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Welcome to the Spring 2023 edition of the 39 Essex Planning Environment & Property Newsletter.

This edition kicks off with an article from **Ned Helme** looking at the Government's proposed pilot designation of the first three Highly Protected Marine Areas in English waters, setting out an explanation of their development and positing what else the pilot may have in store.

We then move on to a number of articles on cases across almost the full gamut of the PEP team practice areas:

Richard Wald KC discusses the case of *Great Yarmouth BC v Al-Abdin & Ors*[1] in which he and **Jake Thorold** successfully obtained an interim injunction preventing the use of a hotel as asylum seeker accommodation;

James Burton and **Daniel Kozelko** look at the recent decision in *University Hospitals of Leicester*[2] on the use of s.106 obligations to fund NHS care;

Celina Colquhoun considers the case of *Armstrong*[3] and the 'death' of the concept of s73 applications being limited to "minor material amendments";

Christopher Moss picks up on the Court of Appeal's decision in *Friends of the Earth*[4] which explores the approach to interpreting an unincorporated international treaty, the Paris Agreement; and

Lastly, **Stephanie David** provides an insight into Bristol *Airport Action Network Co-ordinating Committee*[5] and the consideration of aircraft emissions in planning decisions, as well as highlights two cases to keep an eye out for throughout the rest of 2023 which have recently received permission to proceed.

We hope this edition provides a useful and interesting round up at the end of Hilary Term and wish you all a happy Easter break.

Government to Designate first three highly protected marine areas

Ned Helme
Call 2006

On 28th February 2023 the Government announced its intention to designate the first three Highly Protected Marine Areas ('HPMAs') in English waters: at Allonby Bay in the Irish Sea, Dolphin Head in the Eastern Channel and North East of Farnes Deep in the Northern North Sea (a further two proposed sites, at Lindisfarne and Inner Silver Pit South, will not be designated).[6]

The question of whether HPMAs should be introduced was considered in an independent review chaired by Lord Benyon (a former Fisheries Minister), which launched on World Ocean Day (8th June) 2019 and issued its final report exactly a year later,[7] giving a ringing endorsement to

1 *Great Yarmouth Borough Council v Al-Abdin & Ors* [2022] EWHC 3476 (KB)
2 *R (University Hospitals of Leicester NHS Trust) v Harborough District Council & Ors* [2023] EWHC 263 (Admin)
3 *Armstrong v Secretary of State for Levelling Up, Housing and Communities* [2023] EWHC 176 (Admin)
4 *R (on the application of Friends of the Earth Limited) v Secretary of State for International Trade and others* [2023] EWCA Civ 14
5 *Bristol Airport Action Network Co-ordinating Committee v Secretary of State for Levelling Up, Housing and Communities* [2023] EWHC 171 (Admin)
6 https://questions-statements.parliament.uk/written-statements/detail/2023-02-28/hcws585
7 https://www.gov.uk/government/publications/highly-protected-marine-areas-hpmas-review-2019#full-publication-update-history

the introduction of the designation. This led to a Defra consultation on the five candidate HPMAs mentioned above,[8] which ran from 6th July 2022 to 28th September 2022,[9] and, finally, to the 28th February 2023 announcement.
As its name suggests, the HPMA designation is intended to provide the highest levels of protection to designated areas. There already exists a substantial network of Marine Protected Areas (covering some 40% of English waters), but the Government recognises that the marine environment is nonetheless not as healthy as it needs to be, and considers that HPMAs have a critical role to play in ocean recovery.

The HPMA concept is founded on a "whole site approach" that aims to conserve all habitats and species within the site boundary, including mobile and migratory species that visit or pass through. This is strikingly different to the existing MPA network, in which protection focusses on designated habitats and species. In line with advice from Natural England and the Joint Nature Conservation Committee, the Government anticipates that extractive, destructive and depositional activities will be prohibited within each site. This would include activities such as commercial and recreational fishing, dredging, construction and anchoring, but would not include non-damaging levels of other activities to the extent permitted by international law.

The Benyon Review's final report set out a range of options for introducing a HPMA regime, namely:

a) introducing new primary legislation;
b) using the existing Marine Conservation Zone ('MCZ') provisions under the Marine and Coastal Access Act 2009 ('the MCAA');
c) amending the MCAA through a Statutory Instrument;
d) using Inshore Fisheries and Conservation Authority or Marine Management Organisation byelaws; or
e) using the provisions for Sites of Special Scientific Interest under the Wildlife and Countryside Act 1981.

It noted that these options were appropriate either individually or in combination, but also recommended that the Government introduce and manage HPMAs using quick and pragmatic legislative approaches.

The Government is proceeding with option (b) and will designate the three sites as MCZs before 6th July 2023.[10] The suitability of the current MCZ regime as the legislative vehicle for the designation and management of HPMAs remains to be seen, and this is one the matters which the Government indicated in its consultation document that it would test as part of the pilot. A particular concern (which was flagged by the Office for Environmental Protection in its response to the consultation) is the potential under section 126(7) of the MCAA for authorisations for acts that may hinder the achievement of conservation objectives for MCZs if the benefit to the public of proceeding with the act clearly outweighs the risk of damage to the environment (albeit with a requirement for equivalent compensation to be secured). There is a risk of the high level of protection needed for HPMAs to succeed being undermined if environmental factors yield too readily to socioeconomic ones. But the extent of the risk is hard to judge in advance, and much will depend on the terms of the designation orders and subsequent consenting processes, byelaws and orders, as well as on funding, advice and guidance, management and government arrangements, approach to enforcement and a range of other matters. All of this is likely to become clearer as the pilot proceeds and, assuming it is successful, as the concept is rolled out more widely.

