## INTRODUCTION

Jonathan Darby

Welcome to the latest edition of our Planning, Environment and Property newsletter. This edition includes contributions from Stephen Tromans QC (on the return of the Environment Bill to Parliament); John Pugh-Smith (on the benefits of ADR in the context of ongoing reviews of administrative law and the pre-action protocols); and David Sawtell (on a recent Supreme Court ruling on the discharge of restrictive covenants).

As ever, we have a busy ongoing schedule of webinars, with the next one being our annual Cambridge/East of England regional seminar that will be held virtually this year via Zoom, focussing on planning, environmental and property issues relevant to the region. Topics will include:

- A planning and environment case law update.

## Contents

- Rights of entry under leases for inspection and works – update after *Rees v Earl of Plymouth* [2020] EWCA Civ 816.
- Nuisance and remedies update.
- Discussion of Rectory Homes and its implications for specialist housing provision, including student accommodation.

Please keep an eye on our website (www.39essex.com) for news of other forthcoming events, as well as podcasts, articles and case notes.

## BACK IN DA HOUSE: THE ENVIRONMENT BILL RETURNS

### Stephen Tromans QC

The Urban Dictionary tells us (which was news to me) that the expression "in da house" is an exclamation used as a compliment, especially if the person being complimented is considered very knowledgeable and has helped a person out in some way with little difficulty doing so. I am not sure whether that relates in any meaningful way to the Committee Stage proceedings on the Environment Bill, which resumed in November, but anyway the Bill is "back in da House". Rudely interrupted by lockdown on 19th March, the Bill is now back with the Public Bill Committee, where it will stay for November, 1st December being the agreed "out date".

I have been reading Parliamentary debates and Committee proceedings on environmental legislation for 30 years now, beginning with the Environmental Protection Act 1990. The "line by line" consideration of the Bill in Committee, I am afraid to say, does not grow more exciting with the years. Rather like the age of policemen, as you get older, MPs seem to get ever more prolix. On a number of occasions the Chair of the Committee has had to chide members for making speeches rather than focusing on amendments, and has bemoaned slow progress.

The outcome of the process has a definite theme. The opposition tables amendments designed to increase the accountability of government: the Government opposes them and they are withdrawn or voted down. Alternatively, the Government tables amendments designed to increase the (already broad) discretion accorded to Government: The opposition bemoans then and they are passed. There is a lot of suggesting that "may" should be replaced by "must", and a lot of resisting such changes.

There is also a very large elephant in the Committee Room, which does occasionally get referred to – this is the Government's Planning White Paper, published after the initial Committee proceeding. The ambition to reform the planning system in the way proposed seems unlikely, frankly, to sit easily with environmental aspirations.

There are a few issues where it may be worth highlighting statements made by the Parliamentary Under Secretary, Rebecca Pow MP.

**Environmental principles and proportionality**

The Government resisted an amendment to leave out the qualification of "proportionality" in respect of the provisions on the policy statement on environmental principles in what is currently clause 16, on the basis that the words could be all things to all people. Rejecting the amendment Rebecca Pow MP said:

> *"Proportionate application is a key aspect of use of the principles, and it ensures that Government policy is reasoned and based on sensible decision making. It is vital that this policy statement provides current and future Ministers with clarity on how the principles should be applied proportionately, so that they are used in a balanced and sensible way. Setting out how these principles need to be applied in a proportionate manner does not weaken their effect, nor does ensuring that action on the basis of the policy statement is only taken where there is an environmental benefit. It simply means that in the policy statement, we will be clear that Ministers need to think through environmental, social and economic considerations in the round, and ensure that the environment is properly*

*factored into policy made across Government from the very start of the process.*

*When the policy statement is then used, Ministers of the Crown will take action when it is sensible to do so. This approach is consistent with the objective in relation to the policy statement of embedding sustainable development, aimed at ensuring environmental, social, and economic factors are all considered when making policy. Not balancing those factors could have consequences that halt progress. For example, a disproportionate application of the "polluter pays" principle could result in anyone being asked to pay for any negligible harm on the environment, when in reality, many actions taken by humans cause some environmental harm, such as going for a walk in the country. It is essential to ensure that the principles are applied in an appropriate and balanced way, and proportionality is absolutely key to this."*

## Environmental principles and the armed forces

The Government rejected another amendment to apply the environmental principles provisions to the armed forces and national security matters, removing the exemption in the Bill. Rebecca Pow MP stated:

*"While we recognise the intention behind these amendments, it is fundamental to the protection of our country that the exemptions for armed forces, defence and national security are maintained. The exemptions that would be removed by the amendments relate to highly sensitive matters that are vital for the protection of our realm, so it is appropriate for them to be omitted from the duty to have due regard to the environmental policy statement. A critical part of the role of Defence and Home Office Ministers is to make decisions about the use of UK forces to prevent harm, save lives, protect UK interests or deal with a threat. We have several colleagues in the Room who have strong armed forces links, and I think they will agree with that summary. It would not be appropriate for Ministers to have to go through the process of considering the set of environmental principles before implementing any vital and urgent policies related to the issues I have just mentioned."*

## Environmental principles and fiscal decisions

Similarly, the Government was having no truck with a provision to ensure environmental principles provisions covered fiscal decisions:

*"I thank hon. Members for tabling the amendment. While we recognise the intention behind it, it is important to maintain the exemption to ensure sound economic and fiscal decision making. It is important to be clear that this exemption only refers to central spending decisions, because at fiscal events and spending reviews such decisions must be taken with consideration to a wide range of public priorities. These include public spending on individual areas such as health, defence, education and the environment, as well as sustainable economic growth and development, financial stability and sustainable levels of debt.*

*There is no exemption for individual policy interventions simply because they require spending. Ministers should still have due regard to the policy statement when developing and implementing all policies to which the statement is applicable. This means that while the policy statement will not need to be used when the Treasury is allocating budgets to Departments, it will be used when Departments develop policies that draw upon that budget. This is the best place for the use of the policy statement to effectively deliver environmental protection."*

## Guidance to OEP

Could the Office for Environmental Protection, created by the Bill, prove an inconveniently unruly horse? Perhaps not if the Government creates sufficiently stout reins. For example the Government amendment creating new clause 24 will allow the Government to issue guidance to the OEP on its enforcement policy. Notwithstanding opposition protests, the clause was approved. As put by Rebecca Pow MP:

