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Celina Colquhoun
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Welcome to the Autumn 2024 edition of the 39 Essex Planning Environment and Property newsletter as the new legal year starts. Since the last edition we have a new Government, a 'new' Ministry of Housing, Communities and Local Government and the immediate change made to the NPPF reversing the 'de facto ban' on onshore wind schemes in England. However, one Parliamentary session into the new Government, we are still waiting to see, in concrete terms, exactly what reforms are proposed to the planning system; in particular what challenges, developers and decision makers alike, will face over the "grey belt" once the new NPPF is published.

This is also our first edition since the passing of our dear friend and colleague Paul Darling KC. Paul had a tremendous generosity of spirt and was a formidable advocate, he is much missed by all of us in Chambers.

Ned Helme starts off this edition with an article looking at the evolving area of biodiversity net gain. Considering what principles can be derived from decisions before the introduction of mandatory biodiversity net gain in February 2024 and what lessons can be learned that may help in approaching the new requirements. On top of this we have articles on the following recent decisions and developments:

- **John Pugh Smith** sets out a helpful overview of the recent amendments to the Civil Procedure Rules which provide that facilitating alternative dispute resolution is now an objective of civil justice and his thoughts on the practical impact of this.
- **James Burton** provides a hands-on approach to considering the availability of tort claims against sewerage undertakers following the Supreme Court's decision in *Manchester Ship Canal Company Ltd v United Utilities Water* [2024] UKSC 22.
- **Celina Colquhoun** addresses the recent cases of *R (oao Dr Andrew Boswell v Secretary of State for Energy Security & Net Zero* [2024] EWHC 2128 (Admin) and *Friends of the Earth Ltd v Secretary of State for Levelling Up, Housing and Communities & Ors* [2024] EWHC 2349 (Admin) and what we can learn about assessing greenhouse gas emissions in a post-Finch world.
- **Jon Darby** looks at *R (Strongroom Ltd) v London Borough of Hackney* [2024] EWHC 1221 (Admin) and the approach to s31(2A) of the Senior Courts Act 1981, in which he acted for the successful Claimant; and *Wathen-Fayed v Secretary of State for Levelling up, Housing and Communities* [2024] EWCA Civ 507 on the Cremation Act 1902 in which he acted for the successful Defendant.
- **Chris Moss** looks at the Court of Appeal's decision in *CG Fry & Son v Secretary of State for Levelling up, Housing and Communities* [2024] EWCA Civ 730 and opines on what the new Government may have in store to tackle the difficult issue of net neutrality; and
- Lastly, **Ella Grodzinski** writes on the case of *R (OAO Greenfields (IoW) Ltd) v Isle of Wight Council* [2024] EWHC 2107 (Admin) which covers the impact of alleged bias on a grant of planning permission following a particularly acrimonious meeting of the Isle of Wight Council's planning committee.

Lastly, breaking news, in respect of the latest outfall from Brexit, the Government has confirmed that section 6 of the Retained EU Law (Revocation

and Reform) Act 2023 which would have allowed the Courts to depart from retained/assimilated EU law is not being brought into force on 6 October. The Government has revoked the regulations enacting the section and is reconsidering the issue in the wider context of UK-EU relations. We must wait and see…

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

Weighty Matters for Biodiversity Net Gain

Ned Helme
Call 2006

As readers will know, statutory (mandatory) biodiversity net gain ("BNG") for Town and Country Planning Act 1990 ("TCPA") development went live on 12 February 2024[1] (with transitional provisions[2] and a temporary exemption for non-major development until 2 April 2024).[3] However, there was a long run-up to this following the enactment of the Environment Act 2021 on 9 November 2021; and in the non-mandatory period, developers increasingly offered (and Councils increasingly expected) BNG to be secured. Yet decision makers have sometimes struggled in knowing how to weigh BNG in the planning balance, as the decisions in *NRS Saredon Aggregates Ltd v Secretary of State for Levelling Up, Housing and Communities* [2023] EWHC 2795 (Admin) and *R (Weston Homes Plc) v Secretary of State for Levelling Up, Housing and Communities* [2024] EWHC 2089 (Admin) make clear; and there is a risk of this continuing for applications and appeals subject to mandatory BNG.

Holgate J's guidance to decision-makers on weighing BNG improvements in *Vistry Homes Ltd v Secretary of State for Levelling Up, Housing and Communities; Fairfax Acquisitions Ltd v Secretary of State for Levelling Up, Housing and Communities* [2024] EWHC 2088 (Admin) (at [148]-[163]) is therefore welcome. The case involved two s.288 TCPA claims concerning decisions by Inspectors on planning appeals relating to residential schemes involving "inappropriate development" in the Green Belt, one in St Albans, the other in Hertsmere. Both claims sought to challenge the way in which the Inspector had dealt with BNG benefits (among other matters) for applications to which mandatory BNG did not apply, but the guidance provided by Holgate J addresses the issues for both non-mandatory and mandatory BNG. The following points are of particular interest, both in the BNG context and more widely.

First, there is no legal principle that where a development makes provision for something which is required by a policy or by legislation, that it cannot be regarded as a benefit at all. If a measure is required for a project to consume its own smoke (i.e. the benefit offsets an equal harm), it would not be a benefit. But a genuine benefit remains a benefit whether or not it is required by policy or legislation. For schemes subject to mandatory (as well as those offering non-mandatory) BNG, the provision of BNG will therefore be a benefit to be weighed in the balance. Whether a measure should be treated as a benefit, depends upon, among other things, its nature and purpose, including whether it would help to meet a need which is, or is not, related to the development proposed. And although weight is always a matter for the decision maker (absent Wednesbury error),[4] in the light of the underlying justification for the requirement to reverse a national decline in biodiversity over many years, Holgate J found it difficult to see how logically a decision-maker (in a

1 Regulation 2 of the Environment Act 2021 (Commencement No. 8 and Transitional Provisions) Regulations 2024.

2 ibid Regulations 3 and 4.

3 Regulation 3 of the Biodiversity Gain Requirements (Exemptions) Regulations 2024. There are also various permanent exemptions and exceptions, helpfully set out in the Planning Practice Guidance section on BNG at Paragraph: 003 Reference ID: 74-003-20240214.

4 See Lord Hoffmann's famous passage in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 at p.780 F-H.

case to which mandatory BNG applied) could give no weight at all to provision of 10% BNG because that equated to no more than the requirement in Schedule 7A to the TCPA. It also follows that, where a development would provide BNG of more than 10%, a decision-maker is not entitled to say that only that part of the BNG which exceeds 10% can qualify as a benefit in deciding whether to grant planning permission.

Second, if a decision-maker were to reduce the weight which he would otherwise give to a benefit on the basis that it was no more than required by legislation or policy, that would also be objectionable, certainly in the absence of any logical explanation. Rather, in assessing weight, the decision maker should be assessing how the benefit stands in relation to the justification for the level required by statute or policy. For mandatory BNG, a blanket 10% figure is imposed for a broad range of development to alleviate a national problem, and Holgate J therefore considered it to be a benefit of a generalised nature, contrasting it with the benefit of providing affordable housing which is related to: (a) the highly specific needs identified by a local planning authority for its area; and (b) ensuring that the release of housing land meets the need for affordable housing as well as general housing. Holgate J suggested that such considerations may affect the weight to be given to benefits but highlighted that this is a matter for the decision-maker in the particular case.

