Case Law Update: Business as Usual?

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Introduction

This article considers various significant planning cases decided in the last 12 months. It organises them thematically, so that it may be of use to the busy practitioner. It provides sufficient background information that the key points arising in the cases are intelligible, before commenting on their implications. Where it has proved possible, it indicates whether an appeal is outstanding.

Each planning case decided in the courts will have some importance, in that there is public interest inherent in good administration and planning cases tend to have wider implications than other civil litigation. That is quite apart from the importance of the outcome to the parties concerned. But not all cases contribute significantly to the development of the law, which is the threshold for inclusion here. That threshold set, it may strike the reader that there are numerous judgments included in the paper. That is testament to the determination of those sitting to ensure that, so far as possible, it has been business as usual in the courts this year, leading to an impressive throughput of claims in the circumstances. It also reflects the fact that statute, policy and guidance in this area has been the subject of frequent change, reducing certainty and offering much scope for challenge.

Finally, the paper assumes, as it must, that the reader is reasonably familiar with the town and country planning regime and parallel processes (for planes, trains, automobiles and power stations) and to a lesser extent with other areas, e.g. commons registration. It posits that there have been developments in the law in relation to the following topic areas, and tackles them in this order:

- Plan-making:
  - — Neighbourhood planning: time limit for challenge.
  - — Neighbourhood planning: basic condition re national policy.
  - — Local Plans: Green Belt exceptional circumstances.
- Decision-taking:
  - — Process: resolution to grant and scope of delegation.
  - — Interpretation of policy.
  - — Heritage.
- Interpreting a planning permission.
- Permitted development rights.
- Nationally significant infrastructure.
- Judicial review and statutory challenges:
  - — Procedure.
  - — Costs.
- Enforcement:
  - — Injunctions.
  - — Prosecution: POCA.
- Town or village green and "curtilage".
- Post Brexit.

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Plan-making

Neighbourhood Planning: Time limit for challenge

Fylde Coast Farms Ltd

The Supreme Court handed down its judgment in *R. (on the application of Fylde Coast Farms Ltd) v Fylde BC*[1] in May 2021. The case concerned the St Anne's on the Sea Neighbourhood Development Plan, which had been promoted by the Town Council. The claimant, later the appellant, was the owner of a site which had been excluded from the settlement boundary, thus reducing its development potential.

The challenge was to the *making* of the neighbourhood plan. The making of a neighbourhood plan is the seventh (and last) stage in the neighbourhood plan process. The alleged unlawfulness related to the fifth stage of the neighbourhood plan process, consideration of the examiner's report by the local authority. This is the stage at which a decision is made as to whether to put the plan to referendum. The issue before the court was whether the claim had been brought within time, applying the Town and Country Planning Act 1990 s.61N, a section which makes statutory provision for public law challenges to each of steps five, six and seven in the neighbourhood plan process.

As the court acknowledged, the act of a public authority is taken to be valid and effective unless it is challenged and quashed by legal action taken in proper time. The Supreme Court articulated the key issue to be resolved in the claim as follows. Where a public law measure is taken at the end of and on the basis of a series of steps and its lawfulness is contingent on the lawfulness of each of the steps leading up to it, a question may arise whether the lawfulness of the final measure (in that case, the making of the neighbourhood plan) can be impugned by a claim brought within time assessed by reference to that measure by showing that an earlier step was affected by unlawfulness, even though the claimant would by then be out of time to challenge the lawfulness of the earlier step if taken by itself ([36]). In other words, should the courts accept a "wait to the end" approach, in multi-stage processes? This, the court said, has been a longstanding point of contention in planning law. The court surveyed the legal landscape in order to identify whether there was an established starting point for the interpretation of s.61N.

The Supreme Court noted that in *Burkett*,[2] the House of Lords held that it was open to the claimant to challenge the EIA process at the end, by a challenge to the grant of planning permission. That was followed in *Catt*[3] in the Court of Appeal. However, in *Champion*,[4] Lord Carnwath reserved his position as to whether *Catt* was correctly decided and suggested that this "wait to the end" approach might have to be revisited in light of the administrative disruption it can produce. An interesting question arising from the proposal for new suspended quashing orders in the Judicial Review and Courts Bill 2021 is whether there is scope for such orders to reduce the disruption Lord Carnwath referred to. In thinking about that issue, it is necessary to consider the potential that following proper process will impact upon outcome; and a linked but distinct point about interplay with the Senior Courts Act 1981 s.31.

In *Fylde*, however, the issue was not one in which the court itself was required to balance the various competing factors. Its task was an interpretive one, to decide whether s.61N is permissive or restrictive in its purpose and effect, i.e. whether it recreates new or replacement rights of public law challenge or whether it simply imposes new restrictions as conditions for the exercise of rights which arise anyway from the general law ([42]).

[1] *R. (on the application of Fylde Coast Farms Ltd) v Fylde BC* [2021] UKSC 18; [2021] 1 W.L.R. 2794.
[2] *R. (on the application of Burkett) v Hammersmith and Fulham LBC (No.1)* [2002] UKHL 23; [2002] 1 W.L.R. 1593; [2002] J.P.L. 1346.
[3] *R. (on the application of Catt) v Brighton and Hove CC* [2007] EWCA Civ 298; [2007] J.P.L. 1517.
[4] *R. (on the application of Champion) v North Norfolk DC* [2015] UKSC 52; [2015] 1 W.L.R. 3710.

The court did not think there was a clear general answer as to whether "challenging early" or "waiting to the end" is preferable. It said that this was a matter for Parliament to decide and that if the choice in s.61N had been made with sufficient clarity then it must be respected.

What unlocked the interpretation of the statutory section for the court was its recognition that it made provision only in relation to challenges to the fifth, sixth and seventh stages of the neighbourhood plan process, leaving public law challenges available in relation to earlier stages. Necessarily therefore, the court found, the provisions dealing with the fifth, sixth and seventh stages were restrictive rather than permissive ([46]–[48]). The court added that was thought to be plausible that in enacting s.61N, Parliament had not wished to allow the outcome of a referendum to be set at nought by reason of technical legal arguments which could have been sorted out before the referendum was held ([55]).

As such, the challenge was held to be out of time. It is perhaps self-evident, but it is nonetheless worth emphasising that the take-home point for would-be challengers to neighbourhood plans/those defending such claims is that the six week time limit for challenge will begin once the decision is made/result of the referendum is declared as the case may be, i.e. six weeks from that stage of the process, not six weeks from the end of the process as a whole. It does not make a change to the "wait to the end" approach in planning claims more generally, but it does give further credence to the case for review.

Neighbourhood Planning: Basic condition re national policy

Lochailort

A short time after last year's case law update was given, the Court of Appeal allowed *Lochailort Investment Ltd's*[5] appeal against Lang J's decision to dismiss its statutory challenge. The case turned on the proper interpretation of Policy 5, a local green space policy within the Norton St Philips Neighbourhood plan. It is of interest because it provides useful clarity in respect of one of the "basic conditions": if "having regard to national policies … it is appropriate to make the order."[6] Disagreeing with the High Court, the Court of Appeal found that Policy 5 was "more restrictive than national policies for managing development within the Green Belt and that meant it was not consistent with national Green Belt policy" ([33]). The court noted that none of the papers put before the District Council independently considered this question and as such the validity of the decision was, in effect, dependent on the examiner's report. The court acknowledged that a departure from national policy is permissible, but if that is to be done, reasoned justification must be provided. In the examiner's report in *Lochailort*, no such justification was given and therefore, the court held, the policy did not satisfy basic condition ([37]).

What can be taken from the *Lochailort* case is that although the legislation governing neighbourhood plans permits departure from national policy within neighbourhood plans, there must be express justification for doing so (and of course the decision must be within the bounds of rationality).

Local plans: Green Belt exceptional circumstances

Cherwell Development Watch

The first instance decision in *Cherwell Development Watch Alliance v Cherwell DC*[7] concerned a Planning and Compulsory Purchase Act 2004 s.113 challenge, to Cherwell's "Partial Review—Oxford's Unmet Housing Need". The plan committed the Council to working with the City of Oxford to delivery 4,400 homes in Cherwell to meet Oxford's unmet housing need by 2031. As Thornton J put it, "in simple terms,

[5] *R. (on the application of Lochailort Investments Ltd) v Mendip DC Norton St Philip Parish Council* [2020] EWCA Civ 1259; [2021] J.P.L. 568.
[6] Town and Country Planning Act 1990 Sch.4B para.8.
[7] *Cherwell Development Watch Alliance v Cherwell DC* [2021] EWHC 2190 (Admin).

the spatial strategy adopted is to locate housing development on Green Belt land around North Oxford, including the site of the North Oxford Golf Course, with 30ha of agricultural land reserved for a replacement golf course, if required" ([2]). Ground 1 alleged that in deciding that meeting a neighbouring local authority's unmet housing needs constituted the necessary "exceptional circumstances", the examination Inspector had failed to take into account a reduction in housing need since the previous full assessment. On the facts, the court found that criticism was not made out.

It now seems to be an established part of Green Belt orthodoxy that, at least in principle, housing needs arising from a neighbouring administrative area are capable of contributing to making a case for the exceptional circumstances necessary for Green Belt release. The Green Belt cases considered in the 2020 legal update on the point go some way to explaining why that is so: in *IM Properties Development Ltd v Lichfield DC*,[8] it was held that there is no requirement that Green Belt land is released as a "last resort".[9] Whether "exceptional circumstances" exist is a "cumulative question", i.e. each factor relied upon does not need to be, of itself, exceptional. Rather, it is the totality of the considerations taken together, see *Compton Parish Council v Guildford BC*.[10] Whether exceptional circumstances justifying Green Belt release do or do not exist is a question of planning judgment; so too the relationship between the level of housing need and the extent of release. It is one implication of the duty to co-operate, that such judgments require to be made (the cynic might suggest: negotiated) at the local level.

Decision taking

Process: Resolution to grant and scope of delegation

Flynn

A resolution to grant planning permission subject to "an appropriate legal agreement" (a s.106 planning obligation) and the scope of delegation to officers arising from that resolution were the related subjects of the Court of Appeal decision in *Flynn v Southwark LBC*.[11] The Court of Appeal emphasised that no novel point of law arose. Nevertheless, the court's judgment provides useful guidance on the approach to be taken to construing the delegation of legal authority to officers.

