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Welcome to the Autumn 2023 edition of the 39 Essex Planning Environment and Property newsletter. At the opening of this Legal Year in particular we also welcome and congratulate our new Lady Chief Justice Carr on her momentous appointment. Perhaps heralding a term of change and progress, on 18 September 2023, the long-awaited National Policy Statement for water resources infrastructure was finally designated,[1] and the Levelling Up and Regeneration Bill ('the LURB')has had its third reading in the House of Lords, notably with the Government's attempt to introduce a provision which would override the Habitats Regulations in respect of nutrient neutrality and direct decision makers to ignore them in effect was given short shrift and blocked by Peers.

In this edition **Kerry Bretherton KC** starts us off with her views on the developing area of the certification regime under the Building Safety Act 2022. We are also pleased to welcome our new tenants and first-time contributors **Celia Reynolds** and **Ella Grodzinski** who respectively discuss the decisions in *Fry,*[2] on nutrient neutrality and the continued applicability of Article 6(3) of the Habitats Directive and which may well have triggered the ill-fated attempt to amend the LURB, and *Boswell,*[3] on the assessment of the cumulative climate impacts of road schemes where **James Strachan KC** and **Rose Grogan** acted for the successful Defendant. On top of this we have articles on the following recent decisions:

- **James Burton** addresses the limits of s.73 of the Town and Country Planning Act 1990, a question outstanding, and a practical suggestion for local planning authorities in light of the case of *Fiske*[4] in which he acted for the successful claimant;

- **Daniel Kozelko** covers the decision in *AHGR Limited* on the Court of Appeal's interpretation of a 'live/work' condition in a long lease covenant and the importance of clarity;

- Lastly, **Christopher Moss** writes on the case of *City Portfolio*[5] where Mr Justice Fordham considered whether, and if so how, costs should be awarded to a Claimant who withdrew their claim for judicial review after they achieved practical, if not necessarily legal, success out of court.

We do hope you enjoy this edition of the PEP newsletter and have a productive Michaelmas term.

Certification under the Building Safety Act

Kerry Bretherton KC
Call 1992 | Silk 2016

It has been a busy summer working on a number of cases arising out of the Building Safety Act (BSA). There are so many interesting issues arising under the legislation that it is impossible to address all in a single article. Clients are concerned about remediation orders, whether

1 https://www.gov.uk/government/publications/national-policy-statement-for-water-resources-infrastructure
2 *C G Fry and Son Ltd v Secretary of State for Levelling Up Housing and Communities and another* [2023] EWHC 1622 (Admin)
3 *R (Boswell) v Secretary of State for Transport* [2023] EWHC 1710 (Admin)
4 *R (Fiske) v Test Valley Borough Council* [2023] EWHC 2221 (Admin)
5 *R (City Portfolio) v Lancaster City Council* [2023] EWHC 1991 (Admin)

their buildings are higher risk buildings (some interesting questions have been raised regarding the relevant criteria) and issues to do with accountable persons.

In this article I would like to pick up on one matter which has been of particular concern to a number of freeholders and landlords. That is the regime for certification; a regime which has engaged a substantial amount of my time over the last few months, and which has been the subject of a number of amendments very shortly after the provisions came into force.

Schedule 8 of the BSA contains the provisions restricting or prohibiting recovery of service charges from leaseholders in relation to certain defects, works and costs. Certification is as provided in the Building Safety (Leaseholders Protections) Regulations 2022/711 ("**the BSLP Regulations**"). The BSLP Regulations have been amended by The Building Safety (Leaseholder Protections etc.) (England) (Amendment) Regulations 2023 SI 2023 No 895 made on 4 August 2023 and came into effect on 5 August 2023.

By Regulation 6 of the BSLP Regulations as amended *"a current landlord"* must provide a landlord's certificate in five circumstances as specified in regulation 6(1). This includes obligations to serve certificates by 6(1)(b) within four weeks of receipt of notification from the leaseholder that the leasehold interest is to be sold and by (6)(1)(d) and within four weeks of being requested to do so by the leaseholder and so, effectively, on demand.

The amendments added a new Regulation 6(1)(e) that adds an obligation to serve a Landlord's Certificate within four weeks of becoming aware of a new leaseholder deed of certificate (as defined in regulation 6 of the Building Safety (Leaseholder Protections) (Information etc.) (England) Regulations 2022) which is in relation to a lease of a dwelling in the building of which the current landlord is the landlord and which contained information that was not included in a previous landlord's certificate. This expands the already extensive circumstances in which a Landlord's Certificate is required.

The obligation to serve a certificate depends on whether the landlord is *"the current landlord"*. The *"current landlord"* is now defined in Regulation 1 of the BSLP Regulations as *"a person who is the landlord under a lease of premises in a relevant building"*. This amended definition means that it is likely that a freeholder will be able to argue that it is not the current landlord in a case in which there is a headlease of the building. However, it may well be the relevant landlord and so is obliged to provide a certificate to the current landlord following a request for information by the current landlord under Regulation 6(6), 6(7) and 7 of the BSLP Regulations.

Of course, the consequence of a failure to provide a certificate is as provided in Regulation 6(7) BSLP Regulations namely that the condition in paragraph 2(2) of Schedule 8 of the BSA is treated as having been met in accordance with paragraph 14(2) of Schedule 8 to the BSA.

