INTRODUCTION

Jonathan Darby

Welcome to this 'Bonfire Night' (rather than Lockdown 2.0) edition of our Planning, Environment and Property newsletter. We hope that you are all keeping well.

We have articles from Daniel Stedman Jones and Tom van der Klugt (on a recent case of theirs that related to the relationship between the planning and contaminated land/pollution control regimes); Richard Harwood QC (on the means of challenging planning and related decisions and possible reforms); and Ruth Keating (on the Supreme Court of Ireland's recent consideration of the Irish Government's statutory plan for tackling climate change and its implications).

As noted last time, our webinar series continue apace – with details and bookings available at: **www.39essex.com/category/webinars/**

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Also, don't forget our podcasts:
www.39essex.com/category/podcasts/the-planning-environmental-property-law-podcast/

As well as Stephen Tromans QC's short videos on current issues in environmental and planning law:
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Take care and stay safe!

THE COURT OF APPEAL DISMISSES INTENSIFICATION AND CONTAMINATION APPEAL IN THE GREEN BELT

Daniel Stedman Jones and Tom van der Klugt

Last week the Court of Appeal handed down judgment in *Smith v Castle Point Borough Council* [2020] EWCA Civ 1420. The appeal concerned a decision by the Respondent local planning authority to grant planning permission for a five-metre-high concrete panel boundary wall, running along two sides of an existing scrapyard and waste facility in Essex.

The Appellant argued, primarily, that the Respondent had erroneously failed to consider alleged issues of intensification and contamination in its decision to grant planning permission. The Appellant also argued that the Respondent had failed to appreciate that it had the power to impose a planning condition restricting the existing operation of the entire scrapyard site and had therefore failed to consider whether such a condition should be imposed in coming to its decision. Davis, Moylan and Dingemans LJJ unanimously dismissed the appeal.

Background
Planning permission for the use of the site as a scrapyard and waste facility had been granted in 2002. No planning condition as to the height of the storage was included, although the waste management licence specified that no waste material could be stored or stacked to a height greater than 5 metres.

The Appellant owned land adjoining the scrapyard, which he sought to promote for mixed development, and had submitted a lengthy planning objection. This asserted, amongst other things, that the increase in the height of the boundary wall would 'implicitly' allow a material intensification of the use the of the site, and that the land concerned was contaminated. A Soil Contamination Assessment (conducted on the Appellant's land immediately beside the proposed boundary wall location) was submitted in support of that assertion.

The Appellant subsequently brought a Judicial Review challenge in the High Court against the Respondent's grant of permission for the boundary wall. Mr C.M.G. Ockleton, sitting as a Deputy Judge of the High Court, dismissed that challenge (*Smith v Castle Point* [2019] EWHC 2019 (Admin)).

Contaminated land
In its judgment, the Court of Appeal found that neither the local Technical Guidance for Land Affected by Contamination, nor the relevant sections in the National Planning Policy Guidance or the National Planning Policy Framework, were directed at this type of situation (where the proposed development was a boundary wall), but rather were essentially directed at a proposed new use of land, for example a residential development. Thus, in this situation, no further assessment of contamination, by way of desk-top study or otherwise, was required.

Interaction with the pollution control regime
Further, the officer had been justified in referring to the availability of the right to refer any complaint about pollution to the Environment Agency, which was a relevant matter to the planning decision being taken (paragraph 183 of the NPPF provides that *"The focus of planning policies and decisions*

should be on whether proposed development is an acceptable use of land, rather than the control of processes or emissions (where these are subject to separate pollution control regimes). Planning decisions should assume that these regimes will operate effectively…"

Intensification and planning conditions

The Court of Appeal then went on to distinguish the case on the facts from *Penwith DC v Secretary of State for the Environment* (1977) 34 P & CR 268. As a matter of general principle, in order for a planning condition to be imposed, it must meet a threefold test: it must be for a planning purpose and not for an ulterior purpose, it must fairly and reasonably relate to the development permitted, and it must not be so unreasonable that no reasonable planning authority could have imposed it. In Penwith, an extension to a factory was intended and designed to intensify operations on the existing site. Accordingly, the imposition of new planning conditions on the existing site related to the development (the extension) which was being permitted.

