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Celina Colquhoun
Call 1990

Christopher Moss
Call: 2021

Welcome to our June 2025 edition of the Planning, Environment & Property Newsletter. We have an interesting and varied array of articles in this edition ranging from **Rebecca Drake's** analysis of *Patarkatsishvili v Woodward-Fisher* [2025] EWHC 265 covering moths, fraudulent misrepresentation and caveat emptor, to **Stephen Tromans KC** taking a look at *Frack Free Balcombe Residents' Association v Secretary of State for Housing* [2025] EWCA Civ 495 and the importance of identifying the decision under challenge. **Richard Harwood KC** has also provided an overview of the range of 39 Essex podcasts covering hot topics relevant to Planning, Environment and Property practitioners. On top of this we have a run through of the following recent decisions:

- **John Pugh Smith** takes a look at the decision of the Court of Appeal in *R (Greenfields (IOW) Ltd) v Isle of Wight Council & Westridge Village Limited* [2025] EWCA Civ 488 on the procedural requirement to publish draft Section 106 agreements, the consequences of failure to do so, and how to avoid or truncate such issues with alternative dispute resolution.
- **Daniel Stedman Jones** and **Jake Thorold** provide a detailed look at section 31(2A) of the Senior Courts Act 1981 as considered in *Bradbury v Awdurdod Parc Cenedlaethol Bannau Brycheiniog (Brecon Beacons National Park Authority)* [2025] EWCA Civ 489 in which they acted for the Appellant.
- **Daniel Kozelko** looks at the decision of the Supreme Court in *R (on the application of The Spitalfields Historic Building Trust) v Tower Hamlets LBC* [2025] UKSC 11 on whether a council, by standing orders, can bar a councillor from voting at a meeting of a committee; in which he and Richard Harwood KC acted for the Appellant.
- Lastly, **Flora Curtis** writes on *HM Treasury v Global Feedback Ltd* [2025] EWCA Civ 624 in which the Court of Appeal addressed the scope of Article 9(3) of the Aarhus Convention.

We do hope you enjoy this jam-packed edition of the PEP newsletter and manage to find time over the next couple of months to enjoy the Summer.

Patarkatsishvili v Woodward-Fisher [2025] EWHC 265

Rebecca Drake
Call 2007

The much-anticipated decision in Patarkatsishvill v Woodward-Fisher is probably the most significant case on fraudulent misrepresentation concerning the sale of a residential house to date.

The case concerned a large house in Notting Hill, bought originally by a *"practising surveyor and experienced property developer"* William Woodward-Fisher ("WWF") in 2012 for £10.4 million, who spent a further £10 million refurbishing it and extending it by over 200% over the course of the following year. This included insulating it with two different types of wool-based insulation, Thermafleece and Soundblocker.

At the start of 2018, WWF's wife noticed a problem with clothes moths. Two different pest control firms were called in. After several failed attempts at treatment by spraying and heat pod treatment, Environ concluded, as set out in two different

reports sent to WWF dated May and June 2018, that the infestation was embedded within the wool-based insulation and the only cure was to remove the insulation and replace it with synthetic insulation.

WWF instead had a further spray treatment carried out, but did not remove the insulation. By this time, he was marketing the house for sale discreetly.

The Claimants expressed an interest in the house and an offer was agreed at £32.5 million. Pre-contract enquiries were made, including asking whether the house had ever been affected by *"vermin infestation"*. WWF replied, through his solicitors, that he was *"not aware"* of any such matter.

Within days of moving into the house, the Claimants noticed moths in the house. After several pest control firms surveyed the house, extensive works were carried out to try and remove the wool-based insulation, but there remained a problem with moths.

As a result of subsequent enquiries made of local pest control companies, the Claimants discovered that Environ had carried out moth treatment work for WWF in 2018 and were provided with copies of the two reports identifying the source of the problem as the insulation. The Claimants accordingly brought a claim against WWF alleging fraudulent misrepresentation and sought rescission of the contract of sale and return of the purchase price, together with damages.

WWF claimed that his answers to the pre-contract enquiries had not been dishonest, because, inter alia, moths did not constitute a *"vermin infestation"* as set out in the pre-contract enquiries. He pointed to the first definition of *"vermin"* within the Complete Oxford English Dictionary which made no mention of moths. However, further definitions within the Complete OED and definitions in other dictionaries included insects as well as mammals. Whilst none of the dictionaries referred to specifically mentioned moths, they showed that insects can be vermin.

Fancourt J held that, first, whilst a moth is probably not the example of vermin that anyone asked would give as their first example, or possibly name at all, it is clear that insects are capable of being regarded as vermin. Secondly, the answer to whether the pre-contract reply was false was also to be read in the context it was given. The context was an enquiry to discover whether there had at any time been, or there remained, a problem with an infestation of creatures that had damaged or might damage the property, could adversely affect enjoyment of the property, or give rise to expense to eradicate them. In that context, an infestation of clothes moths would constitute an infestation of vermin.

The reply was false, and the Court found that, on the facts, WWF knew that the reply was false. The Court further found that, had the purchasers known about the vermin infestation, they would not have bought the property. The question therefore was what the appropriate remedy was.

WWF raised three defences to the claim for rescission: delay, affirmation, and impossibility.

Turning first to delay, the Court found that a period of 7½ months from the time when the Claimants probably knew of their right to rescind until their solicitors' letter electing to do so did not, on the facts of this case, constitute sufficient delay to make it inequitable to grant rescission for fraudulent misrepresentation.

Secondly, WWF argued that the Claimants continuing to live in the house constituted affirmation of the contract. Fancourt J held this was not the case: it was instead consistent with the Claimants not having made up their minds whether to elect one way or the other. The Claimants were already living in the house at the time when they came to know of their right to rescind and were not obliged to move out in order to preserve their right to decide to rescind. In any event, the Claimants' continuing to live in the

house did not constitute communication to WWF of an election to affirm the contract.