Third, little help can be gained from looking at the decisions of Inspectors on other planning appeals since usually there is insufficient information to help determine true comparability. Decision letters often do not explain why a particular weighting was adopted. Moreover, it can be meaningless simply to compare percentages of BNG without also being told the *absolute* size of the increase in biodiversity units.

Fourth, notwithstanding the above points, the statutory requirement for BNG of 10% can properly be used as a simple benchmark for comparing the BNG to be provided for a proposed development, so long as the decision maker understands the limitations of using percentages and does not commit any other errors.

Fifth, where substantially more than the mandatory minimum 10% BNG is offered, it may be necessary for a decision-maker to consider Regulation 122 of the Community Infrastructure Levy Regulations 2010 and the principles in, for example, *R (Wright) v Energy Severndale Limited* [2019] 1 WLR 6562. However, Holgate J emphasised that he did not receive submissions on that particular point, and it should be approached with circumspection. Plan-makers are entitled to seek a higher percentage than the 10% minimum where such a policy is justified and evidenced.[5] And even where there is no such development plan requirement, there is clearly scope for argument (in general terms and particular cases) on the Regulation 122 and *Wright* issues.

Sixth, and finally, where the application predates the statutory requirement, that requirement should not be treated as having been applicable, nor should that be the effect of the decision-maker's reasoning. The 10% BNG provision in Schedule 7A to the TCPA 1990 may be used in such cases, but only as a benchmark, in assessing the weight to be given to a BNG contribution. It must not be used to reduce the weight that the decision-maker would otherwise have given to the provision of BNG in a particular case.

These are salutary principles, though they reveal the complexity of the decision-maker's task in identifying and weighing benefits in the planning balance. It is to be hoped they assist decision makers in avoiding the errors into which the Inspectors fell in the *Saredon* and *Weston Homes* cases. But BNG is a highly complex and evolving new area, and the body of case law on it is only beginning to develop.

5 See the Planning Practice Guidance section on BNG at Paragraph: 006 Reference ID: 74-006-20240214.

How the CPR is now going ADR

John Pugh-Smith
Call 1977

Introduction

Last November, the case of *Churchill v Merthyr Tydfil CBC* [2023] EWCA Civ 1416 (Churchill) overruled the earlier Halsey decision, allowing courts to mandate that parties explore Alternative Dispute Resolution (ADR). This article explains the recent amendments made to the Civil Procedure Rules (CPR) which take effect from 1 October 2024. They ensure that ADR is now an objective of civil justice, allowing courts to direct parties to resolve their disputes efficiently and cost-effectively.

Context

Following the Court of Appeal's judgments in *Churchill*, the question then arose as to what would be the practical implications and how they should be woven into the CPR and civil practice generally. Accordingly, the Civil Procedure Rules Committee (CPRC) swiftly decided that rule change was indeed required to create a clear framework for what amounts to a dramatic change in procedural law. By April 2024 it published draft amendments to the CPR for consultation with responses sought by the end of May 2024. Despite the intervening general election, the CPRC approved the draft rules, as slightly amended in response to consultees' comments. They were formally made on 29 July 2024, laid before Parliament the next day and coming/came into force on 1 October 2024. The relevant statutory instrument is the Civil Procedure (Amendment No.3) Rules 2024 (SI 2024 No. 839).

The Amendments

The most significant change concerns the scope of CPR 1, where the overriding objective of civil justice is enshrined, and, from which the judiciary usually measure the exercise of their discretions. The objective of *"enabling the court to deal with cases justly and at proportionate cost"* is now expanded to include *"(f) promoting or using alternative dispute resolution"*. Indeed, CPR 1.4(2)(e) dealing with the court's duty of active case management, now includes *"ordering or encouraging the parties to use, and facilitating the use of, alternative dispute resolution"*.

The second set of amendments address a court's management powers over the ordering of ADR as follows:

CPR 3.1(2)(o) (which form part of the Court's case management powers) now includes:

"(o) order the parties to participate in ADR;

CPR 28 (which deals with matters to be dealt with by directions in fast track and intermediate track cases) now includes *"whether to order or encourage the parties to engage in alternative dispute resolution"*.

CPR 29 (which deals with case management in multitrack cases, so all litigation of significant value and complexity not covered by other Court Guides) requires directions hearing in every case and now provides:

"(1A) When giving directions, the court must consider whether to order or encourage the parties to participate in alternative dispute resolution."

The third amendment relates to the cost's provisions of CPR 44 and how the litigation has bene conducted by the parties. Such conduct now includes:

"(e) whether a party failed to comply with an order for alternative dispute resolution, or unreasonably failed to engage in alternative dispute resolution."

It is noteworthy that the CPRC consciously chose not to define what "alternative dispute resolution" means, leaving it to the parties to decide what is the most suitable form of ADR for the particular dispute.

For example, in the context of judicial review, it will

be recalled that the Pre-Action Protocol already advises in the following terms:

> 10. It is not practicable in this protocol to address in detail how the parties might decide which method to adopt to resolve their particular dispute. However, summarised below are some of the options for resolving disputes without litigation which may be appropriate, depending on the circumstances –
>
> - *Discussion and negotiation.*
> - *Using relevant public authority complaints or review procedures.*
> - *Ombudsmen – the Parliamentary and Health Service and the Local Government Ombudsmen have discretion to deal with complaints relating to maladministration. The British and Irish Ombudsman Association provide information about Ombudsman schemes and other complaint handling bodies and this is available from their website at:* ***www.bioa.org.uk*** *Parties may wish to note that the Ombudsmen are not able to look into a complaint once court action has been commenced.*
> - *Mediation – a form of facilitated negotiation assisted by an independent neutral party.*

In addition, following the practices adopted, for example, in the field of compensation, Early Neutral Evaluation ("ENE") whether binding or non-binding, is another option.

Outworkings

These CPR amendments, coupled with the parallel developments over small claims introduced on 22 May 2024, can only have a dramatic effect on the position of ADR, and mediation in particular, in civil justice.

The fundamental change for general litigation will now lie in the fact that the Courts will now be able to mobilise ADR (especially mediation) during the life of any case. This is in contrast with the pressure to mediate merely being generated by the likelihood that a case (or reference in the case of the Lands Chamber) will reach trial, and, that costs sanctions might be imposed by a judge retrospectively for unreasonably refusing to mediate.

Nevertheless, the case of *Northamber v Genee World* [2024] EWCA Civ 428 has already seen a sanction imposed for failure to mediate since *Churchill*.

Whether or not the Courts will, in future, need to order mediation will depend upon whether the parties simply agree to use mediation by agreement, to avoid any risk of a costs sanction at a directions hearing or still on a specific application. Certainly, there has, within the last few years (since the Covid Pandemic) been increasing experience of ADR by civil practitioners, leading now to fewer cases going to full trial. Experience in other jurisdictions, such as British Columbia, further suggests that compulsion usually means that parties pre-empt compulsion by consent.

For the public law sector, and, the work of the Administrative Court, there is the added challenge that cases are there because of a claimed error of law. Nevertheless, mediation should be actively considered where:

1) A pragmatic solution or outcome can be found, say, through roundtable discussions.
2) It is important to conserve the relationship between the parties, so for example where they need to work together in the future.
3) Negotiations to settle have broken down but where the introduction of an independent neutral third party can help re-start dialogue especially where the parties are in general agreement about the course of action required to resolve a dispute but need help to agree the detail.

Nonetheless, the biggest impact on future litigation culture will come from how Courts now apply the amendments to CPR 1 to their caseloads. So, as we move into Autumn 2024 it would be unwise simply to await more judicial announcements and further reported case

examples before taking active steps; for ADR is now part of the CPR.

