Essex CHAMBERS

PLANNING, ENVIRONMENT & PROPERTY NEWSLETTER

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Introduction

Welcome to our June 2026 edition of the Planning, Environment & Property Newsletter. Since our last edition the NPPF consultation has closed and we are sure that all practitioners eagerly await the outcome which is, according to the Housing Secretary Steve Reed, expected to be published "very very shortly" this summer.

This is not the end of the wide-reaching planning reforms with the Government announcing on 20 May further proposals for "Reforming judicial review for infrastructure".[1] The May publication comes off the back of provisions in the Planning and Infrastructure Act 2025 tightening the judicial review process and reducing the number of attempts a claimant can make to bring a legal challenge, from three to one for meritless claims. These new provisions were put in action in April with Lieven J refusing permission to challenge Stonestreet Green Solar DCO and certifying the application as totally without merit which, as a result of the 2025 Act's changes, means there is no further right of appeal to the Court of Appeal.

The 20 May proposals include plans to enable Parliament to designate Nationally Significant Infrastructure Projects as of Critical National Importance which, if approved, would give the resultant Development Consent Order a distinct statutory status specified in the underpinning legislation, akin to an Act of Parliament. As a result, the intention is that DCO would be protected from judicial review on issues other than human rights grounds. An additional proposal is that all NSIPs will be able to make use of an optional structured challenge window where the Secretary of State would publish a draft decision before a final DCO is issued. This is designed to bring forward potential judicial reviews and enable the Secretary of State to consider and address any issues before issuing a final DCO. This latter change will be a welcome one for developers and Government given the very limited existing powers to amend and revoke DCOs.

We kick off this edition with an article from Ned Helme looking at the Court of Appeal's decision in *Titchfield Festival Theatre Ltd v Secretary of State for Housing, Communities and Local Government* [2026] EWCA Civ 368 on the proper approach to section 57(4) of the Town and Country Planning Act 1990.

In addition, we have articles covering:

- **Celina Colquhoun** – addresses four recent cases that deal with planning enforcement, certificates of lawfulness and revocation of the latter – *Dharmeshkumar v SSHCLG* [2026] EWCA Civ 247; *Leigh v SSHCLG* [2026] EWHC 537 (Admin), *R (Moran) v Medway Council* [2026] EWCA Civ 484 and the (unusual): *R (Ocean One Hundred Ltd) v New Forest National Park Authority* [2026] EWCA Civ 493.
- **Dan Kozelko** provides his views on the *"continuing saga"* of regulation 64(2) of the EIA Regulations as considered by Fordham J in *R (on the application of Barbican Quarter Organisation Ltd) v City of London Corporation* [2026] EWHC 687 (Admin).
- **Jake Thorold** considers *R (River Action) v Ofwat* [2026] EWHC 586, a challenge to conditions attached by Ofwat on the expenditure recoverable for work by water companies on *"storm overflow arrangements"*.

1 http://www.gov.uk/government/publications/getting-britain-building-reforming-judicial-review-for-infrastructure/getting-britain-building-reforming-judicial-review-for-infrastructure

- **Samuel Moss** writes on *R (Ramblers' Association) v Roxlena Ltd* [2026] EWCA Civ 534 and the Court of Appeal's clear restatement of the law on section 31 of the Highways Act 1980.

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

Titchfield Festival Theatre Ltd v Secretary of State for Housing, Communities and Local Government [2026] EWCA Civ 368

Ned Helme
Call **2006**

Introduction and Background

In the *Titchfield Festival Theatre* case, the Court of Appeal gave important guidance on the proper approach to section 57(4) of the Town and Country Planning Act 1990 ("the TCPA 1990"), which provides the following enforcement-related exception to the general principle (under section 57(1)) that planning permission is required for the carrying out of development of land:

> *"Where an enforcement notice has been issued in respect of any development of land, planning permission is not required for its use for the purpose for which (in accordance with the provisions of this Part of this Act) it could lawfully have been used if that development had not been carried out."*

The key background was as follows. In 2010, the appellant ("Titchfield") had purchased land comprising two interconnecting units (A and B) and, in 2021, it had purchased additional land comprising a third such unit (C). Areas A and B had a lawful use for theatre purposes and Area C had a lawful use for storage, but Titchfield created a new theatre straddling Areas B and C, as a result of which Fareham Borough Council ("the Council") issued an enforcement notice alleging, among other things, a breach of planning control through the material change in the use of those Areas to a theatre use.

Titchfield appealed on grounds (a), (f) and (g). As part of its case, it raised a fallback argument, saying that it was entitled to revert to a theatre use on Areas A and B and a storage use on Area C and that this should be taken into account in the appeals on grounds (a) and (f). The Inspector rejected that fallback argument, finding, among other things:

1) That the development the subject of the enforcement notice involved the creation of a single new planning unit covering Areas A, B and C which replaced the two former planning units, one of which comprised Areas A and B and the other of which comprised Area C;
2) That the enforcement notice land (Areas B and C) therefore did not have a lawful use, as Area C had not formed part of the area with a lawful use for theatre purposes;
3) That the land with a lawful use as a theatre (Areas A and B) no longer existed as a planning unit; and
4) That, seeking to apply the decision of *Wyn Williams J in Stone v Secretary of State for Communities and Local Government* [2014] EWHC 1456 (Admin), section 57(4) of the TCPA 1990 could not be relied upon to revert to a theatre use on Area B.

The Inspector went on to dismiss the ground (a) and (f) appeals, though she allowed the ground (g) appeal by increasing the time for compliance to 7 months. Titchfield appealed to the High Court under section 289 of the TCPA 1990, but Neil Cameron KC, sitting as a Deputy High Court Judge, agreed with the Inspector's approach to section 57(4) and dismissed the appeal.[2] Titchfield then appealed to the Court of Appeal, arguing (among

2 [2025] EWHC 883 (Admin).

other things) that the Judge and Inspector had failed to construe section 57(4) correctly.

The Court of Appeal's Decision

The Court of Appeal allowed the appeal. Giving the lead judgment,[3] Holgate LJ began[4] by noting four specific limitations which Parliament has chosen to impose on the ambit of section 57(4):

1) It only creates an exception to the requirement to obtain planning permission for development if an enforcement notice is issued;
2) The breach of planning control alleged in the enforcement notice must relate to development, not a breach of condition;
3) The right to revert under section 57(4) is restricted to a use of land and does not include the carrying out of operational development; and
4) That right to revert is restricted to use rights within the area of land which is the subject of the enforcement notice.

Holgate LJ then[5] set out five steps that a decision-maker should go through in order to comply with section 57(4):

1) Identify the development which the enforcement notice alleges to have been a breach of planning control on the land to which the notice applies;
2) Identify the use of that land immediately before that breach;
3) Make the assumption that that breach has not taken place;
4) On that assumption consider whether the immediately preceding use of the land was lawful;
5) If the answer under (4) is that it was lawful, planning permission is not required to revert to that use.

It followed that, in the present case, section 57(4) had to be applied on an assumption that the material change of use of Areas B and C to a theatre use, as well as associated engineering operations, had not been carried out. When determining whether there was a right of reverter under section 57(4), the Inspector had been required to apply that counter-factual hypothesis but had failed to do so[6] and had instead had regard to irrelevant matters that had to be ignored, namely the development the subject of the enforcement notice and its effect upon the immediately preceding planning status of the land.

