

● ● ●
● ● ● cornerstone
● ● ● barristers

Case Law Update – Part 1

3rd November 2020

Cornerstone Barristers
Planning Week 2020

Speakers



Josef Cannon

jcannon@cornerstonebarristers.com



Ryan Kohli

ryank@cornerstonebarristers.com



Emma Dring

emmad@cornerstonebarristers.com



John Fitzsimons

johnf@cornerstonebarristers.com

Planning Week 2020



Tuesday 3rd - 10am - **Case Law Update - Part 1**

Speakers: Ryan Kohli, Emma Dring, John Fitzsimons; Introduction: Josef Cannon

Tuesday 3rd - 2pm - **Is Net Zero still cool?**

Speakers: Michael Bedford QC, Estelle Dehon

Wednesday 4th - 2pm - **Panel discussion on regeneration.**

Guest speaker: Jeremy Potter, Spatial Planning Manager, Chelmsford City Council.

Panellists: James Findlay QC and Clare Parry. Moderator: Josef Cannon

Thursday 5th - 10am - **Case Law Update - Part 2.**

Speakers: Robin Green, Emmaline Lambert, Ben Du Feu

Friday 6th - 10am - **Plan-making in a changing climate.**

Speakers: Wayne Beglan, Rob Williams

Friday 6th - 2pm - **Remote events: where are we now?**

Speakers: Dr Ashley Bowes, Ruchi Parekh



Dill v SSHCLG [2020] UKSC 20

Dill v SSHCLG [2020] UKSC 20



Facts:

- Two Grade II listed urns on pedestals were removed and sold by Mr Dill
- LPA refused retrospective application for LBC and served LBEN requiring reinstatement
- Mr Dill appealed. Argued that the items were not buildings, so LBC not needed and no power to serve LBEN
- Inspector held status as 'buildings' was established by fact of listing, and Mr Dill could not go behind that.

Dill v SSHCLG [2020] UKSC 20



First issue: could Mr Dill argue that the items were not 'buildings'?

- Yes.
- Nothing in LBA 90 to suggest inclusion on list was conclusive of status as a building.
- 2 essential elements in definition of LB: (i) a building (ii) included on the list. If not a building, could not be a LB.
- *R v Wicks*: presumption a person accused with an offence (contravening LBEN) could raise any relevant defence.

Dill v SSHCLG [2020] UKSC 20



Second issue: How to decide if an item is a 'building' for purposes of LBA 90?

- Definition of 'building' in TCPA 90 also applied to LBA 90, therefore appropriate to apply *Skerritts* test:
 - Size
 - Permanence
 - Degree of physical attachment – importance of method/process of erection as counterpart to 'works for demolition' under s. 7 (need for LBC)
- No concluded view on the urns – arguments both ways!

••• R (Liverpool Open & Green Spaces CIC)
••• v Liverpool CC [2020] EWCA Civ 861
•••

R (Liverpool Open & Green Spaces CIC) v Liverpool CC [2020] EWCA Civ 861



Facts:

- Two linked grants of planning permission for development on land designated as Green Wedge in the development plan.
- Arguments around meaning of policy and discharge of s. 66 LBA 90 duty.
- Appeal had become academic as Mayor publicly stated the scheme was dead and LPA gave undertaking to CA not to implement permissions.

R (Liverpool Open & Green Spaces CIC) v Liverpool CC [2020] EWCA Civ 861



Issue 1: The green wedge policy

- Policy stated LPA would not permit proposals that would “*affect the predominantly open character*” of the GW
- C argued that “*open character*” was synonymous with “*openness*” in NPPF, and policy contained a presumption against development harming “*openness*”.
- LPA argued policy was distinct from national GB policy, “*predominantly open character*” was a qualified concept which envisaged some harm acceptable.

R (Liverpool Open & Green Spaces CIC) v Liverpool CC [2020] EWCA Civ 861



- CA agreed with LPA. GW policy correctly understood, applied in a series of rational planning judgements.
- GW policy differed materially from NPPF.
- LPA had a different policy covering GB which was more restrictive.
- Context is everything - can't just assume words mean the same/similar thing when used in different policies.