John Pugh-Smith *is an experienced mediator, arbitrator and dispute 'neutral'. He is on the panel of the RICS President's appointments for non-rent review references and a member of the Bar Council's Alternative Dispute Resolution Panel. He has been and remains extensively involved in various initiatives to use ADR to resolve a range of public sector issues.*

Manchester Ship Canal v United Utilities (2) [2024] UKSC 22 – the practical outfall for tort claims involving sewage

James Burton
Call 2001

Introduction

Many column inches have been spent on the legally fascinating judgment of the Supreme Court in *Manchester Ship Canal Company Ltd v United Utilities Water* [2024] UKSC 22 *("MSCC v UUW(2)"),* concerning the availability of tort claims against sewerage undertakers appointed under, and at least purporting to discharge functions pursuant to, the Water Industry Act 1991 ("WIA"). This article takes a resolutely hands-on approach, building on a webinar I gave before the end of summer term.[6] The wider context is a continuing shift in public and political opinion against sewerage undertakers, manifesting in *inter alia* a torrent of fines for water pollution, Ofwat toughening its stance and recent downgrading of at least one well-known undertaker's credit rating.

MSCC v UUW(2) – the context and the issue/s

MSCC v UUW(2) is another round in an extended legal bout between the same parties concerning UUW's rights, or otherwise, as sewerage undertaker to discharge into MSCC's Manchester Ship Canal. An earlier round, concerning rights to discharge treated sewage/foulwater, reached Supreme Court in *MSCC v UUW (1)* [2014] UKSC 40 *("MSCC v UUW(1)").* This round concerned untreated sewage/foulwater, at least theoretically. When rainfall was high, MSCC discharged foul water to the canal. No doubt it still does. The Supreme Court was asked to address the following principled question [1]:

> *whether the owners of watercourses (…natural or artificial) or bodies of water can bring actions in nuisance or trespass in the event that the water is polluted by discharges of foul water from the infrastructure of statutory sewerage undertakers, in the absence of negligence or deliberate misconduct.*

The Court was **not** deciding on the merits on the facts of the case, only [1 (cont.)]:

> *whether such actions are barred on the ground that they would be inconsistent with the legislative scheme established by the (WIA).*

As readers will know, the WIA is a complex consolidation statute, that followed close on the heels of the Water Act 1989 and its transfer of the assets etc of the publicly owned water and sewerage providers to the private sector. Regulation by Ofwat is at the heart of the WIA.

The Supreme Court's answer

The Court answered the question posed in the (resounding) affirmative.

In the process, the judgment explains, and tightly confines, the decision of the House of Lords in *Marcic v Thames Water Utilities Ltd* [2002] 2 AC 42, whilst overturning the lower courts' previous understanding of *Marcic* in a run of cases beginning with *Dobson v Thames Water Utilities Ltd* [2007] EWHC 2021 TCC (Ramsey J), continuing through e.g. *Nicholson v Thames Water Utilities Ltd* [2014] EWHC 4249, and

6 https://www.39essex.com/events/manchester-ship-canal-co-v-united-utilities-water-supreme-court-outfall-tort-claims

Bell v Northumbrian Water Ltd [2016] EWHC 133 (TCC), plus the High Court and Court of Appeal decisions in the MSCC v UUW (2) litigation itself. Those cases had understood *Marcic* to mean that the WIA barred tort claims regarding sewage spills **save** if caused by "operational" (non-policy/ strategic/capital expenditure related) negligence/ fault. The reasoning being that anything else was incompatible with the WIA.

The judgment (Lords Reed and Hodge JJSC gave the unanimous judgment in *MSCC v UUW (2)*) is founded on fundamental principles applicable to bodies exercising statutory powers, at [15]:

> *Bodies exercising statutory powers enjoy no dispensation from the ordinary law of tort, except in so far as statute gives it to them. Unless acting within their statutory powers, or granted some statutory immunity from suit, they are liable like any other person for trespass, nuisance, negligence and so forth…*

Precisely because [16-20] what is duly done under statutory authority is lawful action, even if it would otherwise have been a tort, the courts must take care to distinguish between interferences with private rights which Parliament can be taken to have authorised, which are lawful, and interferences which Parliament is not to be taken to have authorised, which are unlawful. Fundamental rights, such as the right to peaceful enjoyment of one's property, and access to a court in the event that such enjoyment is threatened, cannot be overridden by general or ambiguous statutory words: what is needed is express language or necessary implication to the contrary. Moreover, Parliament will not be taken to have intended that powers should be exercised, or duties performed, in a way which causes interference with private rights where such an interference could have been avoided: the test is inevitability (*Manchester Corpn v Farnworth* [1930] AC 171, 183 *per* Viscount Dunedin; *Allen v Gulf Oil Refining Ltd* [1981] AC 1001, 1013-1014 *per* Lord Wilberforce) that being a reflection of the wider principle that legislation is not construed as depriving individuals of their rights unless it does so expressly or by necessary implication (*Metropolitan Asylum District v Hill* (1881) 6 App CAS 193, 208 per Lord Blackburn).

Considering the WIA in light of those principles, the Supreme Court found no support for UUW's position, but the opposite, primarily by reason of s. 18(8) WIA, which was (and is) clear that pre-WIA common law actions are preserved. By s.18 WIA 1991, the Secretary of State and Ofwat shall (not may, but see s.19), where they are the enforcement authority, enforce against water and sewerage undertakers and licensees if the person in question is contravening any condition of its appointment or any statutory or other requirement enforceable under s.18. By s.18(8):

> (8) Where any act or omission –
>
> a) constitutes a contravention of a condition of an appointment under Chapter 1 of this Part or of a condition of a licence under Chapter 1A of this Part or of a statutory or other requirement enforceable under this section; or
>
> b) causes or contributes to a contravention of any such condition or requirement, the only remedies for, or for causing or contributing to, that contravention (apart from those available by virtue of this section) shall be those for which express provision is made by or under any enactment **and those that are available in respect of that act or omission otherwise than by virtue of its constituting, or causing or contributing to, such a contravention.** *(my emphasis)*

Hence the WIA was clear on its face that common law actions predating it were preserved. The Supreme Court also conducted a detailed review of actions against sewerage authorities under previous legislation, which confirmed the availability of those common law claims (not least in nuisance, but also e.g. trespass). All of which leads to this paragraph in the judgment [57]:

> *…if a sewerage undertaker's act or omission gives rise to a cause of action at common law,*

> *the fact that it also contravenes or contributes to the contravention of the 1991 Act does not prevent the courts from enforcing the affected claimant's common law rights and awarding any available common law remedies. That reflects the pre-privatisation law…*

The sewerage undertakers' general duty to effectually drain, imposed by s.94 WIA 1991, is one to which s.18 applies, including s.18(8) [59].

The practical ramifications

Caveats and overview

It is true, as noted, that *MSCC v UUW (2)* is concerned *only* with "deliberate" (designed) discharge of sewage/foul water to water, *and* it is not concerned with the facts. Moreover, in case of discharge to water, *inter alia* s.116, s.117(5)-(6) and 186(3) WIA further confirm there is no right to discharge untreated foul water/cause nuisance.

However, it is difficult to see how the ratio based on s.18(8) WIA, encapsulated at [57], would not apply generally to *all* common law claims unless WIA compensation provisions stand to the contrary.