Upholding the decision of Dove J in the High Court, the Court of Appeal rejected the argument that the report to committee was part of the "instrument of delegation". It said that the report contained the guidance to be applied in negotiating an "appropriate" s.106 agreement, as well as being a record of "the main reasons and considerations" behind the committee's decision. But the instrument of delegation was the resolution ([49]). The court said that if members wanted to stipulate the specific content of a planning obligation needed to make the development acceptable, then such provision had to feature expressly in the wording of the resolution to grant itself ([47]). As to the reading of officer reports in this context, the *Mansell*[12] principles were applied, i.e. that such reports must not be read with "undue legalistic [rigour]", but "with reasonable benevolence, and bearing in mind that [they are] written for councillors with local knowledge" ([48]).

On one view, the case illustrates the potential for difficulties to arise when matters of detail to be addressed in a s.106 planning obligation are left open at the time of the resolution to grant planning permission. However, the substantive affordable housing issue in this case related to arrangements within

[8] *IM Properties Development Ltd v Lichfield DC* [2014] EWHC 2440 (Admin); [2014] P.T.S.R. 1484.
[9] *IM Properties Development Ltd v Lichfield DC* [2014] EWHC 2440 (Admin) per Patterson J at [90]–[91] and [95]–[96].
[10] *Compton Parish Council v Guildford BC* [2019] EWHC 3242 (Admin); [2020] J.P.L. 661.
[11] *Flynn v Southwark LBC* [2021] EWCA Civ 827.
[12] *Mansell v Tonbridge and Malling DC* [2017] EWCA Civ 1314; [2018] J.P.L. 176.

the s.106 planning obligation aimed at addressing a "possible but unlikely" fall-back scenario,[13] providing three options for the provision of affordable housing in that scenario. It is not unusual for complex and long-running schemes to have to contemplate alternative scenarios, and the s.106 drafting necessary to address them is commonly undertaken after a resolution to grant. It may be thought onerous to insist on it in advance of a committee considering the application.

Interpretation of policy

Peel, Paul Newman Homes, Monkhill, Gladman

In September 2020, the Court of Appeal gave judgment in *Peel Investments (North) Ltd v Secretary of State for Housing, Communities and Local Government*.[14] Then, in early 2021, three judgments were handed down by the Court of Appeal within weeks of one another, concerning the "tilted balance": *Paul Newman Homes Ltd v Secretary of State for Housing, Communities and Local Government and Aylesbury Vale DC*,[15] then *Monkhill Ltd v Secretary of State for Housing, Communities and Local Government and Waverley BC*,[16] then *Gladman Developments Ltd v Secretary of State, for Housing, Communities and Local Government, Corby BC and Uttlesford DC*.[17] Applications for permission to appeal in *Paul Newman Homes*, *Monkhill* and *Gladman* have been made to the Supreme Court. It is understood that the appellants have asked that they be heard together. At the time of writing, the applications have not yet been decided by the Supreme Court.

The *Peel* case concerned policies contained within a local plan which was time-expired (the plan period was to 2016, the decision was taken in 2018). The Secretary of State found that policy EN2, a policy couched in restrictive terms, protecting an area designated as "Greenway", was up-to-date, saying "even in the absence of policies for the need and distribution of housing, there remains a plan in place, and a policy for the land in question which is sufficient to establish that the development are unacceptable in principle". In the High Court, Dove J noted (at [66] of his judgment) that:

> "it is very far from uncommon to have policies in a plan related to environmental protection whose objectives will, and are intended to, continue well beyond the end of a plan period. Whilst, of course, when a local development document is formulated it is formulated as a whole, and is intended to present as a coherent suite of policies, that objective is not inconsistent with the inclusion of some environmental policies being intended and designed to operate on a longer time scale than that which may be contemplated by the plan period. The kind of policies to which this might apply are policies such as Green Belt (one of the characteristics of which is its 'permanence'), or policies pertaining to environmental assets such as those relating to heritage assets or internationally protected and irreplaceable habitats. It would be both counter-intuitive, and contrary to long standing provisions of national policy, if policies in a development plan protecting these interests were deemed out-of-date at the expiration of a plan period."

The Court of Appeal agreed, for essentially the same reasons. In a judgment given by Baker LJ (with whom the other members of the court agreed), the notion that the expiry of the plan period rendered policies out-of-date was rejected (see e.g. [67]). Dove J's reasoning was expressly endorsed (see the judgment of Baker LJ at [68]).

[13] See the High Court judgment in *Flynn v Southwark LBC* [2019] EWHC 3575 (Admin) at [22].
[14] *Peel Investments (North) Ltd v Secretary of State for Housing, Communities and Local Government* [2020] EWCA Civ 1175; [2021] J.P.L. 465.
[15] *Paul Newman Homes Ltd v Secretary of State for Housing, Communities and Local Government and Aylesbury Vale DC* [2021] EWCA Civ 15; [2021] P.T.S.R. 1054.
[16] *Monkhill Ltd v Secretary of State for Housing, Communities and Local Government and Waverley BC* [2021] EWCA Civ 74; [2021] J.P.L. 1178.
[17] *Gladman Developments Ltd v Secretary of State, for Housing, Communities and Local Government, Corby BC and Uttlesford DC* [2021] EWCA Civ 104; [2021] J.P.L. 1191.

The *Peel* judgment has important implications for the assessment of local policies as part of decision making. A policy specific enquiry is needed, in order to identify whether the sorts of long-term policy objectives given weight in the *Peel* case are in play, even where they are "shorn of their strategic context".

Paul Newman Homes was the first of three cases in which, in one way or another, the court addressed the relationship between the operation of the tilted balance and the statutory presumption in favour of the development plan in the Planning and Compulsory Purchase Act 2004 s.38(6).

In *Paul Newman Homes*, the court considered the two "triggers" for the application of the tilted balance under the National Planning Policy Framework ("the NPPF") para.11d).

As to the first trigger ("where there are no relevant development plan policies"), the Court of Appeal agreed with the judgment of Sir Duncan Ouseley in the High Court, that the concept of "relevance" means that the policy or policies must have a real role to play in the determination of the application, but there is no requirement that it or they should be enough in themselves to enable the decision maker to grant or refuse that application. The court said that "relevant" "does not mean, and cannot mean, 'determinative'" ([39]). It added (at [40]) that in a case that involves a housing application, there is no reason to restrict the concept of relevance to policies that are specifically targeted at the type of development under consideration or the location of the proposed development. It said that:

> "a general development control policy may be capable of having a real role to play in the outcome of the application; its *importance* is a different matter, which will depend on the facts and circumstances of the particular case, and is a matter of value judgment on which the expertise of the planning inspector will carry significant weight." (emphasis as original)

As to the second trigger (where "the policies which are most important for determining the application are out-of-date"), the court said (at [46]) that the "Judge was right to find that the second trigger contains no requirement that the up-to-date basket of the most important policies in the development plan for determining the application should itself also constitute a body of policies sufficient for the determination of the acceptability of the application in principle" (and Dove J had said no such thing in *Wavendon Properties Ltd v Secretary of State*[18]).

In *Monkhill*, the single issue was whether the application of AONB policy in the NPPF "great weight should be given to conserving and enhancing landscape and scenic beauty" in an AONB, per what was the NPPF para.172, now para.176, "provides a clear reason" for refusing planning permission under para.11d. Monkhill Ltd's principal contention was that a policy specifying the degree of weight to be given to a particular consideration is not capable of providing, in its application, a clear reason for refusal" ([22]). The court disagreed, finding that such policies can indeed provide a clear reason for refusal within the meaning of para.11d). The sense of the word "provides" in the context of para.11d is that "the application of the policy in question yields a clear reason for refusal; in the decision-maker's view, as a matter of planning judgment" (see the judgment of Sir Keith Lindblom, Senior President of Tribunals, with whom the other members of the court agreed, at e.g. [28]). The same approach would hold in respect of heritage policy relating to proposals causing less than substantial harm (see the judgment at [45]) and Green Belt policies (see the judgment at [46]).

The *Gladman* case involved challenges to decisions on two s.78 planning appeals in which the tilted balance was engaged (NPPF para.11d)(ii)), in that the local planning authorities could not demonstrate a five-year housing land supply.

There were two principal issues before the Court of Appeal, together with what appears to have been a subsidiary point, all of which had been argued in the High Court without success.[19]

[18] *Wavendon Properties Ltd v Secretary of State for Communities and Local Government* [2019] EWHC 1524 (Admin); [2019] J.P.L. 1486.

[19] The High Court's judgment (that of Holgate J) was described in Jonathan Easton's 2020 paper as "perhaps the most significant decision on the tilted balance" in that year.

The first issue: whether a decision maker is required *not* to take into account the relevant polices of the statutory development plan for the area when applying the tilted balance. The second, connected issue: whether it is necessary for decision makers to apply the tilted balance and the statutory duty in s.38(6) as separate and sequential steps in a two-stage approach. The final argument concerned whether applying the tilted balance should exclude the exercise anticipated in what was the NPPF para.213 (now para.219), giving development plan policies pre-dating the NPPF due weight according to their degree of consistency with the NPPF.

In the High Court, Holgate J concluded that the NPPF "does not exclude development plan policies from the tilted balance; they are relevant considerations". He said that the issue involved essentially the same arguments as had previously been rejected by the courts (e.g. the Supreme Court in *Hopkins*,[20] by the Court of Appeal in *Hallam Land Management*[21] and at first instance in *Crane*[22] and *Woodcock*[23]), notwithstanding wording changes between the 2012 and 2019 versions of the NPPF. The Court of Appeal agreed. Although the terms of the policy have changed since 2012, the court said that "much of the judicial … remains valid and relevant" ([34]).

On the first issue, the Court of Appeal[24] found that decision-makers are not legally bound to disregard policies of the development plan when applying the tilted balance under para.11(d)(ii). The court said that it was inherent in the reasoning in the decisions of the Supreme Court and Court of Appeal in, e.g. *Hopkins* and *Hallam Land Management* that in practice, "the performance of the statutory duty under section 38(6) and the performance of the exercise entailed in the NPPF policy for the 'tilted balance' may be inter-related, and that, under the provision now in paragraph 11(d)(ii), conflict or compliance with development plan policies can bear on the assessment required by the NPPF policy itself" (see [43]). The court said that the policies of the development plan will often inform the balancing exercise required under para.11(d)(ii) ([59]). In many cases, it will facilitate the assessment of adverse impacts and benefits in the tilted balance to consider not only the relevant policies of the NPPF but also the corresponding policies of the development plan ([59]). A complete assessment under para.11(d)(ii), in which adverse impacts and benefits are fully weighed and considered, may well be better achieved if relevant policies of the development plan are taken into account ([60]). Whether and how policies of the plan are taken into account in the application of para.11(d)(ii) will be a matter for the decision-maker's planning judgment, in the circumstances of the case in hand ([61]).