It has been suggested by some commentators that the structure of the legislation is such that the failure to provide any one certificate is such that the condition in paragraph 2(2) is met for the whole building. These commentators argue that by being treated as having met the developer condition it means that the landlord is then unable to recover costs from remedying relevant defects from any other tenants in the relevant building including commercial tenants. My own view is that this cannot be consistent with the statutory purpose of the certification regime. Further, the language of Schedule 8 is directed to the individual lease which is inconsistent with the suggestion that a single error by a landlord would impact on the whole building.

Other landlords are reluctant to comply with the certification process. The amendments to the legislation have substantially relieved the

obligations on landlords to disclose information and evidence about assets in cases where service charges would not be recoverable. However, the obligation on the current landlord to provide the certificate is mandatory even in cases where the landlord exceeds the threshold for contribution. Further in those cases where the landlord falls below the threshold the obligations are very substantial.

A note of warning. The form of the certification has changed following the amendments to the BSLP Regulations. Be careful to use the form attached to the amended regulations because the forms look very similar but the certificate must be provided in the prescribed form and so, arguably, use of the old form, would not be a valid certificate.
A more substantial problem with the certification regime arises in relation to lease extensions. When a leaseholder takes advantage of the statutory lease extension process under the Leasehold Reform, Housing and Urban Development Act 1993 a new lease is granted. This presents problems for such leaseholders who are granted lease extensions after 14 February 2022 (and arguably on 14 February 2022) because the qualifying time for the purpose of s119 BSA and Schedule 8 is 14 February 2022. There is the potential for a whole group of leaseholders to be excluded from the protection of the legislation because this new lease does not qualify. It seems likely that this matter will be remedied as there is no reason why this group of leaseholders should be excluded from protection.

It is disappointing that the role of the First-tier Tribunal is limited under the current regime. It appears likely that this will be addressed by further amendments to enable it to exercise a far wider range of powers in relation to certification. Such an extension of powers are likely to be welcomed by freeholders, landlords and leaseholders.

C G Fry & Son Ltd v Secretary of State for Levelling Up Housing and Communities and another [2023] EWHC 1622

Celia Reynolds
Call 2022

Broadly speaking, nutrient neutrality aims to mitigate the effects of nutrients (such as phosphates and nitrates) leaking into protected water habitats. An excess of these nutrients causes "eutrophication" – algal blooms which starve waters of light and oxygen, killing wildlife.

Under protections set out by Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (the "**Habitats Directive**") and the Conservation of Habitats and Species Regulations 2017, SI 2017/1012 (the "**Habitats Regulations 2017**") planning authorities are required to undertake an appropriate assessment where a project is likely to have a significant effect on a site with designated protections. The planning authority must have regard to such an assessment and may agree to the plan or project *"only after having ascertained that it will not affect the integrity of the European site."*

In the context of nutrient neutrality, the requirement for an appropriate assessment to be conducted has delayed the development of many projects. In April 2023, the Director for Cities at the Home Builders Foundation averred that the issue of nutrient neutrality had become a serious obstacle for house building in England, delaying an estimated 120,000 homes across the 27 catchments in England, with some 40 percent having already secured outline or full planning permission. It was on foot of statements such as this and the concerns raised, that the recent High Court decision in *C G & Son Ltd v Secretary of State for Levelling Up and Housing Communities* [2023] EWHC 1622 was decided.

FACTS

In 2015, Somerset Council granted outline planning permission to C G Fry & Son Limited for a mixed-used development of 65 houses, lying adjacent to the Somerset Levels and Moors Ramsar Site. Pursuant to paragraph 181 of the NPPF, Ramsar sites are given the same protection as habitats sites. In August 2020, Natural England published a note observing that the Somerset Ramsar Site was in an unfavourable condition and at risk of eutrophication caused by excessive phosphates. Somerset Council were further advised that *"the scope for permitting further development that would add additional phosphate either directly or indirectly to the site, and thus erode the improvements secured, is necessarily limited."*

While the first two phases of the development were completed under separate reserved matters approvals, Somerset Council withheld approval on the basis that an appropriate assessment under the Habitats Regulations 2017 was required before the conditions could be discharged.

In April 2022, the Claimant appealed to the Secretary of State on the basis that the Habitats Regulations did not require an appropriate assessment at the discharge of conditions stage, and even if it did, an appropriate assessment could only be relevant to the extent that it was material to the outstanding conditions at the reserved matters stage.

The Inspector dismissed the Claimant's appeal, determining that because the discharge of conditions was an authorising act which could realise potential effects on the Ramsar site that Natural England sought to manage, it was legitimate to apply the assessment provisions of the Habitats Regulations.

The Claimant challenged the Inspector's decision by way of statutory review. There were three grounds:

1) The Inspector misconstrued the Habitats Regulations 2017 and should not have interpreted regulations 62 and 63 ("the assessment provisions") to apply to the reserved matters approval. Firstly, regulation 70 defines the scope of the assessment provisions with regards to planning permission, which a grant of approval of reserved matters is not. Secondly, EU law could not be used to produce a result contrary to the plain interpretation of the assessment provisions, i.e. produce a *contra legem* interpretation.
2) Paragraph 181 of the NPPF did not enable the Inspector to take into account considerations which were legally irrelevant to the conditions at issue.
3) Even if the assessment provisions of the Habitats Regulations apply to the discharge of conditions, it must be interpreted in such a way that the scope of the appropriate assessment reflects the scope of the conditions being considered.