*"The amendment and new clause will provide a power for the Secretary of State to issue*

*guidance to the OEP on the matters listed in clause 22(6) concerning its enforcement policy. The OEP will be required to have regard to this guidance in preparing its enforcement policy and in carrying out its enforcement functions. This is an important new provision, which will allow the Secretary of State to seek to address any ambiguities or issues relating to the OEP's enforcement functions where necessary. We expect the OEP to develop an effective and proportionate enforcement policy in any event, but Secretary of State guidance can act as a helpful resource for the OEP in the process. For example, the Secretary of State may issue guidance to the OEP relating to how it should respect the integrity of other statutory regimes, including those implemented by regulators such as the Environment Agency. That could also be invaluable to resolve and clarify any confusion that may arise regarding the wider environmental regulatory landscape.*

*As the Minister ultimately responsible to Parliament for the OEP's use of public money, it is appropriate that the Secretary of State should be able to act if the OEP were not exercising its functions effectively or needed guidance from the Secretary of State to be able to do so, for instance, if it were failing to act strategically and, therefore, not taking appropriate action in relation to major systematic issues. The new clause will not provide the Secretary of State with any power to issue directions to the OEP—that is important—or to intervene in specific decisions. Rather, the OEP is simply required to have regard to the guidance in preparing its enforcement policy and exercising its enforcement functions. Furthermore, the Secretary of State must exercise the power in line with the provision in paragraph 17 of Schedule 1, which requires them to "have regard to the need to protect" the OEP's independence. That is important as well."*

**Seriousness and the boiled frog, and venue**

There was debate over the restriction on OEP's enforcement functions caused by the qualification of the word "serious" on the OEP taking action for breaches of environmental law. Labour put it quite memorably in the following analogy:

*"Frankly, as with the old fable of the frog that does not get out of the saucepan before it boils because at no stage does it decide it is too hot for it to stay, the OEP would have no ability to pull the frog out of the saucepan at any stage. It would simply have to stand by while the frog boiled, and then refer the boiled frog to the minister and say, "Is that serious enough and should we perhaps have done something about it beforehand?"*

Another controversial issue is the court venue for actions by the OEP to enforce environmental law. Originally the Upper Tier Tribunal was to be the venue, a decision applauded by many, and which might over time have led possibly to a more intrusive standard of review. Perhaps the Government realised this. The stand-in for Rebecca Pow MP, while she was briefly ill, stated:

*"Having reflected further on how that process will fit within the wider landscape of environmental mitigation, we have identified a risk that hearing environmental reviews in the upper tribunal could introduce unnecessary complexity and, potentially, inconsistency. This change is therefore intended to create greater coherence, clarity and consistency and is in the interests of good administration. First, the change will ensure that all the OEP's legal proceedings are heard in a single forum, the High Court, regardless of whether they are brought as an environmental review following normal enforcement procedure or as an urgent judicial review. Secondly, the change will ensure that all alleged breaches of environmental law are heard in the same forum, regardless of who has brought claims. For example, wider environmental judicial reviews brought by nongovernmental organisations are heard in the High Court and environmental reviews brought by the OEP will now come to the same forum. That should help to promote a consistent approach towards the interpretation and application of environmental law"*

**Producer responsibility**

The Committee moved on to the provisions on waste and there was a lengthy discussion of producer responsibility. Again the Bill gives the Government vast leeway as to what action it takes. However, Rebecca Pow MP did provide some interesting insights in that regard:

> *"The Bill creates producer responsibility obligations in respect of specified products or materials. That is one of a number of provisions that will enable us to take action significantly to improve the environmental performance of products across their entire life cycle—from the raw material used, to end-of-life management. Other powers in the Bill include our ability in schedule 5 to require producers to pay disposal costs for their products; our powers in schedule 6 to introduce deposit return schemes; and the powers in schedule 7 to set resource efficiency standards in relation to the design and lifetime of products.*
>
> *The Government need the flexibility to decide what measures will best deliver the outcomes that we want. Imposing producer responsibility obligations in all cases may not be appropriate. The power is drafted in a way that gives us the flexibility to choose the appropriate measure or combination of measures for any product, and to decide which producers are obligated, the obligations on them, and the steps that they need to take to demonstrate that they have met their obligations."*

To be continued ….

## THAT ADR FEELING

**John Pugh-Smith**

**Context**

At a time of the current round of consultation on changes to our Judicial Review system it seems timely to revisit the role of ADR in Public Law.[1] Last month, the day after the Government commissioned Faulks' Independent Review of Administrative Law closed its call for evidence on 26th October 2020 the Civil Justice Council opened its review of Pre-Action Protocols on 27th October 2020 and closes on 18th December).

The IRAL (the acronym for the Review and on whose panel my colleagues Vikram Sachdeva QC and Celina Colquhoun happen to be sitting) was launched in July 2020. It followed the Government's manifesto commitment to guarantee that judicial review would remain available *"to protect the rights of the individuals against an overbearing state, while ensuring that it is not abused to conduct politics by another means or to create needless delays"*.

The information sheet also advised that the panel would consider *"whether the right balance is being struck between the rights of citizens to challenge executive decisions and the need for effective and efficient government"* and, that the work formed part of *"the Lord Chancellor's duty to defend our world-class and independent courts and judiciary that lie at the heart of British justice and the rule of law"*.

Those of the CJC's current review are to look at look at all aspects of Pre-Action Protocols ("PAPs") including their purpose, whether they are working effectively in practice and what reforms, if any, are required. The launch announcement advises that the CJC is particularly interested in looking at how PAPs are working for litigants with limited means; the costs associated with PAP compliance; the potential of PAPs in online dispute resolution, and

1 See Local Government Lawyer "Bringing it Home" (July 2018): https://protect-eu.mimecast.com/s/a__uCoQ2wcXZDN9l1rwXg based on a paper presented by my colleague, Katie Scott and myself at the Lawyers in Local Government Conference in March 2018

the potential for PAPs to be streamlined. However, they advise that their focus is not closed, and "we are conducting a preliminary survey to obtain feedback and suggestions about what ought to be the focus of the review, and the priorities for reform".

The provisional terms of reference relevant to this article include:

"4. Are the "soft sanctions" for non-compliance with voluntary pre-action protocols – case management directions and costs orders – being regularly and consistently applied?