On the second issue, the Court of Appeal concluded that there is:

> "there is nothing to prevent an approach in which the application of the 'tilted balance' under paragraph 11d)ii is incorporated into the decision-making under section 70(2) of the 1990 Act and section 38(6) of the 2004 Act in one all-encompassing stage. The decision-maker is not obliged to combine in a single exercise the paragraph 11d)ii assessment with the assessment required to discharge the duty in section 38(6) . In principle, however, he lawfully may." ([66])

If that is how it is done, the decision-maker must keep in mind the statutory primacy of the development plan and the statutory requirement to have regard to other material considerations, including the policies of the NPPF and specifically the policy for the "tilted balance" under para.11(d)(ii), and must make the decision, as s.38(6) requires, in accordance with the development plan unless material considerations indicate otherwise. It will not then be necessary to consider twice, in separate stages, matters that arise both under the relevant policies of the development plan and under the policies of the NPPF. Rather than

[20] *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] UKSC 37; [2017] 1 W.L.R. 1865; [2017] J.P.L. 1084.
[21] *Hallam Land Management Ltd v Secretary of State for Communities and Local Government* [2018] EWCA Civ 1808; [2019] J.P.L. 63.
[22] *Crane v Secretary of State for Communities and Local Government* [2015] EWHC 425 (Admin).
[23] *Woodcock Holdings Ltd v Secretary of State for Communities and Local Government* [2015] EWHC 1173 (Admin); [2015] J.P.L. 1151.
[24] Judgment of Sir Keith Lindblom, Senior President of Tribunals, with which the other members of the court agreed.

merging the two presumptions, the court said that this approach acknowledges the existence and status of both presumptions and recognises that they can lawfully be applied together ([67]).

It followed from those conclusions that what was the NPPF para.213 (now para.219) may properly be taken into account in the balancing exercise under para.11(d)(ii)) ([68]).

On the third issue: the Court of Appeal concluded NPPF/213 can properly be taken into account in balancing exercise under para.11(d)(ii) and is not only relevant to weighting of DP policies under s.38(6) [68].

As will be apparent, although each of these cases concerned the tilted balance, the issues arising in each were different. To the extent that there are consistent themes, they are familiar ones: that the court's starting point is the statutory duty under s.38(6), recognising that NPPF policy is a material consideration which cannot displace the development plan; and that there should be latitude given to the expert decision-maker, including in relation to the approach taken to decision-making. It remains to be seen whether the Supreme Court gives permission in any one or more of the cases.

Heritage

Bramshill, Juden, Stonehenge, Liverpool Open and Green Spaces, Wyeth-Price

The key case in respect of heritage planning over the last 12 months was *City & Country Bramshill Ltd v Secretary of State*.[25] The Grade I listed Jacobean mansion itself and its Grade I registered park and garden are in the front rank of heritage assets in this country. The heritage issues in the case thus played out in the context of a house and garden "of the highest order of outstanding significance".[26]

In the High Court and then in the Court of Appeal, City & Country argued that the NPPF requires decision-makers to undertake an "internal heritage balance" and it is only of there is "net" less than substantial heritage harm, that the NPPF para.196 (now para.202) would be engaged. That would necessitate offsetting heritage benefits against heritage harms when making an assessment of the impact of a development proposal on a heritage asset or assets, to lead to a net outcome. That "net" heritage harm approach, it said, was founded in the Court of Appeal's judgment in *Palmer v Herefordshire Council*[27] (a case in which there was in fact no harm to significance). The Inspector did not conduct an internal heritage balance and did not seek to arrive at a "net" balance. Instead, she had approached her assessment on the basis that para.196 applied where the proposals led to less than substantial harm and took account of benefits to significance and other public benefits as part of the para.196 balance. City & Country argued that her failure to adopt the internal heritage balance approach was unlawful.

The court disagreed.[28] It said (at [74]) that the NPPF does not direct the decision-maker to adopt any specific approach to identifying "harm" or gauging its extent. It said that national policy is in general terms. There is no one approach, suitable for every proposal affecting a designated heritage asset or its setting. The court added (at [76]) that identifying and assessing any benefits to weigh against harm are also a matter for the decision maker. It emphasised (at [79]) that "… every element of harm and benefit must be given due weight by the decision-maker as material considerations …" and (at [80]), the court said that the decision-maker has to adopt "a sensible approach".

In terms of the specific point about "off-setting" said to arise from *Palmer*, the court distinguished between harms/benefits to a single asset, which might result in no harm and benefits to other heritage assets, which "would not prevent 'harm' being sustained by the heritage asset in question but are enough to outweigh that 'harm' when the balance is struck" (see [78]). The court did not sanction off-setting of

[25] *City & Country Bramshill Ltd v Secretary of State for Housing, Communities and Local Government* [2021] EWCA Civ 320.
[26] This was one of the appeal Inspector's findings.
[27] *R. (on the application of Palmer) v Herefordshire Council* [2016] EWCA Civ 1061; [2017] 1 W.L.R. 411.
[28] Judgment of Sir Keith Lindblom, Senior President of Tribunals, with whom the other members of the Court agreed.

harm to the significance of one asset by benefit to the significance of another. The Inspector's "methodical" approach, which followed *Jones v Mordue*,[29] took account of all harms and benefits and simply worked through the "fasciculus" of paragraphs within the NPPF was found to be legally impeccable.

In *Bramshill*, the court also considered the meaning of "isolated homes in the countryside". The appellant argued that the Inspector had misinterpreted the NPPF (2018) paras 78 and 79, by failing to consider that the proposal was a cluster of dwellings forming a settlement on previously developed land within the curtilage of an existing permanent structure. The Court of Appeal was satisfied the Inspector had made no error of law: the concept of isolated homes in the countryside was not one of law but an undefined part of planning policy in the NPPF that did not lend itself to rigorous judicial analysis. Its application should depend on the facts of the case. It is not about remoteness from other dwellings, but remoteness from a settlement (see the judgment at [33]).

What the Court of Appeal had said in *Bramshill* about the assessment of heritage harms and benefits was considered by Sir Duncan Ouseley in *Juden v Tower Hamlets LBC*[30] in May 2021 and by Holgate J in *R. (on the application of Save Stonehenge World Heritage Site) v Secretary of State*[31] in July 2021.

In *Juden*, the learned judge found (at [67]) that in the report to committee, the officer did not set the heritage benefits against the heritage harm before concluding that the harm was less than substantial. What follows later in the judgment, at [78]–[79] is obiter (not essential to the decision and therefore not binding on subsequent decision makers). The judge referred to his decision in the *Safe Rottingdean v Brighton and Hove CC*[32] case, which concerned the application of local plan policy. He said:

> "whether or not what I said about paragraph 196 in *Safe Rottingdean* was correct, and whether or not Dove J was wise or unwise to follow it in *Kay*, as to which no particular view is expressed in or deducible from *Bramshill*, the Report did not adopt an unlawful approach either under the LBA or as a matter of the interpretation of paragraph 196 NPPF, with or without the light of Bramshill."[33]

It can be seen that e.g. [78] of the judgment does not repeat or refer expressly to the distinction drawn by the Court of Appeal between harms/benefits to a single asset, which when looked at overall, might result in a conclusion that there is no "harm" and benefits to other heritage assets, which "would not prevent 'harm' being sustained by the heritage asset in question but are enough to outweigh that 'harm' when the balance is struck". Instead, depending on how the judgment is read, the judge seems to have treated any harm to the significance of any asset as capable of being offset by any benefit to the significance of any asset ("where a proposal includes both positive and negative heritage elements, as part of the works to a listed building, or its setting or to a conservation area, it is open to a decision maker either to treat them together as reducing or eliminating the heritage harm against which other benefits have to be set …").

Although legislation on heritage assets does not prescribe any single, correct approach to the balancing of harm to those assets against any likely benefits, or other material considerations, "off-setting" or seeking to take an "internal heritage balance" approach is likely to prove difficult in practice. For complex cases, attempting to offset heritage benefit from harm, to arrive at a net result, where the effects may be quite different, or may relate to separate assets, has obvious potential to complicate an already intricate assessment. It is not necessary. What the Court of Appeal said in *Bramshill* was that the methodical approach adopted by the Inspector in that complex case was the most "realistic". As has already been noted, it said that within the statutory process and under NPPF policy the decision maker must adopt a "sensible approach to assessing likely harm to a listed building and weighing harm against benefits". It

[29] *Jones v Mordue* [2015] EWCA Civ 1243; [2016] J.P.L. 476.
[30] *Juden v Tower Hamlets LBC* [2021] EWHC 1368 (Admin).
[31] *R. (on the application of Save Stonehenge World Heritage Site) v Secretary of State for Transport* [2021] EWHC 2161 (Admin).
[32] *Safe Rottingdean Ltd v Brighton and Hove CC* [2019] EWHC 2632 (Admin).
[33] *Safe Rottingdean Ltd v Brighton and Hove CC* [2019] EWHC 2632 (Admin) at [75].

is necessary that any assessment is clear and methodical. In simple cases, attempting to offset one impact from another may not matter, in complex cases it is undesirable and risks legal error.

In the *Stonehenge* case, the challenge was to the decision to grant a development consent order for the construction of a new route 13km long for the A303 between Amesbury and Berwick Down, which would replace the existing surface route, and would run in a tunnel 3.3km long through the Stonehenge part of the Stonehenge, Avebury and Associated Sites World Heritage Site. One of the grounds of claim was based upon the principles settled in *Bramshill* (see the *Stonehenge* judgment at [168]). It was a matter of agreement in that case that "by whatever means [the decision-maker] employs, [they] must ensure that [they have] taken into account (a) the significance of each designated heritage asset affected by the proposed development and (b) the impact of the proposal on that significance" ([170]).

The claimant challenged the Secretary of State's judgment that the harm identified by the Panel as "substantial" should be treated as "less than substantial". That harm was to the significance of a range of designated and undesignated heritage assets. The claim was defended on the basis that the Secretary of State had to be treated as having agreed with those parts of the Environmental Statement and Heritage Impact Assessment with which the Panel did not expressly disagree ([171]). However, the court noted that the Secretary of State did not receive a precis of, or any briefing on, the parts of those documents relating to impacts on heritage assets which the Panel accepted but did not summarise in its reports. Nevertheless, he disagreed with the overall conclusion on harm. Thus, there was a "gap" ([179]), in that the Secretary of State did not form any conclusion on the impacts upon the significance of those assets, whether in agreement or disagreement with the Panel. On that basis (together with a point on alternatives), the decision to grant the DCO was quashed.