Thirdly, WWF argued that restitution was impossible as:

i) WWF was no longer able to repay the purchase price and;
ii) the Claimants had carried out alterations to the property (and otherwise allowed it to deteriorate) such that it was no longer possible to give back the thing that he sold them.

Again, the Court dismissed this submission. The house was returned to WWF, who had to decide what work to do to deal with the continuing moth problem. The Claimants were to have an equitable lien over the house until it was sold. Credit was to be given for the benefit the Claimants had had by living in the house, as well as any alterations which constituted improvements in value. The Claimants were also awarded substantial damages, including the cost of stamp duty (£3,715,728), purchase costs, and the costs of attempting to eradicate the moths.

What are the implications for sales of other houses? When it comes to moths, the Court was keen to stress that this was an *"extreme case"* and expressly addressed concerns that every seller of a property would have to disclose the presence of moths or otherwise be at risk of a claim for damages or rescission. The Court held that was not the position given that *"There is no duty of disclosure on a seller of real property (caveat emptor), except to the extent that a failure to disclose would make information otherwise given to a buyer misleading or incomplete."*

There is no obligation to answer pre-contract enquiries, although if a seller does answer them, they must answer them honestly. The Court explained: "So, if a question is asked whether within a specified period the sellers have seen a clothes moth in the property, or suffered moth damage to clothing, and the truthful answer is "yes", the seller must either decline to answer, if they consider that the enquiry is inappropriate, or say "yes", with or without further particulars. If the question is whether the seller is aware of any infestation of vermin, and the seller has experienced no more than a few moths and occasional damage to clothing (the "normal" London experience, as Mr Seitler called it), the honest answer will be "no". However, if the seller knows that they have, or may have, an infestation of moths, the only honest answer would be "yes" or "no, but the property was identified on [date] as having a clothes moth infestation".

Where the dividing line lies between *"the "normal" London experience"* and an *"infestation"* is yet to be determined. The risk of rescission for fraudulent misrepresentation also extends wider than moths and would be relevant to other problems, such as mice, damp or flooding. With stamp duty at an all time high, the penalty for any such fraudulent misrepresentation is one to be wary of: it is not just a case of caveat emptor, but caveat venditor!

Picking your target: the importance of identifying the decision under challenge

Stephen Tromans KC
Call 1999 | Silk 2009

In *Frack Free Balcombe Residents' Association v Secretary of State for Housing* [2025] EWCA Civ 495, Sir Keith Lindblom SPT began his judgment by saying that *"In dealing with a legal challenge to a planning decision the court must have in mind what the decision actually was."* This may sound obvious but is surprisingly often overlooked. The case was about planning permission granted on appeal for exploration and appraisal for hydrocarbons within the High Weald AONB under a temporary planning permission for 30 months, with restoration of the site if no commercial production was to follow. Permission to appeal from a decision by Lieven J rejecting a statutory challenge was granted on four grounds. Three of these were hopeless and it

is mildly surprising permission was given. The first ground was the most substantive and prompted Sir Keith's opening remark. It was an argument that the inspector had erred by taking into account the benefits, but not the harm, of commercial hydrocarbon production as part of weighing benefits against harm.

The inspector had accepted the need for hydrocarbons as part of the ongoing transition to a net zero economy, and the inappropriateness of relying on imported oil both from the point of view of security of supply and sustainability in its broadest sense. He noted that nothing in national or local policy restricts appraisal or production of hydrocarbons, or that a proposal for exploration and appraisal should be refused on the ground that the yield may be of small scale or even nil. There was a significant national need for onshore hydrocarbon exploration and assessment which would remain for a considerable time to come, and which weighed greatly in favour of the appeal.

The Court of Appeal found, as in *Preston New Road Action Group* [2018] EWCA Civ 9, that there was never any doubt that the development was solely for exploration and appraisal, not commercial production, a distinction reflected in national planning policy and indeed in relevant development plan policies. This distinction was not lost on the inspector – indeed he had emphasised it. Any future application for production would need an entirely separate planning application to be assessed on its own merits under national and local planning and energy policy applicable at that time. The effects of commercial production remained conjectural at the exploration stage and could not possibly be taken into account.

The Court of Appeal rejected the view that exploration was of no benefit in itself in the absence of commercial production. The benefits correctly identified by the inspector lay in the advantage of exploration to establish whether a commercially viable resource was present. The position was summarised by the Court at paras. 52-53 as follows:

> *52. Three things emerge. First, the inspector did not try to estimate what level of "production" might be achieved on the site if such development ever took place. Secondly, however, and rightly, he did take into account the fact that the proposal before him was intended to establish whether the site would be capable of contributing to the supply of oil, even if its yield proved to be minimal. This was, after all, the essential purpose of exploration and appraisal. And thirdly, he gave weight to the benefit of exploration and appraisal as an activity in its own right, but not to the supposed benefits, or the supposed harm, of a project of commercial production on this site in the future.*
>
> *53. It follows, in my view, that the judge's conclusions on this issue were sound. Following the decision of this court in Preston New Road Action Group, she took a similar view in the parallel circumstances of this case. The same basic point was involved. As the inspector clearly understood, the benefits of the proposed development of exploration and appraisal on this site came not from the assumed benefits of a possible future development of commercial production, but from the opportunity to discover whether there existed here a commercially viable resource of hydrocarbons capable of contributing to energy security. Whether the benefits – and the harm – attributable to a development of commercial production would ever come about was, at this stage, a matter of speculation. They depended on the outcome of some future proposal, which might never be made. But the benefits of exploration and appraisal did not depend on a future proposal. They depended, as the inspector knew, on the proposal now before him. That was the thrust of the judge's conclusions … I think she was right."*

The case is an important reminder of the limitations of the Supreme Court decision in *R (Finch on behalf of the Weald Action Group) v Surrey County Council* [2024] UKSC 20 on the obligation to assess scope 3 emissions from use of products made from extracted hydrocarbons. It

is clear that it would neither be possible nor legally required to embark on the speculative exercise of trying to assess such emissions at the exploration stage. It is also a reminder that despite aspirations on net zero, there remains an important policy imperative for transitional hydrocarbon extraction and prior to that, assessment of potential production viability.