5. Should all PAPs be mandatory? Should any PAPs be mandatory? What should the sanctions for non-compliance be?

8. Are PAPs a mechanism for de facto compulsory ADR prior to commencement of litigation? Should they be?"

Common to both the IRAL and CJC reviews, I would suggest, is their need to take the promotion of ADR, with attendant costs sanctions, much more seriously and rigorously.

Given, too, in this current world of remote working, Zoom meetings, and, on-line hearings that the CJC ADR Working Group's Final Report dated November 2018[2] included, amongst its 24 recommendations the following:

**Recommendation 11:**

*ODR needs to establish itself in the public consciousness in order to realise its vast potential. It offers efficient and proportionate dispute resolution to a world that increasingly embraces online services and interactions in all aspects of life. Part of the solution will undoubtedly be standard setting.*

**Recommendation 21:**

*The Halsey Guidelines for the imposition of costs sanctions should be reviewed and should narrow the circumstances in which a refusal to mediate is regarded as reasonable.*

## Dispute Avoidance

Surprising as it may seem, mediation and its related less formalised facilitation applications are generally considered only when a dispute has crystallised. Increasingly, however, the mediation process is being used more strategically for early dispute management and with impressive results. This is where early review and intervention are deployed with the aim of identifying and managing conflicts. The principles underpinning the process include: restarting communication between the parties; providing a 'safe' arena for open discussion about the problems and the options; encouraging consideration of options for settlement that can include those a court could not consider. Experienced practitioners frequently see the damage to contracts and valuable relationships and understand that structured negotiation at an earlier stage would probably have conserved more resources a good deal sooner and achieved a better commercial outcome. The involvement of an independent professional early on can help the parties rationalise the legal issues, rebuild the trust and the good will necessary to find agreement, assist with risk assessment and support the parties in making good decisions for themselves and their respective organisations. As facilitators, they can chair public meetings or oversee consultation exercises bringing an objective eye and guidance to ensure that issues are addressed and not buried.

Co-incidentally, this type of pragmatic and proactive approach is not new. Indeed, it reflects the aspirations contained in the Government's Dispute Resolution Commitment, announced by the then Justice Minister, Jonathan Djanogly MP, on 23 June 2011. It included:

- Being proactive in the management of potential disputes and in working to prevent disputes arising or escalating, in order to avoid the need to resort to the use of formal dispute mechanisms wherever possible.

2 https://www.judiciary.uk/wp-content/uploads/2018/12/CJC-ADR-Report-FINAL-Dec-2018.pdf

- Using prompt, cost effective and efficient processes for completing negotiations and resolving disputes.
- Choosing processes appropriate in style and proportionate in costs to the issues that need to be resolved.
- Recognising that the use of appropriate dispute resolution processes can often avoid the high cost in time and resources of going to court.
- Educating employees and officials in appropriate dispute resolution techniques, in order to enable the best possible chance of success when using them.

**Mediation and the Courts**

The case for mediation generally is widely accepted. As far back as 2001 Lord Woolf LCJ articulated the capability of this field to embrace mediation. In *Cowl v Plymouth City Council* [2001] EWCA Civ 1935 at para. 1 he remarked:

> *"The importance of this appeal is that it illustrates that, even in disputes between public authorities and the members of the public for whom they are responsible, insufficient attention is paid to the paramount importance of avoiding litigation whenever this is possible. Particularly in the case of these disputes both sides must by now be acutely conscious of the contribution alternative dispute resolution can make to resolving disputes in a manner which both meets the needs of the parties and the public and saves time, expense and stress."*

Further, at paragraph 27:

> *"This case will have served some purpose if it makes it clear that the lawyers acting on both sides of a dispute of this sort are under a heavy obligation to resort to litigation only if it is really unavoidable. If they cannot resolve the whole of the dispute by the use of the complaints procedure they should resolve the dispute as far as is practicable without involving litigation. At least in this way some of the expense and delay will be avoided."*

Quoting Lord Neuberger's key note address on 12 May 2015 to the Civil Mediation Council's Annual Conference:

> *"First, mediation is quicker, cheaper and less stressful and time-consuming than litigation. Secondly, mediation is more flexible than litigation in terms of potential outcomes. Thirdly, mediation is less likely to be harmful to the long term relationship between the parties. Fourthly, mediation is conducted privately, under less pressure and in somewhat less artificial circumstances than a court hearing. Fifthly, it is far more likely that both parties will emerge as 'winners' or at least neither party will emerge as a disgruntled 'loser'"*

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By way of a recent example, in the context of judicial review, the case of *R (Shirley Archer) v HMRC* [2019] EWCA Civ 1021 is instructive in several respects. It involved a substantial claim by Mrs Archer to recover the costs of her judicial review proceedings concerning an accelerated payment notice or "APN" issued to her by HMRC in 2014 of £6,116,598.95 in respect of a tax scheme she had deployed in order to avoid tax on a capital gain of £15.3m in the 2005/06 tax year. Under the APN regime, there is no right to apply to HMRC or to the tax tribunal to postpone payment of the tax demanded. However, section 222 of Finance Act 2014 allows the taxpayer to make representations to HMRC objecting to the APN and/or the amount demanded if the taxpayer believes that the statutory conditions for issuing the APN were not met or the amount shown in the notice is incorrect. Mrs Archer's APN was issued on 4 November 2014 and the 90 days for payment of the tax ended on 5 February, 2015. Yet less than four weeks after the issue of the APN, the legal services department of KPMG wrote to HMRC on 28 November, 2014 stating that they would be applying for a judicial review and that they would be sending a copy of the sealed claim form when it had been issued by the Administrative Court. In fact, the claim form was issued on the same day although not served on HMRC until 2 December, 2014. KPMG then made representations under section 222 of Finance Act 2014 but not until two weeks after service of the judicial review claim form. On 22 December, 2014, HMRC withdrew the APN, but in their defence against the judicial review, said that (1) KPMG's letter had failed to comply with the pre-action protocol for judicial review and in any event was written on the date the claim form was issued; and (2) the claim was premature because Mrs Archer. It was argued on behalf of Mrs Archer that HMRC should pay the whole cost of the judicial review because Mrs Archer had been fully successful in her claim. Total costs were put at £601,552.20, including that of Mrs Archer's husband who had faced a similar APN. This level of costs was described by the judge hearing the original costs application as extra-ordinary, particularly as there had been no detailed preparations at that stage for a trial.