I consider the overarching questions for an adviser faced with a possible tort claim against a sewerage undertaker to be:

a) At common law would the claimant/s have been able to claim?

b) Do the WIA compensation provisions somehow support an implied removal of the right to claim? (it would need to be clear from statute that compensation was intended to *replace* common law remedies).

c) Is the event the *inevitable* result of exercise of statutory powers/duties?

As to (b) the position is that whilst the WIA does contain compensation provisions re. e.g. works to sewer pipes, there is no attempt to make provision equivalent to common law for discharge of sewage, deliberate or accidental.

"Designed in" discharges (almost invariably to water)

For "designed in" discharges to water, whether the claim is framed in nuisance or trespass is not so important, as the discharge is a recurring event, rather than a one-off (and nuisance struggles to respond to a one-off event). But the distinction is not entirely unimportant, as trespass is actionable per se, whereas in nuisance a claimant needs to show a substantial interference with the ordinary use/enjoyment of land *(Fearn v Tate)*.

The judgment in *MSCC v UUW (2)* essentially left trespass alone, but there is support for the availability of a trespass action in "designed in discharge" cases to be found in *MSCC v UUW(1)* (at [2]), and also *BWB v Severn Trent* (CA) (at [36-38]).

On the face of things, it is difficult to see how a claimant would not make out a cause of action in both trespass and nuisance, the latter subject to the claimant showing (objectively) substantial interference (I find it hard to see *discharge* of sewage as an *ordinary use* of land, or *conveniently done*).

Accidental discharges (almost invariably to land)

The typical scenario here involves a sewer pipe in land, which bursts flooding *that land,* in circumstances where the burst is *not* due to overload on the sewerage system from connections, but simple failure due to passage of time. This country has a vast web of sewer pipes, many of which predate the WIA (i.e. Victorian). Failure through simple aging is commonplace.

Sewerage undertakers have tended to operate a system of "reactive maintenance" for most pipes/part of their network, i.e. they react to a burst, rather than seek to pre-empt it (there are exceptions, but taking the country as a whole, over all its area, I consider this a fair summary).

Historically, undertakers have tended to present a system of "reactive maintenance" *tended* to be presented as a matter of strategy/policy, i.e. not

"operational" within the *Dobson* etc division. The judgment in *MSCC v UUW (2)* means that requires wholesale re-evaluation.

The general assumption regarding a sewer pipe in land is that it is present lawfully, through statutory authority. I consider there is an analogy to be drawn with a private easement, where the law as explained by the courts has been undisturbed for c.150 years since *Ingram v Morecraft* (Romilly MR), and *Jones v Pritchard* (Parker J). If the dominant owner has an easement to take e.g. water across another's land, and lays pipes for that purpose, if those pipes fall into disrepair so that water escapes onto the servient land, the dominant owner is liable for damage done, not because they are under a duty to repair as such, but because the dominant owner cannot plead the easement as justifying what would otherwise be a trespass, as the easement is not being properly or fairly exercised.

In my view, the escape to land is a trespass, so the cause of action made out when it occurs (without need to prove damage *per se*).

Viewed through the lens of a defence of statutory authority, I struggle to see how it could be said to be **inevitable** that flooding will occur through a sewer pipe's age-related collapse, as the undertaker could e.g. replace it in time.

The position of other owners (e.g. of profits a prendre) and non-owners, such as swimmers
Assume sporting rights (i.e. to fish) have been sold (if not, then they are part and parcel of riparian ownership, so see above). The (separate) owner of the *profit a prendre* is likely to be viewed as having a sufficient legal interest to found a claim in nuisance (Lord Goff in *Hunter v Canary Wharf: 'nuisance is a tort against land, including interests in land such as easements and profits'*).

Similarly, a person in de facto possession should have sufficient interest to bring a claim in nuisance, e.g. *Foster v. Warblington Urban District Council* [1906] 1 K.B. 648 (plaintiff occupier sued the council for discharging sewage so as to pollute his oyster ponds on the foreshore).

The position of those with no interest in land or de facto possession, and having suffered no personal or physical injury, is much more difficult, e.g boaters would surely struggle to claim, however unpleasant it might be to see signs of sewage washing by the bows.

As regards swimmers, there *might* be claims available in public nuisance or negligence, as both can respond to one-off events (e.g. public nuisance – Buncefield explosion). But there are some issues, which it is beyond the page-allowance for this article to explore (see my July 2024 seminar for further discussion: **https://www.39essex.com/events/manchester-ship-canal-co-v-united-utilities-water-supreme-court-outfall-tort-claims**).

Bursts due to lack of capacity
This is the scenario that faced Mr Marcic, and in *Marcic* the claim in respect of the flooding of Mr Marcic's home by sewage failed because it *relied* on breach of a (non-common law) duty based ultimately on s.94 WIA (s.94 WIA being the duty to effectually drain the area). It was said by Mr Marcic that Thames Water Utilities Ltd ("TWUL"), the sewerage undertaker, owed Mr Marcic a duty to *improve/extend* the sewerage network. It was that duty which completed his cause of action. Mr Marcic could not say TWUL had created or adopted the nuisance. His case was that TWUL was continuing it by not enlarging the sewerage network. But no such claim was available at common law (the claim needed s.94 WIA).

Treated sewage/foul water
Note that as regards *properly treated sewage/* foul water, and the right to discharge that, the decision of the Court of Appeal in *British Waterways Board v Severn Trent Water Ltd* [2001] EWCA Civ 276; [2002] Ch 25 (that the WIA gave sewerage undertakers no express or implied right of discharge) was qualified by the Supreme Court in *MSCC v UUW (1)* in respect of outflows in existence prior to 1991.

Assessing GHG emissions in a post 'Finch' world: where have we got to?

Celina Colquhoun
Call 1990

In this article I look at the recent cases of *R (oao Dr Andrew Boswell v Secretary of State for Energy Security & Net Zero* [2024] EWHC 2128 (Admin) ('Boswell Net Zero case') and *Friends of the Earth Ltd v Secretary of State for Levelling Up, Housing and Communities & Ors* [2024] EWHC 2349 (Admin) ('the Cumbrian mine case').

The Boswell Net Zero case involved a challenge under section 118 of the Planning Act 2008 ('PA 08') to the Secretary of State for Energy Security & Net Zero's (SofS) decision issued on 16 February 2024 to grant development consent for the Net Zero Teesside Project.

The project involved a new gas-fired electricity generating station[7] with post combustion carbon capture plant; a carbon dioxide ('CO_2') pipeline network for gathering CO_2 from a cluster of local industries on Teesside; a high-pressure CO_2 compressor station and an offshore CO_2 export pipeline.

To be clear from the start, this case is not to be confused with the earlier Court of Appeal's decision *R (Boswell) v Secretary of State for Transport* [2024] EWCA Civ 145 ('Boswell A 47 Case') which challenged three road improvement scheme DCO's.

In addition, I flag in the title to this article the Supreme Court's decision in *R (Finch on behalf of the Weald Action Group) v Surrey County Council* [2024] UKSC 20 ('Finch'); which addressed the thorny issue of the need to assess Greenhouse Gas ('GHG') global emissions which arise as an indirect effect of a development as part of environmental impact assessment regime[8], more specifically GHG emissions which will occur when oil extracted from the subject oil well, after being refined, is burnt as fuel.

Neither the Boswell Net Zero nor the Cumbrian Mine case (which were decided after Finch) nor indeed the Boswell A47 case, however, involved any suggestion that there had been a failure to assess the correct *extent* or GHG emissions from the project, nevertheless, these decisions are informative, in my view, of the approach being taken by the Courts to GHG emissions.