R (Liverpool Open & Green Spaces CIC) v Liverpool CC [2020] EWCA Civ 861



Issue 2: Discharge of s. 66 LBA 90

- Officer report to committee referred members to relevant parts of NPPF on heritage.
- Officer failed to draw members' attention to consultation response from design and heritage team objecting to an aspect of the proposal.
- Held, that this alone was sufficient to rebut the presumption that s. 66 had been discharged.
- Even without s. 66, the consultation response was an obviously material consideration.

••• R (Wright) v Forest of Dean DC [2019]
••• UKSC 53

R (Wright) v Forest of Dean DC [2019]

UKSC 53



Facts:

- Single wind turbine to be run by a community benefit society.
- 4% of turnover from turbine operation to be donated into a community fund.
- LPA took the donations into account and imposed planning condition to secure them.
- Mr Wright successfully argued in HC and CA that it was unlawful to have regard to the donations.

R (Wright) v Forest of Dean DC [2019]

UKSC 53



Arguments:

- SoS accepted Supreme Court's invitation to intervene in support of the LPA
- Arguments focussed on the power to impose conditions: benefits lawfully secured by condition are material considerations.
- SoS and LPA argued that *Newbury* criteria should be updated – broader approach to “planning purposes”.

R (Wright) v Forest of Dean DC [2019] UKSC 53



Judgment:

- Proposed community benefits were unrelated to character or use of land and not connected with the proposed turbine
- No need to update *Newbury*
 - public interest in not allowing permission to be sold;
 - applications should be determined on planning merits.
- “Material considerations” is a statutory term, where Parliament wanted to expand its ambit it had amended s. 70(2).



**R (Plan B Earth) v Secretary of State for
Transport [2020] EWCA Civ 214**

R (Plan B Earth) v Secretary of State for Transport [2020] EWCA Civ 214



Background:

- Third runway at Heathrow under the ANPS
- Challenges focused on:
 - Habitats Directive
 - SEA Directive
 - Climate Change issues – Paris Agreement

R (Plan B Earth) v Secretary of State for Transport [2020] EWCA Civ 214



Habitats and SEA Directives

- Standard of Review – Wednesbury Unreasonableness
- “Alternatives” for the purposes of Article 6(4)
- “Hub objective” was central aim – “genuine and critical” - Gatwick not a realistic alternative
- Not unlawful to treat Gatwick as “reasonable alternative” under SEA Directive but not “alternative solution” under Habitats Directive
- SEA Directive not breached on facts.

R (Plan B Earth) v Secretary of State for Transport [2020] EWCA Civ 214



Climate Change Issues

- Paris Agreement – not considered
- Climate Change Act 2008, s1
- What is “Government policy” for purposes of s5(8)?
- Giving effect to an unincorporated international agreement by “the back door”?

R (Plan B Earth) v Secretary of State for Transport [2020] EWCA Civ 214



Relief

- Reminder about nature of “highly likely” test in 31(2A)
- Court grants relief but does not quash – instead a declaration
- Why? Not entirely clear...reference to the conclusions on the SEA Directive and Habitats Directive grounds
- Heathrow’s appeal heard last month

••• R (ClientEarth) v Secretary of State for
••• BEIS [2020] EWHC 1303 (Admin)
•••

R (ClientEarth) v Secretary of State for BEIS [2020] EWHC 1303 (Admin)



Facts:

- DCO for NSIP – two gas-fired generation units at Drax Power Station, North Yorkshire
- Application considered and rejected by panel
- SoS overturns decision – on basis that national need outweighs significant adverse environmental impacts
- Challenge focused on interpretation of EN-1/EN-2 and their legal effect on the application for a DCO

R (ClientEarth) v Secretary of State for BEIS [2020] EWHC 1303 (Admin)



Relevant Considerations

- Post *Samuel Smith*
- §§99-100 – “D-maker does not fail to take a relevant consideration into account unless he was under an obligation to do so” or the consideration was so “obviously material” that it was irrational not to have taken it into account.”
- *Bolton* principles 2 and 6 no longer good law

R (ClientEarth) v Secretary of State for BEIS [2020] EWHC 1303 (Admin)



Assessment of Need and GHG Emissions

- EN-1 must be read as a whole not selectively
- Does not require need to be assessed in quantitative terms
- No heightened obligation to give reasons for departing from panel in light of their misinterpretation of EN-1
- SoS did not treat GHG emissions as having no weight

R (ClientEarth) v Secretary of State for BEIS [2020] EWHC 1303 (Admin)