The Court of Appeal dismissed the claim for costs. Henderson LJ held that Parliament must have intended taxpayers to take advantage of section 222 before having resort to judicial review. Judicial review is a remedy of last resort and the facility to make representations to HMRC under section 222 provides a relatively cheap and simple way for a taxpayer to challenge an APN without resorting to the Administrative Court. A further ground to refuse costs was held to have been the litigation conduct of Mrs Archer's advisers. The Court remarked that no serious attempt had been made by KPMG to comply with the pre-action protocol for judicial review. Indeed, HMRC had been presented with a *fait accompli* on 24 November, 2014 instead of being given time to respond. Far from using judicial review as a last resort, KPMG had employed it as the first line of attack and the very substantial costs of preparing the proceedings had already been incurred and were not recoverable.

## Mediation Considerations

Nevertheless, it has to be recognised that, unlike litigation, where the dispute will always be resolved one way or the other, a mediation may not deliver a settlement on the day. There are many reasons why some mediations do not settle. It is rare for those mediations to be a complete waste of time and money: issues may be narrowed and some resolved or discarded, priorities better understood, options and opportunities identified and even if the result is a heightened determination to litigate then arguably that is a result. For local authorities in particular, this can be of real value when justifying a course of action to cabinet members.

Much depends on the type of ADR used; and below are some of the benefits that have been identified by those who have engaged in mediation in particular:

a) It has a different tone and atmosphere to litigation which tends to foster agreement.

b) It is flexible and can be adapted to the particular characteristics of the parties and the dispute.

c) The process is usually by consent, and if not the attendance then certainly the participation and any agreement reached thereby giving the parties greater control over their decisions.

d) The parties can choose the third party to mediate or arbitrate the dispute.

e) The parties can choose the input from the third party i.e. whether it is helping the parties to formulate their own propositions or when asked to use his/her expertise to offer independent views to the parties.

f) The parties can choose how the mediation is conducted; and it is one of the core skills of the mediator to adjust the process to facilitate the conduct of the negotiations in consultation with the parties and their legal advisers.

g) The negotiations and the outcome can be confidential.

h) It can be cheaper and quicker than litigation. Most mediations only last one day.

i) It can be used to settle all or part of a dispute.

j) It can be used to narrow issues.

k) The outcome can be by way of formal agreement or otherwise as circumstances dictate.

l) A far wider range of outcomes (e.g. an apology or an explanation) is available, rather than the narrow range of remedies available to the Court.

m) It can improve and restore relationships between the parties which is particularly important in sectors where there are fewer players or the costs of termination greatly outweigh the quantum in a particular dispute.

Save in a very few cases, what a Claimant is trying to achieve in a "public law challenge" is the best outcome for that particular Claimant. There is therefore no principled reason why that outcome should be achieved by way of Judgment rather than a mediated settlement. Seemingly, the fact that the vast majority of judicial review claims settle[3,4] suggests that having a public airing of the issues is not, for most Claimants, a priority.

The second consideration goes to the nature of public law disputes. Whereas in private law disputes, parties are free to reach settlements that are based on their interests rather than legal entitlements, it can be rather different in a judicial review claim. There can be issues to consider such as vires, resources and issues of wider public interest that might limit the scope for settlement. It seems to us however that this concern can, in the vast majority of cases, be ameliorated by having a mediator who is familiar with the powers and decision-making processes of the public body in question or with the area of law in dispute and who is able to reality check the proposed settlement with the public body to ensure that it is one that the public body can properly agree. We discuss below the particular issues that arise in this respect in mediating disputes in relation to those who lack capacity.

The third consideration is a practical one. The majority of judicial review disputes settle without requiring any sort of intervention from the Court. The nature of the remedies in judicial review is such that public bodies can avoid the challenge simply by agreeing to reconsider and come to a fresh decision. This is often the quickest and cheapest way out of a dispute for a public body. In this context many practitioners consider that mediation has perhaps a limited role to play in public law disputes. We are not so sure that this is the case. In the first instance it seems to us that mediating a dispute early on is likely to lead to substantial cost savings as well as provide greater certainty over likely outcomes. Further, the fact that the mediation may well lead to the public body reconsidering the decision at hand is

3 *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576

4 Information provided by Sophie Byron, University of Birmingham, following a Pilot Study as presented by her to The Hart 10th Annual Hart Publishing Judicial Review Conference (Dec. 2016): 60% of all disputes are settled before issuing proceedings (after Pre-Action Protocol Letter ('PAPL')); 34% of all claims are settled/withdrawn after the Claim is issued; and of the remaining cases 40% were granted permission, and, of these 63.6% settled before a full hearing. Only 46 cases out of a sample of 1000 disputes with a PAP reached a full hearing.

precisely what may make it an attractive option for Claimants as, in effect, it is all that they can hope to achieve through the judicial review process.

## Dispute suitability for ADR

Clearly, not all disputes are suitable for this kind of dispute resolution. Factors to consider include the following:

a) the nature of the dispute or claim

b) whether the claim can be settled by negotiation

c) what outcome the client wants

d) what added value the involvement of a mediator might bring

e) whether the client wants to be involved in the decision-making process

f) time considerations – is it urgent?

g) cost considerations – what will it cost to mediate, and how does this compare to the anticipated cost of litigation.

Indeed, factors that might make a dispute unsuitable for anything other than litigation include:

i) The nature of the dispute, for example, those requiring the declaratory function of the Court or where injunctions or other coercive or prohibitive orders are required, perhaps with penal notices and powers of arrest attached.

ii) Cases which are less suited to mediation (although not necessarily wholly unsuited) would include claims based on alleged *ultra vires* issues, where ADR may not ultimately resolve the dispute, for example in the planning context where the impact of the decision is sufficiently wide that it may not be possible to engage with all those with an interest in the dispute, or alternatively where the agreement arising from the ADR requires a further consent which itself may give rise to objections from those who were not involved in the ADR process.

iii) The personalities of those involved in the dispute. There are some litigants who struggle with any decision making or are unable of reaching an agreement with a statutory body with whom they perceive themselves to have been at war or who l renege on agreements; and so a court order along with the ability to enforce that order is required. Attempting ADR may for such cases simply add another layer of cost and more delay into the process. Having said that, there have been some remarkable success in mediating with such people.