Stephen acted for the Office for Environmental Protection in the landmark Supreme Court planning cases of Finch and CG Fry. A third edition of his book on EIA Law is in preparation and should be out later in 2025. He is an editor of The Law of Net Zero and Nature Positive by a team of 39 Essex editors and contributors.

Podcasts

Richard Harwood OBE KC
Call 1993 | Silk 2013

39 Essex Chambers produce a range of podcasts relevant to Planning, Environment and Property practitioners.

Construction and The Climate Podcast

In this podcast, Camilla ter Haar and Ruth Keating, discuss the key climate change issues relating to the construction sector.

The built environment and construction sector accounts for 38% of global carbon emissions and it has been estimated that globally every week we build the equivalent of a city the size of Paris. The building sector is therefore well-positioned to have a significant impact on emissions reductions – future legal requirements and case law will reflect this.

Recent episodes include the Institution of Structural Engineers' response to embodied carbon; and developing case law in insurance disputes concerning climate change related damages.

Climate Law Matters Podcast

Steph David, investigates the key legal developments, across both public and private law, in addressing the most pressing challenge of our generation, climate change. Through this podcast, she interviews leaders in their fields, and across a range of sectors, to understand:

i) the key developments as they see them and;

ii) the role for litigation and regulation in those developments, including any legal barriers.

Recent episodes include the role of Ofgem and an interview with Sarah Finch after her Supreme Court case.

Art and Heritage Law: Contested Heritage

Art, heritage and the odd bit of law. Every Wednesday, Richard Harwood KC and Clarissa Levi (of Wedlake Bell LLP) discuss challenges and successes in the heritage and art world with guests from across the sector. For professionals, owners and the general listener, Richard and Clarissa ask: what is going on? what can be done? what are the stories behind the buildings, treasures and the cases?

Recent episodes include the work of the Landmark Trust with Anna Keay; 50 years of SAVE Britain's Heritage; Emily Gould on Artificial Intelligence and Art; and the past, present and future of Gasholders.

The podcast series are available on Spotify and Apple, and via: 39essex.com

Section 106s and yet more reflection

John Pugh-Smith
Call 1977

Introduction

While the case law on Section 106 issues should now be settled, the further recent decision by the Court of Appeal in *R (Greenfields (IOW) Ltd) v Isle of Wight Council & Westridge Village Limited* [2025] EWCA Civ 488[1] reminds that the purpose of publication of the draft on the local planning authority's website is to enable members of the public to know the terms of a proposed or agreed planning obligation, and to enable them to comment on it if they choose to do so.

This article considers not only the "takeaways" from the case itself but also reflects on how the litigation could have been avoided or truncated had "ADR" (Alternative Dispute Resolution) been deployed.

The Case

The Council had first resolved to grant Westridge permission at a meeting of its Planning Committee in July 2021 for a development comprising 473 homes and related infrastructure at Ryde, Isle of Wight. The proposed development was controversial. One of the points of controversy concerned the impact of the proposed development, and other developments, on the highways network and how the costs of any works mitigating that impact would be funded. The Section 106 negotiations also became protracted. So, the application was put back before back to a Planning Committee meeting on 25 April 2023, whereupon it was resolved again that permission should be granted. The Section 106 was then agreed and planning permission finally issued on 4 August 2023.

However, the Council had failed to place either the draft or the final Section 106 on its planning register. The company, Greenfields (IOW) Limited, had been set up by local residents and objectors to initiate judicial review proceedings challenging the decision to grant planning permission. Before HH Judge Jarman KC (sitting in the High Court) the Council's resolution and the decision notice were upheld. However, Lewison LJ granted permission to appeal on four grounds of which the first is relevant to the successful outcome of the challenge and this article, namely, breach of Article 40(3) of the Town and Country Planning (Development Management Procedure) (England) Order 2015 ("DMPO").

On the legal merits, Greenfields' appeal succeeded on its first ground relating to the failure of the Council to publish the Section 106 agreement on its planning register before the decision notice had been issued. The Court of Appeal found that, had it had sight of the Section 106 Greenfields would have been highly likely to make representations to the Council on its contents, in particular, because its shareholders had been concerned with the adequacy of the financial sum to be secured to provide for certain highways works. Further, Greenfields had been unable to establish from any information in the public domain what that sum would be. Indeed, the sum which was eventually secured had been substantially lower than Westridge's estimate of the cost of the relevant works.

Having found for Greenfields, the Court allowed time for the parties to make representations as to the appropriate remedy. This led to a subsequent final order confirming that the August 2023 permission stood quashed but that the Council's April 2023 resolution to grant permission remained valid and lawful.

Interestingly, on the issue of the litigation costs, the sealed Court Order dated 20 April 2025[2] included the return of the sum of £20,000 paid by the Appellant into court and the First Respondent (the Council) being liable for 75 per cent of the

1 *Greenfields (IOW) Ltd, R (On the Application Of) v Isle of Wight Council & Anor* [2025] EWCA Civ 488

2 With thanks to Greenfields' counsel, Charles Streeten, for his Linked-in posting of the sealed Court Order.

Appellant's costs on appeal and below, subject to detailed assessment if not agreed, such sum not to exceed £70,000 (by reason of the £35k cap by virtue of CPR 44.26 (Greenfields' Aarhus protection) and £35k pursuant to Lewison LJ's order granting permission to appeal) with the sum of £50,000 being payable on account of costs within 14 days. The stated reasons also explain that the figure of 75 per cent reflected the fact that the Appellant had not succeed on all its grounds nor did the First Respondent on the issues raised in the Respondent's notice.