Two further heritage cases are worth noting, admittedly more as cautionary tales than for the development of legal principles: *R. (on the application of Liverpool Open and Green Spaces Community Interested Company) v Liverpool CC*[34] and *R. (on the application of Wyeth-Price) v Guildford BC*.[35]

In *Liverpool Open and Green Spaces*, the court noted at the outset what Sales LJ had said in *Jones v Mordue*,[36] that "[generally], a decision-maker who works through [the paragraphs of the NPPF] in accordance with their terms will have complied with the section 66 duty". Thus "[when] an expert planning inspector refers to a paragraph within that grouping of provisions … then—absent some positive contrary indication in other parts of the text of his reasons- the appropriate inference is that he has taken properly into account all those provisions". The appellant contended that the report to committee should have benefitted from that inference. However, in the view of the first instance judge, Kerr J, there were such "contra-indications". The report to committee had failed to refer to the consultation response of Urban Design and Heritage Conservation team, which stated strong conservation objections to the proposal. The report contained what the judge described (among other criticisms) as a "mantra-like formulation of the balancing exercise", with "no reference to any weighting". The judge was left with substantial doubt about whether the statutory duty had been complied with. The Court of Appeal agreed, pointing to a similarity with *Loader v Rother DC*,[37] where the committee had wrongly been told that the Victorian Society did not object to an application, although they had objected to a previous proposal for the same site. The error in the *Liverpool* case was not the same as in *Loader*, but its potential effect was no less significant. It was liable, the court said, "seriously, though innocently—to mislead the members when making their decision" ([80]). The appeal was dismissed, leaving the permission quashed.[38]

[34] *R. (on the application of Liverpool Open and Green Spaces Community Interest Co) v Liverpool CC* [2020] EWCA Civ 861; [2021] 1 P. & C.R. 10.
[35] *R. (on the application of Wyeth-Price) v Guildford BC* [2020] EWHC 3355 (Admin).
[36] *Jones v Mordue* [2015] EWCA Civ 1243.
[37] *R. (on the application of Loader) v Rother DC* [2016] EWCA Civ 795; [2017] J.P.L. 25.
[38] Save for the relocation of a miniature railway, the subject of a separate proposal.

Similar faults led to the quashing of the planning permission in *R. (on the application of Wyeth-Price) v Guildford BC*.[39] In that case, Lang J found that the report did not provide the necessary advice to members about how they should apply s.6 within their decision. NPPF paras 193 and 194 were not identified, nor summarised. As such, as in the *Liverpool Open and Green Spaces* case, there were several "positive contrary indications", leading to substantial doubt as to whether the statutory duty had been performed (judgment at [41]).

Drawing these cases together, it is apparent that fortune has favoured the assiduous decision maker. In this context, as in others, a methodical, rigorous, and indeed sensible approach is needed in order to give effect to the statutory regard and, in turn, to minimise risk of successful challenge. Any methodology employed which is more likely to obscure than illuminate the impact of a proposal on heritage assets is best avoided.

Interpreting a planning permission

DB Symmetry Ltd, Hillside Parks Ltd

There have been two significant cases concerning the interpretation of planning permissions in the last year, *DB Symmetry Ltd v Swindon BC*[40] and *Hillside Parks Ltd v Snowdonia National Park Authority*.[41]

In *DB Symmetry*, a condition was imposed which said, "the proposed access roads … shall be constructed in such a manner as to ensure that each unit is served by a fully functional highway …". The developer later applied for a certificate under the Town and Country Planning Act 1990 s.192 that the formation and use of the proposed access roads as private access roads would be lawful. The Council refused, insisting that the condition required the developer to dedicate the land as a public highway. An appeal against that decision was allowed. The Inspector certified that the use of the access roads for private use only would be lawful. Swindon challenged the appeal decision and succeeded in the High Court. The matter came before the Court of Appeal on the developer's appeal.

The court found that a condition could not lawfully require a developer to dedicate land as a highway without compensation (applying *Hall & Co Ltd v Shoreham by Sea Urban DC*[42]). The court said that if that was the effect of the condition, it would be unlawful ([52]) and since the condition was unlikely to be capable of being severed from the grant of planning permission, the consequence would be that the planning permission could not stand either ([53]).

Having reached that conclusion, the issue before the court was whether the condition required the dedication of the roads as highways, or whether it merely regulated the physical attributes of the roads. The Court of Appeal interpreted the planning conditions by asking what a "reasonable reader" would understand the words to mean in the relevant context. This was not controversial, in that there was a recent authoritative statement of the relevant principles in the Supreme Court's decision in *Lambeth LBC v Secretary of State*.[43] The Court of Appeal went on to hold that the reasonable reader would be:

> "disposed to understand that in imposing conditions on the grant of planning permission, the local planning authority had complied with long-standing government policy. *Hall*, or at least the rule which it embodies, was a landmark in planning law, and also forms part of the relevant legal context. The reasonable reader could not suppose that the local authority intended to grant a planning permission subject to an invalid condition, let alone to grant an invalid planning permission." ([85])

[39] *R. (on the application of Wyeth-Price) v Guildford BC* [2020] EWHC 3355 (Admin).
[40] *DB Symmetry Ltd v Swindon BC* [2020] EWCA Civ 1331; [2021] J.P.L. 683.
[41] *Hillside Parks Ltd v Snowdonia National Park Authority* [2020] EWCA Civ 1440; [2021] J.P.L. 698.
[42] *Hall & Co Ltd v Shoreham by Sea Urban DC* [1964] 1 W.L.R. 240; [1964] 1 All E.R. 1.
[43] *Lambeth LBC v Secretary of State for Housing, Communities and Local Government* [2019] UKSC 33; [2020] J.P.L. 31.

The court adopted the "validation principle" (see, most recently, *Enka Insaat Ve Sanayi AS v OOO Insurance Co Chubb*[44] and *Tillman v Egon Zehnder Ltd*,[45] both cited in the judgment): the court will prefer an interpretation which results in the clause or contract being valid as opposed to void.

Thus armed with these various means to construe the permission, perhaps otherwise than in accordance with the words used, the court found that "the interpretation adopted by the inspector is, to put it no higher, a realistic one even if it is not the most natural. The validation principle therefore applies; and condition 39 should be given the meaning she ascribed to it" ([88]). The case is unusual, in that the condition fell foul of a hard edged legal requirement, but the court's interpretive approach is nonetheless instructive.

It is necessary to acknowledge at the outset that *Hillside Parks* was a factually complex case, with at least one quite puzzling feature, rather than particularly significant in terms of its development of the law. However, one aspect of the Court of Appeal's judgment served to cast doubt on what had previously been assumed about the governing principles in relation to overlapping planning permissions, which is that in basic terms the issue is one of compatibility, per *Pilkington*.[46] It is therefore worthy of study. It is understood that Hillside has applied to the Supreme Court for permission to bring an appeal.

By way of background, the original planning permission had been granted in 1967 for the development of 401 dwellings in Aberdyfi. A masterplan formed part of the approved application.[47] The masterplan showed the proposed siting of the dwellings and the proposed internal road network. Construction of the first two houses began in March 1967, but the approved location was found to be the site of an old quarry and so they were not built in the position designated on the masterplan. Retrospective planning permission was sought and obtained for their retention. Subsequent approvals were granted between 1967 and 1974, described in the Court of Appeal's judgment (at [4]) as "departures from the masterplan". The judgment of HH Judge Keyser QC in the High Court includes the first covering letter and approval (in August and September 1967). The request was couched in terms of "an amendment to the proposed designs". The approval seems to have been the separate grant of planning permission "for the development of the land … by the erection of a 3-bedroom flat". The judge said this:[48]

> "Suffice it to say that in the period from April 1967 until October 1974 the local planning authority from time to time (Merioneth County Council before April 1974, and Gwynedd County Council thereafter) granted a total of eight planning permissions relating to the construction of houses, apartments and/or garages on the Site, all of them representing some kind of departure from the scheme of development set out in the Master Plan in respect of either the location or the nature of the buildings or both of them."

These approvals (together with other later approvals) are referred to in the Court of Appeal's judgment as "Additional Permissions".

In 1985, a dispute arose, in that the local planning authority denied that the 1967 planning permission remained "valid and extant". Civil proceedings were instituted in the High Court (by writ in the Queen's Bench Division claiming certain declarations). By 1987, which is when a decision came to be taken in the case, 19 dwellings had been constructed. It appears that all of the dwellings had been built pursuant to one or other of the Additional Permissions which had been granted between 1967 and 1974.[49]

A curious part of the case, but not one which would disturb the Court of Appeal's reasoning (see below) arises from the conclusions reached by Drake J in the High Court in 1987. The learned judge found that

[44] *Enka Insaat Ve Sanayi AS v OOO Insurance Co Chubb* [2020] UKSC 38; [2020] 1 W.L.R. 4117.
[45] *Tillman v Egon Zehnder Ltd* [2019] UKSC 32; [2020] A.C. 154.
[46] *Pilkington v Secretary of State for the Environment* [1973] 1 W.L.R. 1527; [1974] 1 All E.R. 283.
[47] The permission incorporated the masterplan expressly, see the first instance judgment: *Hillside Parks Ltd v Snowdonia National Park Authority* [2019] EWHC 2587 (QB) at [8].
[48] *Hillside Parks Ltd v Snowdonia National Park Authority* [2019] EWHC 2587 (QB) at [11].
[49] The judgment of HH Judge Keyser QC rather confusingly refers to the houses having been built "wholly or partly pursuant to the Additional Permissions" (at [19]).

the Additional Permissions were "variations" from the masterplan, in some cases "substantial variations". The reason that is puzzling is because the forerunner provision to what is now s.73[50] had only been introduced the previous year, in 1986. Prior to that, there were two mechanisms available to alter a planning permission: either to appeal against the grant of planning permission,[51] or to apply for a new planning permission. Even now, only non-material amendments (s.96A) can be made as variations to the original permission, s.73 applications result in new planning permissions.[52] Therefore, it is not clear what the judge can have meant by "variations" to the 1967 planning permission, when he referred to approvals granted between 1967 and 1974. This is not just a semantic point: Drake J found that the construction of the 19 dwellings had lawfully implemented the 1967 consent, although it appears that the works were pursuant to the Additional Permissions and there seems to have been no assessment of whether those works were consistent with the 1967 approved drawings. An alternative means to analyse the history is that the Additional Permissions were just that, additional planning permissions relating to the same site, rather than variations of the original planning permission. However, if that is right, then it would affect analysis underpinning the 1987 declarations. As has been noted however, none of this would alter the Court of Appeal's reasoning, since the High Court found that regardless of whether Drake J was right or wrong to conclude as he did,[53] it is now plain that the remaining development could not be completed in accordance with the 1967 planning permission because what has been constructed since 1987 does not accord with the approved masterplan and it is not therefore physically possible to build out the entirety of the scheme of development approved in 1967 (see the court's judgment at [54] and [70]).