Holgate LJ also rejected the Secretary of State's contention that section 57(4) only applies: (i) where there is spatial unity between the land the subject of the enforcement notice and the land upon which lawful use rights would exist assuming that there had been no development constituting a breach of planning control; and (ii) where there is unity as to purpose within that area. *Stone v Secretary of State for Communities and Local Government* (supra) was not authority for that contention, it was not supported by the language of the TCPA 1990, and the Secretary of State had not produced a justification for it.[7]

Because of the way in which the case had been argued by the parties before the Inspector and subsequently, Holgate LJ considered it would be *"helpful and appropriate"* to clarify some of the terminology which they had used.[8] Without seeking to set out the law exhaustively, he suggested as follows:[9]

1) A case which is only concerned with an allegation that the use of a building or land has materially changed in breach of planning

3 Lewison LJ gave a brief concurring judgment [110]-[114] and Dove LJ agreed with both judgments [109].
4 [56].
5 [61].
6 [62]-[65].
7 [69]-[86].
8 [93].
9 [105]-[106].

control generally only needs to be assessed using the *"planning unit"* concept explained in *Burdle v Secretary of State for the Environment* [1972] 1 W.L.R. 1207;

2) The concepts of a *"new planning unit"* and a *"new chapter in the planning history"* are essentially concerned with the effects of implementing a planning permission for development on existing lawful use rights. Such a permission is normally for operational development, but it may relate just to a change of use. As *Jennings Motors Ltd v Secretary of State for the Environment* [1982] Q.B. 541 shows, this issue may also arise where operational development occurs without the grant of planning permission;

3) In situations falling within (2) above, it may be preferable to use the term *"a new chapter in the planning history"* in order to avoid confusion with the *Burdle* concept of a planning unit referred to in (1) above. But where this approach is adopted, it will remain necessary to identify the area of land for which a new planning chapter has opened;

4) Where a case falls within (2) above a key consideration will be whether the new development (or a condition of a planning permission) is inconsistent with the subsistence of existing use rights;

5) There is a fundamental difference between the situations in (1) and (2) above. In (1), whether a material change of use has taken place within a planning unit is a threshold question for determining whether planning control is applicable and, if so, whether lawful use rights have been acquired under section 191(2) of the TCPA 1990. In (2), there is no issue as to whether planning control applies or whether a pre-existing use is lawful. Rather the question is whether the implementation of a permission has the effect of extinguishing other planning rights, essentially because of incompatibility.[10] That is an important reason as to why a clear distinction should be maintained between the terms used to describe the concepts so as to avoid confusion.

Holgate LJ considered that the *Titchfield* case was a relatively straightforward example of situation (1). The enforcement notice alleged a material change of use, the identification of which was not affected by the additional allegation that engineering operations had been carried out. The change of use took place within an existing building. Holgate LJ noted that sometimes when applying the tests in *Burdle* the planning unit will change because of a change in the area of occupation and/or the distribution of uses within that area; and that if there has been a material change of use then it will often be the case that reverted to preceding lawful use rights will involve development requiring planning permission. But he found that the analysis in the present case could have been conducted using *Burdle* tests and there was no justification for invoking the *Jennings Motors* line of authority or to refer to extinguishment, particularly as this distracted attention from the real focus of the fallback argument, namely section 57(4).

For those reasons, Holgate LJ found (and Dove and Lewison LJJ agreed) that the Inspector had erred, and since those errors had tainted her decision on both the ground (a) and ground (f) appeals, it was necessary to remit it for redetermination.[11]

Comment

The Court of Appeal's decision adopts a straightforward approach to section 57(4) of the TCPA 1990, in which a decision-maker must simply apply a counterfactual hypothesis in which the development in question has not been carried

10 Holgate LJ noted in a footnote that here there is some similarity with the judicial principles for resolving an issue as to whether the implementation of one planning permission for a site may prevent subsequent reliance upon another planning permission for that same site (referring to *Pilkington v Secretary of State for the Environment* [1973] 1 W.L.R. 1527 and *Hillside Parks Ltd v Snowdonia National Park Authority* [2022] 1 W.L.R. 5077).

11 [89] and [108].

out. Holgate LJ's five-step approach to applying the subsection[12] will likely form a welcome formula for decision-makers and strip out some of the complexity which led the Inspector into error in the *Titchfield* case. However, whether and if so how the right of reverter applies will remain far from straightforward in many cases where the facts are less straightforward (or more contested) than in the Titchfield case.

Planning Enforcement and Lawfulness Cases: *Dharmeshkumar; Leigh* and *Moran* and – *Ocean One Hundred Ltd*

Celina Colquhoun
Call **1990**

In line with the old adage about waiting for a bus, those of us who regularly deal with the many and varied implications of enforcement notices as well as their sister instruments , lawful development certificates, have been waiting for a while for the Courts to get their hands again on the relevant provisions in the TCPA 1990…and then four really meaty decisions come along at once, three of which are from the Court of Appeal!

I deal first with the Court of Appeal's decision in ***Dharmeshkumar v SSHCLG* [2026] EWCA Civ 247.** This relates to the approach to be adopted to challenges to or rather appeals from s174 enforcement appeals under s289 of the Town & Country Planning Act 1990 ('the 1990 Act'), more specifically appeals to the Court of Appeal following a High Court decision of such a challenge.

It may be recalled that even though permission is required to proceed with an appeal against a s174 decision, unlike a challenge under s288 (which also requires permission to proceed), there is no right to appeal to the Court of Appeal against that refusal of permission (see *Binning Property Corporation Limited v Secretary of State for Housing, Communities and Local Government* [2019] EWCA Civ 250; [2019] J.P.L 844).

The case of *Dharmeshkumar* principally revolves around an anomaly arising out of two conflicting statutory provisions and the Civil Procedure Rules ('CPR') which relate to which Court should be involved in considering an application to appeal a s289 decision from the High Court to the Court of Appeal and what the appropriate test is for the grant of such permission. The provisions are s289(6) of the 1990 Act and s55 of the of the Access to Justice Act 1999 ('AJA') together with CPR 52.6 and 52.7.

If an appeal from a High Court s289 decision qualifies as a 'first appeal', permission may be granted by either the High Court or the Court of Appeal where the court considers that appeal to have a real prospect of success or there is some other compelling reason for the appeal to be heard. If it is a 'second appeal', permission may only be given by the Court of Appeal and the test for the grant of permission is stricter. The Court of Appeal in the latter circumstances must be satisfied that the appeal has a real prospect of success and raises an important point of principle or practice; alternatively, that there is some other compelling reason for the Court of Appeal to hear the appeal.

The appellant duly obtained permission to appeal the Inspector's decision to dismiss his appeal under s174 of the 1990 Act (as well as the Inspector's costs decision) but when both appeals were refused by the judge the appellant sought permission to appeal this decision from the Court of Appeal. What therefore was the right test to be applied? Is it the first appeal test or stricter second appeal test?

12 [61] – set out above.

S 55 of the AJA addresses second appeals confirming the stricter two-part test above for the grant of permission to appeal to the Court of Appeal ie *"the appeal would raise an important point of principle or practice, or (b) there is some other compelling reason for the Court of Appeal to hear it"*.