At the heart of the Boswell Net Zero case, as identified by Mrs Justice Lieven, was the Claimant, Dr Boswell's, submission that the SoS had assessed the significance of the environmental impacts of GHG emissions from the Net Zero scheme in accordance with the Institute of Environmental Management and Assessment ("IEMA") Guidance 'Assessing Greenhouse Gas Emissions and Evaluating their Significance'[9] and that there was a *"significant tension"* between the finding by the SofS of the *"significant adverse effect based on IEMA"* on the one hand and the SofS's conclusion on the other that the Scheme *"will help deliver the Government's net zero commitment"* [52].[10] These conclusions were said either therefore to be unreasonable and/or meant that the SofS has failed to give adequate, or any, reasons for the suggested inconsistency.

Put more simply, the Claimant alleged that it was not rational to assess significant adverse effects on the basis of the IEMA Guidance and yet conclude that the Scheme meets the Government's net zero commitment.

7 With an electrical output of up to 860 megawatts.

8 i.e. *Directive 2011/92 on the effects of public and private projects on the environment); the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 or the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017.*

9 IEMA Guide (2nd edition) February 2022.

10 See SofS decision letter at para 4.11.

This tension was argued specifically to arise because the IEMA Guidance[11] states that GHG emissions are considered to be significant adverse[12] where a project *"is locking in emissions and does not make a meaningful contribution to the UK's trajectory towards net zero"* or *"falls short of fully contributing to the UK's trajectory towards net zero"*.[13] To that end the argument was that there could be no contribution to net zero from such a scheme.

Lieven J dismissed these submissions for a number of reasons.

There were three principal factors which led to her conclusions.

The first was that it was not in dispute that the IEMA Guidance and Significance Criteria within it had been to assess GHG emissions within the Environmental Statement ("ES"). In addition, the Examining Authority in its report ('ExAR') had endorsed the applicant's use of the IEMA Guidance to assess significance and Lieven J concluded therefore it was *"clear that the ExAR was itself relying on the IEMA Guidance"* when making their own assessment .

That assessment in particular included rejecting the applicant's own assessment of the GHG emissions from the development for the purposes of the EIA Regulations as being both significant and beneficial. Instead the ExA accepted the Dr Boswell's submissions concluding that the GHG emissions from the development would have a significant adverse effect for the purposes of the EIA Regulations.[14] This was then said to carry *"moderate weight in the planning balance"* [38].[15] Lastly Lieven J noted that he SofS had *"expressly agreed with the ExA's conclusions on significance. At no point did the SoS say she was departing from the ExA's approach, or explain what different approach she was taking."* [55 – 57].

What was missing from the Claimant's critique, as argued by the Interested Party with whom Lieven J agreed, was the fact that there is clear support for Carbon Capture Schemes and Carbon Capture Utilisation Schemes within the relevant Nation Policy Statements EN-1 and EN-2 (2011) and the 2024 versions (which were designated by the time the decision so regard was had to them in accordance with the transitional provisions). In addition, EN-1 (2024) as well as the Government's Net Zero Strategy and Carbon Budget Delivery Plan (which responded to the Climate Change Committee's own deliberations) provided specific support for the Teesside project itself.

Lieven J concluded at [72] that reading the SofS decision letter *"sensibly and as a whole it seems to me clear that the SoS…was not relying on IEMA for her conclusion on significance"* rather that she applied the appropriate two stage approach, using the IEMA guidance first to carry out the *"more absolute analysis of significance at the EIA stage"* [75] and secondly thereafter weighed the finding of that analysis *"against the broader policy context of transition to net zero at the substantive stage"* [75] . To that end, the judge found that the decision and reasoning made *"perfectly good sense"* [idem].

In addition, the judge found that the Claimant in fact *"plainly disagrees with the SoS's approach, and indeed that of the Climate Change Committee, in their support for this project"*. However she also stated in the alternative that *"even if the SoS had been relying on IEMA"* she remained *"unconvinced… it could have made any difference to the ultimate conclusion. The development was strongly supported in national policy, both planning and energy policy. It is entirely clear to any fair reader of the ExAR and the DL why the SoS supported the Scheme despite the level of emissions. The*

11 The aim of which is to assist GHG practitioners in assessing GHG emissions [see section 1.1 of IEMA Guidance].
12 It may be noted that IEMA treats major or moderate adverse or beneficial effects as "significant" [see section 6.3 Box 3 of IEMA Guidance].
13 See also section 6.3 Box 3 of IEMA Guidance.
14 See (ExAR5.3.57).
15 See ExAR5.3.59.

Claimant may disagree with the analysis and the weight given to different factors, but the reasoning behind the conclusions are both clear and lawful" [78].

The essential issue remains though that the IEMA guidance goes further than advising on how EIA practitioners should approach significance as part of the EIA process. The tension that exists therefore lies perhaps between the IEMA Guidance itself and the NPS because the guidance states in terms that a project such as this *"with major adverse effects is locking in emissions and* ***does not make a meaningful contribution to the UK's trajectory towards net zero****"* [emphasis added]. The IEMA guidance is seemingly without statutory status in the decision-making process whereas the NPS position has the most significant statutory status in DCO consent in accordance with s104 Planning Act 2008. Practitioners should therefore beware.

Whilst it did not form the basis for the specific challenge there were some notable updates to the ES that occurred. In particular having initially omitted upstream and downstream methane emissions, the Applicants submitted a revised assessment including well-to-tank emissions, and a cumulative revised assessment of GHG emissions for construction, operation and decommissioning of the offshore pipeline that would be part of the wider project ("the GHG Assessment"). In addition, further debates ensued as a result of the representations made by Dr Boswell's group who took part in the examination[16] after the examination closed which centred on whether the GHG Assessment had double counted the beneficial effect of carbon capture when calculating carbon emissions.

Ultimately the matter was resolved and as noted the SofS as well as the ExA concluded that the project would have a significant adverse effect in terms of the GHG emissions however practitioners may want to note the approach adopted to upstream and downstream emissions (before the SC had handed down its decision in Finch).

At the hearing of the substantive matter, the claimant in Boswell raised Finch noting in particular the SC's finding that *"UK national policy is clearly relevant to the substantive decision whether to grant development consent. But it is irrelevant to the scope of EIA"* [65]. Lieven J however batted the relevance of this away stating [66]:

> *"This is not a case where an environmental impact, GHG emissions, were not fully assessed for the purposes of EIA. Nor is it suggested that those impacts were not considered and weighed in the ultimate planning balance. Both stages of the process were undertaken, and the SoS weighed up the significant adverse impact of GHG emissions, in the ultimate planning balance. Therefore the case is analytically quite different from Finch and the dicta of Lord Leggatt does not impact on the alleged error of law here."*

Turning then to the Cumbrian Mine Case which as many will know involved a proposal to open the first new deep coal mine in the UK for 30 years which had been called in by the then Sof S Robert Jenrick in March 2021, following Cumbria County Council resolving in its favour back in 2020. Permission was then granted by his successor in title, Michael Gove in December 2022, after concluding that whilst it had an *"unacceptable environmental impact" including that the likely carbon emissions from the project were "not significant"* its economic benefits outweighed the harm.

The decision was challenged under s288 of the 1990 Act by a local action group South Lakes Action on Climate Change (SLACC) and Friends of the Earth both arguing that the SofS's approach to GHG emissions resulting from the proposed extraction of coal and their effects on climate change was unlawful.