The HPMA pilot is an exciting opportunity to road-test the concept, but at present it is very small-scale. In its final report, the Benyon panel found that five pilot sites were the "bare minimum required to evidence the success of HPMA introduction", something which has not yet been

8 The boundaries of the Allonby Bay and Dolphin Head sites have been modified in response to the consultation.
9 https://www.gov.uk/government/publications/highly-protected-marine-areas/highly-protected-marine-areas-hpmas
10 The expiry of the deadline under section 119(10) of the MCAA

achieved given the decision not to proceed with the Lindisfarne and Inner Silver Pit South sites. Moreover, the combined area of the Allonby Bay, North East of Farnes Deep and Dolphin Head sites is 986 square kilometres, less than half a percent of English waters. This may hamper the ability to draw meaningful conclusions on the impact of HPMA designation, and on the most suitable sites for further roll-out.

The decision to designate three HPMAs is nonetheless a meaningful start, and the Secretary of State has asked officials to explore additional sites for consideration as HPMAs this year, so the English pilot may well grow. The HPMA concept is also set to be rolled out in Scotland: there is an ongoing consultation on HPMAs, which closes on 17th April 2023;[11] and Scottish Ministers have committed (through the Bute House Agreement) to at least 10% of Scotland's seas as HPMAs by 2026. The HPMA concept therefore appears set to become a significant feature in our seas over the coming years, and it is to be hoped it lives up to its promise.

High Court rules against the use of hotels as asylum seeker accommodation within a Great Yarmouth protected seafront area – *Great Yarmouth Borough Council v Al-Abdin & Ors* [2022] EWHC 3476 (KB)

Richard Wald KC
Call 1997 | Silk 2020

The UK has, over the last several months, seen unprecedented levels of channel crossings made by asylum seekers. Section 95 of the Immigration and Asylum Act 1999 (read together with the regulation 5 of the Asylum Seekers (Reception Conditions) Regulations 2005 imposes a duty on the Home Secretary to provide "support" (which includes accommodation) for such asylum seekers and their dependents who appear to her to be or likely to become "destitute" within 14 days.

As a result of these statutory obligations the Home Secretary has entered into arrangements with individual hotels via various providers of public services such as Serco Ltd whereby such accommodation offered to asylum seekers whilst their applications for asylum are being processed. In the recent case of *Gt Yarmouth v Al-Abdin & Ors* [2022] EWHC 3476 (KB) Holgate J considered whether, against this factual background, an interim injunction granted by Knowles J on 23 November 2023 prohibiting the use of the Villa Rose Hotel and any other hotel within Gt Yarmouth's protective tourism Policy GY6 area, should be continued until the hearing of Gt Yarmouth BC's final injunction application. The basis for Gt Yarmouth BC's application for an injunction was that the use of hotels to accommodate asylum seekers would constitute a material change of use of those premises from a hotel use to a hostel use, for which planning permission should first be obtained.

This was not the first occasion on which Holgate J had considered whether injunctions sought by local authorities in similar contexts should be granted or continued. In *Fenland DC v CBPRP Ltd (2) Serco Ltd (3) H&H North Ltd* [2022] EWHC 3132 (KB), the court refused to grant a local authority's application for an interim injunction restraining a hotel in Wisbech from being used by a government contractor as interim accommodation for asylum seekers because there was no evidence of any particular risk to the asylum seekers in the town, and the planning concerns about the hotel's use did not outweigh the substantial need for temporary accommodation in light of a recent increase in the number of asylum seekers arriving in the UK. And before that, in *Ipswich Borough Council v (1) Fairview Hotels (Ipswich) Ltd (2) Serco Ltd; East Riding of Yorkshire Council v (1) LGH Hotels Management Ltd & Ors* [2022] EWHC 2868 the court refused to continue two interim injunctions obtained by local authorities restraining hotels from being block-booked as temporary accommodation for asylum seekers by government contractors on the basis that although there was a triable issue as to whether that use was a material change of use from a hotel to a hostel, the balance

11 https://consult.gov.scot/marine-scotland/scottish-highly-protected-marine-areas/

of convenience lay in allowing the use to continue until trial, particularly in light of the Home Office's need for temporary accommodation for the recent influx in asylum seekers.

But the Gt Yarmouth case marked a departure from previous High Court decisions to discontinue interim injunctions preventing the placement of asylum seekers in hotels, for two principle reasons. First, both the hotel in question in that case (the Villa Rose) and the wider area covered by the interim injunction, fell within a policy area (GY6) aimed at preventing the loss of hotel uses and any consequential harm to the locally important tourist economy. And second the Villa Rose itself was already subject to an enforcement notice dated 2006 but still in force, prohibiting any change from hotel to hostel use.

These two key features of the Gt Yarmouth case distinguished its facts from those of similar injunction applications which had come before the court and informed different conclusions in this case. Holgate J, applying the principles he had set out in the Ipswich case, held (in common with those earlier cases) that there was a serious issue to be tried (namely whether there had been an unauthorised change of use from hotel to hostel use) but that because of the importance and "highly specific" nature of the protective policies of Policy GY6 [50], the longer period of likely occupation by asylum seekers than had been envisaged in previous injunction applications [55] and the seriousness of the likely harm to the local tourist economy between the date of the application to continue the interim injunction and any final hearing [63] the balance of convenience lay in favour of continuing the interim injunction rather than discharging it.

Moreover, unlike in previous injunction cases which Holgate J had considered, he held that "the apprehended breach of planning control has a flagrant character" because the existence of the 2006 enforcement notice at the Villa Rose had done nothing to prevent plans to change the use of that hotel in breach of the terms of the notice [67].