Comment

Following the publication of the judgment, handed down on 16 April 2025, there was considerable "industry chatter" about this important procedural reminder and the legal and procedural consequences for local authority officers and advisers.

The significance of the case is that it clarifies the proper approach to breaches of procedural obligations under the DMPO and other similar legislative provisions. In this regard, Lewis LJ (giving the lead judgment) accepted Greenfields' submission that the lawfulness of compliance with DMPO requirements is to be approached applying the decisions in *R v Soneji [2006] 1 AC 340 and A1 Properties Ltd v Tudor Studios RTM Co Ltd* [2024] UKSC 27 i.e. by asking what Parliament intended the consequences of the breach in question to be, having regard to (1) the extent to which there had been substantial compliance with the purposes of the legislative provision, and (2) the extent of any prejudice.

Applying those principles, Lewis LJ found that the purpose of publishing the actual draft Section 106, and not simply Heads of Terms, is to enable members of the public to know the terms of a proposed or agreed planning obligation, and, to enable them to comment on it if they choose to do so.

In the particular context, the absence of publication of the draft Section 106 was particularly prejudicial to the objecting local residents; for only the Heads of Terms for that agreement had been set out in the report to the Planning Committee. The amount of the highways financial contribution was not provided and remained unknown to Greenfields until after the issue of the actual planning permission decision notice. Therefore, it was manifestly deprived of the opportunity to make representations as to its adequacy. Had the amount of the financial contribution to the highways works been provided set out in the report to the Planning Committee. The amount was not known, and remained unknown to the Claimant until after the issue of the permission. The Claimant was therefore deprived of the opportunity to make representations as to its adequacy.

Reflecting on the foregoing, lead to the following reminders:

1) Local planning authorities have to comply fully with the DMPO's publicity requirements and not assume that a lesser standard of "need to know" should be applied to the general public. Published Heads of Terms only reflect, at best, agreement to agree.

2) Developers and local authorities should neither under-estimate (nor over-promise) the need to swiftly secure the required Section 106 obligations when seeking to get permissions over the line, particularly when faced with local residents' objections; for protracted time spent in viability negotiations may not always lead to better outcomes. Rather, there should be the ability within the wording of the Section 106 to re-visit such matters, with a more nuanced approach to dispute resolution than a default referral to a single independent expert.

3) The ability to modify a Section 106 agreement, even after five years, is limited and rarely succeeds save on a consensual basis. Despite the ability to apply for modification or discharge after five years under Section 106A such cases as *R (Millgate Developments v Wokingham*

BC [2011] EWCA Civ 1062 and *R (Mansfield DC) v SSHCLG* [2018] EWHC 1794 (Admin) demonstrate that the Courts will continue to uphold local authorities' demands that the developer should be held to the planning obligations it contracted to discharge even if circumstances have subsequently changed.

4) Furthermore, completed Section 106s, whether bi-lateral or unilateral, are formal deeds so must be interpreted on that basis.[3] Therefore, particular care must be given to their drafting, the salutary tales to the contrary being exampled by the two other recent challenges *Norfolk Homes Limited v North Norfolk District Council & Norfolk County Council* [2020] EWHC 2265 (QB) and *Redrow Homes Ltd v Secretary of State for Levelling Up, Housing and Communities & New Forest District Council* [2023] EWHC 879 (Admin). Both arose out of subsequent Section 73 amended consents and a lack of appreciation of the "carry over" effects from the original Section 106 agreements, in the former by the local planning authority (who managed to lose the affordable housing element) and the latter by the housebuilder (who was shackled to an unbuildable footbridge over a railway). Unlike the *Norfolk Homes* case (where the original planning permission had not been implemented and the obligations in the Section 106 had therefore not yet arisen) in *Redrow* not merely had the operative permission been implemented but it had, in all material respects, been completed.

Concluding Remarks

It is, perhaps, a sad reflection of the state of the planning system that High Court challenges have to be taken where pragmatism and common-sense might have led to a better and earlier outcome. Indeed, because High Court challenges can only succeed if a genuine error of law is found and one sufficient to justify quashing the decision, the final outcome may not always be what the claimant had hoped at the outset, as in the instant circumstances. Therefore, I wonder what might have been the sooner outcome if the judicial review proceedings had been stayed for formal mediation (as now encouraged by the CPR amendments since last October 2024) and/or neutrally chaired discussion between the principal parties had occurred back in 2023.

Looking ahead, if real housing growth is to be delivered in our current economic climate, then both the current Government needs to "dial down" the overly simplistic rhetoric of "builders v blockers", and local planning authorities and developers need to be encouraged to embrace less adversarial processes. Even now, through its Planning & Infrastructure Bill, the Government could adopt the approach taken by the Scottish Government in its reforming Planning (Scotland) Act 2019 and include a general provision to promote and use mediation.[4]

Even without such statutory recognition, such facilitation techniques are already available and can still be swiftly deployed. So, all round, lessons can and should be learned from and through the Greenfields case as to how to "do better".

JOHN PUGH-SMITH FSA FCIArb of 39 Essex Chambers is a recognised specialist in the field of planning law with related disciplines acting for both the private and public sectors. He is also an experienced mediator, arbitrator and dispute 'neutral' dealing with section 106 obligations and their outworkings along with other development related dispute.

3 *Arnold v Britton* [2015] AC 1619; *Wood v Capita Insurance Services Limited* [2017] 2 WLR 1095; *R (Robert Hitchins Ltd) v Worcestershire County Council & Worcester City Council* [2015] EWCA Civ 1060), as applied by *Holgate J in Norfolk Homes Limited v North Norfolk District Council & Norfolk County Council* [2020] EWHC 2265 (QB).