JUDGMENT

Ground 1

With regards to ground 1, Sir Ross Cranston, sitting as a High Court judge determined that, in nutrient neutrality areas, an appropriate assessment must be undertaken before a project is consented, irrespective of whatever stage the process has reached. Three reasons were given.

Firstly, he observed that article 6(3) of the Habitats Directive requires that an appropriate assessment be undertaken before a project is agreed to. While counsel for the Claimant contended that the Habitats Directive had no status within the UK legal system (except through regulation 9(3) of the Habitats Regulations 2017), Sir Ross Cranston rejected those submissions and found that Article 6(3) continued to be recognised in domestic law after exit day.

Applying section 4(2)(b) of the European Union (Withdrawal) Act 2018, he concluded that Article 6(3) had been recognised by the CJEU in the *Waddenzee* decision[6] as having direct

6 In the decision of *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw* [2005] Env. L.R. 14

effect prior to exit day (31 December 2020) and therefore continued to have effect in domestic law thereafter. Reliance was placed on Harris v Environment Agency [2022] EWHC 2264 (Admin) (at §90), where Johnson J reasoned that because Article 6(2) was "of a kind" with Article 6(3), it likewise persisted as an obligation recognised in domestic law after exit day.

Secondly, while on a *"strict"* reading the assessment provisions of the Habitat Regulations were confined in their application to the planning permission stage, on a *purposive interpretation,* they extended to the discharge of conditions. The court observed that if an appropriate assessment was restricted to the planning permission stage, it would open a lacuna in habitats assessment, leaving the possibility that no assessment could be undertaken where the negative effects of a development were raised only after the first stage in a multi-stage consent process.

Equally, a purposive interpretation flowed from the strict precautionary approach which the CJEU had adopted to the assessment provisions of the Habitats Directive. That approach seeks to ensure the avoidance of harm to the integrity of protected sites.

Finally, Sir Ross Cranston determined that he was bound by case law to apply the assessment provisions of the Habitats Regulations 2017 to the discharge of conditions, namely *R(Barker) v Bromley LBC* [2006] UKHL 52, *R(Wingfield) v Canterbury City Council* [2019] EWHC 1974 (Admin), and *R(Swire) v Canterbury City Council* [2022] EWHC 390 (Admin). In the context of the EIA multi-stage consenting procedure, Lord Hope recognised in *Barker* that a material change in circumstances could require an assessment at the reserved matters stage. In *Wingfield,* Lang J relied upon *Barker* to conclude that that an appropriate assessment under the Habitats Regulations 2017 could be conducted at the reserved matters stage. That decision was upheld at the Court of Appeal, [2021] 1 WLR 2863. Likewise, in *Swire,* Holgate J relied upon *Wingfield* to observe that *"for the purposes of the Habitats Regulations, there is no decision authorising the implementation of the project in the case of a multi-stage consent until reserved matters are approved."*

Ground 2
Having found against the Claimant on ground 1, the Inspector could not be described as bringing in irrelevant considerations to paragraph 181 of the NPPF. In any case, it was the fact of the potential impact on the Ramsar site that created the nexus to paragraph 181 of the NPPF.

Ground 3
Finally, Sir Ross Cranston observed that the assessment provisions of the Habitats Regulations required the relevant authority to consider the implications of the project, not the implications of the part of the project to which the consent relates to. Reliance was again placed on *Barker* and *Wingfield,* which likewise concluded that it was the environmental effects of the development which were to be assessed, not the effects of the reserved matters.

COMMENT

It is understood that this matter has been appealed to the Court of Appeal and further steps may therefore be taken, but until then, the key takeaway from *Fry* will be that in nutrient neutrality areas, an appropriate assessment must be undertaken before a project is consented and will not be limited to the initial permission stage of a multi-stage consent process. In any case, the status of this judgment may change pending the intended revocation of certain retained EU law at the end of 2023 under the Retained EU Law (Revocation and Reform) Act 2023.

On 29 August 2023, the government tabled an amendment to the Levelling Up and Regeneration Bill to address "defective EU laws" regarding nutrient neutrality. The amendments, if they had been passed, would have required local planning authorities, to assume "*that nutrients in urban waste water from the potential development, whether alone or in combination with other factors,*

will not adversely affect the relevant site." However, on 13 September 2020 the proposed amendment was defeated for the second time in the House of Lords by a vote of 203 to 156. Because the amendments were introduced at a late stage of the Bill's passage, it is not expected that it will make a return to the Commons.

In any event, in this author's view, any narrative which presents a simple dichotomy between house-building and pollution-prevention should be looked at with a critical eye. The proposed amendment would have compelled planning authorities to make assumptions that may well have been obviously false, and seriously compromised the future integrity of the UK's water habitats. In the short-term, developers and local authorities should expect the issue of nutrient neutrality to remain in flux.

R. (on the application of Boswell) v The Secretary of State for Transport [2023] EWHC 1710 (Admin)

Ella Grodzinski
Call 2022

Introduction

The focus of this case was how the cumulative climate impacts of road schemes should be assessed under the Planning Act 2008 and the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 ('IEIA Regulations'). James Strachan KC and Rose Grogan, of 39 Essex Chambers, successfully represented the Secretary of State for Transport (the defendant). The court held that it had not been irrational for the Secretary of State to assess the estimated carbon emissions from three road schemes individually against the national carbon budget, rather than in combination.