It was a matter of agreement that s289(6) provides for permission to appeal to the Court of Appeal and Holgate LJ in the Court of Appeal agreed with the appellant that it is *"plain"* that it *"provides for permission to appeal to be obtained either from the High Court or the Court of Appeal"* [39]. However, Holgate LJ also found it was *"equally plain that an appeal to the Court of Appeal falling within s.55(1) of the AJA 1999 can only be brought with the permission of the Court of Appeal itself, not of the High Court or of another court"* [idem].

Holgate LJ, having identified this *"head-on conflict between these two provisions",* confirmed it *"can only be resolved by one or other of two responses: either the two provisions apply in combination, or one provision must apply instead of the other."*

Applying *Smith International Inc v Specialised Petroleum Services Group Limited* [2005] EWCA Civ 1357; [2006] 1 WLR 252 which dealt with similar conflicting provisions and the principles on implied repeal set out in in *Henry Boot Construction (UK) Limited v Malmaison Hotel (Manchester) Limited* [2001] QB 388 at pp.401H-403D, Holgate LJ confirmed that s289 *"forms part of a specific, detailed and relatively self-contained code dealing with appeals against enforcement notices and appeals to the High Court and above"*. In his view s 55(1) of the AJA 1999 did not act impliedly to repeal the relevant part of s.289(6) to remove the High Court's power to grant permission to appeal to the Court of Appeal. As such he concluded, s55(1) does not apply to decisions by the High Court or Court of Appeal on whether to grant permission to appeal to the Court of Appeal under s.289(6) and hence the stricter test does not apply to such appeals from the High Court (even though they may be 'second appeals').

Equally Holgate LJ rejected the Respondent Secretary of State's arguments that the CPR meant the stricter test applied even if s55 of the AJA does not apply, as well rejecting the submission that a different stricter approach to s289 appeals should be adopted by the Court of Appeal in any event.

Turning then to ***Leigh v SSHCLG*** **[2026] EWHC 537 (Admin),** which also involved the deployment of novel arguments about the meaning of relatively familiar provisions, Tim Smith, sitting as a Deputy High Court Judge, confirmed that the relevant date for determining whether an enforcement notice was *"then in force"* in applying the test for lawfulness under s191(2)(b) of the 1990 Act , was the date the application for the certificate was submitted, **not** the date when immunity from enforcement action would have arisen under s.191(2)(a).

The claimant in this case argued at an oral permission hearing that, even though an enforcement notice existed and had not been appealed, which required the removal of the subject operational development, a lawful development certificate should be granted on the basis that the evidence showed the operational development had been substantially completed before the enforcement notice had been issued.

At the heart of the case was the argument that when section 191(2)(b) refers to development contravening the requirements of any enforcement notice *"then in force"* being unlawful, the **"then"** means the point in time at which immunity from enforcement action became available (per section 191(2)(a)) and not the point in time at which the application for the certificate was submitted.

This was rejected by the Deputy HCJ who relied upon Holgate J's (as he then was) judgment in *R (Ocado Retail Limited) v Islington London Borough Council* [2021] PTSR 1833 [146] which states that *"Parliament did not wish an extant enforcement notice (or breach of condition notice) to be negated by the subsequent application of a time limit in s.171B to something which contravened the requirements of that notice"*.

It should be noted that the Inspector had applied both parts of s191(2) and agreed that there was evidence to demonstrate that the operational development had been completed in excess of four years prior to the issue of the enforcement notice, however it was clear that is not the full test and, what is more, s191(4) makes it plain that lawfulness must be assessed at the date of the application for the certificate.

It is a sharp lesson in the consequences of the failure to appeal an enforcement notice.

Turning then to ***R (Moran) v Medway Council*** **[2026] EWCA Civ 484** this is a case again where the consequence of an existing enforcement notice provided a complete answer.

Other than a successful appeal or a decision by an authority to withdraw an enforcement notice the only other way to overcome the provisions of an enforcement notice is to seek planning permission for any matters that may be *"inconsistent"* with the notice. S180 confirms that the notice *"shall cease to have effect to the extent that it is inconsistent with the permission granted"*. S70 C of the 1990 Act however provides that if such permission is sought the planning authority has a discretion to reject the application and not determine it.

S70C has been the subject of a series of High Court decisions (namely *R (Wingrove) v Stratford-on-Avon District Council* [2015] EWHC (Admin) 287; *R. (oao O'Brien) v South Cambridgeshire DC* [[2016] EWHC 36 (Admin); *R (oao Seventeen De Vere Gardens (Management) Limited) v Royal Borough of Kensington and Chelsea* [2016] EWHC 2869 (Admin); *R. (oao Banghard) v Bedford BC* [2017] EWHC 2391 (Admin) and *R (Chesterton Commercial (Bucks) Limited) v Wokingham Borough Council* [2018] EWHC 1795 Admin), [2019] PTSR 2020). Dove LJ in his judgment in *Moran* helpfully reviewed these and the principles which flow from them with particular regard to the purpose of s70C and how it is to be interpreted.

The case itself involved a long planning history of attempts to obtain permission for use of a site as a residential caravan site for Gypsies following the issuing of an enforcement notice. The notice had not been appealed, and the local planning authority had, relying upon s70C (some seven times) rejected a series of subsequent attempts to seek permission for various but related forms of development made by the previous owners and others. The authority had also taken direct action by way of an injunction and a subsequent committal order, and the site had been cleared in accordance with the terms of the notice. The appellant had purchased the site and carried out fresh works as well as making a further attempt to obtain permission for change of use to *"residential use accompanied by the siting of caravans and mobile homes together with the construction of four-day rooms and a stable building"*.

Once again, the authority rejected the application in reliance upon s70C.

The appellant challenged this decision, having argued, inter alia, at the application stage that there had been no opportunity to test the planning merits of the appellant's development and pointed to the fact that the notice had been complied with prior to his development (an argument put forward in Wingrove).

The appellant argued before the High Court and the Court of Appeal that the purpose of s70 C is to defeat attempts to delay enforcement action, consistent with the conclusions reached by Cranston J in Wingrove. Where enforcement action had been taken and effectively 'completed' therefore the claimant argue it should not apply. In addition, the appellant argued but that its purpose was not simply to avoid a site owner or developer from having two separate opportunities for the underlying merits of the breach of planning control comprised in an enforcement notice to be considered (flowing from O'Brien and Banghard : the 'two bites of the cherry" argument). This, it was argued, was not what the appellant's application should be categorised as.

In addition, the appellant argued that the authority was required to consider the planning merits of

the development in reaching its conclusion and had failed to take into account or failed properly to address certain matters which were argued to be material to the decision, namely, evidence of the need for Gypsy and Traveller sites properly; flood risk issues and the fact that there had been no statutory objections to the proposed application.