4 https://www.legislation.gov.uk/asp/2019/13/section/40

Bradbury v Awdurdod Parc Cenedlaethol Bannau Brycheiniog (Brecon Beacons National Park Authority) [2025] EWCA Civ 489

Daniel Stedman Jones
Call 2011

Jake Thorold
Call 2020

Background

This appeal concerned a judicial review challenging the grant of two connected planning permissions at a sheep farm in the Brecon Beacons National Park, the effect of which would be to create a large sheep handling area.

The Appellant, a member of a local environmental group, is concerned that the effect of this development would be to facilitate an increase in sheep numbers on the farm, with ramifications for water quality in the nearby River Wye from phosphate run-off.

In the High Court, Mr Justice Jay concluded that the two planning permissions had been granted unlawfully because (in summary):

1) Although Appropriate Assessments as required under the Habitats Regulations 2017 had been carried out concluding that – with appropriate conditions imposed – the development would not have adverse effects on the River Wye Special Area of Conservation, at the time that the planning committee decided to grant the planning permissions, the assessments remained in draft form. As such, the grants of planning permission contravened regulation 63(5) of the Habitats Regulations 2017, which requires the planning permission should only be granted "in the light of the conclusions of the assessment" and "only after having ascertained that [the plan or project] will not adversely affect the integrity of the European site". As there were no concluded assessments, this requirement was not met.
2) The draft appropriate assessments were not made available to members of the public until after the planning committee had decided to grant planning permission, which constituted a breach of section 100D of the Local Government Act 1972.

Mr Justice Jay concluded, however, that relief (i.e. quashing the two planning permissions) should be withheld notwithstanding the unlawfulness on the basis of section 31(2A) of the Senior Courts Act 1981, which holds that the Court must refuse to grant relief "if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred". In summary, Mr Justice Jay took the view that:

1) the planning committee were aware of the conclusions of the appropriate assessment, and as such the fact that it was not yet finalised was unimportant; and
2) even if members of the public had had the appropriate assessments, in the circumstances there was nothing further they could have said which could have altered the planning committee's decision to grant the planning permissions.

The Appeal

The Appellant brought the appeal on five grounds against Mr Justice Jay's conclusion that Section 31(2A) should be applied notwithstanding the unlawfulness. The Respondent local planning authority also put in a Respondent's Notice contending that Mr Justice Jay had been wrong to conclude that regulation 63(5) of the Habitats Regulations and section 100D of the Local Government Act 1972 had been breached.

The Court of Appeal's Judgment

The Court of Appeal unanimously dismissed the appeal, with Lord Justice Lewis giving the

judgment (Lady Justice Nicola Davies and Lord Justice Holgate agreeing).

In short, the Court of Appeal's conclusion largely mirrored that of the High Court: the local planning authority had acted unlawfully in granting the two planning permissions, but Mr Justice Jay was correct to conclude that section 31(2A) of the Senior Courts Act 1981 applied on the facts.

On the Respondent's arguments, Lewis LJ stridently rejected the argument that the local planning authority's duty under regulation 63(5) of the Habitats Regulations had been delegated to officers, such that there was no breach because the planning decision notices were signed off *after* the appropriate assessments had been finalised. The Respondent's arguments on this point were, in Lewis LJ's words, "not tenable" [63]. As the planning committee did not have finalised appropriate assessments before it when it determined to grant planning permission, the requirements of regulation 63(5) were not met.

Although Lewis LJ was less certain regarding Jay J's finding of a breach of section 100D of the Local Government Act 1972, ultimately, he considered that it was not necessary for the Court to determine this [49, 66].

In respect of the Appellant's appeal regarding section 31(2A) of the Senior Courts Act 1981, Lewis LJ essentially upheld the conclusion of Jay J, finding that "nothing has been identified which suggests that an issue arose which the appellant or others could not have addressed because of the failure to prepare or publish the assessments prior to the planning meeting. The fact that assessments were not made or published did not, therefore, affect the decision-making process" [82].

Comment

Although the Appellant ultimately did not achieve the quashing order she sought, this case nonetheless serves as a salutary reminder to local planning authorities of the need for stringency in order to ensure that proper procedures are followed. In particular, local planning authorities should take care to ensure that completed appropriate assessments are provided, and made available to the public, in good time before the determination of planning applications.
The Court of Appeal's judgment is likely to be of particular significance for Lewis LJ's comments on the nature of section 31(2A) of the Senior Courts Act 1981. Notably, Lewis LJ cast doubt on the usefulness of the summary list of principles provided by the High Court in *R (Cava Bien Limited) v Milton Keynes Council* [2012] EWHC 3003, stating that those principles should not be applied as a "form of checklist" and casting doubt on the accuracy of a number of the principles when considered devoid of proper context [73-74].

In Lewis LJ's view, section 31(2A) of the Senior Courts Act 1981 "emphatically does not require the court to embark on an exercise where the error is left out of account and the court tries to predict what the public body would have done if the error had not been made" because this would "run the risk of the court forming a view on the merits". Rather, Lewis LJ held, "the focus should be on the impact of the error on the decision-making process that the decision-maker undertook to ascertain whether it is highly likely that the decision that the public body took would not have been substantially different if the error had not occurred" [74].

In practice, this distinction may be difficult to draw. It is open to question, for example, whether the Courts' conclusion in this case that there was nothing which members of the public could have said which might have changed the local planning authority's decision truly avoids the Court forming a view on the merits. While the Courts are understandably anxious to observe the constitutional separation of powers between the executive and the judiciary, in the authors' view the nature of the section 31(2A) duty inevitably involves some blurring of this line. It would not be surprising if this issue found its way to the Supreme Court in the not-too-distant future.

Daniel Stedman Jones and Jake Thorold represented the Appellant Ms Bradbury.