The four declarations made in the civil proceedings in 1987 were based upon Drake J's findings. They were: (1) the January 1967 planning permission was lawfully granted; (2) the January 1967 permission was a full permission, which could be implemented in its entirety without the need to obtain any further planning permission or planning approval of details; (3) "the development permitted by the January 1967 permission has been begun; and that it may lawfully be completed at any time in the future"; and (4) concerned a condition.

Snowdonia National Park Authority was established as the local planning authority in 1996. After that date, it issued three approvals expressed to be "variations" of the 1967 planning permission (in 1996, 1997 and 2004), together with what appear to have been planning permissions for various individual buildings and groups of buildings. The High Court judge said that each of those Additional Permissions "was a grant of full planning permission for the development mentioned in it, and each has been implemented" (at [22]).

In 2017, Snowdonia said that it would not be possible to implement the 1967 planning permission further and a second dispute began. Hillside brought a Pt 8 claim to resolve it, culminating in the case before the Court of Appeal. Various declarations were sought, res judicata[54] relied upon etc. The issue of wider interest for planners is how the court dealt with the overlapping planning permissions.

There was no dispute on the facts: it would not be physically possible to build out the entirety of the scheme of development approved in 1967.[55] Snowdonia's case relied upon *Pilkington*. It argued that because it would not be possible to build out the remainder of the approved scheme, it would not be lawful

[50] Town and Country Planning Act 1971 s.31A, introduced by the Housing and Planning Act 1986 s.49. See also the Annex to Circular 19/86 para.13.

[51] See *Lambeth v Secretary of State for Housing, Communities and Local Government* [2019] UKSC 33 at [9]; [2020] J.P.L. 31: the background to s.73 was taken from the judgment of Sullivan J (as he then was) in *Pye v Secretary of State for the Environment, Transport and the Regions* [1998] 3 P.L.R. 72; [1999] P.L.C.R. 28: an "applicant aggrieved by the imposition of the conditions had the right to appeal against the original planning permission, but such a course enabled the Local Planning Authority in making representations to the Secretary of State, and the Secretary of State when determining the appeal as though the application had been made to him in the first instance, to 'go back on the original decision' to grant planning permission. So the applicant might find that he had lost his planning permission altogether, even though his appeal had been confined to a complaint about a condition or conditions".

[52] See, e.g. NPPG ID: 17a-001-20140306.

[53] NB the decisions in *Pilkington v Secretary of State for the Environment* [1973] 1 W.L.R. 1527, *Hoveringham* and *Pioneer Aggregates* all pre-dated the judgment of Drake J. As noted in the High Court judgment (at [32]), so far as appears from his judgment, none of the cases were cited to him.

[54] A matter that has been adjudicated by a competent court and therefore may not be pursued further by the same parties.

[55] *Hillside Parks Ltd v Snowdonia National Park Authority* [2019] EWHC 2587 (QB) at [30].

to carry out development relying on the 1967 planning permission. Those arguments were straightforward, and they prevailed (see the Court of Appeal's judgment at [72]–[73] and [76]).

There was some industry concern about the case, focused on the court's treatment of *F Lucas & Sons Ltd v Dorking and Horley RDC*.[56] The court in *Hillside Parks* was at pains to emphasise that *Lucas* was an "exceptional case", which "should be regarded as having been decided on its own facts".

In *Lucas*, the developer had built two dwellings pursuant to one planning permission and then proposed the construction of 14 houses pursuant to what appears to have been an earlier planning permission for the same area of land, which was inconsistent with the other. At the time (1960s), there was no scope to vary the consent by use of e.g. s.73. The judge in the case said that the original planning permission was not a permission to develop the site as a whole, but for any of the development comprised within it. The issue which seems not to have been addressed squarely in the case is that the two planning permissions were not compatible. This would offer one explanation for why the Court of Appeal in *Hillside Parks* preferred the later *Pilkington* line of authorities.

There was also some disquiet about the implications of Singh LJ's remarks in *Hillside Parks* about a "modern planning permission for the development of a large estate such as a housing estate". He said (at [90]), "typically there would be not only many different residential units to be constructed in accordance with that scheme, there may well be other requirements … which are all stipulated as being an integral part of the overall scheme which is being permitted …".

If it is understood that Singh LJ was saying no more than that development must come forward in a manner consistent with what has been approved, then that should serve to reassure. There should be no difficulty arising in having "drop-in" applications, provided the main application is dealt with correctly (i.e. any necessary s.73 applications are made).

Permitted development rights

Rights: Community: Action, RSBS

The *Rights: Community: Action v Secretary of State*[57] judicial review challenged Orders amending the Town and Country Planning (General Permitted Development) (England) Order 2015 ("the GPDO")[58] and Town and Country Planning (Use Classes) Order 1987.[59] The practical effect of those changes was:

- To permit the construction of one or two additional storeys above a single dwelling house or above a detached or terraced house used for commercial purposes.
- To permit the demolition of a block of flats or certain commercial buildings and rebuilding for residential use.
- To introduce a new commercial, business and service Use Class with the effect that changes of use of buildings or land within that Class are removed from development control.

There were three broad grounds of challenge, set out in the judgment of Lewis LJ and Holgate J (at [78]): failure to carry out strategic environmental assessment, failure to have regard to the public sector equality duty and failure to "consider the weight of the evidence against these radical reforms". None succeeded. Permission to appeal has been sought, on the environmental assessment ground.

The court accepted that the Use Classes Order is a legal measure which simply defines whether certain changes of use constitute development for the purposes of development control. As such, it cannot be

[56] *F Lucas & Sons Ltd v Dorking and Horley RDC* (1964) 17 P. & C.R. 111.
[57] *Rights: Community: Action v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 3073 (Admin); [2021] J.P.L. 799.
[58] Town and Country Planning (General Permitted Development) (England) Order 2015 (SI 2015/596).
[59] Town and Country Planning (Use Classes) Order 1987 (SI 1987/764).

described as setting a framework for the grant of future development consents ([89]). Similarly, the permitted development changes were found not to set a framework, rather they grant planning permission for certain defined development [92]–[99]. The court noted that the contention that legislation of this kind falls within the scope of art.3(4) to the Directive and so is required to be the subject of environmental assessment "appears to be a novel one". The court said, "it has wide ramifications …" "… with consequences for other legal regimes". One to watch.

RSBS Developments Ltd v Secretary of State[60] was a case dealing with a discrete issue of statutory interpretation, with significant implications for the availability of permitted development rights. It concerned the GDPO art.3(5).

The linked statutory challenges related to the conversion of an office block into flats for residential use, which had been undertaken relying on permitted development rights, with the benefit of prior approval. Unauthorised building works were undertaken after the grant of prior approval, and after the commencement of permitted development works, but before the change of use took place. GPDO art.3(5)(a) provides that "in the case of permission granted in connection with an existing building, the building operations involved in the construction of that building are unlawful". "Existing" "in relation to any building" is defined in art.2(1) as "existing immediately before the carrying out, in relation to that building … or use, of development described in the order". The unauthorised building works were held to trigger that exception (see the judgment of Lang J at [52] and [60]). *R. (on the application of Orange PCS) v Islington LBC*[61] was distinguished, on the basis that in that case, the "change occurred after the claimants had committed to the development, in reliance on their permitted development rights [and] the designation was entirely outside the control of the developers and was not anticipated by them".

The learned judge said that she could not accept that the terms of the Order would exclude the unlawful building operations which post-dated the grant of prior approval. In *Evans v Secretary of State*,[62] Neil Cameron QC (sitting as a Deputy High Court judge) had held that "if the building operations involved in the construction of any part of that building are unlawful, the permitted development rights granted in connection with the building do not apply". In *RSBS*, the judge said "in my judgment the principle established in *Evans* also applied in this case. It is not confined to situations where the issue is the lawfulness of the building itself, or where the unlawful works are the same as the permitted development sought" (at [58]).

Some commentators have suggested that *RSBS* settles the relevant point in time for determining whether or not art.3(5) applies: the date on which the development the subject of the permitted development took place. This might hold good for a change of use, but the position may be less clear as it relates to built development, noting that in *RSBS* the unauthorised building works post-dated the commencement of the permitted development works and bearing in mind the definition of "existing", which is *before* the carrying out of development. Whether or not that question needs to be considered further, one of the practical implications of the case is that it will be necessary to take particular care to establish that where permitted development rights are relied upon in relation to an existing building, the building operations undertaken in the construction of that building are lawful.

[60] *RSBS Developments Ltd v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 3077 (Admin); [2021] J.P.L. 736.
[61] *R. (on the application of Orange PCS) v Islington LBC* [2006] EWCA Civ 157; [2006] J.P.L. 1309.
[62] *Evans v Secretary of State for Communities and Local Government* [2014] EWHC 4111 (Admin); [2015] J.P.L. 589.

Nationally significant infrastructure

R. (on the application of Friends of the Earth Ltd) v Heathrow Airport Ltd, Drax

Beyond the obvious importance of the case in terms of its thinking about the Paris Agreement and the Climate Change Act, there are additional aspects of the Supreme Court's judgment[63] in *R. (on the application of Friends of the Earth Ltd) v Heathrow Airport Ltd* which repay close attention.

First: National Planning Statements and need. The narration of the history of National Policy Statements is useful for promoters and objectors alike, in particular in that it illuminates the "mischief" that the Planning Act 2008 was intended to address. A key problem with the previous system was said to be that significant delays were caused at the public inquiry stage, because the need for the infrastructure had to be established through the inquiry process.

In its judgment, the Supreme Court noted that the 2007 White Paper envisaged that the NPSs would resolve whether there is "a case for infrastructure development" or "the need for additional capacity", without those matters having to be considered at public inquiry. There is a link here to the *Drax* case (see below). Whether that objective is fulfilled in a given case may depend upon the facts. But as a starting point, it is useful to have this section of the judgment in mind.