Facts

The claimant, Dr Boswell, applied for judicial review of the consent granted by the Secretary of State for Transport (the defendant) for three road schemes in Norfolk.

The road schemes were designated as nationally significant infrastructure projects, for which development consent is required from the Secretary of State (Planning Act 2008, ss. 14(1)(h), 22 & 31). As part of this process, each scheme had an environmental impact assessment ('EIA'), as required by the IEIA Regulations reg.4(2). Under paragraph 5, Schedule 4 to the IEIA Regulations, the EIA was required to include a description of the likely significant effects of the development on the climate, and the cumulation of the effects with other 'existing and/or approved projects'. In addition, the Secretary of State had a legally binding duty under the Climate Change Act 2008 s.4(1) to set carbon budgets for five-year periods, and to ensure that the UK carbon account does not exceed the budget for each period.

In the instant case, the Secretary of State had acknowledged the relevance of cumulative impacts in the course of making each respective decision, but had only compared the impact of each scheme individually against the national carbon budgets, rather than the impact of all three schemes cumulatively. As assessed by the Secretary of State, each scheme represented an increase in emissions of 0.001%-0.004% of the relevant carbon budgets. Accordingly, the Secretary of State had concluded that each scheme was compatible with the 'Net Zero' target under the Climate Change Act 2008.

However, the claimant argued that the Secretary of State was required to look at the three related road schemes cumulatively with each other and with other local road schemes as 'existing and/or approved projects' under paragraph 5, Schedule 4. In combination, the three schemes along with other developments in the local area amounted to 0.47% of the UK's 6th carbon budget. The claimant argued that failure to compare such cumulative impact against the national carbon budget rendered the decision of the Secretary of State unlawful.

The Secretary of State submitted that the question of how to assess cumulative impacts was rather one of judgment for the decision maker, with the court having supervisory oversight, and that the approach adopted to assessment of cumulative impacts in this case was not irrational.

Judgment

The court held, applying established principles ((*Bowen-West v Secretary of State for Communities and Local Government Northamptonshire CC & Ors* [2012] EWCA Civ 321; *R (Preston New Road Action Group) v Secretary of State for Communities and Local Government* [2018] Env LR 18)), that the assessment of the cumulative impacts of carbon emissions from the three schemes required the application of measured judgment by the decision maker on the basis of the evidence before them. The question of what impacts should be cumulatively assessed, how such cumulative impacts might occur, the significance of such cumulative impacts and how that significance should itself be assessed were all matters of evaluative judgment. The court was required only to decide whether the decisions reached by the Secretary of State in this respect were outside of the range of reasonable decisions open to them.

In the present case, the cumulative impacts of the three road schemes had been calculated and provided. This satisfied paragraph 5, Schedule 4 of the IEIA Regulations. It had not been irrational for the Secretary of State to decline to compare this cumulative figure against the national carbon budget, but rather to compare each scheme individually, for three broad reasons: Firstly, there was no single required approach to assessing the cumulative impact of carbon emissions. Secondly, given that there was no sector-specific or local area-specific carbon budget against which to compare the schemes, comparison against the national carbon budget had been appropriate. Thirdly, the approach to assessing carbon impacts differs from that for comparing other cumulative environmental impacts because the effects of carbon emissions are not locally limited. The impacts of carbon emissions are felt globally. It would be scientifically arbitrary to combine local schemes for comparison against a carbon budget; as the court put it, adopting the 'pithy' phrasing of Counsel for the Secretary of State, it does not matter whether the emissions are from a road in Norfolk or in Oxford because their impact is the same and the target against which they are being assessed is a national, not local, target.

The court held that the challenge by the claimant really amounted to a challenge to the acceptability of the impacts of the schemes. The claimant deemed the usage of nearly half a percent of a carbon budget on a relatively small section of road in a relatively small area to be unacceptable and criticised, in line with independent guidance and caselaw, the usefulness of comparing individual projects against national budgets. However, the court held this to be a matter of policy and the merits of climate decision making, into which the court must not be drawn.

Comment

As the court noted, it is the role of the government not the court to decide how best to balance emissions reductions across the economy. However, without sector-specific targets, it is hard to see how the impact of individual projects such as these can be meaningfully considered. Climate change is, when viewed at the scale of national or international causation, the result of the accumulation of individually insignificant contributions. The trend of wide contextualisation of emissions seen here follows on from the case of *R (GOESA Ltd) v Eastleigh Borough Council and Southampton International Airport Ltd* [2022] EWHC 1221 (Admin) (in which members of 39 Essex acted for both sides). There is risk in contextualising each project too widely, such that the scale of the overall challenge of emissions reduction prevents enforcement of the individual steps necessary to meet it.

The limits of section 73: R (Fiske) v Test Valley Borough Council [2023] EWHC 2221 (Admin)

James Burton
Call 2001

Introduction

Despite *Finney v Welsh Ministers* [2019] EWCA Civ 1868; [2020] PTSR 455, section 73 of the Town and Country Planning Act 1990 remains widely misunderstood. No doubt partly because *Finney* was necessarily focused on its particular facts.

The past year or so has seen a glut of High Court judgments concerning section 73, not all of them readily reconcilable.