In this case, however, it remained wholly unclear just how the proposed development (the boundary wall) would or might cause intensification of the use of the scrapyard. Although this had been asserted in the planning objection, quite how such an implication should arise had never actually really been explained by the appellant.

There was therefore no basis on which a restriction on the existing use of the entire site in terms of the height or intensification of scrap storage could properly be related to the proposed development in the form of the boundary wall, such as to meet the test for imposing a planning condition.

Further, no express reference to intensification was required within the officer's report in order to demonstrate that the appellant's objections in that regard had been taken into account.

Wording of the planning officer's report

Finally, the Court of Appeal found that officer's report, read naturally and as a whole, did not show that the planning officer had wrongly thought that there was no power at all to impose a condition restricting the operation of the scrapyard. Rather, the officer was indicating that the building of the boundary wall did not, in his planning judgment, provide a justification for or properly relate to a restriction on the wider use of the site.

The case is important and unusual for its exploration of the relationship between the planning and contaminated land/pollution control regimes. However, the court ultimately emphasised the important functional separation between the two.

Daniel Stedman Jones and Tom van der Klugt acted for the successful Respondent.

PLANNING COURT – NOT SO FAB FOUR

Richard Harwood QC

The planning system is facing two simultaneous reviews, albeit from different perspectives. The Planning White Paper has looked at its general processes, whilst the Independent Review of Administrative Law is addressing judicial review and similar measures in the Administrative and Planning Courts. My chambers colleagues Vikram Sachdeva QC and Celina Colquhoun are members of that latter review.

An issue lurking in both reviews is the means of challenging planning and related decisions. Remarkably, and for no particularly good reason, they are subject to a variety of different procedures. This simply gives rise to confusion, expensive and occasionally catastrophic errors. It is necessary for practitioners to have the different processes well in mind, and it is time for reform.

Types of proceedings

There are four types of proceedings in the Planning Court, and a further related procedure in the Divisional Court. Judicial review is a residuary category and so is mentioned last of the Planning Court procedures:

i) **A planning statutory review in the High Court**

This is an application made to the High Court made under specified statutes: Town and Country Planning Act 1990, s 288 (against decisions of Ministers or Planning Inspectors on planning appeals or call-ins of planning applications and on revocation or discontinuance orders and completion notices; also tree preservation orders); Town and Country Planning Act 1990, s 287 (simplified planning zones and highway orders under the Act); Planning and Compulsory Purchase Act 2004, s 113 (development plans); Planning (Listed Buildings and Conservation Areas) Act 1990, s 63 (against decisions of Ministers or Planning Inspectors on listed building consent appeals or call-ins and on revocation or modification orders); Planning (Hazardous Substances) Act 1990, s 22 (against decisions of Ministers or Planning Inspectors on hazardous substances consent appeals or call-ins). Permission to apply to the Court is required for these claims. These procedures are governed by CPR Part 8 and Practice Direction 8C and are closely modelled on judicial review. There are differences in standing, time limits and remedies to those in judicial review.

ii) **An application to the High Court under Part 8**

There are various other rights to apply to the High Court. Unlike planning statutory reviews claims do not require the permission of the Court to proceed and are governed by CPR Part 8 and Practice Direction 8A. These claims include the confirmation of compulsory purchase orders, certain road traffic regulation orders, alterations to the definitive map of rights of ways, certain environmental impact assessment claims and the designation of Areas of Archaeological Importance (Ancient Monuments and Archaeological Areas Act 1979, s 55).

iii) **An appeal to the High Court**

Certain planning decisions are challenged by appeal to the High Court: Town and Country Planning Act 1990, s 289 (against decisions of Ministers or Planning Inspectors on enforcement notice, tree replacement notice and (in Wales) section 215 amenity notice appeals); Planning (Listed Buildings and Conservation Areas) Act 1990, s 65 (challenging listed building enforcement notice appeals); and for hazardous substances enforcement notice appeals (Planning (Hazardous Substances) Regulations 2015, reg 19, 20.

iv) **Judicial review**

Covers all proceedings which are not in the above. The most common are challenges to the grant of planning permission by local planning authorities (since objectors have no ability to appeal to the Minister against an approval). Other judicial reviews will include approvals by local authorities of details under planning permissions, designation of listed buildings and conservation areas, decisions on whether to take enforcement action, the validity of various enforcement related notices, decisions to make compulsory purchase orders or a refusal to confirm a compulsory purchase order, some highways and road traffic regulation orders, and various planning policies. Judicial review is also applicable to some aspects of planning or enforcement appeals. Certain decisions are subject to judicial review with special statutory time limits: national policy statements (such as the ongoing Heathrow litigation); development consent orders authorising nationally significant infrastructure projects, and neighbourhood

plans. Judicial reviews of magistrates or Crown Court decisions on planning or European related environmental matters would be within the Planning Court remit.