Whilst acknowledging (once again) the importance of the statutory duties to provide emergency accommodation for asylum seekers, to which the Home Secretary is subject [73] the Court accepted Gt Yarmouth's evidence as to the importance to it of its tourist economy and the further importance of encouraging this key source of income after particularly challenging periods brought about by the COVID pandemic and the recent economic downturn [77]. The Court also noted that Serco Ltd had failed either to take account of the GY6 planning policy, within which the use of Villa Rose and other hotels fell to be considered, and failed also to demonstrate either the Villa Rose or any other hotel or hotels within the GY6 were essential in order for it to assist the Home Secretary in meeting her statutory obligations to provide emergency accommodation for asylum seekers [78].

Careful to emphasise the particular features of the Gt Yarmouth case (and therefore not to unduly impede the discharge of the Home Secretary obligations in relation to asylum seekers by the use of other hotels where necessary and justifiable) Holgate J therefore held both in relation to the Villa Rose hotel and to all other hotels also situated within the GY6 policy area that "…the factors in favour of continuing the injunction plainly outweigh those in favour of discharging it." [79]

There is no doubt that this case marks a stemming of the tide of judicial acceptance of the use by the Home Secretary of hotels as emergency accommodation for asylum seekers without seeking either planning permission or a certificate of lawfulness to show that no such permission is required. The Gt Yarmouth case is an illustration of the Court's preparedness to apply the American Cyanamid interim injunction principles differently where particular circumstances dictate. It serves also as a clear signal to the Home Secretary and its agents that more careful consideration of the suitability of particular sites is required before decisions are made to accommodate asylum seekers there.

Richard Wald KC and Jake Thorold of 39 Essex Chambers, acted for Gt Yarmouth BC in these proceedings.

R (University Hospitals of Leicester NHS Trust) v Harborough District Council & Ors [2023] EWHC 263 (Admin)

James Burton
Call 2001

Daniel Kozelko
Call 2018

Introduction

This case concerns various issues, but the standout is whether LPAs can, or will be willing to, insist on s.106 planning obligation monies to fund NHS services. On that, this judgment should be of intense interest to developers and LPAs, as well as NHS Trusts. In theory, its ramifications also extend beyond the NHS.

But how much of a change does the judgment represent? And for whom?

On the key issue, in terms of what Mr Justice Holgate actually decided, *as ratio,* the judgment very much turns on its own facts. However, Holgate J gave strong *obiter dicta* with considerably wider scope.

Facts

The facts, in a nutshell, were that a developer (which happened to be a local authority, Leicestershire County Council) had sought planning permission for a sizeable (up to 2,750 dwellings) residential led development in the area of the claimant NHS Trust.

The Trust's position was that the new development would bring 2,896 new people to the Trust's area, which would generate additional demand for NHS services. The Trust sought to persuade the LPA that it should insist the developer provide a s.106 contribution of, ultimately, close to £1,000,000 in order to meet what it presented as a "funding gap": the Trust said it would face a shortfall in funding for the first year each new (out of area) resident came to occupy the development. The Trust told the LPA this funding gap would exist because its revenue streams were based on annual "block" contracts with the relevant then-clinical commission groups (now integrated care boards), and the nature of the block contracts would create a shortfall in relation to each new-to-area resident until the block contract figures caught up the following year.

In simple terms, the LPA's officers were not satisfied that there would be a "funding gap", not least given that the NHS as a whole is funded at a national level with regard given to population projections. LPA officers pressed the Trust to demonstrate that there would, in fact, be a funding gap. Ultimately, the LPA was not persuaded and so it declined to insist on a s.106 contribution in respect of services provided by the Trust.

The Trust challenged that decision, on four grounds, all of which failed.

The ratio

The grounds of challenge were: (ground 1) that NPPF 2019 had been incorrectly interpreted by the LPA; (ground 2) that the LPA had failed to take into account a relevant consideration, being the Trust's funding arrangements; (ground 3) that the LPA took into account an irrelevant consideration: the Trust's funding arrangements and, (ground 4) that LPA officers ought to have referred the planning application back to committee due to a 19-month delay between the resolution to grant permission and the decision notice. All grounds were rejected by Holgate J (and he noted that ground 2 was contradictory to ground 3, as the former alleged funding arrangements were ignored whereas the latter alleged that funding arrangements were not relevant planning considerations at all).

As to the key issue, Mr Justice Holgate resolved that essentially on the straightforward basis that it

was a matter of judgment for the LPA whether the NHS Trust had persuaded it of a funding gap, and it was manifestly reasonable of it to find it had not. In those circumstances, an obligation to fund such a gap was not "necessary" for the purposes of the CIL Reg.122 tests,[12] as the existence of such a gap had simply not been demonstrated to exist.

As such, the *ratio* itself is concerned with entirely classic principles applied to the particular facts.

Although the judgment makes clear the case for the Trust was not assisted by its initial arguments before the Court *against* the characterization of the shortfall as a "funding gap", when that was the very basis on which it had sought to persuade the LPA and was, logically, the only basis on which it could have sought to satisfy the CIL Reg.122 tests, the ratio did not turn on that.

What the judgment provides of general interest, though, is to open up the wider question of whether s.106 obligations to fund NHS care can be justified at all, through *obiter dicta*. To which we now turn.