Secondly, there was a point of disagreement with the Court of Appeal on a matter of statutory construction, as to what constitutes "Government policy" within the Planning Act 2008 s.5(8). The Court of Appeal adopted a wide definition insofar as it said that the words "Government policy" were ordinary words which should be applied in their ordinary sense to the facts of each case. That troubled the Supreme Court, conjuring for it the image of civil servants having to trawl Hansard and press statements to see if anything had been said by a minister which might be characterised as policy. The court said that Parliament cannot have been intended to create a "bear trap" for ministers by requiring them to take into account any ministerial statement which could as a matter of ordinary language be described as a statement of policy relating to the relevant field (see the judgment at [105]).

The Supreme Court instead preferred a narrower construction. The "epitome of Government Policy", it said, is "a formal written statement of established policy". The criteria for a "policy" to which the doctrine of legitimate expectation could be applied would be the absolute minimum required to be satisfied for a statement to constitute policy for the purpose of that statutory provision. That means a statement would qualify as policy only if it is "clear, unambiguous and devoid of relevant qualification" ([106]). On that basis, statements by Andrea Leadsom MP and Amber Rudd MP were not policy, nor was the ratification of the Paris Agreement.

The third point of interest in the judgment is confirmation that the *Blewitt* approach to the content of Environmental Statements applies in the strategic environmental assessment context.

In *Blewitt*, the Court of Appeal held that it is for the public authority making a decision as to whether or not to grant planning permission for EIA development to decide whether the environmental information contained within the Environmental Statement is sufficient. A review is on normal *Wednesbury* principles.

The *Heathrow* case of course concerned strategic environmental assessment (rather than EIA), because the designation of the Airports National Policy Statement set the framework for decisions on whether a development consent order for the development of an additional runway at Heathrow should be granted ([54]). EIA would come later.

The reason the court gave for, in effect, allowing a limited scope for review, is that if authorities responsible for promulgating an environmental report do not have sufficient editorial discretion, that will impede their ability to ensure that such reports are properly focused on the key environmental and other

[63] *R. (on the application of Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020] UKSC 52; [2021] J.P.L. 905. Judgment of Lord Hodge and Lord Sales (with whom Lord Reed, Lady Black, and Lord Leggatt agreed).

factors which might have a bearing on the proposed plan. Absent such a discretion, the court felt that there would be a risk that public authorities would adopt an "excessively defensive approach to drafting environmental reports, leading to the reports being excessively burdened with irrelevant or unfocused information which would undermine their utility in informing the general public in such a way that the public is able to understand the key issues and comment on them" ([146]).

Finally, on the *Heathrow* case, the Supreme Court considered what constitutes a "material consideration", providing a delineation of the boundaries of that concept. It is likely to prove to be of real practical importance.

There are three categories of material consideration:

- Those clearly (whether expressly or impliedly) identified by statute as considerations to which regard must be had. A good example would be the s.66 duty to have "special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses". See, e.g. the *Bramshill* case above, which considered that statutory duty.
- The second category is those considerations identified by statute as considerations to which regard must not be had.
- The third category is those to which the decision maker may have regard if in his or her judgment and discretion she or he thinks it right to do so. That third category is the subject, perhaps inevitably, of much judicial thinking, in particular, as to how a court should resolve the question of whether something is "so obviously material" to a particular decision. The Supreme Court approved the Court of Appeal's approach in the earlier *Baroness Cumberlege of Newick*[64] case. It is for the decision maker to conclude whether that is so; and the Court's supervisory jurisdiction is again based on *Wednesbury* principles. The Supreme Court envisaged two sorts of case within that third category of material consideration:
  - — One where the decision maker does not advert at all to that consideration. In such a case, unless the consideration is obviously material according to the *Wednesbury* rationality test, the decision is not affected by any unlawfulness [120].
  - — Another, where the decision maker does turn their mind to a particular factor but gives it no weight. This, the court said, shades into a cognate principle of public law, that in normal circumstances the weight to be given to a particular consideration is a matter for the decision-maker, and this includes that a decision-maker might (subject to the test of rationality) lawfully decide to give a consideration no weight, per *Tesco Stores* ([121]).

It will be apparent that there is much to reflect on within the judgment, quite apart from the specific Paris Agreement/Climate Change Act points decided.

A note of constitutional affront can be heard in the Court of Appeal's judgment in the *Hillingdon LBC v Secretary of State for Transport*[65] case. It began as an application under the High-Speed Rail (London-West Midlands) Act 2017 ("the HS2 Act") Sch.17, then an appeal hearing, before making its way to the Court of Appeal.

Development was proposed within an area designated as an archaeological protection zone. Consent was sought for earthworks amongst other things, as part of ecological mitigation for the railway. No archaeological impact assessment was provided: HS2 had not secured access to the land and although there was desk-based evaluation, no on-site archaeological investigation had been undertaken.

[64] *DLA Delivery Ltd v Baroness Cumberlege of Newick* [2018] EWCA Civ 1305; [2018] J.P.L. 1268.
[65] *Hillingdon LBC v Secretary of State for Transport* [2020] EWCA Civ 1005; [2021] J.P.L. 300.

The HS2 Act sets out potential reasons for refusal relating to important local interests (including archaeology), in what is a bespoke planning process designed to provide local control over local interests. Those reasons do not include lack of or insufficiency of information, which was the basis of the Council's decision although it was not expressed as such.

Despite Hillingdon's objections, the Secretaries of State granted consent, in the absence of archaeological information about impact. They criticised the Council for failing to justify its refusal on archaeological grounds. They placed reliance on HS2's self-managed environmental minimum requirements to address potential impacts arising in the development process.

The Court of Appeal adopted arguments relying on *Padfield* and Parliamentary purpose that the High Court had rejected. The Court asked itself (rhetorically) whether Parliament intended Sch.17 to be construed to lead to a situation whereby the state nominated undertaker could circumvent local planning control over impact by declining to furnish the authority with information on such matters and abrogate to itself the task of carrying out any required investigation, free from independent control by the local authority. Such a system, the court said, would create the appearance of "an acute conflict of interest on the part of the nominated undertaker who, on the one hand, is under a contractual obligation (under the Development Agreement) to deliver the project and, on the other hand, is under a duty to protect local planning interests which could hinder or undermine the obligation of the undertaker to meet its contractual delivery objective". Parliament did not, in the court's view, intend to set up a scheme which gave the appearance that HS2 Ltd was judge in its own cause.

The court's treatment of the Secretaries of States' position on appeal was perhaps unusually detailed. It described the Secretaries of State as simultaneously criticising the Council for demanding the evidence it needed to provide the reasons and explanations; and condoning the refusal of HS2 Ltd to provide that self-same information; and did not challenge the conclusion of the Council, of Historic England and the Inspector, that HS2 Ltd had not provided evidence relevant and adequate to the task. Nowhere, it said, do the Secretaries of State explain how any local authority could address the evidential matters that HS2 Ltd and the Secretaries of State had said should be addressed in a refusal decision, without evidence.

It suffices to say the appeal was allowed. A decision on a later appeal to do with HS2 lorry routes, which came before the Court of Appeal this summer, is awaited.

One interesting feature of the case, which is of wider importance, is the court's approach to a material consideration which would come within the first category of those identified by the Supreme Court in *Heathrow* (i.e. those identified by statute as those to which regard must be had, see above). The court considered for itself the question of evidential sufficiency, rejecting the argument advanced on behalf of the Secretaries of State that the information before them had been sufficient in order to reach their decision (note, without reference to *Wednesbury* rationality). A decision from the Court of Appeal is awaited in a subsequent HS2 Act Sch.17 appeal (to do with lorry routes), which may touch upon this issue.

The judgment of the Senior President of Tribunals in *R. (on the application of ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy, Drax Power Ltd*[66] is required reading for those promoting or objecting to nationally significant infrastructure, irrespective of whether or not their particular project comes under the auspices of EN1 the overarching NPS for Energy.[67] That is for three reasons.

First, the case re-states that the exercise of policy interpretation is to be undertaken by "construing the language of the relevant policy objectively in its context and having regard to its evident purpose", per *Tesco Stores Ltd v Dundee CC*[68] and *Secretary of State for Communities and Local Government v Hopkins*

[66] *R. (on the application of ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy, Drax Power Ltd* [2021] EWCA Civ 43; [2021] J.P.L. 1107.

[67] Note, a new draft of EN1 was published between the date on which the talk for the 2021 conference was recorded and the date of the online conference itself.

[68] *Tesco Stores Ltd v Dundee CC* [2012] UKSC 13; [2012] J.P.L. 1078.

Homes Ltd.[69] Those general principles apply equally to the interpretation of national policy statements as they do to the interpretation of other planning policies ([57]). This is as per the judgment of Lindblom LJ as he then was, that is to say before he was appointed as the Senior President of Tribunals, in the *R. (on the application of Scarisbrick) v Secretary of State for Communities and Local Government*[70] case. *Drax* in the Court of Appeal in particular provides an excellent illustration of that exercise.

Secondly, because of its approach to the challenge to the Secretary of State's conclusions on the need for the proposal. In the extant version of EN-1, it says that "all applications" for development consent should be assessed "on the basis that the Government has demonstrated that there is a need for those types of infrastructure" and "the scale and urgency of that need is as described [in an earlier part]" "substantial weight" should be given to "the contribution which projects would make towards satisfying this need". However, it then goes on to say that "the weight which is attributed to considerations of need in any given case should be proportionate to the anticipated extent of a project's actual contribution to satisfying the need for a particular type of infrastructure" (para.3.2.3) ([57]). Note that this text is not repeated in the consultation draft of EN1 (published on 6 September 2021), see, e.g. s.3 dealing with need and s.4 which provides "assessment principles".

The court did not treat those passages of the extant EN1 as in tension with one another. It said that while the starting point is that "substantial weight" is to be given to "considerations of need" the weight due to these considerations is not immutably fixed. It should be "proportionate to the anticipated extent of the project's actual contribution to satisfying the need" for the relevant "type of infrastructure". To this extent, the court said, the decision maker "may determine whether there are reasons in the particular case for departing from the fundamental policy that "substantial weight" is accorded to "considerations of need". It said that "these are matters of planning judgment, which involve looking into the future" ([66]). The court did not think there was justification for reading a requirement into policy that there should be a quantitative rather than qualitative assessment, rather, how the task is to be carried out is a matter for the decision maker to resolve ([67]). It added that this part of EN1 ensures that the decision maker "takes a realistic and not an exaggerated view of the weight to be given to considerations of need in the particular case".

EN1 does envisage the exercise of planning judgment; a conventional one at that, which is that the weight to attribute to a positive factor within a decision depends upon its particular nature and characteristics, how beneficial it is. And so, in cases to which EN1 applies, the starting point will be that substantial weight attaches to need. However, if the decision maker has to grapple with information about need and form conclusions on what it shows, then particularly if there is no prescriptive methodology for that, it would seem to increase the scope for uncertainty within the process. This would seem not to be consistent with one of the key objectives for the DCO regime (see above re the history of the introduction of national policy statements in *Heathrow*).