Challenges to the decisions of the magistrates or the Crown Court on appeal by case stated fall in principle within the general Administrative Court jurisdiction, but they could be taken within the Planning Court's jurisdiction under the lead judge's discretion. That discretion can be exercised widely: the first hearing in the Planning Court was a challenge to a decision not to designate a battlefield site, a matter which does not fall within any of the listed categories.

Reform of the multiplicity of types of proceedings

Despite reforms in 2015, there are a number of instances where multiple proceedings have to be brought over decisions in the same document. For example, if planning permission is granted in an enforcement notice appeal then the local planning authority would have to bring a section 288 application against the planning permission and a section 289 appeal against the enforcement notice appeal being allowed. A third party challenger would have to make a section 288 application against the permission and bring judicial review proceedings against the notice appeal.

There are a steady stream of errors involving the wrong forms or timescales, a recent example being *Bellamile v Ashford Borough Council* [2019] EWHC 3627 (Admin). Whilst the judicial review and planning statutory review procedures are very similar, the other two claims are different and outdated.

There is no readily discernible reason why these different procedures are used and reforms have been limited in scope, for example the equalisation of some of the time periods in 2015. The requirement to secure the permission of the Court to bring a statutory review was introduced for those applications under planning Acts by the Criminal Justice and Courts Act 2015, but not in other legislation. The Bill as originally published contained a permission requirement for section 288 applications but for no other planning cases (such as a listed building consent appeal in the same decision). Bob Neill MP tabled amendments to widen the permission requirement to the other planning statutory reviews. Those were taken up by the Ministry of Justice. However the amendments did not tidy up the other applications as they would have involved securing the agreement of Departments other than DCLG/MoJ and in the case of compulsory purchase orders raised a policy question of access to the courts by those facing CPO.

The opportunity ought to be taken to rationalise the modes of challenge. The most effective reform would be to abolish statutory reviews and appeals to the High Court under section 289 (and equivalents) and have all proceedings brought by judicial review. Where appropriate the statute can provide that particular decisions may not be challenged by other means and specify the time period for bringing proceedings so that it cannot be extended. This is done of course for the planning appeal and policy decisions which are subject to statutory reviews and by statute for certain judicial reviews. There is no case for a major change in those protected decisions and others which may be subject to a, usually rare, extension of time for proceedings and the potential for collateral challenge by the individual in resisting proceedings.

Such a reform will also broaden the range and flexibility of remedies available to the Court: some of the statutory reviews are limited to the quashing of unlawful decisions and lack the ability of judicial review to fashion a suitable, proportionate remedy.

More modest reforms would be to change the statutory appeals to the High Court into applications to the Court. This would, for example, remove section 289 of the Town and Country Planning Act 1990 and place all challenges to enforcement notice appeal decisions under section 288 planning statutory reviews.

This proposal was made as long ago as 1989 by Robert Carnwath QC in his report *Enforcing Planning Control* (at para 6.6). Another modest change would be to complete the 2015 reforms by requiring all applications to the Court under the planning/environmental statutory provisions to have permission before proceeding.

A further issue is the position of the appeal by case stated. Its process is for the appellant to ask the court which is the subject of the appeal to state a case, that is, to set out the subject matter of the proceedings, its findings of fact, the arguments raised, its findings as to the law and conclusions and then the questions for the appellate court. The process is slow and prone to argument and ex post facto rationalisation. Whilst necessary when magistrates' courts did not give reasoned judgments, it seems to no longer be required or desirable. Appeals should therefore proceed in a more conventional manner of a challenge to the reasoned judgment.