The wider obiter dicta

Mr Justice Holgate proceeded to set out reasoning in the event that the NHS Trust had, in fact, demonstrated a funding gap:

> *147. But what if in a future case a NHS trust could demonstrate that it would suffer a funding gap in relation to its treatment of new residents of a development during the first year of occupation? On one level it would be a matter for the judgment of the local planning authority as to whether the three tests in reg.122(2) of the CIL Regulations 2010 are satisfied and whether it would be appropriate to require a financial contribution to be made, after taking into account other requirements and any impact on the viability of the scheme. But all that assumes that there is no legal (or other) objection to a contribution of the kind sought in the present case. The argument in this case does not enable the court to decide that issue as a legal question. This judgment should not be read as deciding that there would be no legal objection.*
>
> *148. Where a housing development is carried out, some of the new residents may be entitled to social welfare benefits, which, like the need for secondary healthcare, arises irrespective of where that person lives. Of course, no one would suggest that the developer should make a contribution to funding those benefits.*
>
> *149. The funding of treatment in NHS hospitals would appear to be different in two respects. First, in an area of net in-migration any increase in the need for treatment and staff will be experienced in the relevant local area, not nationally. Second, because the patients would receive treatment even if they had not moved home, a local funding gap would only arise if funding for the relevant NHS trust did not adequately reflect a projected increase in population and/or the national funding system did not adequately provide for a timely redistribution of resources. Population projections will involve some areas of out-migration as well as areas of net in-migration. It is therefore significant that CCG funding across the country takes into account ONS population projections. Accordingly, in the distribution of national funds there may be increases or decreases in funding for individual CCGs by reference to size of population.*
>
> *150. It seems to me that two points follow. First, even if it could be shown in a particular area that there is a funding gap to deal with "new" residents, HDC was entitled to raise the possibility that this is a systemic problem in the way national funding is distributed. Although the Trust criticised HDC for taking it upon themselves to raise this point, it strikes me as being a perceptive contribution to a proper understanding of the issue. If there really is a systemic problem, this may raise the question in other cases whether it is appropriate to require individual development sites across the country*

12 Regulation 122(2)(a) of the Community Infrastructure Levy Regulations 2010.

to make s.106 contributions to address that problem. However, for the purposes of dealing with the present challenge, HDC's decision rested on the Trust's failure to show that there was a funding gap in this case, not any systemic issue.

151. Second, whether there is a lack of funding for a Trust to cope with the effects of a substantial new development is likely to depend not on those effects in isolation, but on wider issues raised by the population projections used as one of the inputs to determine funding for CCGs. The interesting arguments from counsel in this case suggest that these issues merit further consideration as a matter of policy outside the courts and even outside the planning appeal system.

As this obiter dicta reflects, the difficulty for the purposes of the CIL Regulation 122 tests is that individual NHS Trusts are funded by way of a central cascade down of national funding. If, as Mr Justice Holgate suggests, it is legitimate for an LPA to query whether that national funding cascade is adequate in terms of its ability to respond to local-level population shifts, then one can well see why that might drive a major change in the approach to s.106 contributions to the NHS.

Whether the correct analysis is to approach matters focused on specific local funding gaps at individual NHS Trusts, or on a broader systemic issue, is likely to be key to demonstrating the necessity for such s.106 contributions.

It should be noted that the judgment is at pains to mark a distinction between contributions to infrastructure and contributions to services, but equally recognises that it may be difficult to draw the line between the two (see [127]). It may be wondered whether there is a distinction of principle between the two in the case of the NHS. However, there is nothing in the judgment that disturbs the principle, which is confirmed at [139], that:
where, for example, a development would itself cause direct harm to a public facility, so that the three tests in reg.122(2) of the CIL Regulations 2010 are satisfied, the local planning authority would be entitled to require the developer to mitigate that harm under a s.106 obligation, irrespective of whether the authority responsible for that facility is able to raise taxes or has borrowing powers.

A further question is whether the reasoning in that obiter dicta is persuasive beyond NHS-specific application.

As to that, Mr Justice Holgate was at pains to reject the analogy the NHS Trust had sought to draw with contributions towards highways infrastructure [140]. For obvious reasons: a highway authority is not under an obligation to provide new highway infrastructure.

However, other realms might be considered closer to the NHS position. To take what is probably the most obvious: education. A local education authority is under a statutory obligation to make provision, whatever the demographic swings in its area. Just as there is a statutory obligation to provide NHS services. The key differences are that a local education authority's obligations apply only to those in its area, and it is funded locally, albeit that money comes ultimately from national taxation as well as local taxation and other revenue streams. Whereas, the NHS obligation to provide services applies wherever a person lives in the country, and is funded through national taxation. But if local education authority funding includes an element for projected population, the same factual issues as confronted the NHS Trust here may arise on the particular facts.

It does seem to the writers that the judgment will lead to justified scrutiny of s.106 agreements already entered into, and s.106 contributions presently under discussion, not limited to those concerning the NHS.

Even Further clarifications to the remit of section 73 of the Town & Country Planning Act 1990: *Armstrong v SSLUHC* [2023] EWHC 176 (Admin)

Celina Colquhoun
Call 1990

In the last Newsletter I wrote about the case of *Reid v Secretary of State for Levelling Up Housing & Communities; Newark & Sherwood District Council* [2022] EWHC 3116 (Admin). The judgment in that case, inter alia, rejected an Inspector's conclusion that, despite the fact that an application under s73 did not involve the imposition of a new condition or removal of one which was inconsistent with the description of the development on the face of the principal permission, the amendment proposed was not within the remit of s73 as the *"effect of the proposal…would not be consistent with the description of the development and so the appeal cannot succeed"* [22] . This approach had also been taken by the local planning authority beforehand. The Court confirmed, in short, that just because the removal of a condition might allow for a future change of use under permitted development rights that did not in itself lead to an inconsistency with the stated permitted use and prevent s73 applying. The effect and desirability of that removal needed to be assessed and had not been.

There has now been even further clarification of s73 in the case of *Armstrong* (albeit without reference to *Reid*) once again applying the Court of Appeal's guidance in *Finney*[13] and confirming that what is key in assessing whether an application falls within s73 is indeed whether there is any actual change to that operative part of the permission itself. In addition, as many will have noted (perhaps with a sigh of relief), the judgment firmly kicked into touch the notion which arose as a consequence of the wording of the Planning Practice Guidance[14] [27] which had led to many authorities and planning professionals approaching s73 applications on the basis that amendments to conditions which led to more than a '**minor** material amendment' to the permitted scheme were outside s73's remit.