Thirdly, it is of interest in relation to greenhouse gas emissions. In the High Court, the learned judge concluded that greenhouse gas emissions are not capable of being treated as a freestanding reason for refusal in this context ([179] of the High Court judgment). The Court of Appeal disagreed. It said that the sense of EN1 was that emissions are not, of themselves, an automatic and insuperable obstacle to consent being given for any of the infrastructure for which EN1 identifies a need and establishes a presumption in favour of approval. But it does not prevent greenhouse gas emissions from being taken into account as a consideration attracting weight in a particular case. The court said that the question of weight was for the decision maker and it follows that in a particular case, such weight could be significant, or even decisive, whether or not with another "adverse impact" ([87]).

[69] *Secretary of State for Communities and Local Government v Hopkins Homes Ltd* [2017] UKSC 37; [2017] J.P.L. 1084.
[70] *R. (on the application of Scarisbrick) v Secretary of State for Communities and Local Government* [2017] EWCA Civ 787.

The court's approach suggests a significant margin of appreciation for the decision maker in the assessment of need and in weighing the adverse impact of greenhouse gas emissions (the latter subject to meeting carbon budgets). In this, the court has deftly ensured that future decision makers are not constrained to business as usual scenarios. How long that lasts will depend on the revision and development of the relevant national policy statements.

One additional observation can usefully be made about *Drax*. In the court's judgment at [96], it is noted that the relevant provisions of the Planning Act 2008 do not refer to "material considerations", which is correct. The court went on to say that "of course normal public law principles will apply to proceedings challenging a development consent order" ([96]). There is an interesting issue as to the potential influence within the DCO regime of the third category of material consideration per the *Heathrow* case mentioned earlier, particularly if DCOs are subject to normal public law principles, as suggested.

Judicial review and statutory challenges

Procedure

Croyde

Croyde Area Residents Assoc v North Devon DC[71] was a very late judicial review, allowed to proceed because of an obvious and significant error in the planning permission granted, with serious consequences. Late meant more than six years after the grant of planning permission.

The relevant permission had been granted pursuant to an application for an extension to opening hours, but the red line area wrongly included a much larger area of land than intended, and included neighbouring land, in an Area of Outstanding Natural Beauty. The effect of the planning permission was to authorise the use of the neighbouring land for the stationing of caravans. The error had gone unnoticed until the neighbour applied for a certificate of lawful use (s.192) ("LDC"), to station caravans on that land. The local authority refused, but the LDC was granted on appeal in 2020. As the learned judge (Lieven J) rather drily explained the position: "this is an application for judicial review to quash the grant of planning permission to the Interested Party on 27 January 2014 … It can be seen from that opening sentence that the decision under challenge is very long outside the normal 6-week period for judicial review of planning decisions set out in CPR54.5."

The case was exceptional for various reasons. Most unusually, the four grounds of challenge were not disputed by the defendant or interested party (see the judgment at [22]). It was common ground that the planning permission was unlawful ([4]). The defendant accepted that it should be quashed, the interested party did not. It sought to argue that there was a statutory bar to the claim being brought, arising because the lawful development certificate relied on the 2014 planning permission. It was said that the combined effect of the Town and Country Planning Act 1990 ss.192, 195, 284, and 288 was that "the planning permission upon which the lawfulness of the use in s.193 is presumed cannot itself be challenged. This is because to do so would be to question the validity of the LDC granted under s.195, contrary to the restriction (or privative provision) in s.284(1)". The argument developed along the lines that if the planning permission were to be quashed, but the LDC stood (as it must do by s.284(1)), either the legal position will be wholly unclear, or the interested party is deprived of the LDC (see the judgment at [37]). The claimant argued that on the clear words of the statute, the bar in s.284 only applies to the LDC and not to any planning permission upon which it is based ([40]). The learned judge resolved the issue principally on the basis that s.284 does not on its wording debar a challenge to the planning permission which underlies the grant of an LDC ([54]). In the judge's view, it was appropriate to take a "cautious approach to extending

[71] *R. (on the application of Croyde Area Residents Assoc) v North Devon DC* [2021] EWHC 646 (Admin); [2021] P.T.S.R. 1514.

a statutory limitation on challenge, as is given in s.284 to the LDC, to a different legal order, the planning permission". She said that "if I accepted Mr Maurici's argument, I would be extending s.284 to a legal document which the statute does not protect" ([56]).

As to the exercise of discretion, the court found that there were exceptional factors which justified the extension of time. Prejudice to the interested party was considered and assessed in terms of the weight the various factors merited in the overall balanced decision (see [74]–[79]). The judgment follows the principles described and applied in *Thornton Hall Hotel*[72] and Gerber,[73] including that each period of delay must be justified ([81]–[82]). A really crucial factor in the case seems to have been that it was "a more extreme version of *Thornton Hall*" and that "the interests of the credibility of the planning system weighs heavily in favour of quashing the permission. It would be very hard to explain to a member of the public why a permission which was granted in complete error and where the developer has now got a permission which gives him what he originally sought, i.e. the extension of operating times, should not be quashed" (see the judgment at [86]). Hence extending time and quashing the permission ([87]). An appeal looks to be outstanding.

Costs

CPRE

Judgment was handed down at the very end of term, on 31 July, in *CPRE Kent v Secretary of State*.[74] It dealt with a short but not insignificant point about entitlement to/liability for the costs of multiple Acknowledgments of Service and Summary Grounds of Claim.

The outcome of the case affects not only statutory reviews under the Civil Procedure Rules Pt 8, but also judicial reviews which operate under similar rules in Pt 54 and its accompanying practice directions.

The Supreme Court confirmed (at [28]–[29]) that there is no general rule in planning cases which limits the number of parties who can recover their reasonable and proportionate costs of preparing those documents, if the application is refused at permission stage. It is not necessary for the additional defendants and/or interested party to show "exceptional" or "special" circumstances in order, in principle, to recover those costs.

The assessment of proportionality will be case-specific. If, for example there is an obvious lead defendant and the court was not assisted by the Acknowledgment of Service or summary grounds of an additional defendant, then the costs may not be proportionate and so may not be recoverable. Defendants and interested parties will be well advised to co-operate to minimise duplication.

Enforcement

Injunctions

Barking and Dagenham LBC v Persons Unknown

No fewer than 38 claimant councils were joined in a case considering injunctions against "persons unknown" heard by Nicklin J in the High Court in May 2021: *Barking and Dagenham LBC v Persons Unknown*.[75] The matter is going to appeal, a three-day hearing in the Court of Appeal has been fixed for the end of

[72] *R. (on the application of Thornton Hall Hotel Ltd) v Thornton Holdings Ltd* [2019] EWCA Civ 737; [2019] J.P.L. 1100.
[73] *Gerber v Wiltshire Council* [2016] EWCA Civ 84; [2016] J.P.L. 809.
[74] *CPRE Kent v Secretary of State for Communities and Local Government* [2021] UKSC 36; [2021] 1 W.L.R. 4168.
[75] *Barking and Dagenham LBC v Persons Unknown* [2021] EWHC 1201 (QB).

November 2021. It post-dated and referred to *Bromley LBC v Persons Unknown*,[76] decided last year, said by the Court of Appeal[77] to be the "first case involving an injunction in which the Gypsy and Traveller community were represented before the High Court. As a result of their success in discharging the interim injunction, it is also the first such case to be argued out at an appellate level …". The learned judge drew on what had been said in that case in relating the recent history in relation to injunctions against "Persons Unknown". He said that Harlow Council had applied for a borough-wide injunction in 2015 to prevent the unauthorised occupation or use of land by "Persons Unknown", in effect (as the court described it), "Traveller Injunctions". That was perceived to be a success, and it led to a surge in similar applications by local authorities ([4]). The court said that history of these so-called Traveller Injunctions shows how they have developed. They started out targeting actual trespass on land by named individuals. Identified individuals would be named as defendants, with relief sought in addition against "Persons Unknown", being those who were alleged also to be unlawfully to be occupying land but whose identity was not known. Local authorities then started taking a different approach, bringing claims against "Persons Unknown" rather than named individuals and injunctions were sought (and obtained) on the basis of threatened, rather than actual unauthorised use or occupation of land. The injunctions were typically granted for periods of three years, although there are examples of longer periods ([5]).

The issue for determination by the court was whether a "final injunction" granted against "Persons Unknown" is subject to the principle that final injunctions bind only the parties to proceedings (as the Court of Appeal held in *Canada Goose UK Retail Ltd v Persons Unknown*,[78] following *Att-Gen v Times Newspapers (No.3)*, the "*Spycatcher*" case[79]). In a judgment extending to 248 paragraphs, the learned judge did the reader the great courtesy of employing an index, a logical system of headings and sub-headings and a section entitled "overview and summary of conclusions". The latter is likely to provide a sufficient insight into the court's reasoning for the casual reader.

Each local authority claimant contended that, to be effective, injunctions to prohibit trespass and/or breach of planning control, must bind newcomers (see e.g. [121]). What that means in practice is that people who know nothing about the injunction and come newly to land might find themselves in breach of an injunction. The local authorities' submissions were rejected. The court said that the Traveller Injunctions granted in the claims were subject to the principle (from the *Spycatcher* case, endorsed in *Canada Goose*), that a final injunction operates only between the parties to proceedings; and did not fall into the exceptional category of civil injunctions that can be granted "contra mundum" (against the world) ([124]). In reaching that conclusion, the judge rejected the distinction the authorities had sought to draw between injunctions under, e.g. the Town and Country Planning Act 1990 s.187B and an injunction to vindicate a civil wrong. The fundamental principle was said to remain that injunction orders do not bind third parties ([184]).