S104(7) Balance and other grounds

- SoS legally entitled to reject panel's approach and give "substantial weight" to the need case
- Matter of planning judgment not to give greater weight to GHG emissions
- SoS did consider whether monitoring measures appropriate under 2017 EIA Regs 21(1)(d)
- Drax's late submission did not give rise to an unfairness

••• R (Kenyon) v Secretary of State for
••• HCLG [2020] EWCA Civ 302

R (Kenyon) v Secretary of State for HCLG [2020] EWCA Civ 302



Facts:

- JR of screening direction given by SoS re residential development proposal of 150 houses
- Appellant concerns re air pollution
- SoS concluded not EIA development – not likely to have significant effects on environment
- Appeal focused on issues concerning:
 - Evidential basis for SoS conclusions
 - Failure to take a precautionary approach

R (Kenyon) v Secretary of State for HCLG [2020] EWCA Civ 302



Evidential Basis for finding of “no likely significant effects”

- “uphill task” – especially re “preliminary broad-based assessment of environmental impacts, undertaken by those with relevant training and expertise”
- “nit-picking” accusation – d-maker not required to set out all the information and statistics
- There was a sufficient evidential basis for conclusions reached

R (Kenyon) v Secretary of State for HCLG [2020] EWCA Civ 302



Precautionary Approach

- Appellant argued - “inevitable uncertainty” re air pollution means need to have regard to precautionary principle
- “misconceived” – pp will only apply if there is a “reasonable doubt in the mind of the primary decision-maker” (*Evans*)
- No doubt in decision maker’s mind here and thus “no room for the precautionary principle to operate”

••• **New World Payphones Ltd v**
••• **Westminster City Council [2019]**
••• **EWCA Civ 2250**

New World Payphones Ltd v Westminster CC [2019] EWCA Civ 2250



Facts

- NWP wanted to use PD rights (Part 16 Class A of Schedule 2) to replace two existing telephone kiosks with a new kiosk with digital “multi functional capability”
- It was said that the kiosk would “incorporate an internally illuminated digital advertisement panel”
- As such NWP said that the kiosk and incorporated digital advertisement panel were inextricably linked

New World Payphones Ltd v Westminster CC [2019] EWCA Civ 2250



“Development by or on behalf of an electronic code operator for the purpose of the operator’s electronic communications network...consisting of

(a) The installation, alteration or replacement of any electronic communications apparatus”

Electronic communications apparatus is defined in the Communications Act 2003 (Para 5 Sch. 3A) as including:

(1)...

(d) other structures or things designed or adapted for use in connection with the provision of an electronic communications network

(2) “structure” includes a building only if the sole purpose of that building is to enclose other electronic communications apparatus

Common ground that telephone kiosk was a “building” and therefore a “structure” if and only if its sole purpose is to enclose other electronic communications apparatus

New World Payphones Ltd v Westminster CC

[2019] EWCA Civ 2250



- It was argued that the advertisement display panel was merely ancillary or incidental to the electronic communications apparatus
- Hickinbottom LJ held that
 - To take advantage of PD rights, the proposed development must fall entirely within the scope of the right relied upon;
 - Mixed use developments cannot take advantage of that benefit because PD rights would then be used for something outside its scope;
 - Absent the advertising panel the development would have fallen within the scope of the relevant right;

New World Payphones Ltd v Westminster CC [2019] EWCA Civ 2250



- Proposed development had a dual purpose: the use/purpose of the illuminated display was for advertising but the use/purpose of the kiosk was to house electronic communications equipment
- Significance not limited to telecoms cases. The “purpose” of the proposed development is what matters and whether or not the purpose falls within the qualifying purposes specified by any relevant use class
- The whole of any development must fall within the scope of a class within Schedule 2 of the GPDO.



R (on the application of Packham) v SSHCLG
[2020] EWCA Civ 1004

R (on the application of Packham) v SSHCLG [2020] EWCA Civ 1004



Introduction

- Challenge to the Government’s “macro political” decision to continue with the HS2 project following a non-statutory review
- The key issue was whether the Government erred in law by (a) misunderstanding or ignoring local environmental concerns; and/or (b) failing to take account of the effect of the project on the commitment to net zero by 2050 following the Paris agreement

R (on the application of Packham) v SSHCLG [2020] EWCA Civ 1004



Facts

- HS2, if fully constructed, will be a high speed rail link connecting London, Birmingham, Manchester and Leeds.
- Construction envisaged in phases under an Act of Parliament giving the necessary powers for the construction and operation of each phase.
- On 21 August 2019 the Secretary of State announced a review of the project. On 11 February 2020 after the review had been completed and a report submitted, the Prime Minister announced the Government's decision that the project would continue.