Facts and circumstances of Armstrong

The circumstances in *Armstrong* were also notable in two further respects – firstly, Mr Armstrong represented himself throughout and secondly, the changes he proposed through his s73 application, which substituted new plans with a varied condition, would indeed bring about a very different design of dwelling than the one originally permitted. The change was described as being from a house that was of an *"irregular shape and in a modern architectural style"* to that of an *"alpine lodge style"*. There could be little doubt therefore that the materiality of the changes was considerable however the wording of the operational part of the permission, i.e *"Construction of one dwelling"* on the relevant site, was again key. As with *Reid* however the effect of the material changes was never assessed.

The authority duly refused permission on the basis that the *"revised design completely alters the nature of the development and would result in a development that would differ materially from the approved permission"* and that *"[a]s a result this proposal goes beyond the scope of Section 73"* [16].

On appeal the Inspector in effect accepted the authority's approach having identified whether the main issue on appeal as whether the *"proposal could be considered as a minor material amendment under section 73"* [19].

Even though the descriptive part of the permission was broad enough to encompass quite significant changes without such changes being inconsistent with it, the Inspector concluded that because *"the wholesale redesign of the house results in a development that would be of a substantially different nature than the one originally approved.*

13 *Finney v Welsh Ministers* [2019] EWCA Civ 1868
14 Reference ID: 17a-017 to 018

In these circumstances, ***the PPG advises that a new planning application is necessary****".* The Inspector in drawing this conclusion also though clearly appeared to equate the PPG advice that *"One of the uses of a section 73 application is to seek a minor material amendment, where there is a relevant condition that can be varied"* meant that *"the word "minor"* ***qualifies the extent to which material changes should be considered via this [s73] route****".* [emphasis added]

To that extent it appeared that the Inspector had equated 'substantial difference' to one that is 'more than a minor material amendment' and as argued by the Claimant, this is despite there being no statutory basis for that qualification. The Defendant in fact accepted in response that that was the wrong approach but argued that the Inspector had in fact approached the decision applying the *"the correct legal test to be applied i.e… on whether the modifications were too fundamental to fall within the scope of s73" [62].* In the alternative it was argued that even if he had fallen into the error in respect of the PPG the Inspector would have reached the same conclusion applying *Simplex.*[15]

The judgment

James Strachan KC sitting as a Deputy Judge roundly accepted Mr Armstrong's arguments and set out clear and helpful guidance on the limitations of s73 and how it should be applied.

Firstly, in terms of s73 itself and any limitations on the face of the statute that it is an *"important starting point"* that *"provided the application is limited to noncompliance with a condition (rather than any other part of the permission) it falls within the stated scope of s73 of the TCPA 1990"* [74].

Secondly, as a consequence of *Finney*, the Deputy Judge confirmed that the *"requirement that a s73 application be confined to applications for non-compliance with a condition is significantly restrictive in and of itself"* and that he could see no reason for the introduction or necessity for further limits on its scope which are not otherwise expressed in the section to be read in. In short he concluded that *"where an application for non-compliance with a condition does not lead to any conflict or inconsistency with the operative part of the permission, it is difficult to see why it is objectionable in light of the statutory purpose of section 73"* [75].

Thirdly, he held that if Parliament had intended the power to restrict the application and use of s73 *"further (for example to limit it to "minor material" amendments to a condition, or non-fundamental variations to a condition) one would have expected that to be expressed in the language used and it could readily have done so"* and it had clearly not [76].

Fourthly, he contrasted this with the way that s96A is specifically worded to refer to 'non material amendments' which he took to be *"yet a further indication that if Parliament had wished to limit the power under s.73 to "minor material amendments" or so prevent "fundamental variations" to conditions, it would have done so expressly"* [77].

Fifthly, similar to the circumstances in *Reid*, the fact that because an application does not conflict with or alter with the operative part of the permission and is indeed focussed on the conditions and can therefore be considered under s73 is not of course the end of the story, the planning merits thereafter must be determined. As with *Reid* the Inspector stopped short of doing so having concluded the proposal was out with the section. The point that is made with regard to the question of whether or not there is a fundamental difference brought about by any changes is part of the planning merits assessment. Strachan KC also highlighted the difference between the circumstances here with those in *Finney*.

Sixthly, the Deputy Judge confirmed that the caselaw, in particular *Arrowcroft*[16] and *Finney*, did not give rise to the more limiting interpretation of s73 in particular because both cases involved a

15 *Simplex GE (Holdings) Ltd v SSE* (1986) 57 P & CR306

16 *R v Coventry City Council ex p Arrowcroft Group Plc* [2001] PLCR 7

fundamental inconsistency with the operative part of the permission [80 and 81]. In particular he went on to consider the judgment of Collins J in *Vue*[17] which he said confirmed his approach.

The remainder of the judgment addresses the more thorny ground where it is argued that an application which makes no change to the operative part of the permission does nevertheless still involve a "*fundamental variation of the permission overall"* in seeking a change to the conditions. The Defendant had raised this in the context of Collins J's observations in *Vue* and Strachan J noted this was only raised as a *"possibility"*. The Deputy Judge went on to state as follows at [86]:

> *"On any basis Vue is therefore not authority for the proposition that a s73 application which is consistent with the "operative part" of a planning permission is nonetheless outside the scope of s.73 if it is considered to involve a "fundamental variation."* ***Even if it is possible that such a fundamental variation might arise in reality, I find it difficult to conceive if it involves no conflict with the operative part of the permission itself.****"* [emphasis added]

Having found that however he went on in the alternative on the basis that such a possibility might arise and, in the circumstances, as argued.