Prosecutions: POCA

Kamyab

An unusual case came before the Criminal Division of the Court of Appeal at the end of July 2021: *Barnet LBC v Kamyab*[80] where the Court of Appeal itself assessed the merits of a confiscation order and made an assessment of quantum for the purpose of settling the correct order. It followed a successful prosecutor's appeal against a Proceeds of Crime Act confiscation order made in the Crown Court for £270. The Court

[76] *Bromley LBC v Persons Unknown* [2020] EWCA Civ 12; [2020] J.P.L. 852.
[77] Coulson LJ in *Barking and Dagenham LBC v Persons Unknown* [2021] EWHC 1201 (QB).
[78] *Canada Goose UK Retail Ltd v Persons Unknown* [2020] EWCA Civ 303; [2020] 1 W.L.R. 2802.
[79] *Att-Gen v Times Newspapers Ltd (No.3)* [1992] 1 A.C. 191; [1991] 2 W.L.R. 994.
[80] *Barnet LBC v Kamyab* [2021] EWCA Crim 1170.

of Appeal made a confiscation order in the sum of £499,363. The court emphasised that its decision would be "framed in the same way we would expect a Crown Court judge to express reasons for making an order following a complex and contentious confiscation hearing". Importantly, the court said, "we are not seeking to give guidance for other cases or establishing any form of precedent. The purpose of this judgment is to explain to the parties and the public why we have come to the conclusions we have reached, and nothing more" and that "We have directed ourselves, in particular, that any issues of law which are genuinely arguable should be resolved for our purposes in favour of Mr Kamyab. This means that our decisions on such points are not authoritative decisions of this court". What the court said must be heeded. The reason it is referred to here is that it provides a worked practical example of the POCA confiscation process, including assessing the benefit derived from the criminal conduct and the "available amount". The content is not repeated, but the judgment is commended as useful reading for any practitioner who deals with the Proceeds of Crime Act in the context of planning enforcement cases.

Town or village green and "curtilage"

Town or village greens

TW Logistics v Essex CC

The latest village green case to come before the Supreme Court, *TW Logistics v Essex CC*[81] related to a 200m^2 area of concrete close to the water's edge of the River Stour, in a working privately owned port, upstream of Felixstowe.

Registration, or the risk of registration, has most often been considered in the context of risk arising to development proposals. Here, the issue was whether the historic and ongoing use of the land as part of a private working port ought to have, in one way or another, prevented the registration. For that reason, it is worth being aware of the decision.

The land had been registered following a public inquiry. The Inspector found that the land had been used by local inhabitants for lawful sports and pastimes, as of right, for 20 years up to the date on which the land had been fenced off (which had prompted the application). He found that concurrent with the recreational activities of the public, port related commercial activities had taken place on the land throughout the relevant period. The recreational and commercial activities had co-existed for many years, including throughout the relevant 20-year period.

The registration was the subject of a judicial review claim, but that was stayed pending the outcome of an application to the Chancery Division for rectification of Essex CC's Town or Village Green Register. It was that claim which made its way to the Supreme Court.

There are two points of real interest in the case, for those advising landowners in particular.

The first is about "implied permission". Registration in part turned on whether the recreational use had been as of right, i.e. without the landowner's permission. TW Logistics argued that in tolerating the use, it had given implied permission. The Court of Appeal disagreed. Lewison LJ held that it was important to distinguish between permission on the one hand and a landowner's tolerance or acquiescence on the other, with the former requiring some overt act on the part of the landowner. Mere inaction in the face of known use could not amount to implied consent. That was not challenged. That finding was referred to specifically by the Supreme Court, seemingly with approval ([38]).

The second aspect of the case of wider importance is the effect of registration. Quite apart from the implications for the development potential of land, registration has the effect that the public acquire the general right to use the land as a town or village green, which means the right to use it for any lawful sport

[81] *TW Logistics v Essex CC* [2021] UKSC 4; [2021] 2 W.L.R. 383.

or pastime (whether or not corresponding to the particular recreational uses to which it was put in the 20-year qualifying period). However, the exercise of that right is subject to the "give and take" principle. This means the public must use their recreational rights in a reasonable manner, having regard to the interests of the landowner. The standard of reasonableness is determined by what was required of local inhabitants to allow the landowner to carry on its regular activities. The application of this standard, the court said, means that after registration the landowner has all the rights that derive from its legal title to the land, as limited by the statutory rights of the public [65]–[66].

It can readily be understood that once registration occurs, its effect goes beyond preventing the redevelopment of the land. It preserves the status quo. That means there is a new and potentially serious constraint on the use of the land for the landowner.

The key practical implication of the case is that where the public accesses land, it cannot be assumed that the fact that a business operates on that land means that there is no registration risk.

Curtilage

Blackbushe Airport Ltd v Hampshire CC

What constitutes the curtilage of a building has been considered in a variety of areas: in cases concerning taxation/rates; in landlord and tenant type litigation; in cases involving listed buildings; in other contexts, e.g. town or village green law (commons registration); and in planning generally (e.g. the curtilage of an industrial building).

In the town or village green category, *Blackbushe Airport Ltd v Hampshire CC*[82] came before the Court of Appeal this year. It concerned a point of statutory interpretation, the meaning of the word "curtilage" used in the Commons Act 2006. The court considered the jurisprudence in each of the above categories of cases. In that the interpretation of the Commons Act was at issue, what was said about curtilage in those other contexts will be persuasive, but it is not strictly binding on later decision makers. The Supreme Court has been asked for permission to bring an appeal, no decision has yet been taken on that application.

The Court of Appeal upheld the High Court's decision in *Hampshire*, but what is said about curtilage in, e.g. listed buildings cases differs as between the High Court and Court of Appeal. In the High Court,[83] Holgate J suggested that different lines of reasoning had been followed in different legal contexts. He said that the principle that "Land and buildings should comprise part and parcel of the same entity or are so inter-related as to constitute a single unit or integral whole, comes from the *Calderdale* case". He said, "That principle does not accord with *Methuen-Campbell*, *Dyer* or [another case, *Barwick*]". He said (at [125]) "The wider approach to curtilage in *Calderdale* is justified for listed building control, which is concerned to bring within its ambit structures or objects which are closely related to the building which has been listed such that their removal or alteration could adversely affect its interest".

In a judgment with which the other members of the Court of Appeal agreed, Andrews LJ said (at [25]) that "the curtilage of a building is a single concept … there is in truth only one test, and that is the test articulated by Buckley LJ in *Methuen-Campbell* … whether the test is satisfied in any given case will depend on the facts and circumstances of the case". The learned judge added (at [26]): "the ambit (or physical extent) of the curtilage of a building in any given case will be a question of fact and degree. Various factors may be helpful in resolving that question, including, where relevant, a consideration of the statutory consequences of a finding that land … falls within or outside of the curtilage of a building."

It will be apparent that although there have been different approaches to what constitutes a building's curtilage for different purposes over time, the current thinking at Court of Appeal level seems to be that

[82] *Blackbushe Airport Ltd v Hampshire CC* [2021] EWCA Civ 398; [2021] 3 W.L.R. 567.
[83] *Hampshire CC v Secretary of State for the Environment, Food and Local Affairs* [2020] EWHC 959 (Admin); [2021] Q.B. 89.

there is only one test: whether the land is "so intimately connected with [the building] as to lead to the conclusion that the former forms part and parcel of the latter" (Hampshire Court of Appeal at [20] and [109]). The court did not seem to accept that the test in a listed building case is any different ([110]). The court rejected the argument that the "part and parcel test" is unworkable in practice and linguistically unsound ([66]).

It is not necessarily the case that *Hampshire* supersedes the principles summarised in *Challenge Fencing*[84] or indeed *Calderdale*.[85] The factors identified as relevant in each of those cases may well be material to the overall judgment about what constitutes a building's curtilage. As has been noted, the Supreme Court has been asked for permission to appeal, but the Court of Appeal's decision in *Hampshire* represents the current law. It is binding as it relates to the Commons Act and persuasive in its remarks in relation to the curtilage of listed buildings.

Post Brexit

Direction of the law post EU-withdrawal

The first decision of the High Court after the end of the UK's post-Brexit transition period to consider EIA legislation as retained EU law was the case of *Pearce v Secretary of State*.[86] It is noteworthy simply for that reason, but it is of interest in its treatment of relief in judicial review proceedings relating to breaches of retained EU law. The agreed position in the case was that the High Court was bound by retained EU case law (see the judgment of Holgate J at [148]).

The claimant challenged the decision to make the North Vanguard Offshore Wind Farm Order, which granted development consent in respect of what was said to be one of the largest offshore wind projects in the world ("the Vanguard development") ([1]). The Vanguard development is closely related to a second wind farm project, Norfolk Boreas ("Boreas"), lying immediately to the north-east of the Vanguard array.

The claimant argued that cumulative impacts from the onshore project substations for both the Vanguard and Boreas projects needed to be addressed when determining the Vanguard application and that the Secretary of State's failure to do was unlawful and in breach of the applicable environment impact assessment ("EIA") regulations (ground 1). He also argued that the reasons given for deferring the assessment of cumulative impacts were irrational (ground 2).

The High Court upheld both grounds and declined to withhold relief under the Senior Courts Act 1981 s.31(2A) (or, insofar as it applies to EIA as retained EU law, the stricter test set out in *Simplex GE (Holdings) Ltd v Secretary of State for the Environment*[87]), on which the court said it would reach the same conclusion [150].

On the primary ground, the judge articulated the essential principle as follows (at [120]):

> "The effect of Directive 2011/92/EU, the 2009 Regulations and the case law is that, as a matter of general principle, a decision-maker may not grant a development consent without, firstly, being satisfied that he has sufficient information to enable him to evaluate and weigh the likely significant environmental effects of the proposal (having regard to any constraints on what an applicant could reasonably be required to provide) and secondly, making that evaluation."

The judge held that the cumulative impacts were significant effects that needed to be evaluated and that the Secretary of State's justification for deferring assessment—"the limited information available" on the Boreas project—was not, on the facts of the case, lawful or rational.

[84] *Challenge Fencing Ltd v Secretary of State for Housing Communities and Local Government* [2019] EWHC 553 (Admin).
[85] *Att-Gen ex rel Sutcliffe v Calderdale BC* (1983) 46 P. & C.R. 399.
[86] *Pearce v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWHC 326 (Admin); [2021] J.P.L. 1229.
[87] *Simplex GE (Holdings) Ltd v Secretary of State for the Environment* [2017] P.T.S.R. 1041; [1988] J.P.L. 809.

The judgment is notable for its restatement of key principles of law relating to the proper approach to EIA, in particular in relation to cumulative and in-combination impacts, and the effect of the amendments to the EIA Directive made in 2014 and transposed into UK secondary legislation in 2017.

Conclusion

It remains to be seen whether the online-only versions of the Oxford Conference in 2020 and 2021 will be mere curiosities in its long and illustrious history. Despite the near miraculous feat of producing and delivering Covid vaccines to the population of this country, at the time of writing, it is not clear whether the coming months and years will see a return to business as usual, or even to something better. Whatever may come, the fraught process of reconciling competing interests on a small island means it remains crucial to know the current boundaries of the law and to be in a position to test them, or to shore them up against challenge. It is hoped that this case law summary assists in that endeavour.