In *R (Fiske) v Test Valley Borough Council* [2023] EWHC 2221 (Admin), Mr Justice Morris has handed down a judgment that conducts a meticulous review of the relevant authorities in the course of upholding the Claimant's ground of challenge based on section 73 (and accordingly quashing the impugned planning permission). For now at least, the judgment can reasonably be considered comprehensive as regards the limits of the section.

Although there was another ground of challenge (on which the Claimant also succeeded) the sole focus here is on section 73.

Facts

The facts themselves may be briefly stated.

In 2017, the LPA had granted detailed planning permission for a solar farm, the operative wording to which 2017 permission included a "substation", and the plans/drawings to which showed a 33kW substation, approximately the size of a shed, which was secured by condition. Such a substation was, in fact, incapable of connecting the solar farm to the electricity grid (there being a 132kW overhead grid power line running through the site), so was incapable of allowing the solar farm to fulfil its intended purpose of exporting electricity to the grid, but this was apparently not appreciated by the LPA at the time.

The developer then made attempts to gain permission for the "district network operator" ("DNO") substation compound that was in fact required to connect to the grid ("the DNO compound"). By comparison with the 33kV substation, the DNO compound was a relatively massive piece of infrastructure. After one 2019 permission purportedly granted pursuant to section 73 for a new varied permission with the DNO compound included was quashed by consent on the Claimant's challenge (albeit the LPA not conceding it was ultra vires section 73), in 2021 the developer then gained permission for a form of "drop in" permission, for the DNO compound plus some solar panels in a location at the centre of the solar farm granted by the 2017 permission (albeit it and the LPA were now, notably, referring to the very substantial DNO compound as (merely) a "substation"). That 2021 permission is the subject of a separate challenge, shortly to be considered by the Court of Appeal.

Following the grant of the 2021 Permission, the developer applied pursuant to section 73 for a fresh permission varying the 2017 permission to, effectively, clear the central space taken up by the 2021 permission, allowing both to be built together. In 2022, the LPA purported to grant the permission sought pursuant to section 73. However, the 2022 permission, whilst retaining (as it had to, given the statutory requirement to consider only the conditions, and see *Finney*) the operative wording of the 2017 permission, removed the 33kV substation, or any substation.

The section 73 restrictions

The Claimant argued that the 2022 permission was *ultra vires* section 73 by reason of the removal of the substation permitted by the original, 2017, permission, contending that this offended against two restrictions on the use of section 73 apparent

from the statutory language (which requires LPAs consider only the conditions), as explained by the authorities ("Restrictions 1 and 2").

Restriction 1: The first restriction contended for was that the new section 73 permission must not conflict with the (necessarily fixed) operative part of the original permission, in the sense of varying or altering its nature or extent.

Restriction 2: The second restriction contended for was that the new section 73 permission must not amount to a fundamental alteration of the development permitted by the original permission.

The Defendant LPA hotly contested Restriction 1, pointing to a number of judgments that upheld the imposition of conditions on a full grant of planning permission that cut down what had been applied for, beginning with *Kent County Council v Secretary of State for the Environment* (1977) 33 P&R 70 and proceeding through such as *Bernard Wheatcroft Ltd v Secretary of State for the Environment* (1982) 4 P&CR 233, and placing particular emphasis on *Kevin Stevens v Blaenau Gwent County Borough Council* [2015] EWHC 1606 (Admin), in which a permission that cut down the operative wording by condition was upheld.

As to Restriction 2, the Defendant made that common ground, whilst denying that the removal of the 33kV substation fundamentally altered the development permitted by the original 2017 permission.

Mr Justice Morris accepted the Claimant's submissions regarding Restriction 1, finding that the 2022 permission was *ultra vires* section 73 due to the conflict between the operative part/wording and the conditions. As Restriction 2 was common ground, Morris J proceeded on the basis that too was correct, and found that the removal of the substation was a fundamental alteration, so the 2022 permission was *ultra vires* section 73 for that reason also, if necessary.

It is worth tracing the reasoning.

For Restriction 1, the reasoning begins with reliance upon the principle first explained by Glidewell LJ in *Cadogan v Secretary of State for the Environment* (1992) 65 P&CR 410 (CA), at p.413 on a "full" application (that the conditions must not vary or alter the nature of the grant). That was echoed by Sullivan J (as he then was) in *R v Coventry City Council, ex parte Arrowcroft* [2001] PLCR 7, at [35] (read with [33]) on a section 73 application, albeit without reference to *Cadogan* (expressed as a prohibition against giving with one hand by the operative part, the grant, but taking with the other by the conditions), also by Collins J in *R (Vue Entertainment Ltd) v City of York Council* [2017] EWHC 588 (Admin) at [15-17] concerning another section 73 application (with reference to *Arrowcroft* but again without reference to *Cadogan*), and approved by Lewison LJ in *Finney,* expressly at [15(iii)] (which directly cites Glidewell LJ *supra*), implicitly elsewhere, notably at [42-43], in what is at least very powerful *obiter dicta*.

The reasoning then proceeds to Lewison LJ's explanation of *Arrowcroft* [33] and [35] at *Finney* [29] in particular, plus the very recent High Court judgments in *Ried v Secretary of State for Levelling-Up, Housing and Communities* [2022] EWHC 3116 (Admin) *per* Farbey J at [50, 51 and 53] and *Armstrong v Secretary of State for Levelling-Up, Housing and Communities* [2023] EWHC 176 (Admin), *per* James Strachan KC, sitting as a DHCJ, at [75], all of which give strong support to Restriction 1.