He concluded the Inspector had not *"properly grappled with why it is that what he saw as a fundamental variation in the form and style of the dwelling in fact amounts to a fundamental variation to the permission itself (as opposed to the conditions affecting that permission"*. This was because on the facts of this case there was *"no change in the basic principle of what was being permitted on the Site, namely the construction of a single dwelling"* [91].

In the final part of his analysis Strachan KC also concluded that *"even if a test of fundamental variation is a lawful one to apply"* again he was *"not persuaded that the Inspector applied such a test in this case"* [92]. This was because the Inspector in his view had *"misdirected himself by reference to the PPG and its concept of "minor material amendments"*.

He then went on roundly to criticise the *"wording of the guidance"* which he stated *"is liable to confuse, as evidenced by the Inspector's decision itself"*. This was because the PPG had introduced the "concept of *"minor material amendment" where no such expression exists in the statutory scheme, nor is otherwise supported by the most recent authorities."* In his view it was "unsurprising that any reader of the PPG might infer that the reference to *"minor material amendment" is advice that it is only minor material amendments that fall within the scope of s73. In my judgment, that is exactly how the Inspector expressed his own understanding of it"*. It was of course notable that the Defendant had not argued that this was the correct understanding of s73.

Conclusions:

So, the concept of s73 being limited to minor material amendments is clearly dead and many planning professionals have concluded rightly so – we are left in a planning world where an amendment is in the first instance either 'material' or 'non material'.

The clear emphasis for any s73 application going forward is if it effects **directly** the operative part of the principal planning permission.

It is therefore arguable from the recent caselaw that **any** direct effect or proposed change upon the wording of the operative part, ignoring its impact upon the development permitted as a whole takes an application out with s73 (indeed this is the approach applied by Lane J subsequently in *Atwill v New Forest National Park Authority* [2023] EWHC 625 (Admin) 22 March 2023).[18] The question remains however whether decision makers should in such circumstances still err on the

17 R(Vue Entertainment Ltd) v City of York Council [2017] EWHC 588 (Admin)

18 In which the author acted for the successful Claimant.

side of caution and carry out the planning merits assessment in any event (which the Inspectors in *Reid* and *Armstrong* did not do).

It is important to recognise from this judgment though that the concept of *"fundamental variation"* as a consequence of a change to the conditions alone and which has no effect upon the operative part of the permission is **not** however entirely dead. It was clear from *Reid* and from this case that even if is *"difficult to conceive"* of a fundamental variation arising in such circumstances it is seemingly important for decision makers in carrying out their planning merits assessment under s73 to ensure that fundamental variation is addressed.

R (on the application of Friends of the Earth Limited) v Secretary of State for International Trade and others [2023] EWCA Civ 14

Christopher Moss
Call: 2021

Facts

In June 2020, UK Export Finance ("UKEF") decided to provide £1.15bn in financial support to a liquified natural gas plant in Mozambique. In making this decision, it decided that consideration of the Paris Agreement should be taken into account. As part of this process, UKEF prepared a climate change report on the development which concluded that funding the plant aligned with the Government's Paris Agreement obligations. It was also said that whilst the Project's scope 3 emissions (those which are the result of activities from assets not owned or controlled by the reporting organization, but that the organisation indirectly affects in its value chain) would significantly exceed its scope 1 and 2 emissions, it was not possible to assess the scope 3 emissions accurately.

Friends of the Earth sought a judicial review of UKEF's decision, arguing that:

1) As UKEF had concluded the funding decision was aligned with the UK's obligations under the Paris Agreement, this conclusion had to be correct, not merely 'tenable';
2) There was no rational basis for UKEF to have concluded that its decision was compatible with the Paris Agreement, in particular, article 2(1)(c) which provided that the Paris Agreement aimed to "strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by: … (c) making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development". Further, it was additionally irrational because the Government itself had later acknowledged in its March 2021 Guidance: *Aligning UK international support for the clean energy transition* that financing the project did not align with the UK's obligations under the Paris Agreement; and
3) UKEF had not discharged their Tameside duty of enquiry by failing to obtain a quantification of the scope 3 emissions of the project.

The Divisional Court, comprising Stuart-Smith LJ and Thornton J, heard the matter in December 2021 but could not agree on the outcome. Accordingly, the application was dismissed but with permission to appeal granted.

The Court of Appeal's Judgment

Sir Geoffrey Vos MR gave the unanimous judgment dismissing the appeal.

In respect of grounds 1 and 2, he held that whilst there was no requirement for UKEF to consider the Paris Agreement, given it is an unincorporated international treaty with no domestic effect, they were allowed to and had chosen to consider it. Nevertheless, this did not alter the standard of review when dealing with an unincorporated treaty which is whether the decision maker adopted a 'tenable' view as to its interpretation.

Whilst the Court of Appeal declined to take a firm view of what the UK's obligations under the Paris Agreement were, it did state what they were not. The Court held that article 2(1)(c) only sets out the aims and purposes of the Paris Agreement and did not create an obligation on the UK to demonstrate that its overseas funding was consistent with a pathway towards limiting global warming to well below 2°C and pursuing efforts to 1.5°C.

In the circumstances, UKEF's view that the funding decision aligned with the UK's Paris Agreement obligations was a tenable one. There were huge complexities in respect of the climate change impact and UKEF had received internal advice that the gas produced could displace coal in power generation in other states and that the project was an important part of Mozambique's transition to cleaner energy sources. Further, that the UK government may later have concluded the decision to fund the project was not aligned with the UK's obligations under the Paris Agreement was moot, the Court's assessment was based on UKEF's view at the time of the decision, not with the benefit of hindsight.

Accordingly, both grounds 1 and 2 were dismissed.