With regard to s70C Dove LJ, having reviewed the relevant s70C authorities, rejected the grounds of appeal confirming the following [54-56]:

i) On a straightforward understanding of the statutory language of s70C, it was clear that it applied to the circumstances of the case. This was because the application sought permission for *"the matters specified in a pre-existing enforcement notice as a breach of planning control"* (as per s70C (1). Dove LJ stated that *"there is nothing in the language of the section which suggests that the section could not apply in circumstances where the enforcement notice has been complied with or direct action has been taken by the local planning authority to rectify the breach of planning control. The section does not preclude reliance upon it in circumstances where the planning application is prospective"*.

ii) The fact that the development may have occurred in the past and been the subject of successful enforcement action as well as the breach having then be remedied, did not assist the appellant. Dove LJ stated that the *"scheme of the enforcement provisions of the 1990 Act are clearly designed, working as a whole, to ensure that where it is expedient in the opinion of the local planning authority breaches of planning control are stopped, removed and not reinstated. Thus, the use of the term "retrospective" does not affect an understanding of the plain meaning of the section"*.

iii) The purpose of s70C was 'clear' in Dove LJ's view. He concluded that it is *"designed to enable a local planning authority to decline to determine an application for planning permission in respect of either the whole or part of a breach of planning control at a parcel of land which has a pre-existing enforcement notice issued in respect of that breach of planning control. It prevents a duplication of the consideration of the planning merits of the breach of planning control which is the subject of the enforcement action unless the local planning authority are prepared for that to be undertaken. The potential for the occupier of the land subject to the enforcement notice to insist upon more than one determination of the planning merits of the breach of planning control is in my view clearly the mischief which section 70C is aimed at and prevention of that is its statutory purpose"*.

Dove LJ identified the two principal questions that need to be asked in applying s70C (1) was there a pre-existing enforcement notice? (2) if so, did the application seek permission for development which included development identified as a breach of planning control in the pre-existing enforcement notice? If the answer to each is yes then the local planning authority has a discretion as to whether to decline to consider the application, or to accept it and determine it on its merits.

In addition, Dove LJ held that the authority had in fact considered Gypsy and Traveller site need and that the other issues raised were not material to the decision under s70C in any event.

Finally we return to s191 of the 1990 Act and what was described by Holgate LJ at the very opening of his judgment as the *"most unusual case the circumstances of which, it is to be hoped, are unlikely to be repeated"*: ***R (Ocean One Hundred Ltd) v New Forest National Park Authority*** **[2026] EWCA Civ 493.** This was a judicial review involving bias and a decision by the authority's Board of members to revoke a CLEUD under s.193(7) of the 1990 Act.

The appeal was principally successful in respect of apparent bias displayed by the officer's report but in the course of considering the exercise of the revocation powers Holgate LJ set out clear and helpful guidance.

The case in fact involved a number of unusual aspects.

The first was that the subject CLEUD which had been issued by the authority ('the NPA') went far wider than that which had been applied for without any obvious reason. The details of the CLEUD application which were available (many of the relevant documents had in fact disappeared) are set out in the judgment at [64]-[91]. The applicant, it was found, had sought a certificate in relation to a part of a site but the CLEUD was issued in respect of the whole site. In addition, the use that the applicant wanted to confirm as lawful was the storage of caravans (of which there were about 20) (adjacent to bungalow in which he lived). By contrast the CLEUD as issued identified the lawful use as being that of *"a caravan site"* which applied to the whole site save for the small area the applicant had originally identified. The use of that smaller area was identified as storage of touring caravans. The use of that smaller area was identified as storage of touring caravans. As reflected in the judgment, there was evidence that the notion that the wider site was lawfully in use as a caravan site came from an assertion by the applicant at the time that he had permission for such use. This was however not correct (there was an appeal decision showing that caravan club use]. The NPA, despite it clearly being open to check this, appeared to accept that it was. It was asserted subsequently by the relevant officer that the CLEUD application itself contained this claim.

The second unusual aspect that Holgate LJ drew attention to was the fact that the NPA had lost or destroyed a number of documents in its files relating to the application for the CLEUD. This included file notes of a site inspection and communications between the applicant and NPA CLEUD team concerning information about the application which had not been retained. The records that were available had been gathered by a different NPA team responsible for taking enforcement action (which the NPA pursued against the new owner and appellant who had commenced use as a mobile home park).[13]

The third unusual aspect is at the heart of the matter. A local resident, the then Official Verderer of the New Forest, put forward a case to the NPA for it to revoke the CLEUD and there was evidence in effect of a local 'campaign' by local residents who objected to the use of the site as a caravan park supporting the revocation. These campaigners were approached to provide information and there was a considerable degree of communication between the relevant officer at the locals as well as the Verderer applicant. The Court of Appeal found that the NPA had adopted an approach it considered appropriate, but which involved the promotion of the case for revocation and to gather evidence for that purpose. Whilst this specific approach was not found itself to be unlawful it meant that the officer writing the report and assessing whether the CLEUD should be revoked needed to take particular care and in this case the officer's conduct during the process, including the sharing of drafts of his report for comment by the complainant Verderer, Lord Manners, which helped give rise to the appearance of bias.

This conduct together with the relevant officer's recommendations in favour of the revocation to the NPA's board of councillors led to the ultimate finding of the appearance of bias (in accordance with *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357. The nature of this report had in fact been criticised by Jay J in the court below (albeit he concluded that its failings did not vitiate the Board's decision on behalf of the NPA) and the Court of Appeal agreed with those criticisms. In particular, as noted at [95], Jay J had found that on a review of the information available *"… it is highly unlikely"* that the CLEUD applicant had told the CLEUD officers *"that the touring caravan site covered the whole of the Site"* which was the statement or misstatement at the core of the application *"and later documentation supports that view."*

However Holgate LJ disagreed with Jay J's subsequent analysis that a representation within the CLEUD application form about the applicant's

13 Which was appealed but held in abeyance and undetermined at the time.

understanding of the wider use of his land (and which the NPA asserted it relied upon to grant the wider CLEUD despite the rest of the wording of the application) was a relevant misstatement in respect of the revocation decision. Holgate LJ specifically found that *"the scope of the application for a CLEUD was a material consideration which the NPA had to take into account when deciding whether the power in s.193(7) could and should be used"* as such whether a material misstatement had been made or material information had been withheld in completing the CLEUD application *"needed to be considered having regard to the CLEUD for which [the applicant] was applying"*.

Holgate LJ's judgment sets out in detail a number of relevant aspects within the officer's report which the officer either failed to draw the Board's attention to but also a number of inferences and assertions that the officer said could be made which were not properly based or correct in fact and law.

The Board had accepted the recommendations and duly revoked the CLEUD stating only that its reasons were contained within the said officer's report and nothing more. The fact that these were the only reasons provided by the NPA in effect meant that the bias in the report 'infected' the decision.

As set out in the judgment the power under s.193(7) of the1990 may only be exercised if the local planning authority is satisfied that, *"on the application for the certificate (a) a statement was made or document used which was false in a material particular; or (b) any material information was withheld"*.

The procedure to be adopted is contained in Article 39(15) to (17) of the Town and Country Planning (Development Management Procedure) (England) Order 2015 (SI 2015 No. 595) which includes inter alia the giving of notices and the opportunity for the relevant landowner or occupier to make representations.

Holgate LJ confirmed at [34] however that the *"general procedural rules of this nature are not exhaustive of the requirements of procedural fairness or other public law requirements which may arise on the facts of a particular case"* (see e.g. *Bank Mellat v HM Treasury (No.2)* [2013] UKSC 39; [2014] AC 700, 777 at [35]; *Hopkins Developments Limited v Secretary of State for Communities and Local Government* [2014] EWCA Civ 470; [2014] PTSR 1145 at [62]).