The various "full" planning application authorities are not on point, as they are concerned with a LPA altering a *proposed development* when granting permission, and the LPA can, of course, grant a permission with operative wording different to that sought, rather than granting a permission with conflict between the operative part and the conditions. The exception is *Kevin Stevens,* but in that case *Cadogan* was not cited.

As to Restriction 2, the reasoning here relies upon the principle identified in the "full" application cases, that the LPA cannot fundamentally alter

what is applied for when granting permission (other terms are used, such as the need for the development permitted to be substantially the same as that applied for), taken up in the section 73 cases first in *Arrowcroft* at [33], then *Finney* at [29]. This in the context of notably lighter touch procedural requirements for s.73 applications than full applications.

Restriction 2 was expressly doubted in *Armstrong,* and the subject of query in *Vue Entertainment*. Fundamentally, though, if it is correct that under section 73 the LPA cannot impose conditions that it could not have imposed on the original permission in the first place, Restriction 2 must stand.

Note that Morris J refused the LPA's application seeking PTA. It is not known whether the application will be renewed.

A question outstanding

A point of interest, potentially for another case, is whether the "operative part" of the original permission, with which the conditions must not conflict, is merely the operative wording or, as the Claimant argued (but on the basis it was unnecessary for her case for the Court to decide the point, hence the Court did not) *both* the operative wording and the detailed plans/drawings where the original permission is a full permission.

The Deputy High Court Judge in Armstrong also hinted at this point, at [70-71], but it was not argued before him.

Certainly, in a case where the operative wording expressly refers to the plans and drawings, it is the writer's view that they must all be within the rubric "operative part".

The less straightforward position, though, is the common one, in which the operative wording does not refer to the plans and drawings. It is long established that for a full permission, the permission is to be read as including the detailed plans/drawings, whether or not they are identified by condition (*Barnett v Secretary of State for Communities and Local Government* [2008] EWHC 1601 (Admin), 2009 JPL 243, at [24] *per* Sullivan J as he then was, affirmed [2009] EWCA Civ 476, [2009] JPL 1597, at [17-22] *per* Keene LJ). But whether in such circumstances the plans/drawings form part of the operative part with which the conditions must not conflict is moot.

A practical suggestion for LPAs

A point that LPAs might wish to mull on is whether their descriptions of development permitted in decision notices are adequate for the purpose: if a LPA wishes to maximise control over development, then it would seem sensible to use the operative wording to spell out all elements of the development departure from which it would consider a fundamental alteration, which would include expressly incorporating the plans and drawings in the operative wording in the case of a full permission.

James Burton appeared for the (successful) Claimant in *Fiske,* instructed by Lewis Silkin LLP.

AHGR Limited v Dr Luke Kane-Laverack, Mr Peter Kane-Laverack [2023] EWCA Civ 428

Daniel Kozelko
Call 2018

Introduction

In this case the court interpreted the meaning of 'live/work' in a long lease covenant. That terminology came from the grant of planning permission for a development which provided for the unit in dispute, which was described as a 'live/work' unit. The lease required that the premises not be used for anything other than as a 'live/work unit in accordance with the terms and conditions set forth in the planning permission'.

The Appellant, the owner of the development,

brought proceedings for breach of covenant against the Respondents, the long leaseholders of the unit. Aside from the interpretation of the clause itself, there was a dispute as to the reliance that could be placed on external aids to interpretation: here relevant supplemental planning guidance (SPG), the officer report given prior to the grant of appeal, and an earlier version of the unit floorplan.

Approach below

At first instance in the County Court and on appeal in the High Court it had been held that 'live/work' should be interpreted as 'live and/or work'. As such, it was held that a sole residential use was within the terms of the planning permission and the covenant. On appeal, the Appellants said the term must be interpreted as 'live and work'.

Judgment of the Court of Appeal

The Court of Appeal (Dingemans LJ, Snowden LJ and King LJ agreeing) dismissed the appeal. Dingemans LJ began by recognising the principle that both leases and planning permissions must be read objectively and in the context of the admissible background. The regard that can be had to extrinsic documents not incorporated into a public document such a planning permission is limited. Indeed, this will often be constrained to cases where a planning permission expressly incorporates those extrinsic documents. Courts should be extremely slow to consider the intention behind conditions using documents which are not incorporated, particularly if they are not in the public domain.

On its face, Dingemans LJ interpreted 'live/work' as meaning 'live and/or work'. This was for a number of reasons. First, the language itself was ambiguous. Secondly, the relevant plan incorporated into the planning permission (and, thus, directly referred to by the lease) marked the entire unit as 'live/work'; no sub-division was imposed. Thirdly, because a leaseholder might be served with an enforcement notice and ultimately be at risk of criminal sanction, if a requirement to live and work were intended that should have been clearly and unambiguously spelled out.

Dingemans LJ concluded this without referring to the extrinsic material to which he did not consider a reasonable reader would have regard. This was because the SPG, officer report, and unit floorplan had neither been referred to nor incorporated. However, having regard to those documents he concluded that they supported the 'live and/or work' interpretation in any event.