On the other hand, we suggest that ADR, and in particular mediation should be actively considered where:

1) The dispute is complex, involves multiple parties and were it to be litigated would take up significant court time. Active consideration is being given to what, if any, parts of that dispute can be mediated so that the contested issues are reduced.

2) It is important to conserve the relationship between the parties, so for example where they need to work together in the future.

3) Negotiations have broken down but where the introduction of an independent neutral third party can help re-start dialogue especially where the parties are in general agreement about the course of action required to resolve a dispute but need help to agree the detail.

4) A claim for damages is included in judicial review proceedings.The flexibility of the mediation process enables the parties to take a more needs based view of the dispute.

5) There is an imbalance between the parties, making negotiation very difficult, for example, where one party is not legally represented and the mediator can ensure a more level playing field and that all voices are heard.

## Mediation examples in the Administrative Court

Unfortunately, because of the confidential nature of both ADR and, largely, pre-action and related

judicial review correspondence it is difficult to point to any specific examples, bearing out the types of case identified above, other than anecdotally. Furthermore, from the study work undertaken by Sophie Byron of University Birmingham in conjunction with Richard Gordon QC of Brick Court Chambers (reflected in the 2016 Hart Judicial Review Conference paper footnoted at [3] above), and from a peer group conference held in October 2016 (attended by myself and other representatives of the various specialist Bar associations, and, judicial representatives including Lord Carnwath SCJ and Sir Ernest Ryder) it was clear that there had been a surprising uptake and success in the use of ADR across the broad range of specialisms covered by administrative law. Unfortunately, the Birmingham study project had to cease thereafter due to lack of funding and manpower to undertake a detailed study of Administrative Court files.

Nonetheless, the recent decision of Sir Ross Cranston, sitting as a Deputy High Court Judge, in *R (Janice Hemms) v Bath and North East Somerset Council & Chubb* [2020] EWHC 2721 (Admin), and, in which my colleague, Katherine Barnes successfully acted for the Council, is instructive; for it is a good illustration of the concern by some Administrative Court judges that pre-issue negotiation has not been attempted. Here, the judicial review was against the Council's decisions, for the icon time, not to issue a planning revocation notice under section 102 of the Town and Country Planning Act 1990 against stock fencing within an AONB, erected by Ms Chubb, as they did not consider it expedient. By way of postscript, the Judge, who happened to be a former Head of the Administrative Court, and, I understand, was the prime mover behind its initial Judicial Review Guide in July 2016,[5] remarks as follows:

> *58. In addressing the court, the interested party, Miss Chubb, stated that if the claimant had approached her at the time of the alterations to her property, the situation could have been resolved. For the claimant Ms Dehon replied that it was not through lack of trying on the claimant's part that matters had escalated and has added that the claimant had made a number of attempts to mediate. Miss Chubb has written to the court to dispute aspects of Ms Dehon's claims. It is not for me to establish the facts, to attribute blame, or to suggest a resolution. However, I understand from what Ms Chubb told me that she is now willing to negotiate to resolve matters between the claimant and herself. Given Ms Chubb has given this indication in open court I very much hope she will follow through with a suggestion to the claimant as to how matters can be resolved. That would be to the public benefit, not just to the benefit of these two parties."*

## Some ways forward

Given that the CJC ADR Working Group's 2018 Final Report suggested a suitable "way forward" using the "Notice to Mediate" procedure it is disappointing that no active steps have yet been taken, publicly, to prepare the ground. Utilised by the Canadian Court system in British Columbia the Report commented as follows:

5 The current 2020 version, nevertheless, remains rather lacking in punch on the consequences of not actively pursuing ADR, the limited references are in the following terms:

*5.2.6. Stage one of the Protocol requires the parties to consider whether a method of alternative dispute resolution ("ADR") would be more appropriate. The Protocol mentions discussion and negotiation, referral to the Ombudsman, and mediation (a form of facilitated negotiation assisted by an independent neutral party).*

*12.2.1. The parties must make efforts to settle the claim without requiring the intervention of the Court.This is a continuing duty and, whilst it is preferable to settle the claim before it is started, the parties must continue to evaluate the strength of their case throughout proceedings, especially after any indication as to the strength of the case from the Court (such as after the refusal or grant of permission to apply for judicial review).The parties should consider using alternative dispute resolution (for example, mediation) to explore settlement of the case, or at least to narrow the issues in the case.*

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/913526/HMCTS_Admin_Court_JRG_2020_Final_Web.pdf

## A way forward: Notice to Mediate:

*"8.39 The advantage of automatic, self-policing ADR systems like family MIAMs[6] is that they do not require judicial intervention or court time.We think that the most promising first step in this direction could be the introduction of the Notice of Mediate scheme as already operating in British Columbia.*

*...*

*8.41 Essentially if one party issues a Notice to Mediate, being a formal invitation by one party to the other to mediate, then a mediation will kick into action and a mediator will automatically be appointed from a Court-approved roster (if the parties do not agree on a mediator themselves) without any consideration or intervention by the Court. The Court has a residual supervisory role but the indications we have from practitioners who use the system is that it has had the effect of making the court-based mediation system culturally normal, that there is very little or not satellite dispute about the fitness or appropriateness of a given case to mediate and that these have proved in British Columbia to be successful steps towards increasing public awareness and acceptance of mediation as a technique.*

*8.42 If we introduce a Notice of Mediate system a number of critical policy decisions arise.*

*a) Should there be an ability to refer to court if the Notice to Mediate is issued by an unreasonable opponent who you believe will never settle. A striking feature of the British Columbia scheme is that the only basis for relief from the obligation to mediate is attendance at a previous, failed, mediation.*

*b) Are the stakeholders sufficiently confident there is an ADR product of guaranteed quality available as a default system, just as there is a system of court rostered mediators available in British Columbia?*

*c) Under the British Columbia scheme sanctions for ignoring a notice to mediate include striking out the defaulting party as well as costs orders. Rule-makers would have to decide whether that was too severe a sanction under a Notice to Mediate procedure in England and Wales."*

Whether or not such an approach falls within the current IRAL and CJC reviews, each should, at the very least, strongly recommend that a more effective "triage system" be adopted by the Administrative Court. In my view such a system both as part of Pre-Action Protocol requirements and also at permission stage. This should make it a requirement that the prospective parties should explain what steps have been taken to use ADR, why they have, so far failed, and, whether they could still be utilised.[7]
Furthermore, greater use should be made of stays to the proceedings, similar to that now adopted by the Upper Tribunal (Lands Chamber) in Section 16 of its new 2020 Practice Direction[8] (19th October 2020). In such a way the parties could then have time for some or more meaningful dialogue with the procedural *"time-clock"* paused.