In respect of ground 3. The Court held that whilst scope 3 emissions were not quantified, it was always understood they would be significantly larger than scope 1 and 2 emissions. In any event, quantifying the scope 3 emissions would not answer the more nuanced question of whether approval of the financing would or would not align with the UK's obligations under the Paris Agreement. The obligations in question were, anyway, held by the Court not to be absolute requirements. Rather, they were simply some of the purposes of the Paris Agreement. The Court of Appeal also noted that the project would have gone ahead with or without this funding, as other backers were prepared to put up the necessary money. A decision by the British government not to fund the project would not have reduced or avoided the emissions in question.

The Court concluded that the Government's decisions as to the quantification of the scope 3 emissions and the adequacy of the project's climate change report were "well within the substantial margin of appreciation allowed to the decision-makers". A failure to estimate the scope 3 emissions as part of a multifaceted decision-making process did not itself render the decision irrational.

Comment

With the change in UK Government policy from March 2021, that it will no longer provide new direct financial or promotional support for the fossil fuel energy sector overseas, this decision of perhaps limited practical relevance. Nevertheless, the case itself may still have a road to run. Friends of the Earth have sought permission to appeal to the Supreme Court. If permission is granted, it will be intriguing to see whether the Supreme Court adopts the same 'deferential' approach as the Court of Appeal in respect of the Paris Agreement or if they provide a more definitive view of the Government's specific obligations.

This latter scenario, though unlikely given the wealth of case law on the approach to unincorporated international treaties cited in the Court of Appeal, assumes further importance given Friends of the Earth's recent application seeking permission to challenge the grant of planning permission for the new Cumbrian coal mine.[19] One of their grounds of challenge relates to the decision conflicting with the UK Government's international obligations under the Paris Agreement. This ground is likely to be heavily influenced by the Supreme Court's decision, if any, in this case, particularly if a definitive view on the UK's specific obligations under the agreement is provided.

Further, as the Court of Appeal's decision, in this case, demonstrates the high level of deference that will be afforded to the executive in respect of the interpretation of unincorporated international treaties considered in an international context. Whether a court may be willing to apply a greater degree of scrutiny in the context of a challenge to a

19 https://friendsoftheearth.uk/climate/legal-challenge-filed-over-cumbrian-coal-mine

domestic development, rooted by reference to Paris Agreement's obligations, will be another interesting point to ponder should the Cumbrian coal mine challenge get off the ground on this point.

Consideration of aircraft emissions in planning decisions *Bristol Airport Action Network Co-ordinating Committee v Secretary of State for Levelling Up, Housing and Communities* [2023] EWHC 171 (Admin) & Two to watch

Stephanie David
Call 2016

The focus in this planning statutory review was whether, and to what extent, aviation emissions should play a role in deciding whether permission should be granted under the Town and Country Planning Act 1990. In particular, whether the defendant properly interpreted local plan policies (CS1 and CS23) and paragraph 188 of the National Planning Policy Framework ("NPPF") in the context of the proposed extension of Bristol airport.

Lane J determined that policy CS1 is broad enough to include the issue of aircraft emissions but neither that policy, nor CS23, articulates the way in which aviation emissions should be addressed. He observed that (para 82):

> *"This is significant, given the obvious fact that aviation emissions, which can occur at any point in an aircraft's journey to and from Bristol Airport, are of a different character from, for example, carbon emissions that can be addressed by reducing energy demand through good design of buildings in the area of NSC."*

He therefore determined that, whilst the policy is capable of including aircraft emissions, it falls upon the individual decision-maker to exercise their judgement in order to determine how such emissions should be dealt with.

The argument on para 188 of the NPPF was that the panel had erred by (i) assuming that the Secretary of State would meet his obligations under the Climate Change Act 2008 ("2008 Act") and meet the carbon budgets; and (ii) the assumption was irrebuttable. Paragraph 188 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. Equally, where a planning decision has been made on a particular development, the planning issues should not be revisited through the permitting regimes operated by pollution control authorities."*

The claimant's main argument was advanced by drawing a parallel between the 2008 Act and the air quality regime on the basis that the 2008 Act is "programmatic in nature", imposing obligations on the State to comply with relevant emission limits, set in the carbon budgets, by the time specified in those budgets via the policy means set by the Secretary of State (para 131). Thus, it was argued that, para 188, properly interpreted "does not require a planning decision-maker to assume that the Secretary of State will have acted within the time span of the carbon budgets to take the action required in order to discharge his responsibilities under the legislative scheme for climate." It is therefore a question of law as to whether the CCA is included in the definition of "pollution control regimes".

Lane J did not accept the argument. He considered that the relationship between local and national decision-making in respect of air quality is significantly different to that for greenhouse gas emissions from aircraft (para 139). Aircraft emissions are controlled at the national level; whereas, air quality issues also have a "significant and discrete local element" *(ibid).*

The challenge was dismissed. Lane J observed, in concluding, that (para 258):

> *"…I should make clear that nothing in this judgment is to be taken as contradicting what is said in its opening paragraph, regarding the significance of climate change and GHGs. As will by now be apparent, the main issue in this case is not whether emissions from any additional aircraft using Bristol Airport should be ignored. Plainly, they should not. Rather, it is about how and by whom those emissions should be addressed."*

This case only further illustrates the growing disconnect between the approach adopted in national policy and individual planning decisions. The Jet Zero Strategy provides that, whilst the Government remains committed to growth in the aviation strategy, the policy frameworks for airport planning "provide a robust and balanced framework for airports to grow sustainably within our strict environmental criteria" and "expansion of any airport in England must meet our climate change obligations to be able to proceed" (para 3.56).

Watch this space: permission granted

Permission to proceed has been granted for two important cases.