Considering the SPG, the lack of a delineation between the live and work uses for the unit were emphasised. The same was true of the earlier version of the plan for the unit; that version had expressly delineated between a live and work area. As the final plan did not do this, it again supported the interpretation reached. Finally, the officer's report had raised concerns that this unit essentially sought to circumvent affordable housing requirements, and that the final unit plan bore no similarity to a genuine live/work unit. However, the planning permission was granted without change following this observation. As such, Dingemans LJ thought the failure to make changes in light of the officer report further supported the conclusion that 'live/work' did not require both living and working to be compliant.

Comment

While AHGR repeats well-known dicta concerning the interpretation of planning permissions (and leases), it serves as a reminder of the importance of clarity in planning conditions (and use covenants). Dingemans LJ's reference to the criminal sanctions which can follow breach of planning permission is a telling one and indicates an almost *contra proferentem*[7] approach against local planning authorities (and landlords that rely on planning conditions). The case is an important one emphasising the need for clarity in expressing how the use of a development will be controlled.

7 The principle that a clause in a contract which is ambiguous should be interpreted against the interests of the party that drafted that clause.

R(City Portfolio Ltd) v Lancaster City Council [2023] EWHC 1991 (Admin)

Christopher Moss
Call 2021

Introduction

In this case, Mr Justice Fordham had to determine the Claimant's application for costs following the withdrawal of their judicial review claim and whether a Defendant local authority which had chosen to accommodate the judicial review claimant's grievance (causally linked to the fact of the claim but without accepting the Claimant's challenge was correct) should find itself liable to pay their costs and if so in full.

Facts

The Claimant owned land at Stone Row Head in respect of which it had applied for planning permission in November 2020. On 7 January 2022 the Defendant designated the Lancaster Moor Conservation Area based on an emergency report dated 6 January 2022, it did not undertake consultation before doing so. The catalyst for urgent action was said to be an application dated 13 December 2021 for demolition of the old hospital at Ridge Lea. The designated Conservation Area included within it the hospital at Ridge Lea and the land at Stone Row Head. After a letter before claim (9 January 2022), the Claimant began judicial review proceedings (17 February 2022). Permission for judicial review was granted on all 6 of the pleaded grounds (4 April 2022).

In August 2022, the Defendant carried out a public consultation on the merits of continued designation of the Conservation Area. On 19 October 2022 the Claimant responded to the consultation. On 6 December 2022, post-consultation, the Defendant decided to rescind the 7 January 2022 adopt a varied Conservation Area. The varied area still included the hospital at Ridge Lea and the land at Stone Row Head. Following the December decision, the parties filed an agreed statement that as the decision under challenge had been withdrawn, the claim for judicial review was now academic. The only remaining dispute between the parties was whether the Defendant was liable for the Claimant's costs of the withdrawn judicial review, totalling £83,294.16 and if so, to what extent.

The Claimant's essential argument was that it should be entitled to its costs as it had achieved what it was seeking to achieve by the claim for judicial review. Namely that a decision on the merits of the Conservation Area had been obtained after a public consultation; and the Defendant's decision to undertake a public consultation and ultimately to withdraw the January decision were plainly causally linked to the Claimant's claim. The Defendant's argument was that the August consultation and December decision were free-standing. They maintained the January decision was lawful and the Claimant had not obtained vindication in respect of a challenge to this. The process of further consideration was motivated solely by the fact that the urgency surrounding the (entirely lawful) January 2022 decision had not allowed for consultation, it had nothing to do with the Claimant's claim.

Judgment

Mr Justice Fordham considered two key questions, whether:

1) The Claimant could be considered the successful party; and if so
2) Whether the Claimant's 'success' was casually linked to their bringing of the claim.

In respect of the first question, the overarching principle is that a Claimant who obtains all the relief they seek is the successful party and they will be entitled to all of their costs unless there is a good reason to the contrary [8]. In judicial review often the most that can be achieved by way of 'success' is an order that a decision-maker reconsiders their decision on a correct legal basis. [9]-[10]

In respect of the second issue, the question is whether there was a causal link between the bringing of the claim and the obtaining of relief. If a Defendant claims to have settled a claim for reasons unconnected to the Claimant's claim, a clear explanation of this is needed, and if a Defendant wishes to avoid costs when making a concession, this should in principle be done at the pre-action stage. Whilst it has been said that establishing the causal link will usually mean the court has to be satisfied the Claimant is likely to have won, this is not always the case and there is no principle that the Claimant must achieve vindication on the legal issue which is the basis of the claim in order to obtain an order for costs. Claimant's costs orders in judicial review cases may be broadly appropriate where the outcome sought in the claim is achieved. [11-13]

On the facts of this case, Mr Justice Fordham agreed with the Defendant that its December 2022 decision did not vindicate the Claimant's claim, the legality issues remained unresolved. However, the Judge considered that the Claimant was right that the December 2022 merits reconsideration following the August 2022 consultation was all that could have been achieved by way of the 'outcome' of the judicial review, in this sense the Claimant had 'succeeded'.