From my experience, acting both as retained counsel and neutral dispute resolver, the use of "stays" can work, albeit not in every situation where the challenge has been commenced. Nonetheless, despite the even stricter time limits applying to Planning Court challenges, it can work well, to which I can give testimony as the appointed mediator who helped resolve a complex heritage related judicial review with multiple parties. We did it in an intensive month of "shuttle diplomacy",[9] worthy of Henry Kissinger, both in

6 Mediation Information and Assessment Meeting

7 For example, where a procedural error could be overcome by a fresh round of, or, more intensive consultation and/or re-presentation to the decision-maker (e.g. to Committee Members)

8 https://www.judiciary.uk/wp-content/uploads/2010/11/Practice-Directions-UTLands-Chamber-19-Oct-2020_-1.pdf

9 https://en.m.wikipedia.org/wiki/Shuttle_diplomacy

plenary sessions and working with the parties; but the success of the dispute resolution process was in no small to the willingness, particularly of the planning authority and the actual developer, to achieve a swift resolution to enable construction to commence within a tight window of opportunity.

## Concluding Remarks

So, in my view, both the IRAL and CJC reviews need to highlight to Government the tangible benefits that can be derived from the greater promotion and use of ADR within the current administrative law system. Furthermore, they need to explain that there are simple but effective ways of conveying these benefits.

Finally, there is the reminder that the active encouragement of a less adversarial and more nuanced approach to administrative law disputes can improve the quality, speed and certainty of decision-making, and, thereby reduce the uncertainties arising from the threat of potential legal challenge with its consequent costs and delays. Such a step change can improve relationships, and long-term outcomes, all benefits in the wider public interest both desirable and necessary, suggest, at any time but especially at such a time as we are in at present.

## 16.0 Stays of proceedings and alternative dispute resolution ("ADR")

*16.1 Parties may apply jointly to the Tribunal at any time for a short delay in the proceedings (referred to as a "stay of proceedings") to allow time for them to reach agreement outside the Tribunal process by negotiation or alternative dispute resolution ("ADR"). No fee is payable for such an application.*

*16.2 If both parties apply jointly the Tribunal will usually grant a stay of the proceedings for up to two months to allow mediation or another form of ADR to be attempted. During the stay the parties will not be required to take any step in the proceedings other than to engage actively in efforts to reach agreement.*

*16.3 A second or longer stay may be granted if the parties satisfy the Tribunal that it is justified and has a good chance of leading to a settlement. A fee must be paid for such an application. A second or subsequent stay may only be granted by a Judge or Member.*

*16.4 The Tribunal will not grant lengthy or repeated stays where there is no evidence of progress being made towards a settlement of the dispute. If final agreement has not been reached after a second stay the Tribunal will usually expect the parties to continue negotiations, including ADR, while preparations are made for the final hearing of the case.*

*16.5 If a party unreasonably refuses to engage in ADR at the request of another party the Tribunal will take that refusal into consideration when deciding what costs order to make at the end of the proceedings, even when the refusing party is otherwise successful. The Tribunal will not treat every refusal of ADR as unreasonable, for example, where the chances of settlement are reasonably considered to be too low.*

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## LAND-USE CONFLICT – SUPREME COURT RULES ON THE DISCHARGE OF RESTRICTIVE COVENANTS: *ALEXANDER DEVINE CHILDREN'S CANCER TRUST V HOUSING SOLUTIONS LTD* [2020] UKSC 45

David Sawtell

The appeal in *Alexander Devine Children's Cancer Trust v Housing Solutions Ltd* [2020] UKSC 45 was the first time that either the Supreme Court or the House of Lords had considered the Upper Tribunal's power to discharge or modify restrictive covenants affecting land under section 84 of the Law of Property Act 1925. The case confirms important principles affecting the interplay between private law property rights, planning and land use. Lord Burrows, giving the only substantive judgment of the Supreme Court, agreed with the Court of Appeal that the Upper Tribunal's decision was wrong, but disagreed in a number of important respects with the speech of Sales LJ (as he then was) in the Court of Appeal ([2018] EWCA Civ 2679). For a number of reasons, it is likely that we shall be reading and re-reading this Supreme Court decision for many years to come.

At the heart of the case was what Lord Burrows styled a *"dilemma"* ([3]). The Alexander Devine Children's Cancer Trust ('the Trust') had built a hospice that enjoyed the benefit of a restrictive covenant preventing building on a plot of land ('the Application Land'). This covenant afforded the terminally ill children of the hospice privacy in the use of its grounds. Housing Solutions Ltd ('Housing Solutions') was the successor in title to a developer that had already build 13 units of much-needed affordable housing on the Application Land, in breach of this restrictive covenant. These homes had been built with planning permission, and in fact were erected to satisfy a requirement imposed by a deed made pursuant to section 106 of the Town and Country Planning Act 1990. Lord Burrows noted at [43] that, *"Two competing uses of the land are therefore pitted against each other" in an "land-use conflict".*

Lord Burrows clarified that there are two stages to consider in an application under section 84. The first step is to consider whether the applicant had made out the appropriate jurisdictional gateway. The Court of Appeal had erred by considering questions of the applicant's 'cynical' breach of the restrictive covenant at this point when considering if the public interest test was made out. Instead, this was an issue that fell to be considered at the second, discretionary, stage. Lord Burrows identified that, by building the dwellings in breach of covenant without first making an application under section 84, the applicant had created the public interest quandary in the first place. It would be wrong for the applicant to rely on the fait accompli it had itself created. The application therefore failed.