16 viz Climate Emergency Policy and Planning ('CEPP')

The new Labour Government SofS Angela Rayner consented to judgment based upon Finch but the Second Defendant, the applicant/developer West Cumbria Mining Ltd maintained its defence. A rolled-up hearing was ordered to be held in July 2024 shortly after the Finch judgment had been issued and heard before (the now Lord Justice) Holgate J in what must be the last (if not one of the last) of his judgments as a Justice of the High Court and Planning Liaison Judge.

The issues raised did not surround whether scope 3 emissions should be assessed and taken into account as part of the ES process but whether it was possible to counter balance such emissions by way of 'substitution' which rendered the assessment needless. This argument was that *"even if GHG emissions from end use were taken into account there would be a nil increase in GHG emissions overall. This was said to be because the Cumbrian coal would substitute for or displace the supply of US coal to UK and European steel producers and there would be a reduction in GHG emissions because the coal would be transported over a shorter distance and would come from a "net zero mine" rather than a US mining operation producing GHG emissions."* [166].

This argument was essentially discarded by Holgate J based upon the evidence and the inconsistent way both the Inspector and the SofS addressed the matter.

In order lawfully to conclude that there was no need for the combustion of the mine's coal to be assessed depended upon the decision-maker accepting the developer's contention that the *"extraction of that coal would result in perfect, or virtually perfect, substitution for US coal supplied to the UK and European market".* The judge found that both the Inspector and the SofS drew conclusions that were inconsistent with such a finding and that in effect only a partial substitution was found.

Indeed, Holgate J went further stating that it *"would be absurd"* to conclude that this argument removed the need for the assessment of the emissions from combustion of the Cumbrian mine's coal in any event.

"Instead, the correct analysis is that both are significant matters and, if substitution of US coal would be a likely effect of the proposed project, both effects had to be assessed in accordance with the [EIA] Regulations" [103].

Holgate J also accepted a further ground of challenge relating to the precedent set by and *"impact of granting planning permission on UK's leadership role in promoting international action on climate change"* because it would lead to other similar projects depending upon further offsetting arrangements which was undesirable because offsets are a finite resource. This was an argument that had been raised by FOE before the SofS but which it was held the SofS had failed to deal with at all.

An additional offsetting argument was also raised. The s.106 obligation which had been entered into whereby the net change in GHG emissions from the operation of the mine would be reduced to zero. The arrangements would involve the purchase of credits in the voluntary carbon market. The obligation before the Inspector and the Secretary of State allowed the purchase of offsets arising outside the UK.

FOE submitted that domestic legislation relating to carbon accounting does not allow offsets from outside the UK to be taken into account and hence into taking this into account it was said the Inspector and the SofS erred in law.

Holgate J concluded that FOE was right in that it had raised the application of the UK's policy to the offsetting proposed to support the net zero claim and that it was "a principal important controversial issue" which attracted a legal obligation on the part of the Secretary of State to give reasons. It was also an "obviously material consideration" to the "net zero mine" case and which the SofS had failed to address. The question about the extent of domestic legislation however had not been raised

and Holgate J therefore allowed this ground on the more limited basis.

The decision was duly quashed.

Conclusions:
It appears clear from the above that even before the SC's decision in Finch (which took a year to be handed down) applicants and developers were already paying more attention to the question of scope 3 emissions when assessing the total GHG emissions of a scheme as part of the ES.

As a result of the Cumbrian mine case, the question of how and whether one is able to include offsetting, or substitution needs to handled very carefully noting in particular the comment about dealing with a finite resource. Whether this decision is the death knell for future coal mines remains to be seen.

The Boswell Net Zero case is an interesting example of how policy and the achievement of Net Zero can be resolved with the EIA of schemes, especially those supported specifically through policy, when a full scope 3 analysis of GHG emissions is required.

Catherine Dobson appeared on behalf of the Claimant and Rose Grogan appeared on behalf of the Secretary of State both of 39 Essex Chambers in the R (oao Dr Andrew Boswell v Secretary of State for Energy Security & Net Zero [2024] EWHC 2128.

James Strachan KC of 39 Essex Chambers appeared on behalf of the Defendant in Friends of the Earth Ltd v Secretary of State for Levelling Up, Housing and Communities & Ors [2024] EWHC 2349 (Admin).

Richard Harwood KC and Celina Colquhoun acted for Orsted in relation to the examination of the Net Zero Teesside DCO.

Planning Court confirms approach to s.31(2A) of the Senior Courts Act 1981

Jonathan Darby
Call 2012

On 22 May 2024, the Planning Court (Mrs Justice Lang DBE) handed down judgment in *R (Strongroom Ltd) v London Borough of Hackney* [2024] EWHC 1221 (Admin), which concerned the Council's admittedly irrational decision to grant Prior Approval on a second application, without notifying and consulting the Claimant as it had done on an earlier similar application. The Court described the Council's approach as "seriously flawed". Much of the substantive hearing therefore addressed discretion and remedy, The case is of wider interest for its commentary on the exercise of the Court's discretion under s.31(2A) of the Senior Courts Act 1981. The Claimant submitted that the Council had failed to discharge the burden of proof upon it under s31(2A), in the absence of any supporting evidence. The Court endorsed the "helpful summary of the case law" provided by Kate Grange KC, sitting as a Deputy Judge of the High Court, in *R (Cava Bien Ltd) v Milton Keynes Council* [2021] EWHC 3003 (Admin), before concluding that a quashing order was the appropriate relief on the facts of this case.

Jonathan Darby acted for the successful Claimant, instructed by Richard Eaton of Birketts LLP.

When is a crematorium actually a crematorium and when is a flood risk sequential test required?

On 10 May 2024, the Court of Appeal handed down judgment in *Wathen-Fayed v Secretary of State for Levelling Up, Housing and Communities* [2024] EWCA Civ 507.

The Court of Appeal dismissed the Claimant's appeal against the High Court's dismissal of her

challenge to the grant of planning permission for a crematorium on land in the parish of Tandridge, near Oxted, Surrey.

At first instance ([2023] EWHC 92 (Admin), Timothy Mould KC (sitting as a Deputy High Court Judge) dismissed the claim. The first instance judgment is available here.[17]

The appeal concerned two main issues – first, the proper construction, application and effect of interpretation the Cremation Act 1902 and how to apply the definition of a crematorium and associated locational restrictions; second, the proper approach to the sequential assessment of sites with regards to policies relevant to flood risk in the National Planning Policy Framework and relevant guidance in the Planning Practice Guidance.

Lady Justice Andrews (giving the lead judgment), concluded that the appeal should be dismissed. In summary:

1) Although her reasons differed slightly from those of the Judge at first instance, the Court of Appeal agreed with his conclusion that the proposed development on this site would not inevitably contravene the requirements of the 1902 Act. The Inspector properly addressed that objection, and reached a decision that he was entitled to reach.
2) So far as the risk of flooding from surface water is concerned, the judge and the Court of Appeal in R (on the application of Substation Action Save East Suffolk Ltd) v Secretary of State for Energy Security and Net Zero [2024] EWCA Civ 12 interpreted the relevant policy in the same way as the Judge did at first instance in the present case. On application of the relevant principles, the Judge was right to find that the Inspector understood the policy, that he made no error in his approach to the issue of flood risk, and that he reached a decision that was open to him on the evidence as a matter of planning judgment.

In respect of its discussion of the 1902 Act, the Court of Appeal judgment is of wider interest with regards to statutory analysis and the purposive approach to the interpretation of statutory provisions, mindful of historical developments over time.