Mr Justice Fordham held that he could not accept the Defendant's submission that the reconsideration was motivated solely by the fact the urgency in January 2022 was no longer present as the Defendant had provided no evidence in support of this and authorities set out that a clear explanation of a Defendant's decision was required and that close scrutiny would be appropriate. Against the "dearth of evidence…there is common sense…I cannot accept the submission that this decision was "nothing to do with" the claim". [17]

The question of what costs the Claimant was entitled to was fact specific. Mr Justice Fordham held that the Defendant could have avoided a costs order entirely had it identified public consideration and merits reconsideration as a response to the Claim for judicial review. However, he also noted it was open to the Claimant in its letter before claim of 9 January 2022 to identify these as options the Defendant could adopt and they failed to do so. When proceedings were commenced on 17 February 2022, the Defendant had the opportunity to reflect again when filing its acknowledgment of service on 11 March 2022. He held that if the Defendant had identified consultation and a merits reconsideration at this stage, they would not have merited costs penalisation. However, again they did not do so. The Defendant's reconsideration came only after permission was granted on 4 April 2022.

On the facts and circumstances of the case, Mr Justice Fordham held that the order that would do justice between the parties reasonably and proportionately was for the Defendant to pay the Claimant's costs of the judicial review proceedings incurred after 11 March 2022, on the standard basis, to be the subject of a detailed assessment if not agreed.

Comment

Whilst City Portfolio is another example of the highly fact specific nature of many costs decisions, it also offers a number of useful takeaways for practitioners on both sides of a claim.

1) Mr Justice Fordham's decision is a concise and helpful consideration of what 'success' means for costs purposes in the judicial review context and paragraphs [7]-[13] of his Judgment provide an overview of the relevant case law that will doubtless provide particularly helpful for practitioners;
2) When advising on a claim, consider what success looks like for your client in practical terms at the earliest possible stage. As Mr Justice Fordham notes, where the relief sought is a finding that the decision under question was unlawful, the best that can usually be achieved by way of judicial review is getting the relevant public body to 'look again'. Inviting the Defendant to do so at

pre-action stage will therefore usually be a sensible idea. Here, given the Judge noted that the Claimant failed to make this clear in their letter before claim despite it being open to them to do so, it may well be the case that flagging this option at the pre-action stage would have resulted in a more favourable costs order; and

3) As a Defendant, if you are seeking to argue that there was no causal link between the Claimant's claim and a decision that either renders the claim academic or amounts to 'success' for the Claimants, this decision makes abundantly clear that cogent and candid disclosure of evidence of fact to support such a position is essential.

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Call 1992 | Silk 2016

High value complex property litigation and disputes are at the heart of Kerry's practice. Her work is centred on property, property development, fire safety and the Building Safety Act 2022 and agriculture. Kerry has acted in some of the leading property cases on land registration and mortgage possession and frequently advises on high value disputes relating to options and overage, freehold covenants, restrictive covenants and easements including rights of way and rights to light. She regularly acts in boundary disputes, land registration and mortgage litigation. Her landlord and tenant work involves all aspects of commercial landlord and tenant as well as residential disputes. Co-author of The Electronic Communications Code: A Practical Guide she is an expert in the Electronic Communications Code and its impact on developers and land-owners. She is described as *"an accomplished silk with a wealth of expertise in real estate litigation"* Chambers 2022.

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Celina regularly acts for and advises local authority and private sector clients in all aspects of Planning and Environmental law including the Community Infrastructure Levy (CIL) regime, Highways Law, Sewers and Drains and National Infrastructure. She appears in Planning Inquiries representing appellants; planning authorities and third parties as well as in; the High Court and the Court of Appeal in respect of statutory review challenges and judicial review cases. She also undertakes both prosecution and defence work in respect of planning and environmental enforcement in Magistrates' and Crown Courts as well as Enforcement Notice appeals. She specialises in all aspects of Compulsory Purchase and compensation, acting for and advising acquiring authorities seeking to promote such Orders or objectors and affected landowners. Her career had a significant grounding in national infrastructure, airports and highways projects and she continues those specialisms today – *"dedicated, very analytical and keen for precision… She is very much considered to be a leading figure in the legal planning world."* Chambers Directory 2023.

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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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Daniel Kozelko
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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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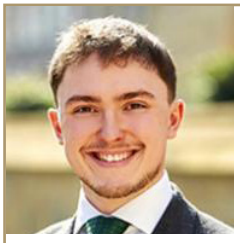

Christopher Moss
Call: 2021

Christopher is keen to grow his practice in planning and environmental matters. He has advised claimants and local authorities on matters including rights of way and related issues, breach of condition enforcement proceedings, and local authorities' powers in relation to restricting advertising of 'high carbon' products. He is currently being led by Daniel Stedman Jones in a judicial review of a decision by a local authority to de-pedestrianise a road as part of a multi-million-pound scheme of highway improvements.

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Celia accepts instructions across all areas of Chambers' practice, and is keen to grown a practice in public, planning and environmental law. She is currently being led by Daniel Stedman Jones in respect of an appeal against the refusal of a planning application for the development of 580 dwellings. She has also been instructed to advise and draft pleadings for judicial review in relation to other environmental law matters.

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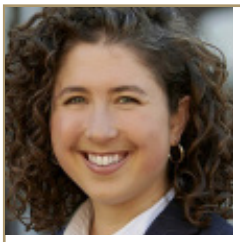

Ella Grodzinski
Call 2022

Ella joined 39 Essex Chambers as a tenant in September 2023, following successful completion of her pupillage. She accepts instructions across all the Chambers' practice areas, with a particular interest in environmental, planning and public law cases. She has already been involved in matters ranging from judicial review of planning decisions to the registration of town and village greens.

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