The case is one in a series of important recent decision on such conflicts which involve the interplay of private law property rights and planning. The Supreme Court has previously considered the same in respect of the tort of private nuisance in *Lawrence v Fen Tigers Ltd* [2014] UKSC 13; [2014] AC 822. It also follows the Court of Appeal decision on the scope of any 'private law' rights to privacy in *Fearn and others v Board of the Trustees of the Tate Gallery* [2020] EWCA Civ 104, [2020] 2 WLR 1081 (which I discussed in https://www.39essex.com/david-sawtells-analysis-of-the-development-implications-of-the-recent-court-of-appeal-decision-in-fearn-and-others-v-board-of-the-trustees-of-the-tate-gallery-2020-ewca-civ-104/). This trio of cases demonstrates the continuing importance of private law property rights and causes of action such as restrictive covenants or the tort of private nuisance in the development and use of land.

### The facts

The Application Land is close to Maidenhead and is designated as Green Belt. The restrictive covenant arose as part of a sale of land that included an overage agreement. The covenant

prevented the erection of any structure or building on the Application Land, and prevented it from being used for any purpose other than as an open space for car parking. The overage obligation expired in 1994, leaving the restrictive covenant.

The land with the benefit of the covenant passed to a Mr Barty Smith, who gifted it to the Trust for the purpose of building a hospice together with recreational areas and a wheelchair path. Planning permission was granted for its construction.

A company called Millgate Developments Limited ('Millgate') acquired the Application Land. The Upper Tribunal made a finding of fact that the company was always aware of the restrictive covenant, and could always have found out who had the benefit of it. In July 2013, Millgate applied for and in due course obtained planning permission to build 23 affordable housing units on the Application Land. This was linked to its application for planning permission to build 75 housing units on another site for commercial sale. Permission to build the 75 units was made conditional on the provision of affordable housing, and Millgate entered into a deed made pursuant to section 106 of the Town and Country Planning Act 1990 not to make available for sale more than 15 units constructed for commercial sale until 23 units had been transferred to an affordable housing provider.

Lord Burrows recorded at [14] that it was a very important point that Millgate could have chosen to lay out its development of the site differently so that it could honour the restrictive covenant by building a larger block of flats on the unencumbered land. The encumbered Application Land could have been used as a car park. The local planning authority indicated that it would have approved such a proposal. Millgate, however, chose not to pursue this alternative.

Millgate began works in July 2014. Barty Smith became aware of the development of the site in August 2014 and instructed solicitors. Despite objections, Millgate continued to build the houses and bungalows on the application land, completing them in July 2015.

## The proceedings

At first instance, the Upper Tribunal allowed Millgate's application to modify the restrictive covenants under section 84 of the Law of Property Act 1925 to permit the occupation and use of the Application Land. As a condition of the ruling, Millgate was ordered to pay £150,000 compensation to the Trust.

Millgate sold the land to Housing Solutions, including the 13 built housing units that had been built on the Application Land. These dwellings were subsequently occupied by tenants. The Trust appealed to the Court of Appeal, who overturned the Upper Tribunal's decision and re-made the decision by refusing the application to discharge or modify the restrictive covenant.

## The statutory provisions

The general position is that the burden (as opposed to the benefit) of a freehold covenant does not run with freehold land. This was confirmed by the House of Lords in *Rhone v Stephens* [1994] 2 AC 310 when it rejected the submission that the burden of positive covenants should run with the land. Since the nineteenth century, however, a series of cases starting with *Tulk v Moxhay* (1848) 2 Ph 774 established that the burden of a freehold restrictive covenant could run with the land in equity. This burden could run with land only where the covenant was restrictive in nature and where it was intended to run with the land; two plots of land were concerned, with one bearing the burden and the other receiving the benefit; and the subsequent owner of the burdened land could not set out a defence that they had purchased the land for value without notice (a situation that has been modified by the modern system of land registration). The benefit of the covenant must also run with the benefited land: it must touch and concern the land; and must have passed to the claimant by annexation, assignment, or a scheme of development.

The development of the enforceability of restrictive covenants against successors in titles took place before the advent of a public law system of planning. It allows an owner of land to impose controls on its development. It arose during the Industrial Revolution in a period of rapid industrialisation to allow for developmental controls to be imposed over a number of plots of land while parting with the ownership of the freehold.

Such covenants, however, can outlive their usefulness, and can impede the useful development of land in a way out of all proportion to their benefit: *"restrictive covenants cannot be regarded as absolute and inviolable for all time"* (*Jaggard v Sawyer* [1995] 1 WLR 269, 283 per Sir Thomas Bingham MR). As Martin George and Antonia Layard, the authors of *Thompson's Modern Land Law* (7th edition), observe (p.483), *"It may also be the case that their continued enforceability is socially detrimental, preventing socially desirable development of the land."* In order to prevent land (which is necessarily finite) from being encumbered by obsolete or unreasonable covenants, section 84 of the Law of Property Act 1925 gives what is now the Upper Tribunal the jurisdiction to wholly or partially discharge or modify such restrictions. There is a two-stage test. The first stage (section 84(1)) gives the Upper Tribunal jurisdiction by reference to one of five gateways, including changed character of the property or obsolescence (section 84(1)(a)), or that no injury would be caused to the person entitled to the benefit of the restriction (section 84(1)(c)).

In the *Alexander Devine* case, the Upper Tribunal was concerned with the 'contrary to public interest' jurisdictional ground (section 84(1)(aa): *"the continued existence thereof would impede some reasonable user of the land for public or private purposes or, as the case may be, would unless modified so impede such user"* and section 84(1A)(b), by impeding some reasonable user, that restriction *"is contrary to the public interest"*). When considering section 84(1A), the Upper Tribunal must, under section 84(1B), *"take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant areas"*.

If a party can satisfy the Upper Tribunal that the prescribed ground has been made out, the Tribunal then has a discretion at the second stage whether or not to make an order for modification or discharge of the restrictive covenant (section 84(1): *"shall… have power"*; *Driscoll v Church Commissioners for England* [1957] 1 QB 330). It is the separation between the first and the second stages that marks the difference between the approaches of the Court of Appeal and the Supreme Court.

**The approach of the Supreme Court**

The most important point that emerges from the decision of the Supreme Court is its treatment of Millgate's behaviour. The Upper Tribunal described its behaviour as *"highhanded and opportunistic"* ([105], [2016] UKUT 515 (LC)). Lord Burrows described it as a *"cynical breach"* ([36]), deliberately committing a breach of the restrictive covenant with a view to making profit from so doing.