R (on the application of The Spitalfields Historic Building Trust) v Tower Hamlets LBC [2025] UKSC 11

Daniel Kozelko
Call 2018

Background

May a council, by standing orders, bar a councillor from voting at a meeting of a committee? That was the question that the Supreme Court had to answer in this case. At a meeting held on 14 September 2021 Tower Hamlets' planning committee ('the Council' and 'the Committee') resolved to grant planning permission in respect of an application made by Old Truman Brewery Ltd ('the Developer') to redevelop the Old Truman Brewery on Brick Lane. As a result of standing orders in the Council's constitution, a number of councillors were barred from voting at that Committee meeting as they had not been present at the previous meeting which had also considered (and deferred) the application. The key standing order was para 11.4 of the Committee's procedure rules:

> *'Where an application is deferred and its consideration recommences at a subsequent meeting only Members who were present at the previous meeting will be able to vote. If this renders the Committee inquorate then the item will have to be reconsidered afresh. This would include public speaking rights being triggered again.'*

The Spitalfields Historic Building Trust ('the Trust') argued that para 11.4 was not a standing order that lawfully could be made. In doing so it said that it was not within key powers in the Local Government Act 1972 ('the LGA 1972'). Paragraph 42 of Schedule 12 of the LGA 1972 provides:[5]

> *'Subject to the provisions of this Act, a local authority may make standing orders for the regulation of their proceedings and business and may vary or revoke such orders.'*

The arguments

The Trust argued that the voting rights of councillors were strong rights which could only be removed by express statutory enactment. This is because the key nature of the right in representative democracy, and the existence of the right to vote as implicit in the LGA 1972 and explicit in the committee proportionality provisions of the Local Government and Housing Act 1989 ('the 1989 Act'). Thus, while the Trust accepted that the standing order did not set out a rule that was irrational, it argued that it was ultra vires the powers to make standing orders within the LGA 1972.

In response, at first instance the Council and the Developer argued three alternatives: (1) that the standing order operated so as to reconstitute the Committee so that, when it considered the application, it was only comprised of those members that had been present at the previous meeting; (2) that the standing order operated so as to delegate the decision to a sub-committee of the Committee made up of only those members present at the previous meeting; and, (3) that the standing order was within the powers in the LGA 1972 to make standing orders. At first instance the judge (Morris J) rejected (1) and (2) but accepted (3) and held that para 11.4 was within the scope of the LGA 1972 power. On appeal, the Court of Appeal (Sir Keith Lindblom SPT, Bean and Coulson LJJ) agreed with Morris J, and did not consider (1) and (2).[6]

Judgment

In the judgment of Lord Sales, the Supreme Court agreed with the courts below and held that the power to make standing orders in the LGA 1972

5 Also pertinent was s.106 of the 1972 Act.

6 The Developer but not the Council having cross-appealed by way of a respondent's notice; this cross-appeal was maintained in the Supreme Court.

extended to standing orders such as para 11.4. He held that such a standing order was well within the natural and ordinary meaning of the words 'proceedings and business'. While a councillor's ability to vote is central to their role, that right should be located within the wider context of the LGA 1972. The power to make standing orders is an important feature of a council's power to take effective and lawful action.

Lord Sales noted that there are some principles of impartiality and fair dealing which are so fundamental that they are implicit within the legislative framework but are not explicit disbarments in the 1972 Act: for example, when a councillor is biased or appears to be biased. If a councillor were to vote in that situation the decision taken by the council would be unlawful and liable to be set aside. It cannot be enough that the matter be left to the judgement of the councillor, and Parliament cannot have intended to let the principle of effective action be dependent on good conduct of an individual councillor.

Turning to the case law, he noted the decision in *ex parte Armstrong Braun* [2001] LGR 334 and explained that the voting rights involved are not rights conferred on the individual councillor. Rather, the rights are of the community at large to have a local authority take lawful and effective action. A parallel could be drawn to *Armstrong-Braun*, where the Court of Appeal accepted in principle that there could be good reasons for a local authority to adopt standing orders which limited the ability of a councillor to place a matter on an agenda for consideration (thereby limiting the ability to vote on it).[7]

The background to council decision-making is that of common law corporations. The LGA 1972 had to be interpreted with this in mind. Para 39 of Schedule 12 of the LGA 1972, which provided for majority decision-making, thus merely provides that decisions will be taken by majorities of members who are attending and can validly cast a vote. The power to regulate the conduct of meetings is not limited by this, and did not imply a right of all councillors to vote.

Lord Sales then noted that standing orders are subject to the normal principles of judicial review; they must be rational. The rationality of this standing order was not challenged; indeed, explicable reasons for such a rule were apparent. It obviates the risk of councillors voting on a matter without the full information available (and thus the making representations a hollow charade).

Ultimately, the entitlement of councillors to vote is subject to general rules intended to enhance the quality of local authority decision-making and to ensure public confidence in the system. That this is left to the council to decide makes sense as that authority is expected to be especially well-attuned to local concerns. That Parliament has imposed some external controls (such as where a councillor has a financial interest) does not change this. This is all consistent with the wording of the LGA 1972. It is also consistent with the fact that the proper interpretation of voting rights is not of a fundamental right established at common law, in respect of which any constraints must be read down.

Lord Sales held that nothing in the 1989 Act changed this. It was not the intention of the proportionality provisions that they establish an explicit statutory right; rather, the proportionality controls were overlayed on the existing 1972 Act schema. *Of In re Hartlands (NI) Ltd* [2021] NIQB 94, in which a similar standing order made under the Northern Ireland legislation had been quashed, Lord Sales said the legislative scheme was different. He also noted that, contrary to Scoffield J's dicta in that case, the any right to vote is nuanced, and it is incorrect to suggest (as the judge did) that it would be expected that a limitation on the right to vote would be 'clearly spelt out in statute'. The asserted right of a

7 Albeit on the facts of that case the standing order was quashed.

councillor to vote should not be elevated to an unsustainable degree; ultimately, the right must be seen in its proper context.

Of the cross-appeal, Lord Sales rejected both points shortly, noting that they lacked reality and did not accord with what the standing order purported to be doing.