SUPREME COURTS AND CLIMATE CHANGE

Ruth Keating

In *Friends of the Irish Environment CLG v The Government of Ireland & Ors* (2020) IESC 49, the Supreme Court of Ireland considered whether the Irish Government's statutory plan for tackling climate change (the ***"Plan"***), adopted under the Climate Action and Low Carbon Development Act 2015 (the ***"Act"***), was unlawful and/or constituted a breach of rights. The breach of rights claim was based on alleged violations of the right to life and the right to bodily integrity, cumulatively a right to a healthy environment (the ***"Breach of Rights Ground"***).

Significantly, the Court unanimously found that the Plan was unlawful under the Act. Of note, is that although the Court did not make a finding on the Breach of Rights Ground, the door has been left open, or at least ajar, for rights-based claims for future litigants in the climate change context, as discussed below.

This week seems an appropriate time to revisit the recent decision as the Supreme Court in Oslo (from November 4-12) in '*The People vs Arctic Oil*' will consider whether the state has violated its constitution by issuing licenses for oil industry activity in sensitive Arctic areas.

The question is what this all means for other jurisdictions, particularly the UK.

Overview of the Irish Supreme Court's decision

The Plan was too vague and aspirational: The Act required the Plan to specify the manner in which Ireland's transition to a low carbon economy by 2050 would be achieved. The Plan was *"excessively vague or aspirational"* in parts, at [6.43] of the judgment, and fell *"well short of the level of specificity required to provide that transparency and to comply with the provisions of the 2015 Act"*, at [9.3].

Rights based arguments: At [9.4] and [9.5] Mr. Justice Clarke said that given he had quashed the Plan it was not necessary to consider the further issues. However, given those arguments could be raised in respect of future plans he briefly addressed them. (i) He concluded that Friends of the Irish Environment, as a corporate entity, did not enjoy in itself the right to life or the right to bodily integrity, and did not have standing to maintain the rights based arguments sought to be put forward whether under the Constitution or under the ECHR. On that basis he did not consider it appropriate to address the rights-based arguments put forward, but did offer views on the question of whether there is an unenumerated or, as he preferred to put it, derived right under the Constitution to a healthy environment.

While not ruling out the possibility that constitutional rights and obligations may well be engaged in the environmental field in an appropriate case, he expressed the view that the asserted right to a healthy environment is either

superfluous (if it does not extend beyond the right to life and the right to bodily integrity) or is excessively vague and ill-defined (if it does go beyond those rights). He reserved the position of whether, and if in what form, constitutional rights and state obligations may be relevant in environmental litigation to a case in which those issues would prove crucial.

What does this mean for the UK?
Ireland has its own specific constitutional backdrop against which the decision must be read. However, there are learning points of wider application which arise out of the decision:

- The Supreme Court's judgment was described by the UN Special Rapporteur on human rights and the environment, Dr David R Boyd, as a *"landmark decision"*. It is one of a small number of high-profile *"strategic"* climate cases which have been taken globally. The decision should be seen as part of a growing trend of climate change cases (including *Juliana v United States* and *Leghari v Federation of Pakistan,* to name two other examples). The judgment reemphasises one of the messages in *Urgenda* that even individual countries have their own independent obligations to reduce emissions.
- The case starkly illustrates the importance of government's reflecting on their statutory duties so that they can realistically discharge those commitments. This point is of wide application for areas of decision making where policies exist to pursue net zero emissions by 2050. As the court put it, by implementing the Act *"policy became law"*, meaning the court was obliged to consider whether the Plan complied with the legal obligations imposed on a plan by the Act.

Regardless of the outcome of the upcoming decision in *'The People vs Arctic Oil'* one thing is certain, that we will be seeing more of these cases in the near future.

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Richard specialises in planning, environment, public and art law, appearing in numerous leading cases including SAVE Britain's Heritage, Thames Tideway Tunnel, Chiswick Curve, *Dill v SoS* and Holborn Studios. Recent cases include housing, retail, minerals, environmental permitting, nuisance, development consent orders, and development plans. He is a case editor of the Journal of Planning and Environment Law and the author of Planning Permission, Planning Enforcement (3rd Edition pending) and Historic Environment Law and co-author of Planning Policy. He is also a member of the Bar Library, Belfast. To view full CV click here.

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