It was accepted that section 84 requires a narrow interpretation of what is meant by, *"contrary to the public interest"* in section 84(1A)(b). The test is not whether it would be contrary to the public interest to maintain the restrictive covenant: instead, *"the wording requires one to focus more narrowly on the impeding of the reasonable user of the land and to ask whether that impediment, by continuation of the restrictive covenant, is contrary to the public interest."* ([42]). This is a narrow inquiry: the good or bad conduct of the applicant (including any cynical breach) is irrelevant at the jurisdictional stage ([44]). The Upper Tribunal had not, therefore, made an error of law. Differing from the Court of Appeal on this point, the Supreme Court held that the question of a cynical breach was relevant at the discretionary stage only.

The next question was whether the Upper Tribunal had made an error of law in the exercise of its

discretion: it was not whether the Supreme Court would have reached the same decision, or even agreed with it. Lord Burrows agreed with Sales LJ that an error of law had been made, although he expressed *"some reservations"* about how he chose to explain it ([53]). It was not correct (although Lord Burrows was *"sorely tempted to agree"* at [55]) that there was a principle that an applicant who had committed such a cynical breach should have its application refused. Further, the Upper Tribunal had taken into account Millgate's behaviour. Instead, Lord Burrows pinpointed two particular factors that should have been taken into account, which were not referred to by the Upper Tribunal.

Firstly, had Millgate respected the Trust's rights and applied for planning permission for the units on the unencumbered land, it would not have had to have applied to discharge the restrictive covenant. In addition to the cynical breach, Millgate put paid to what would have been a satisfactory outcome: it could have avoided a land-use conflict altogether by submitting an alternative plan.

Secondly, had Millgate applied under section 84 before starting to build on the Application Land, it was likely it would not have been able to satisfy the 'contrary to public interest' jurisdictional ground. The cynical breach of covenant had fundamentally altered the position in relation to the public interest. Millgate were relying on a state of affairs that they had created by their own deliberate breach, presenting the Upper Tribunal with a fait accompli.

## The status of planning permission

In the Court of Appeal, Sales LJ made a number of impactful points about the relative status of planning permission and restrictive covenants. At [43], he made the following general observation:

> *"43. The grant of planning permission does not generally have any impact upon private property rights. It is a decision taken regarding what development of a particular site can be regarded as acceptable in planning terms, with reference to the public interest. Actual development in accordance with a grant of planning permission may depend upon the developer being able to negotiate to buy out or overcome any private property rights which stand in the way of the development."*

At [47], Sales LJ then went on to state that, *"in interpreting and applying that provision [section 84] it is necessary to bear in mind that it is a private contractual right with property-like characteristics which is sought to be removed or modified, against the objection of the right-holder. That is not something which Parliament intended should occur lightly or without very good reason."* He quoted Carnwath LJ (as he then was) in *Shephard v Turner* [2006] EWCA Civ 8; [2006] 2 P&CR 28 at [58], where he stated that section 84(1)(aa) *"seeks to provide a fair balance between the needs of development in the area, public and private, and the protection of private contractual rights."* Lord Burrows did not criticise this passage, and nothing in his speech undermines it.

There are several reported cases quoted by *Preston & Newsom's Restrictive Covenants Affecting Freehold Land* (10th edition) at p416ff to the effect that planning permission, without more, *"could not possibly prove more than that the permitted development is not contrary to the public interest"* (quoting *Re Davies' Application* (1971) 25 P & CR 115 at 135). The 'public interest' in *SJC Construction Co Ltd v Sutton LBC* (1975) 29 P & CR 322 was not proven by the fact of planning permission, but by the fact that works have reached a certain point in the context of a local shortage of land for housing.

The question posed by the Upper Tribunal in the *Alexander Devine* case was the narrow one of whether, in impeding the use of the Application Land as the site of 13 dwellings which would otherwise be available as social housing, the covenants were contrary to the public interest ([96]). Lord Burrows referred to the fact that, *"The waste involved would be a very strong factor*

*indicating that that would indeed be contrary to the public interest"* ([43]). While section 84(1B) requires the grant of planning permissions to be taken into account in considering whether a case falls within subsection (1A), nothing in what the Upper Tribunal, the Court of Appeal or the Supreme Court stated means that it should be given any greater weight than was previously the case. Planning permission, without more, is merely permissive: it does not trump private law rights.

Lord Burrows refused to be drawn into a closer analysis of Lord Sumption's remarks on the interface between private law remedies and planning in the *Fen Tigers* case. At [161], Lord Sumption reflected in what were self-obviously obiter remarks that, *"it may well be that an injunction should as a matter of principle not be granted in a case where a use of land to which objection is taken requires and has received planning permission"*. Sales LJ picked up on the fact that none of the other Supreme Court justices endorsed this comment, as well as the difference in context between remedies for the tort of private nuisance and an application under section 84. As Lord Burrows noted at [66], the Upper Tribunal did not in fact apply Lord Sumption's wider comments. He therefore left them alone without giving any further clue as to his opinion on them. The Trust's application for prohibitory and/or mandatory injunctions was very much live in separate proceedings: we shall wait and see if this is reported as well.

## Conclusion

The Supreme Court has provided useful clarification as to the different tests to be applied at the jurisdictional and discretionary stages of assessing a section 84 application. The effect of a cynical breach should usually be considered at the latter stage.

The case also confirms the narrowness of the 'public interest' test. Lord Burrows did not place any greater weight on the fact that planning permission had been granted than earlier cases have done. The 'public interest' disclosed by the waste of so many dwellings was itself overpowered by the fact that they need not have been erected in breach of covenant at all.

Martin Dixon, writing about the Court of Appeal decision, reflected that, *"The result—the likely demolition of the affordable houses—sounds a warning to those who think that covenants, and those that enjoy their benefit, are just interfering busy bodies who are standing in the way of progress. It also makes it clear that "proprietary" obligations are exactly that and not to be disregarded when they are inconvenient."* ('A smorgasbord', [2019] 1 The Conveyancer and Property Lawyer 1-3). Nothing that Lord Burrows stated in the Court of Appeal dampens the relevance of this warning. The litigation therefore confirms the continuing relevance of private law restrictions on the development of land. This should be ignored by developers and subsequent purchasers at their peril.

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