First, in the claim brought by the Marine Conservation Society and others in their challenge to the Storm Overflows Reduction Plan, published on 26 August 2022 in purported compliance with s141A of the Water Industry Act 1991. The plan allows the discharge of untreated sewage into water bodies (including coastal waters) to continue for decades (see *R (Marine Conversation Society, Richard Haward's Oysters (Mersea), and Tagholm) v SSEFRA* and *R (Wild Fish Conservation) v SSEFRA*). The grounds of challenge are as follows:

1) The plan fails to discharge defendant's duty under s 141A of the Water Industry Act 1991, properly understood.
2) The plan was irrational in that it (i) adopted a definition of 'high priority sites' that excluded the majority of coastal areas that have been designated for their ecological sensitivity, without any coherent explanation for the choice and (ii) adopted a definition of 'no adverse ecological impact' that can only be applied to freshwater sites, such that there is no viable way to measure compliance with one of the plans' three targets for those coastal areas including in its scope.
3) It breaches the article 1, protocol 1 and article 8 rights of Haward's Oysters and Tagholm.
4) The plan is contrary to the Public Trust Doctrine, namely the ancient common law rights to residents to fish, gather food and navigate coastal waters and foreshore of England. Pursuant to this doctrine, there are collateral obligations on defendantrs to safeguard those rights, which includes a duty to maintain coastal waters in a fit ecological state to support fisheries and allow for recreation.

Second, the challenge brought, pursuant to s 288 of the Town and Country Planning Act 1990, to grant planning permission for an exploratory gas well in Surrey. The grounds are as follows:

1) There was a failure to take into account a mandatory material consideration, namely para 175 NPPF insofar as the defendant had failed to give great weight to conserving and enhancing landscape and scenic beauty of Area of Outstanding Natural Beauty.
2) There are substantial inconsistencies between this decision and that taken in Ellesmere Port appeal on the same day, in particular in respect of the climate impact of unmitigated greenhouse gas emissions from natural gas exploration.
3) The defendant adopted an internally inconsistent approach by taking into account downstream economic benefits but not downstream climate impacts. He also adopted an internally inconsistent approach to downstream benefits overall. Alternatively, his reasoning on downstream benefits was inadequately explained.
4) Finally, there was double-counting of the downstream benefits of proposal in the final planning balance.

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Richard Wald KC is a leading environmental, planning and public law silk. He has been ranked by Chambers and Partners and The Legal 500 in the categories of Environmental Law, Planning Law, Aviation Law, Administrative and Public Law and Energy Law. Prior to taking silk he was rated by Planning Magazine Legal Survey as amongst the UK's top planning juniors for over a decade and nominated by Chambers and Partners as Planning and Environment Junior of the Year

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Celina regularly acts for and advises local authority and private sector clients in all aspects of planning and environmental law. She also regularly appears in the High Court and Court of Appeal in respect of statutory challenges and judicial review. She undertakes both prosecution and defence work in respect of planning and environmental enforcement in Magistrates' and Crown courts. She specialises in all aspects of compulsory purchase and compensation, acting for and advising acquiring authorities seeking to promote such Order or objectors and affected landowners. Her career had a significant grounding in national infrastructure planning and highways projects, and she has continued that specialism throughout. *"She has a track record of infrastructure matters"* Legal 500 2019-20

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

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Ned specialises in planning, environment, energy, administrative and public law and associated areas. He acts for developers, landowners, local government and other public bodies, individuals and interest groups. He has been recommended in the directories for a number of years and is currently ranked as a leading junior in The Legal 500 for both planning and environment. He has extensive court experience, including in the Supreme Court, Court of Appeal and High Court and he also appears regularly in inquiries, hearings and local plan examinations. He has a background in the biosciences and is particularly interested in cases involving scientific, environmental and other technical issues, including those relating to climate change, biodiversity and habitats, environmental assessment, energy and natural resources and strategic infrastructure. He is on the Board of the Journal of Environmental Law and is a General Editor of the Sweet & Maxwell Environmental Law Bulletin

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Daniel has a mixed practice incorporating planning, environmental, and public law. His instructions have included: acting in proceedings to obtain a certificate of lawfulness of existing use or development; advising on material changes of use of land in the context of retail developments; and, work on matters involving damage to utilities and highways. Daniel has also recently returned from a secondment at the Supreme Court of the United Kingdom, where he was judicial assistant to Lord Carnwath and Lady Arden. In the course of that secondment Daniel worked on a number of cases raising planning and environmental issues, including *R (on the application of Samuel Smith Old Brewery (Tadcaster) and others) v North Yorkshire CC* [2020] UKSC 3 and *Dill v Secretary of State for Housing, Communities and Local Government and another* [2020] UKSC 20.

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Stephanie accepts instructions across all areas of Chambers' work, with a particular interest in planning matters (including environmental offences). Stephanie makes regular court appearances, undertakes pleading and advisory work and has a broad experience of drafting pleadings, witness statements and other core documents. She has been instructed to advise on a range of matters, including enforcement notices, environmental offences (such as fly-tipping), and applications for planning statutory review. She has also appeared before the Magistrates Court to obtain entry warrants on behalf of Environmental Health Officers.

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Jake accepts instructions across all of Chambers' practice areas with a particular interest in public, planning and environmental law. In 2021-2022 Jake was a Judicial Assistant at the Supreme Court of the United Kingdom and Judicial Committee of the Privy Council, assigned to Lord Sales and Lady Rose. In this role Jake was involved with some of the most important planning cases of the year, including *Hillside Parks Ltd v Snowdonia National Park Authority* and *DB Symmetry v Swindon Borough Council.* Jake is currently instructed on a number of planning matters, including as sole counsel for three residents groups in the South Kensington Tube Station Inquiry.

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Call: 2021

During pupillage Christopher was involved in a variety of planning and environmental law matters and is keen to grow his practice in these areas. He is currently being led by Daniel Stedman Jones in a statutory review of a decision refusing a planning application for a major solar farm on agricultural land, contrary to an inspector's recommendation. He has also been instructed to advise and draft pleadings in relation to tree-related subsidence.

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