He then drew attention to the fact that it is clear (as set out in his earlier judgment in Ocado (see above) [61]-[73])when applying for a CLEUD that the *"onus lies on the [applicant] to demonstrate to the civil standard that a change of use without planning permission has become lawful ([61]). If the LPA is not satisfied with the adequacy of the information provided by the applicant, then it may refuse the application [64]. Care needs to be taken in the drafting of an application because of the risk of revocation and/or criminal prosecution at any time thereafter [67]. In making an application an applicant assumes a risk of revocation on the grounds set out in s.197(3), which risk passes to or affects successors in title. That risk is likely to increase where an applicant takes a minimalist approach to the provision of information to support his application [71]."*

Holgate LJ then set out at [35] the relevant procedure to adopt with regard to an application to revoke as follows (referring to Ocado):

1) *The power to revoke may only be used on one or both of the grounds set out in s.193(7). It may not be used because the LPA wishes to revisit the merits of the application or has changed its mind about the findings of fact it made or the inferences it drew [81], nor may it be used to correct an error of law in the determination of the application under s.191 [103].*
2) *The power may be exercised by an LPA at any time. It is not subject to confirmation by the Secretary of State or a right of appeal and does not give rise to a right to compensation [82].*

3) *The first ground for revocation (s.193(7)(a)) lays down an objective test, that the statement in question was false, in the sense of incorrect. It does not also require that the maker of the statement knew it to be false or was reckless in that regard [84].*
4) *The withholding of material information under s.193(7)(b) also involves an objective test. A withholding may be accidental, mistaken, careless or reckless. It does not have to be deliberate. Ground (b) in s.193(7) does not depend upon the subjective intention of the applicant ([85]-[92]).*
5) *The terms "in a material particular" and "material" (which appear in s.193(7) and in s.194(1)) refer not only to the relevance of information withheld or falsely stated but also its significance, in terms of whether, if the false statement had not been made or the information withheld, the LPA could (not would) have refused to grant any CLEUD or could have granted the certificate in different terms ([93]-[99]).*
6) *The LPA must direct itself correctly on the relevant legal principles. Where a LPA's identification of a false statement or withheld information does not involve an error of law, its evaluative judgment on "materiality" can only be challenged if irrational or on some other public law ground ([101]-[102]).*

In addition s193(7) *"requires the LPA to be satisfied that a statement was made or a document used which was materially false, or that material information was withheld, "on the application for the certificate". It is therefore necessary for the LPA to consider whether the false or withheld information is material in relation to the application, including the application form as signed by the applicant for the CLEUD. Accordingly, if there is an issue as to what a s.191 or s.192 application was for, the LPA will need to resolve that question (unless perhaps the case is one where the grounds in s.193(7) are satisfied however that issue might be resolved)".* This latter issue was as noted above a point in this case.

There were a number of grounds which the appellant sought to rely upon, and it is notable that it was successful only on the one dealing with apparent bias. The facts around this, which I have only really briefly touched on, are an unhappy tale of strong local feelings and politics which serve to undermine the lawfulness of an authority's actions and with which practitioners may be familiar (although the detail may be of interest in terms of showing where such conduct oversteps the line). It is also interesting to note Holgate LJ's surprise that record keeping was poor in this case when again it is something with which I suspect many of us unfortunately familiar. It is a salutary tale of those acting on all sides.

I end with Holgate LJ's summary at [165]:

165. I return to my observation at the beginning of this judgment that this is a most unusual case. It remains a mystery as to why the CLEUD was granted in terms which, on one view, were much broader than the scope of the application and why this was not queried or challenged at the time. There is uncertainty as to what information [the CLEUD applicant] provided while his application was under consideration and what information was obtained by the NPA's officers. Unfortunately, documents which could have thrown light on these and other questions have not been retained, assuming, of course, that they were created in the first place. When it came to the process for gathering information and representations on a proposal to revoke the CLEUD and for the taking of the decision itself, this unusual set of circumstances required careful handling. Although the officer directing the process was entitled to gather information from local residents as well as from the current landowners, he had to remain above the fray. Given that the issue was whether the landowner's certificated planning rights should be removed, the officer had to avoid behaving in a way which appeared partisan. He had to remember that in due course he would need to present an objective report addressing all the matters which had to be considered by the Board. Regrettably that did not happen and there plainly was an appearance of bias on the officer's part which tainted that report and the reliance upon it by the members of the Board."

Latunji v One Savings Bank Plc [2026] EWHC 1023 (Ch) Departure from fixed costs

Christopher Moss
Call **2021**

Introduction

In *Latunji v One Savings Bank Pltd* [2026] EWHC 1023 (Ch) Deputy Master Glover considered the costs that should follow from the Claimant's successful application to make final several third-party debt orders and determined that it was appropriate to depart from the fixed costs regime.

Background and facts

The underlying proceedings arose from possession orders made in 2024 against two properties owned by the Defendant as a result of mortgage arrears. Enforcement proceedings were issued in October 2025, the Defendant opposed these and made an application for an injunction preventing the Claimant from taking or continuing any enforcement action in relation to the two properties. This application was dismissed on 28 October 2025 and the Defendant ordered to pay the Claimant's costs of £14,000. The Defendant did not appeal against this costs order and also failed to pay the assessed sum.

The Claimant bank applied for various third-party debt orders against bank accounts held by the Defendant which they sought to make final at the hearing before Deputy Master Glover. The Defendant opposed the Claimant's application and applied to set aside/stay the underlying costs orders. The Defendant's application was multi-faceted and required the claimant to instruct counsel and prepare hearing bundles. The defendant's applications failed and the question arose as to whether it was appropriate for fixed costs to apply.

CPR 45.16(1) provides that *"in any case to which this Section applies [Commencement, Entry of Judgment and Enforcement], unless the court orders otherwise, the only costs allowed in respect of a legal representative's charges are those specified in this Section"*, CPR 46.23 and PD45 Table 7 set out that the applicable fixed costs were £98.50 per application.

Judgment

Deputy Master Glover held that it was appropriate for costs to be assessed, rather than for the usual fixed costs to apply. Materially:

> [36]: *"Third-party debt order applications are largely formulaic, particularly where they are based on debts that have accrued under judgments of a court, as in this case.* ***Mr Latunji has elected to resist these applications for third-party debt orders and he has sought to resist them robustly. He has issued a number of applications within this phase of the claim. He has filed various witness statements and documents, the contents of which,*** *while certainly advertising and addressing his core complaint and concern about the bank's entitlement to enforce under the mortgage,* ***have not actually advanced a meritorious response to the discrete third-party debt order applications. Nonetheless, they have required the court and the creditor, namely the bank, to have to engage with the material that Mr Latunji has provided, as well as to engage with the correspondence passing between the parties. This has become a complex application for third-party debt orders, and a fully contested final hearing for final third-party debt orders, and, in my judgment, it is entirely right to disapply the fixed costs regime."***
> (Emphasis added)