Comment

This important case provides a framework for future council decision-making and emphasises the importance of the effective functioning of local government. Not only does the case stress the width of the power to make standing orders in the LGA 1972 (albeit being subject to the normal grounds of judicial review) but also highlights how effective decision-making is a central principle which will be now regularly invoked in disputes concerning council powers.

HM Treasury v Global Feedback Ltd

Flora Curtis
Call 2019

Section IX, Part 46 of the Civil Procedure Rules sets out limits to the costs which are recoverable between parties to a claim that falls within the scope of Article 9(3) of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ("the Aarhus Convention").

Article 9(3) of the Aarhus Convention requires Parties to ensure that members of the public *"have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment."* Article 9(4) requires those procedures to *"provide adequate and effective remedies"* and not to be *"prohibitively expensive"*. The Part 46 costs limits serve as the mechanism by which the UK ensures that Aarhus convention claims are not prohibitively expensive.

In *Feedback*, the issue between the parties was whether Global Feedback Limited's ("Feedback") claim fell within the scope of Art.9(3). The central question was the meaning and scope of the phrase *"which contravene provisions of its national law relating to the environment"*. In summary, Holgate LJ decided that Art.9(3), and the associated Part 46 cost limits, applies only to alleged contraventions of provisions of national law which have as their purpose the protection and/or regulation of the environment.

Background

Feedback's challenge related to a decision taken by HM Treasury and the Secretary of State for Business and Trade ("the Appellants") to make regulations ("the 2023 Regulations") giving effect to tariff preferences on Australian imports under a Free Trade Agreement ("FTA"), which had been signed by the UK and Australia in December 2021.

The background to Feedback's claim was its concern that the FTA would lead to substantial increases in greenhouse gas ("GHG") emissions from the production of cattle meat. This was because beef production methods in Australia produce significantly more GHG emissions per weight of beef than those in the UK, and Australian beef is lower in price than UK beef. Feedback argued that this was likely to lead to a net increase in production of Australian beef for consumption in the UK. Feedback referred to the process of increasing GHG emissions by moving production to another country as "carbon leakage".

The FTA was signed in December 2021, having been immediately preceded by an Impact Assessment ("IA") which had referred to the impact of the agreement on UK GHG emissions and to carbon leakage. Following parliamentary scrutiny, the Appellants made the 2023 Regulations under Part 1 of the Taxation (Cross-Border Trade) Act 2018 ("the 2018 Act") on 23 February 2023. The regulations came into force on 31 May 2023.

Feedback's challenge to the IA

Feedback was granted permission to bring its judicial review in June 2024. The grounds of challenge alleged:

i) public law errors in the Appellants' consideration of the carbon leakage that would arise from the FTA; and

ii) a breach of s.28 of the 2018 Act, which required the Appellants when making the 2023 Regulations to have regard to *"international arrangements to which Her Majesty's government in the United Kingdom is a party that are relevant to the exercise of the function"*.

With respect to point (ii), Feedback argued that these arrangements included the UNFCCC and the Paris Agreement.

Before the High Court Feedback had argued that its claim was an Aarhus Convention claim. Following a contested hearing Lang J agreed on the basis, inter alia, that section 28 of the 2018 Act arguably required the Appellant to take the UNFCCC and the Paris Agreement into account when making the 2023 Regulations. Those treaties were directly connected with environmental issues, and so Art.9(3) of the Aarhus Convention was engaged. The Appellants appealed this decision to the Court of Appeal, arguing that neither:

i) s.28 of the Act, nor

ii) general public law principles were provisions of national law relating to the environment falling within the scope of Art.9(3).

Court of Appeal's Decision

The Court of Appeal allowed the appeal and held that Feedback's claim was not an Aarhus Convention claim for the purposes of Part 46 of the CPR.

Holgate LJ, delivering the Court's unanimous judgment, recognised that Art.9(3) refers to provisions of national law *"relating to"* the environment. In context, Holgate LJ concluded that those words require a substantial and direct connection between the national law at issue and the environment. Holgate LJ drew support from the *travaux préparatoires* to the Convention in support of his conclusion in two ways. First, it was apparent from the *travaux préparatoires* that the Parties to the Aarhus Convention had moved away from earlier, more broadly framed drafts of Art.9(3). Whereas earlier drafts referred only to *"matters related to the protection of the environment"*, the final text of the Convention was more narrowly framed. Second, the official French text of Art.9(3) as adopted translates to *"which contravene provisions of its **national environmental law**"* (empahsis added), not any law 'relating to' the environment. In light of this, the words "relating to" were clearly intended to serve as a strong, rather than loose, connector.

Holgate LJ also referred to the fact that Art.9(3) applies to challenges to private persons as well as public bodies. He reasoned that it was unlikely that the Parties to the Convention would have intended to entitle members of the public to challenge other private citizens' contravention of *any* national law that might have an impact on the environment. Holgate LJ also relied upon other parts of the Convention which use the phrase *"relating to"*, and for which a narrow interpretation also made sense.

Holgate LJ's overall conclusion was therefore that to fall within the ambit of Article 9(3), a challenge must allege a contravention of a legal provision that is environmental, in the sense that its purpose is to protect or otherwise regulate the environment.

In terms of the question whether public law principles can engage Art.9(3), Holgate LJ was clear that such principles do not form part of the UK's law relating to the environment. Their purpose is not to protect or regulate the environment. Where a principle of public law is contravened, it would be wrong to say that this alone amounts to a breach of environmental law. Nor is it enough for a claim to raise any public law error that is in some way connected with the environment. The essential question will be whether the defendant has contravened a national legal provision for the

protection or regulation of the environment. That will depend upon the wording, context and purpose of the provision under which the defendant has acted.

