with the aim of meeting both EU and UK targets. In light of the CCA 2008, and this Government’s recent ratification of the Paris Agreement, there is no reason to think that even if the Renewable Energy Directive were itself inapplicable post-Brexit⁹ the existing schemes, chosen by Parliament as an effective means of reducing emissions and ensuring a secure and sustainable supply

of energy in a cost-effective manner, will be under any threat. Certainly, any amendment taking away existing rights would require an Act of Parliament in the clearest terms if it is not to infringe the common law presumption against retrospective effect,¹⁰ and in principle loss of goodwill or existing contracts could infringe property rights under Article 1 Protocol 1 of the ECHR (as given effect to by the Human Rights Act 1998).¹¹

A similar point may be made as regards energy efficiency: the 20% target in the EU Directive may well fall away, but it has long been recognized that measures ensuring demand reduction/energy efficiency are an important (indeed an essential) part of the regulatory ‘toolkit’ in meeting the (tough) carbon reduction targets under the CCA 2008.

The EU ETS

This regime falls into a different category post-Brexit as there is no UK-only equivalent (though there are some non-EU/EEA members of EU ETS, for instance Iceland). The EU ETS is “politically” open to expansion beyond the EU, with several bilateral negotiations already taking place, and with the Paris Agreement expressly encouraging and envisaging a broader international carbon trading system. The advantages, provided there is essential compatibility (for instance in equality of measurement) and a cap on certificates to trade, have been widely recognized. As the UK has been an active participant in the scheme to date, it is likely to be considered to be of mutual advantage to provide for the UK to remain party to (or immediately rejoin) the EU Emissions Trading System.

In the (it would seem, unlikely) event the EU ETS is not available to the UK post-Brexit (for instance, if it becomes a ‘bargaining chip’ in negotiations that fail), it is to be anticipated that the UK would introduce an equivalent scheme (it has already put in place a carbon floor price to support the EU ETS) and seek to expand/link that scheme to others on a bilateral or multilateral basis post-Brexit.

⁸ Directive 2003/87/EC first established the trading scheme, which has been amended and supplemented by a number of later EU Directives.

⁹ That the Renewables and the Energy Efficiency directives will no longer ‘bite’ on the UK qua Member State of the EU (with the necessary corollary that breach could be pursued by Commission action before the Court of Justice of the EU and penalties imposed) would seem to be a likely result of exit from the EU (unless an EEA or similar arrangement is agreed). The aims may more readily be supplanted by specific renewables and energy efficiency targets in national legislation (for instance by amendment to the CCA 2008), though the view may be taken that this is unnecessary in light of the existing terms of the CCA 2008.

¹⁰ See for instance *R. (on the application of Homesun Holdings Ltd) v Secretary of State for Energy and Climate Change* [2012] EWCA Civ 28; [2012] Env. L.R. 25; [2012] at [43-53].

¹¹ In this respect, see the judgment of the Court of Appeal, considering the position of current investors in renewable generation in *Breyer Group Plc v Department of Energy and Climate Change* [2015] EWCA Civ 408; [2015] 1 W.L.R. 4559; [2016] 2 All E.R. 220.

Concluding remarks

In the area of climate change law it is likely to be a question of plus ça change whatever form of Brexit is ultimately pursued. The same cannot however be said of a great many other issues in environmental law: from harmonization of vehicle emissions, to air quality, bathing water, waste disposal, building standards, habitats... in these areas the law can more clearly be seen to have been "driven" by Brussels, with the UK, at times, a reluctant partner. Some of these issues will be dealt with in future articles in this newsletter.

THE UPPER TRIBUNAL – A SAFER BET AFTER WILLIAM HILL?

Rosie Scott

All bets are off on the old interpretation of section 25 of the Tribunals Courts and Enforcement Act 2007 after the sensible judgment by the Deputy President of the Upper Tribunal (Lands Chamber) in *William Hill Organization Limited v Crossrail Limited* [2016] UKUT 274 (LC), which also provides the stables' hot tip on the next likely source of contention, straight from the horse's mouth.

Section 25 of the Tribunals, Courts and Enforcement Act 2007 grants the Upper Tribunal "*the same powers, rights, privileges and authority as the High Court*" in relation to "*all other matters incidental to the Upper Tribunal's functions*" (s.25(2)). Section 25(3) provides that this power-sharing may be limited only by an express limitation in the Tribunal Procedural Rules.

The Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 are notably concise, and nature abhors a vacuum. Section 25 therefore offers clear possibilities for applying the vast array of High Court procedural powers to Upper Tribunal cases governed by the comparatively brief 2010 Rules. This has the potential to impact significantly on those cases and on the strategy of lawyers conducting them at every stage.

Previous cases had taken a restrictive view of what High Court powers the Upper Tribunal could acquire under section 25. For example, both *IB v Information Commissioner*¹² and *Raftopoulou v Commissioners for HMRC*¹³ focussed on the fact that the statutory power in question was conferred on defined categories of "courts",

not "tribunals". In each case the Upper Tribunal therefore denied that it could wield that High Court statutory power through section 25: "the power afforded to the High Court... is therefore confined by the limitations inherent [in the Act] itself, in particular the jurisdictional limitation.... S.25 cannot be construed to permit an extension beyond those express jurisdictional boundaries" (*Raftopoulou*, at [14]).

Actually, reasoned Martin Rodger QC in *William Hill*, that is exactly what s.25 must be construed as doing. Parliament is aware of the High Court's powers, both inherent and statutory, and section 25 contains no limitation regarding the origin of the High Court's powers. The wording of section 25 is clear: the limiting factor for whether the Upper Tribunal acquires a High Court power is not the source or terms of that power, but whether that power is "*incidental to the Upper Tribunal's functions*".

Section 25 therefore is "intended to be read literally and applied generally". As long as Parliament has not expressly legislated that the Upper Tribunal should not possess a particular power and the 2010 Rules have not imposed an express limitation, then "the Upper Tribunal must be taken to have the same powers as the High Court in relation to all matters incidental to its functions".

Here, section 25 gave the Upper Tribunal the powers in section 35(3-4) of the Limitation Act 1980 to allow a "new claim" to be made after the expiry of limitation, by substituting a new party under section 35(5). Martin Rodger QC found that the Tribunal's "functions" include the resolution of compensation disputes; the procedure for correctly joining parties was plainly incidental to that function. He also adopted the same approach to section 35(3) as the High Court, applying CPR r.19.5. This was appropriate as the source of the power was the same, and the Tribunal's procedural rules did not require a more restrictive approach.

By identifying the proper approach to section 25 TCEA 2007, Martin Rodger QC has brought welcome clarity to this important section. He has also indicated the next likely field of combat: the meaning of the critical limitation in section 25 of "*matters incidental to the Upper Tribunal's functions*". But that is a story for another day.

¹² [2011] UKUT 370 (ACC)

¹³ [2015] UKUT 630 (TCC)

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Jonathan's broad practice encompasses all aspects of public and administrative law. His planning, environmental and property practice encompasses inquiries, statutory appeals, judicial review, enforcement proceedings and advisory work. Jonathan is instructed by a wide variety of domestic and international clients, including developers, consultants, local authorities and the Treasury Solicitor. He is listed as one of the top junior planning barristers under 35 in the Planning Magazine Guide to Planning Lawyers. Before coming to the Bar, Jonathan taught at Cambridge University whilst completing a PhD at Queens' College. To view full CV [click here](#).



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Philippa undertakes a wide range of planning and environmental work, including planning and enforcement appeals, public examinations into development plan documents and challenges in the High Court. She acts for developers, local authorities, individuals and interest groups, and she has been listed for the past three years as one of the top planning juniors under 35 by Planning Magazine (2013, 2014 and 2015). Examples of recent cases include an appeal relating to an enabling development scheme for the restoration of a nationally important collection of historic buildings and a judicial review challenge to a local authority's decision to designate a sports stadium as a conservation area. To view full CV [click here](#).



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Daniel specialises in planning and environmental law and regularly acts in public inquiry, High Court and Court of Appeal proceedings. He is the co-editor of Sweet & Maxwell's Planning Law: Practice and Precedents and a contributory editor of The Environmental Law Encyclopedia. He is also a contributor to Shackleton on the Law of Meetings. Daniel also practices in public, regulatory and competition law, with a particular emphasis on the energy sector. Daniel is a member of the Attorney General's 'C Panel' of Counsel. Before coming to the bar, Daniel completed a PhD at the University of Pennsylvania including an Urban Studies Certificate. To view full CV [click here](#).

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