Comment

For those specifically concerned with fixed costs applicable to third-party debt orders, although not cited by the Deputy Master, the issue has been considered on other occasions. Notably by *Akenhead J in Amber Construction Services Ltd v London Interspace HG Ltd* [2007] EWHC 3042 (TCC) whose judgment was applied to the new

fixed costs regime by Judge Paul Matthews in *Chedington Events Ltd v Brake* [2024] EWHC 384 (Ch). Materially, Judge Paul Matthews held:

> "[20] *"The FRC for a final TPDO is appropriate for what Akenhead J calls "debt collection exercises". These will include cases where there is no dispute that there is a debt due from the third party to the judgment debtor, and where there is no substantive opposition to the making of the final TPDO. In the present case, however, the whole process has been fought tooth and nail by the defendants. Every possible obstacle has been thrown in the way of the claimant. Because every step has been vigorously challenged, the claimant has been required to deal with each procedural step fully and carefully. As a result, counsel has been fully involved."*
>
> [21] *"…as Scarman LJ once said, in a quite different context, if you "act out the part of Hampden, you have got to be right": R v Reid [1973] 1 WLR 1284, 1289. So, if they are wrong, and have put the claimant to considerable expense to obtain the order it sought, then the court is likely to "order otherwise" and make an order for the payment of substantive costs under Part 44."*

With respect to fixed costs more widely, there has understandably been greater interest in the circumstances when a departure from fixed costs may be justified given, they now apply to most claims up to £100,000 on the Fast and Intermediate Tracks.

Inevitably, each case will turn on its facts and the extent to which *Latunji* is of wider utility to parties seeking to depart from fixed costs on the Fast and Intermediate Tracks is questionable given the different rules that apply. CPR 45.16(1) allows for the departure from fixed costs in relation to commencement, entry of judgment and enforcement where the court *"orders otherwise"*. This is to be contrasted with the higher bar set by CPR 45.9(1) which applies to fixed costs on the Fast and Intermediate Track where the court must be satisfied that there are *"exceptional circumstances"* justifying disapplication.

The wider lesson from *Latunji* is that fixed costs now cover an extremely wide range of proceedings and inevitably there will be circumstances taking an application or case significantly out of the norm. It will likely take less to convince a court to depart from the fixed costs otherwise applicable to a complicated third-party debt order, given the intention that these procedures are intended to be swift and not likely to face substantive opposition, than the more comprehensive regime applicable on the Fast and Intermediate Track. Nonetheless, Latunji provides a helpful reminder to consider seeking a departure from fixed costs where proceedings have gone significantly out of the norm, and extensive work and costs have had to be incurred.

The continuing saga of reg.64(2) of the EIA Regulations: *R (on the application of Barbican Quarter Organisation Ltd) v City of London Corporation* [2026] EWHC 687 (Admin)

Daniel Kozelko
Call **2018**

Introduction

This case is another in the line of jurisprudence identifying what is required by reg.64(2) of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/571) (**the EIA Regulations**). That regulation provides:

> *64. Objectivity and bias.*
>
> *(1) Where an authority or the Secretary of State has a duty under these Regulations, they must perform that duty in an objective manner and so as not to find themselves in a situation giving rise to a conflict of interest.*

> *(2) Where an authority, or the Secretary of State, is bringing forward a proposal for development and that authority or the Secretary of State, as appropriate, will also be responsible for determining its own proposal, the relevant authority or the Secretary of State must make appropriate administrative arrangements to ensure that there is a functional separation, when performing any duty under these Regulations, between the persons bringing forward a proposal for development and the persons responsible for determining that proposal.*

The question in this case ***(Barbican Quarter Organisation)*** was whether the Defendant council had breached reg.64(2) by granting itself planning permission without proper compliance with the "Handling Note" produced to address reg.64(2). However, to understand this case, it is necessary first to look at the legal background.

The legal background – London Historic Parks and Gardens Trust

The first key case to engage with the requirements of reg.64(2) was *R (on the application of London Historic Parks and Gardens Trust) v SSHCLG* [2020] EWHC 2580 (Admin) ***(London Historic)***. That case concerned the called-in application for the holocaust memorial proposed near the Palace of Westminster. The application was made by the Secretary of State for Housing, Communities and Local Government, and was subsequently called in by the Minister of State for Housing. Importantly, by calling-in the application, an inspector would consider the application and make a recommendation to the Minister of State for Housing (rather than the inspector determining the application, as would happen on appeal). The ultimate decision was to be made by the Minister of State.

The claimant in that case brought pre-emptive proceedings to inquire as to the framework to achieve objectivity and bias in the department. This was done prior to the outcome of the public inquiry, with the apparent intent of securing the mechanism by which the decision would ultimately be made within the department. As part of the proceedings the handling arrangements were disclosed, and the question for Holgate J was whether they met the requirements of reg.64(2). He held they did not.

There was no doubt that a determination by an inspector would meet the requirements of reg.64(2); the issue here was that the matter would then come to the department for a decision. Holgate J held that there was a breach of reg.64(2) as a result of the failure to refer in the handling arrangements specifically to the duty, and in the failure to publish the arrangements. That was because it was *"important to bring home to those to whom the arrangements apply… that the document lays down a regime… to comply with the Secretary of State's legal obligations"*. He held that the arrangements were "not to be treated as simply guidance". Further, publication was required *"so that the public is aware that it sets out the arrangements made… to comply with his legal obligations"* (para 126).

Holgate J considered other amendments also required, including to make clear that collective Ministerial responsibility would not apply to a decision (para 128), and a prohibition on discussions about the application between the relevant Minister (or their officials) deciding the application, and the Secretary of State (or their officials) making the application (para 130). There was also a requirement to include provisions to avoid *"direct or indirect pressure"* on those making the decision (para 131). It did not, however, require the removal of contact with hierarchical superiors as part of the general working relationship (para 134).

Holgate J directed that the handling arrangements be amended to achieve these changes.

The legal background – subsequent cases

The decision in *London Historic* represents the highwater mark of the case law applicable to central government decision-making. However,

two important cases followed address local government decision-making, and emphasised that the rigour of reg.64(2) was apparently more relaxed at that level.

The first was the decision of Lane J in *R (on the application of Ashchurch RPC) v Tewksbury BC* [2022] EWHC 16 (Admin).[14] In that case the critical issue was whether the attendance of the planning officer with *"overall responsibility for the Screening Report"* addressing whether an EIA was required attending a meeting with the developer (another branch of the council) was a breach of the regulation. Lane J held that *"it is important to not lose sight of reality"* and explained that what is *"required of central government may not be the same as is required of a body, such as a Borough Council, given the difference in resources, including access to relevant professional expertise, and the need in smaller authorities, at least, for Members to have a number of different roles"* (para 159). He concluded that it did not matter if the officer attended the meeting, but if wrong that in any event the breach was not one which would make it appropriate to quash the permission (para 161).

The second was the decision of Dan Kolinsky KC (sitting as a Deputy High Court Judge) in *R (on the application of Glass Woodin v Oxford CC* [2025] EWHC 489 (Admin). In that case a councillor sitting on the planning committee had previously been part of a decision concerning the funding of the relevant application being brought forward by the council. The councillor subsequently was part of the planning committee that granted permission. The judge in that case concluded that a decision on funding did not make the councillor a person *"bringing forward a proposal for development"* for reg.64(2) (para 174). He also noted that compliance with reg.10 of the Town and Country Planning General Regulations might be sufficient to meet the requirements of reg.64(2) in any event (para 175).