In respect of the flood risk sequential assessment issue, the Court of Appeal confirmed the correctness of its earlier approach in Substation Action, agreeing with the Claimant's submission that the Inspector's approach had been the "the epitome of the pragmatic approach urged upon decision-makers by the PPG."

Jonathan Darby acted on behalf of the Secretary of State before both the Planning Court and the Court of Appeal, instructed by the Government Legal Department. Permission to appeal to the Supreme Court was refused by the Court of Appeal, but the Claimant has subsequently applied directly to the Supreme Court.

17 https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Admin/2023/92.html&query=(title:(+wathen-fayed+))

Nutrient neutrality issues, sticking around like a bad smell – *CG Fry & Son Ltd v Secretary of State for Levelling Up, Housing and Communities* [2024] EWCA Civ 730

Christopher Moss
Call: 2021

Introduction

On 28 June 2024 the Court of Appeal handed down their eagerly awaited decision in *Fry*, addressing the vexed issue of nutrient neutrality and whether the Habitats Regulations 2017 required an appropriate assessment to be carried out before an LPA decided whether to discharge conditions on the approval of reserved matters, having previously granted outline planning permission, without such an assessment, for a major development of housing on land close to a protected site. The Court of Appeal confirmed the overarching decision of the High Court; yes.

Background

In December 2015, Somerset Council granted outline planning permission for a mixed-use scheme including up to 650 houses on land near the River Tone, which flows into the Somerset Levels and Moors Ramsar Site, this was to take place in eight phases. In June 2020, the Claimant obtained reserved matters approval for phase 3 relating to 190 dwellings, subject to conditions. The Council did not carry out an appropriate assessment, under the Habitats Regulations 2017, at either outline or reserved matters stage.

In 2020, Natural England published an advice note to Somerset local authorities on development in relation to the Somerset Levels and Moors Ramsar site, which it considered was at risk from the effects of eutrophication (caused by excessive phosphates), an issue that could be exacerbated by foul water generated by new developments. It advised that local authorities should undertake a habitats regulations assessment ("HRA") of the implications of a project and only grant consent if it was ascertained that any development would not have an adverse effect of the integrity of the site.

In 2021, the Claimant sought discharge of the conditions. The Defendant local authority withheld approval on the basis that an HRA assessment was required before the conditions could be discharged.

On appeal, the planning inspector determined that the requirement for an HRA assessment under regulation 63 applied to the discharge of conditions stage, regardless of the specific subject matter of the conditions.

The Claimant argued that the inspector wrongly construed the Regulations and should not have applied regulation 63 to the discharge of conditions on a reserved matters approval.

It contended that the relevant provision was regulation 70 and that confined assessments to the planning permission stage. The Claimant further argued that even if regulation 63 applied, the scope of the appropriate assessment should reflect the scope of the conditions being considered.

At first instance, Sir Ross Cranston held on the key points regarding the 2017 Regulations that:

- While on a strict reading of the Habitats Regulations 2017 the assessment provisions of regulation 63 do not cover the discharge of conditions, in his view they do apply as a result of firstly, article 6(3) of the Habitats Directive, secondly, a purposive interpretation of their provisions and thirdly, case law binding on the court.
- Regulation 63 requires an appropriate assessment to consider the implications of the project as a whole, not the implications

of the part of the project to which the consent relates.

The Claimant appealed against the decision and also sought permission for a leapfrog appeal to the Supreme Court, this was rejected by the Supreme Court with the appeal therefore being heard before the Court of Appeal.

Decision of the Court of Appeal

In a joint judgment from Sir Keith Lindblom (Senior President of Tribunals), Singh LJ and Arnold LJ the appeal was dismissed and the decision of Sir Ross Cranston upheld. On the key issue of when the regulations required an appropriate assessment to be carried out the Court of Appeal held that applying ordinary principles of statutory interpretation, reg 63 and 70 could require an appropriate assessment to be undertaken at the stage when the discharge of conditions was being considered, this did not require any reference to the doctrine of direct effect. They went on to find that where the provisions for appropriate assessment were engaged, reg.63 and reg.70 had the effect of **requiring** such an assessment to be carried out before development was authorised to proceed by the "implementing decision". At paragraph [85] they noted:

> *"Taken together therefore,* ***regulations 63 and 70****, both as applied directly to European sites under the habitats legislation itself and when given equivalent practical effect for Ramsar sites under national planning policy in paragraph 181 of the NPPF,* ***allow for appropriate assessment to be undertaken at the final stage in a multi-stage consent process. Indeed, where the provisions for appropriate assessment are engaged, these two regulations have the effect of requiring such an assessment to be carried out before development is authorised to proceed by the "implementing decision".*** *If this were not so, there would be a gap in the regime for assessment, which would enable development to proceed with potentially harmful effects on a protected site, for lack of an assessment at the initial stage, when outline planning permission is granted."* (Emphasis added)

They went on to state that whilst in an ideal world an appropriate assessment would be undertaken when the opportunity first arose, it would be wrong to say that a failure to undertake an assessment at the outset made it impossible or unnecessary to do so when the "implementing decision" is taken. Indeed, at [87] they held that the applicant's interpretation of the regulations, that an appropriate assessment could not be required at this later stage, would *"in some cases leave the authority powerless to prevent a project going ahead even though it was clear that if the final authorisation were given for it the development was going to cause the kind of harm the Habitats Regulations are designed to prevent, and simply because the prospect of such harm was not recognised when outline planning permission was granted, or despite a change in circumstances such as occurred here when Natural England published its advice note in August 2020."*

In respect of what the appropriate assessment must address, at [99]-[101] they held that where an appropriate assessment was required before an "implementing decision" was made, the assessment had to be of the whole development whose implementation was authorised by that decision. It would not be sufficient for the appropriate assessment to be limited to the matters affected by the conditions for discharge alone.

Comment

The Appellant does not appear to have sought permission to appeal to the Supreme Court therefore the Court of Appeal's decision is the end of the line for now as far as construction of the Habitats Regulations go. As Sir Ross Cranston noted at first instance, the significant public policy issues underlying the claim are not a matter for the courts to resolve. The status quo therefore prevails which will doubtless be of frustration to developers.

Nonetheless, in the Court of Appeal the Secretary of State acknowledged that "the law as it stands is a problem – in effect holding up the supply of new housing". Whilst we have had a change of Government since the case was heard, the Labour Government also agree that nutrient neutrality is an issue requiring rectification.

On 20 July 2024 the Secretaries of State for housing Communities and Local Government, and Environment, Food and Rural Affairs issued a joint statement acknowledging that the "status quo [of nature protections] is not working" and indicated that they "want to use the value gained from enabling development to proceed quicky and smoothly to support nature recovery".[18] In other words, allowing developers to commence development first and **then** undertake mitigation measures with possibly greater funds and confidence given development is allowed to commence. It is worth noting that while in opposition the now Secretary of State for Housing Communities and Local Government indicated that any such homes could not be occupied until mitigation is put in place.[19]

It is reassuring that the 'new' Government are committed to tackling this issue, although one is left wondering whether postponing the pain of mitigation is really likely to either be that attractive to developers or significantly ease the development backlog. Only time, and draft legislation, will tell.

Pride, Prejudice, and Planning Procedure: A case-note on *R. (on the application of Greenfields (IOW) Ltd) v Isle of Wight Council* [2024] EWHC 2107 (Admin)

Ella Grodzinski
Call 2022

Anyone who was on the internet during the pandemic probably remembers the (absolutely hilarious) Handforth parish council meeting which went viral in February 2021, at which councillors hurled insults, threats and obscenities at each other over zoom. (Think: "you have no authority here Jackie Weaver!!")[20] The proceedings of the Isle of Wight Council's planning committee in the case of *R. (on the application of Greenfields (IOW) Ltd) v Isle of Wight Council* [2024] EWHC 2107 (Admin) have not gone viral, but they appear to have been nearly as acrimonious.