R (on the application of Packham) v SSHCLG [2020] EWCA Civ 1004



As to limb (a) of the challenge (misunderstanding/ ignoring local concerns):

- Macro political decision which required only a “low intensity review”. Government entitled to a broad measure of discretion in handling the content of the report.
- The decision was taken at the highest level of Government and was largely a matter of political judgment.
- In arriving at the decision, Cabinet must have been aware that the Act authorising Phase One included a detailed assessment of environmental impacts and there had been no change in circumstances since that date.
- A number of significant and potentially conflicting political, economic, social and environmental considerations had to be balanced.
- There was no single ‘right’ answer. A decision either way might have been reasonable.

R (on the application of Packham) v SSHCLG [2020] EWCA Civ 1004



As to limb (b) of the challenge (failing to take into account effect on commitments in the Paris agreement)

- Thrust of the argument relied on the 3rd runway Heathrow challenge where Government conceded it had not taken into account the Paris commitments as the Airports National Policy Statement was designated in June 2018 which was one year before the Climate Change Act 2008 was amended to reflect the Paris agreement
- However, the HS2 review expressly took account of the Government's net zero target for 2050
- Review frankly accepted the construction would push up carbon emissions for much of the period before 2050 but would promote modal shift. The whole rail network would need to be decarbonised if the Government is to deliver on net zero target.
- Conclusion was one of balance taking account of the construction and operation of HS2.

••• R (on the application of the London Borough of
••• Hillingdon) v SST; SSHCLG [2020] EWCA Civ 1005
•••

R (on the application of the London Borough of Hillingdon) v SST; SSHCLG [2020] EWCA Civ 1005



Introduction

- Hillingdon LBC appealed against the decision of the SoS and the High Court that it had erred in refusing to approve certain plan and specifications relating to the HS2 project in accordance with its statutory obligations
- Importance of the case lies in establishing the extent to which LPAs have control over aspects of HS2

R (on the application of the London Borough of Hillingdon) v SST; SSHCLG [2020] EWCA Civ 1005



Facts

- On 20 March 2018, LBH refused to grant approval for a request made by HS2 Ltd for approval of plans and specifications for proposed works associated with wetland habitat ecological mitigation for the Colne Valley Viaduct
- Dispute related to the failure by HS2 Ltd to submit any information or evidence which would enable the LPA to perform their statutory duty in evaluating the plans and specifications for their impact on relevant planning interests (archaeological remains)
- Planning Inspector recommended that the refusal be upheld but the decision was called in by the SoS and decision of the Inspector was reversed. Lang J dismissed the appeal in the High Court.

R (on the application of the London Borough of Hillingdon) v SST; SSHCLG [2020] EWCA Civ 1005



The Law

- Schedule 17 of the High Speed Rail (London-West Midlands) Act 2017 Para 3(6)

The LPA can refuse an approval request where

“the design or external appearance of the works ought to, and could reasonably be modified - ... (c) to preserve a site of archaeological or historic interest”

To perform this evaluation requires an exercise of planning judgment where design is measured against the risk to archaeology and that, in turn, informs an assessment of the need for mitigation or modification measures

R (on the application of the London Borough of Hillingdon) v SST; SSHCLG [2020] EWCA Civ 1005



How does Schedule 17 operate?

- Court held that LPA is under a statutory duty to perform an evaluation of the impact of the submitted plans and democratic responsibility and accountability rested with the LPA who are addressing themselves to matters of local concern.
- HS2Ltd argued that certain “Environmental Minimum Requirements” had been agreed contractually with the SoS which had the effect of ousting the duty of the LPA under Schedule 17
- Statutory guidance warned LPAs not to modify or replicate the “controls already in place”. However, court held that guidance could not have the effect of stripping from the authority the powers and duties imposed by statute.

Questions



Contact details:

**Cornerstone Barristers
2-3 Grays Inn Square
London
WC1R 5JH**



Tel: 020 7242 4986

Fax: 020 3292 1966

**Email: clerks@cornerstonebarristers.com
events@cornerstonebarristers.com**