Finally it is worth noting in passing that the strictures of reg.64(2) do not apply with the same weight at the EIA screening stage; having the administrative arrangements in place was enough with or without them being written down and published in *R (on the application of Hough) v SSHD* [2022] EWHC 1635 (Admin) at para 42.

Barbican Quarter Organisation

Returning to *Barbican Quarter Organisation*, the question in this case was whether a failure properly to follow the "Handling Note" was a breach of reg.64(2) which rendered the permission granted unlawful. Among other things, the Handling Note provided for inaccessible file storage to be introduced to exclude certain officers from certain documents. That had failed and documents in breach of reg.64(2) were available to those officers working for the council as applicant. Fordham J did, however, hold that the relevant officers had not accessed the documents as a matter of fact. Thus, he concluded that the outcome would have been the same whether or not the Handling Note were properly followed.

The judge then went on to consider whether, notwithstanding this conclusion, breach of reg.64(2) made the permission unlawful. He concluded it did not. He first rejected the argument that reg.64(2) did not include an ongoing duty to secure the functional separation and rejected the argument that the question is whether functional separation has in fact been secured (rather, the question is implementing and maintaining the functional separation) (paras 27 and 28). However, Fordham J went on to conclude that he could accept that proper compliance with reg.64(2) would have made no difference given the facts he had found. Put shortly, the *"door of inaccessibility should have been locked. But nobody opened the unlocked door. Nobody even tried"*. There was no prejudice, no materiality, and breach of reg.64(2) was not an *"automatic vitiating consequence"*. Thus, the claim failed on this ground (para 29 onwards).

Comment

Regulation 64(2) is an important stumbling block for an applicant for EIA development that is also

14 Overturned on appeal on a different point [2023] EWCA Civ 101.

the decision-maker. However, it does seem that the courts will approach local government with realism and flexibility (when compared to central government at least). Even so, the need for a framework for proper handling of decisions is essential if apparent breaches are to be explained and a successful judicial review avoided.

There are two further points to make. The first is that, in *Barbican Quarter Organisation*, the failure related to the applicant part of the council having access to files. It might be asked what would have happened if it were the officers of the decision-making part of the council having such access. Typically, it is not the officers that are the decision-makers but rather the planning committee. This poses the interesting question of whether reg.64(2) can effectively bite in circumstances when separation between officers has failed, but this does not appear to have impacted upon the true decision-maker (the planning committee). It raises the question of whether the recommendation in an officer's report is enough to cause a legal problem notwithstanding that separation.

The second is that reg.64(2) is not the only key stumbling block for a local authority applying to itself. The other is in relation to publication of information; a council applying to itself is captured by para 9 of Schedule 12A of the Local Government Act 1972. As such, when a council applies to itself, it must be careful not to assert documents are "exempt" from publication where it might otherwise do so. Both this and reg.64(2) will be fruitful provisions for prospective claimants in such circumstances.

R (River Action) v Ofwat [2026] EWHC 586)

Jake Thorold
Call **2020**

Introduction

This judicial review claim concerned decisions taken by Ofwat in December 2024 as to the level of expenditure that water companies could recover from their customers from 2025-2030. In particular the Claimant, a campaign group on river health, targeted decisions on the conditions attached by Ofwat on the expenditure recoverable for work by water companies on *"storm overflow arrangements"* (i.e. circumstances where a sewage treatment works is above capacity, resulting in excess wastewater being diverted into open water, such as rivers).

In a nutshell, the Claimant contended that the conditions attached by Ofwat would enable water companies to charge their customers twice for the same level of service. This was notwithstanding a previous commitment by Ofwat in 2021 that customers would not pay twice for environmental improvement works which should already have been delivered.

The Facts

This judicial review was brought specifically in relation to arrangements made by United Utilities Water Limited, a water company in northwest England. If successful, however, the grounds of challenge would have had ramifications for all water companies in England and Wales.

In December 2024, Ofwat concluded an exercise to set the charges that the sixteen largest water companies could make in the period April 2025-March 2030. This process involved the setting of *"expenditure allowances"* (i.e. what could be charged to customers) alongside the service levels and objectives that the water companies

would be expected to deliver in exchange for such allowances.

A condition of the expenditure allowances for the water companies was that *"all funding is for enhancing the function of the asset beyond permit compliance"* – in short, water companies could only charge customers in respect of expenditure on *"storm overflow arrangements"* which resulted in the infrastructure performing better than it was already required to pursuant to the applicable environmental permit.

The Claimant contended, however, that the conditions should require the water companies to provide proof that the relevant asset / infrastructure had **in fact** been operating in accordance with any / all conditions of the applicable environmental permit **prior** to any enhancement works. The Claimant's essential argument was that, absent this requirement, water companies would be able charge customers for *"enhancements"* which in reality did little more than bring that asset / infrastructure into compliance with its *existing* legal obligations. This, the Claimant argued, contradicted Ofwat's policy that customers should not pay twice because it produced a risk – approaching a certainty according to the Claimant – that customers would in fact do so given water companies' widespread failings to comply with their existing legal obligations.

The Claimant's central ground of challenge was that it was irrational for Ofwat to adopt an approach which would enable customers to be charged twice for the same service levels, contrary to Ofwat's stated policy that this could not occur.

Decision

At the outset of the *"decision"* section of his judgment, Mr Justice Swift stated (at [24]) that he *"accept[ed] as a general proposition that having set a policy objective for itself* (i.e. that customers would not pay twice), *it would be unlawful for Ofwat to act contrary to that policy without good reason"* [25].

It was Ofwat's position, however, that there was no contradiction. As formulated by Mr Justice Swift, the question for the court was therefore whether Ofwat's conclusion – i.e. that there was no contradiction – was not one reasonably open to it. *"In most cases",* Mr Justice Swift opined, *"the relevant question should be whether there was a sufficient logical basis for the conclusion that Ofwat reached"* [25].

In concluding that there was such a logical basis, Mr Justice Swift relied heavily on the witness evidence provided by Ofwat's senior director with responsibility for price reviews ([27]-[29]). In summary, Mr Justice Swift was satisfied that the process adopted by Ofwat did in fact include a process to ensure that expenditure to remediate pre-existing issues was not included within the category of *"enhancement expenditure",* for which customers could be charged ([29]). Moreover, Mr Justice Swift pointed to specific steps taken by Ofwat prior to its December 2024 decision, including requiring water companies to provide evidence that *"enhancement expenditure"* would not be used to meet the cost of compliance with existing permit conditions.

Comment

This is a somewhat unusual case, not least because of its heavy factual content with very little consideration of the applicable legal principles. The result is a sense of the court somewhat struggling to ascertain how it should approach the Claimant's case. With respect, the statement that *"in most cases"* the Court should consider whether Ofwat had a *"sufficient logical basis"* for its conclusion is unhelpfully vague.

Beyond this, there are two key takeaways.

Firstly, the court's heavy reliance on the witness evidence from Ofwat is a further reminder of the deference which tends to be afforded to the decisions of expert regulators. Judicial review claimants will need to provide compelling evidence to overcome this, which doesn't appear to have been the case here.