The factual background for the case is a grant of conditional planning permission for the development of agricultural land, granted by the Isle of Wight Council (the local planning authority). The Claimant sought to bring a Judicial Review of the decision. At a rolled-up hearing in August of this year, HHJ Jarman KC refused the Claimant's application.

To say that tensions seem to have been running high would be putting it lightly. The judge recited excerpts from the July 2021 meeting but commented that *"this cannot convey the tenor of the meeting"*. Councillors are recorded as calling each other's conduct *"scandalous"*, *"dismissive, "intimidating"*, *"humiliating"* and *"belittling"*. A large

18 Ministry of Housing Communities & Local Government and Department for Environment Food & Rural Affairs, 'Planning and Infrastructure Bill; Letter to Nature Conservation Organisations' (gov.uk 20 July 2024) https://assets.publishing.service.gov.uk/media/669c04b9ce1fd0da7b59295b/Joint_SoS_letter_to_eNGOs_on_Planning_Bill.pdf

19 Angela Rayner and Steve Reed, 'Plan to ease river pollution rules is reckless and labour will block it', (The Times, 13 September 2023) < https://www.thetimes.com/uk/politics/article/plan-to-ease-river-pollution-rules-is-reckless-and-labour-will-block-it-rgzdxggt6 > (paywall); summarised in BBC News, 'Labour set to vote against scrapping home building pollution rules', (BBC, 13 September 2023) < https://www.bbc.co.uk/news/uk-politics-66788547 >

20 https://www.theguardian.com/uk-news/2021/feb/05/handforth-insults-and-expletives-turn-parish-council-meeting-into-internet-sensation

proportion of this appears to have been directed at the chair of the meeting, who had – improperly, it was alleged – excluded from the meeting a number of councillors who seemed likely to vote against the application. It appears that a large number of the councillors were predisposed against the application, while the Chair of the meeting was in favour of it.

The Judicial Review was brought on a number of grounds, but the two most interesting ones were: (1) that the original meeting of July 2021 which initially resolved to grant planning permission had been procedurally improper and/or unfair, which vitiated the grant of planning permission; and, relatedly, (2) that the chair of that meeting was biased and/or exercised his functions for an improper purpose, which likewise vitiated the planning permission.

In relation to ground 1 on procedural irregularities, the judge held that while the chair's advice to certain councillors not to attend the meeting did not actually exclude them, the chair's decision to explicitly prohibit one specific councillor from the meeting on the factually and procedurally flawed basis that he had missed too much of the site visit did amount to a procedural irregularity. However, the procedural irregularity and other viable "criticisms" of the procedure at the July 2021 meeting had been "overtaken by events" – the proposal had been reconsidered at a further meeting of April 2023, at which conditional permission was granted following a proper debate and vote, of which no criticism was made. As such, the procedural irregularities at the July 2021 meeting did not vitiate the eventual grant of conditional planning permission.

In relation to bias (ground 2), the judge reinforced the clear distinction in the caselaw between predisposition and predetermination. The judge noted the case of *R (Lewis) v Redcar and Cleveland Borough Council* [2008] EWCA Civ 746, at which Pill LJ said at [63]:

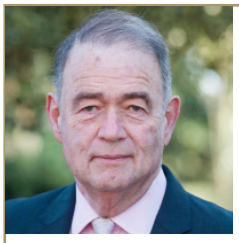
> *"Councillors are elected to implement, amongst other things, planning policies. They can properly take part in the debates which lead to planning applications made by the Council itself. It is common ground that in the case of some applications they are likely to have, and are entitled to have, a disposition in favour of granting permission. It is possible to infer a closed mind, or the real risk a mind was closed, from the circumstances and evidence. Given the role of Councillors, clear pointers are, in my view, required if that state of mind is to be held to have become a closed, or apparently closed, mind at the time of decision."*

The judge summarised that *"The test for apparent bias is whether the relevant circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the decision-maker was biased"* (¶68), but that *"Bias is a different, although related, concept to predetermination."* He found that the Chair did indeed seem to have been *"predisposed in favour of the application, but in my there is no clear indication that he had predetermined it, and such indications as there are suggest otherwise."* (¶69)

Further, the Chair and planning officers had stressed that *"if the application was going to be refused then it should be refused on planning grounds. To the extent that those members who were predisposed against the application found it humiliating to be reminded of this principle then that is a consequence of the tension which sometimes arises between the democratic process and the obligation on councillors to implement planning policies"* (¶71).

In conclusion, the planning process in this case had been controversial and discordant to say the least, but the resultant procedural irregularities and biases of the councillors involved did not go so far as to vitiate the grant of planning permission itself. While the Isle of Wight Council's planning committee meeting may not have reached viral fame, it is nevertheless a reminder (if anybody needed one) of the ever-present tensions between local politics and proper planning procedure.

CONTRIBUTORS



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John is a recognised specialist in the field of planning law with related environmental, local government, parliamentary and property work for both the private and public sectors. He is also an experienced mediator and arbitrator and is on the panel of the RICS President's appointments. He is a committee member of the Bar Council's Alternative Dispute Resolution Panel, an advisor to the All Party Parliamentary Group on ADR, one of the Design Council's Built Environment Experts and a member of its Highways England Design Review Panel. He has been and remains extensively involved in various initiatives to use ADR on to resolve a range of public sector issues.

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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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James Burton

Call 2001

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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Jonathan Darby

Call 2012

Jon is ranked by Chambers & Partners as a leading junior for planning law and is listed as one of the top planning juniors in the Planning Magazine's annual survey. Frequently instructed as both sole and junior counsel, Jon advises developers, consultants, local authorities, objectors, third party interest groups and private clients on all aspects of the planning process, including planning enforcement (both inquiries and criminal proceedings), planning appeals (inquiries, hearings and written representations), development plan examinations, injunctions, and criminal prosecutions under the Environmental Protection Act 1990. Jon is currently instructed by the Department for Transport as part of the legal team advising on a wide variety of aspects of the HS2 project and has previously undertaken secondments to local authorities, where he advised on a range of planning and environmental matters including highways, compulsory purchase and rights of way. Jon also provides advice and representation in nuisance claims (public and private), boundary disputes and Land Registration Tribunal matters.

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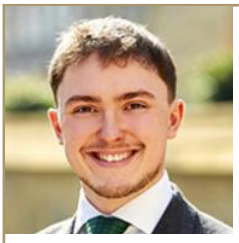

Christopher Moss

Call: 2021

Christopher has a particular interest in planning and environmental work and is ranked as one of the top 20 junior planning barristers under 35. He recently worked with Jonathan Seitler KC advising a local authority on potential challenges to the tabling of a commercial offer to purchase a significant parcel of land. Earlier this year he was led by Daniel Stedman Jones acting for the Claimant in *R (Pennine House Limited) v Bradford MDC* [2024] EWHC 608 (KB) where the Defendant Local Authority's Environmental Impact Assessment was found to be unlawful on rationality grounds. 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.

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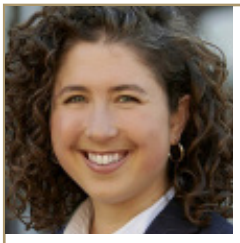

Ella Grodzinski

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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