Recognising perhaps that this interpretation was narrower than the approach that had routinely been taken in practice, Holgate LJ explained how his conclusion could be reconciled with established case law, most notably *Venn v Secretary of State for Communities and Local Government* [2015] 1 WLR 2328. Holgate LJ rejected the suggestion that *Venn* gave a broad interpretation to the phrase *"relating to"*. Rather, in *Venn* the Court of Appeal had been concerned with the question whether *"provisions of national law relating to the environment"* can encompass policies which national law requires a decision maker to take into account, insofar as that policy is for the protection (or regulation) of the environment. Furthermore, *Venn* had to be read in its specific context, namely the planning code. Sullivan LJ had concluded that the planning code and its associated policies were the vehicle through which Parliament had chosen to enact most of the UK's laws relating to environmental protection.

Holgate LJ went further in his analysis of *Venn*, commenting that while Sullivan LJ had in that case said that the definition of the *"environment"* in the Aarhus Convention was arguably broad enough to cover most, if not all, planning issues, this did not mean that all planning **challenges** would fall within the scope of Article 9(3). According to Holgate LJ, to engage Article 9(3) a challenge must allege a contravention of a legal provision that is for the protection or regulation of the environment. The clear implication of *Venn* is that a challenge brought on the ground that a decision-maker has failed to take into account a material consideration, thereby breaching s.70(2) of the Town and Country Planning Act 1990 ("TCPA"), will not be enough to engage Art.9(3) unless the purpose of the policy or other measure left out of account was the protection or regulation of the environment.

Applying this reasoning to Feedback's claim, Holgate LJ concluded that Art.9(3) was not engaged. Section 28 of the 2018 Act was not analogous to s.70(2) TCPA. Parliament had not given any indication that a purpose of section 28 was to protect or regulate the environment. In any event, the Appellants had taken climate change considerations into account when making the 2023 Regulations in accordance with Art.4(1)(f) UNFCCC. Feedback's true complaint lay in the manner with which the Appellants did so. Its challenge alleged breaches of public law principles, not any environmental law. It was not therefore an Aarhus Convention claim.

Comment

Holgate LJ's decision in *Feedback* will be good news for defendants to environmental claims, and bad news for would-be environmental claimants in both the planning and non-planning contexts, for the following reasons.

First, Holgate LJ has confirmed that a narrow approach to Art.9(3) should be taken in cases that raise environmental issues, but which do not directly allege contraventions of national environmental law. This will in particular make the task of bringing public interest environmental challenges more expensive, and therefore more difficult, for claimants seeking to break new ground in areas of law in which climate change and the environment have not historically been at the forefront. This is a lesson that ClientEarth already learned in its unsuccessful 2023 challenge to the Financial Conduct Authority's approval of a share prospectus under the Financial Services and Markets Act 2000. On the other hand, the Court of Appeal's judgment has not completely sealed off the possibility that a claimant could argue that a policy framework outside the planning code was similarly intended by Parliament to serve as part of the UK's national environmental law, in a manner analogous to *Venn*.

8 *R (Client Earth) v (1) Financial Conduct Authority (2) Ithaca Energy PLC* [2023] EWHC 3301 (Admin)

Second, although *Feedback* was not a planning case, Holgate LJ's observations on the correct interpretation of *Venn* in the planning context will inevitably lead to developers and public authorities seeking to challenge would-be claimants' reliance upon the Aarhus Convention in planning judicial and statutory reviews. Since *Venn*, planning claimants have often relied upon Aarhus costs protections as a matter of course without being challenged by defendants. The dicta in *Feedback* could see that position change and see an increase in satellite litigation connected to the question whether an individual challenge does allege a breach of national environmental law as defined in *Feedback*.

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Richard specialises in planning, environment, art and public law, acting for developers, landowners, central and local government, individuals and interest groups. He appears in the courts, inquiries, examinations and hearings, including frequently in the Planning Court and appellate courts. He has appeared in many of the leading cases of recent years including four Supreme Court cases since 2020.

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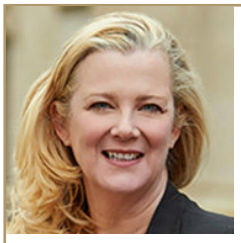

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Call 1990

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. She was awarded Legal 500 Planning and Land Use Junior of the Year 2024.

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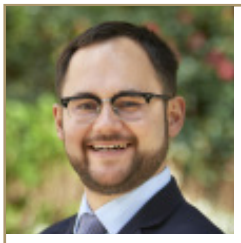

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Call 2018

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.

In 2019-2020 Daniel was a judicial assistant to Lord Carnwath and Lady Ardenat the Supreme Court of the United Kingdom. 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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Flora's practice is focused on environmental, planning and public law. Flora has been ranked as one of the top planning barristers under the age of 35. She acts for a wide range of clients including NGOs, central and local government, developers and landowners, and local residents. She regularly appears in court, inquiries and hearings, both in her own right and as junior counsel. Flora has particular experience in cases involving complex environmental matters, and has acted in high profile climate change litigation. Between August 2023 and March 2024, she was seconded to the Office for Environmental Protection.

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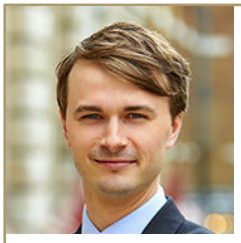

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Jake accepts instructions across all of Chambers' practice areas with a particular interest in public, planning and environmental law. In 2021-2022 Jake was a Judicial Assistant at the Supreme Court of the United Kingdom and Judicial Committee of the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

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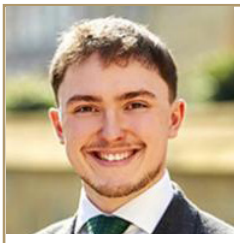

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Christopher has a particular interest in planning and environmental work and is ranked as one of the top 20 junior planning barristers under 35. He recently worked with Jonathan Seitler KC advising a local authority on potential challenges to the tabling of a commercial offer to purchase a significant parcel of land. He was recently 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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