Secondly, the public outcry regarding the health of the UK's rivers means that regulators such as Ofwat and the Environment Agency are under evermore scrutiny. Notably, in December 2025 the Office for Environmental Protection published reports concluding that Ofwat, the Environment Agency and Defra had failed to comply with environmental law in respect of combined sewer overflows.

Use it or lose it: presumed dedication under section 31 Highways Act 1980

Samuel Moss
Call **2023**

Roxlena Limited v R (The Ramblers' Association) [2026] EWCA Civ 534

The Court of Appeal has helpfully clarified the position on deemed dedication under section 31 Highways Act 1980, reaffirming that ***intermission in*** use and ***interruption of*** use are categorically distinct ideas **[17].** Lewison LJ has helpfully resolved any doubt over the relevance of the reason for a gap in use and provided an authoritative eight-point restatement of the law. **[60].**

Facts

Cumbria County Council made a Definitive Map Modification Order in January 2021 adding 18 footpaths and a bridleway across Hayton Wood on Roxlena's land **[3].** A Planning Inspector declined to confirm the Order, finding that a four-month cessation of use during the 2001 foot and mouth disease outbreak meant the paths had not been "actually enjoyed" for the full 20-year period required by section 31(1) **[4].** The Ramblers' Association challenged that decision by judicial review, and it was quashed by Lang J **[6].** Roxlena appealed. The Court of Appeal dismissed that appeal, and the decision itself has been remitted to the Secretary of State for determination on the correct legal basis **[73].**

The Key Legal Points

1. **Intermission or Interruption.** The Court drew a crucial distinction between an *intermission* (a gap in use) and an *interruption* (an overt act disputing the right) **[32]-[40].** An interruption requires "an obstruction … an overt act indicating that the right is disputed" (para 37). A gap in use, however long, is not automatically an interruption.

2. **The reason for the gap is relevant.** Contrary to Kerr J's earlier observation in *R (Roxlena Ltd) v Cumbria CC* [2017] EWHC 2651 (Admin) that "the cause of any non-use is not the issue", the Court held that the reason for an intermission may well be legally relevant **[48], [50], [58]-[60].** Critically, the Inspector failed to consider that after the foot and mouth restrictions lifted, public use resumed and continued for eight or nine further years. That resumption was plainly significant but was simply ignored by the Inspector **[57].**

3. **The Inspector's error.** The Inspector asked only whether the four-month gap was *de minimis,* concluding it was not, and that the 20-year threshold was therefore unmet **[13], [62].** This was the wrong test. The correct approach requires surveying the 20-year period as a whole and asking whether the use would have brought home to a reasonable landowner that a continuous right was being asserted **[50]; [60(iv)].**

The Eight Propositions

Lewison LJ set out an authoritative restatement of the law in eight propositions [60]:

1. A public right of way will be deemed to have been dedicated by 20 years continuous enjoyment of the way by the public.
2. Use means actual use of the relevant type (walking, riding, etc.) for the particular way.
3. Use must be "as of right", i.e. without force,

stealth or permission – assessed objectively, rather than on the subjective belief of particular members of the public.

4. Use must be sufficient to alert a reasonable non-absentee landowner that the public is asserting a continuous right of enjoyment – assessed objectively.
5. Sufficiency is assessed over the 20-year period as a whole, not a particular sub period in isolation.
6. Use need not be continuous throughout the 20-year period. An intermission will be relevant, though not necessarily fatal to section 31 deemed dedication.
7. In considering the effect on the mind of the reasonable landowner of an intermission in use, it will be relevant to consider any "explanation" for that intermission which would have been apparent, so as to consider whether the non-use in a given period is consistent with the public's assertion of a right in that period.
8. Whether "use" is sufficient is a distinct question to whether the "enjoyment" has been "without interruption". "Interruption" requires not merely cessation of use but "an obstruction", an "overt act" or an "interference with the enjoyment of the right."

Practical Guidance for Local Authorities

These eight propositions clarify the approach local authorities should take to section 31 matters. Importantly:

Is it an intermission or interruption? Local authorities should consider whether there has been an "interruption" first. If there has been an interruption, the statutory test is not met. If there has been an intermission, the question is whether there has been sufficient use over the 20 period, and the reason for that intermission will be legally relevant. If the intermission arises out of restrictions imposed by law (i.e. foot and mouth closures, or even Covid-related restrictions), ***Roxlena*** says that is unlikely to defeat a claim if use was otherwise consistent over the 20-year period.

20 years of use should be considered as a whole. Local authorities should gather evidence of use across the entire 20-year period. Do not treat a gap — even a substantial one — as automatically defeating the dedication. Consider the period as a whole, including what happened either side of the intermission **[57].**

Contributors

Celina Colquhoun

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.

celina.colquhoun@39essex.com

Ned Helme

Call **2006**

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

ned.helme@39essex.com

Daniel Kozelko

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.

daniel.kozelko@39essex.com

Contributors

Jake Thorold

Call **2020**

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.

jake.thorold@39essex.com

Christopher Moss

Call **2021**

Christopher has a particular interest in planning and environmental work and is ranked in the 2026 Legal 500 as a Rising Star. He regularly appears in court, inquiries and hearings as sole or junior counsel and acts for local authority, private sector, and third sector clients. His recent instructions have included representing a local authority at a multi-day enforcement inquiry covering 4 linked appeals, advising claimants and local authorities on matters including rights of way and related issues as well as s.73 applications raising *Hillside* problems. Christopher has also gained experience advising on the intersection of planning, public, and contract law by working with Jonathan Seitler KC to advise a local authority on potential challenges to the tabling of a commercial offer to purchase a significant parcel of land.

christopher.moss@39essex.com

Samuel Moss

Call **2023**

Samuel's broad practice spans public, commercial, planning, Court of Protection, and civil liabilities work, but he accepts instructions across all of Chambers' practice areas. Samuel has a busy court practice and regularly appears in the County Court, Coroner's Court, High Court and First-tier Tribunal. Samuel holds a First-class degree from the University of Oxford and Distinctions in the GDL and the Bar Course from City, University of London. During his law studies, Samuel held major named scholarships from Gray's Inn and City Law School. Samuel has a working proficiency in French and is very happy to take on cases with French-speaking clients or a Francophone link.

samuel.moss@39essex.com

Key Contacts

Andrew Poyser
Director of Clerking
+44 (0)20 7832 1190
+44 (0)7921 880 669
andrew.poyser@39essex.com

Elliott Hurrell
Director of Clerking
+44 (0)20 7634 9023
+44 (0)7809 086 843
elliott.hurrell@39essex.com

Chief Executive Officer: **Lindsay Scott**
Director of Clerking: **Andrew Poyser**

39essex.com
020 7832 1111

London
81 Chancery Lane
London
WC2A 1DD
DX: London/Chancery Lane 298
+44 (0)20 7832 1111

Dubai
Dubai International Financial Centre (DIFC)
Innovation Hub
Gate Avenue
Zone D – Level 1
AL Mustaqbal St
UAE

Singapore
28 Maxwell Road
#04-03 & #04-04
Maxwell Chambers Suites
Singapore 069120
+65 6320 9272

Kuala Lumpur
#02-9
Bangunan Sulaiman
Jalan Sultan Hishamuddin
50000 Kuala Lumpur
Malaysia
+60 32 271 1085