



STORE WARS – ANOTHER ROUND

The Supreme Court handed down judgment today in **Tesco Stores Ltd v Dundee City Council** [2012] UKSC 13 and rejected Tesco's challenge to Dundee's decision to grant planning permission to a rival operator. Although the appeal arises from Scotland, it will have a significance to all practitioners in the UK for two reasons. First, it considered the issue of the proper approach to planning policy and secondly it concerned the application of the sequential test and the issue of site suitability.

First, as to policy, the Court determined that the meaning of planning policy (contained in the development plan or otherwise) is not in principle a matter which decision makers are entitled to determine from time to time as they please, subject only to the limits of rationality. On the contrary, the interpretation of planning policy is a matter of law, the meaning to be ascertained objectively in accordance with the language used, read in the proper context.

There was however a recognition that (i) policy statements should not be construed as if they were statutes or contracts and (ii) many policy statements are framed so as to require an exercise of judgment in their application and that application is a matter for the decision maker.

There is no basis for suggesting any different approach in England & Wales and Court emphasised the need for decision makers properly to understand the policy in question and so appreciate the full extent or significance of any potential departure from the development plan.

Second, as to the sequential test, more care is needed as to the application of the Court's decision to England & Wales both because (i) the national policy statements, although directed at the same outcome – promotion of town centres, are substantially different in their drafting and (ii) also because the Court was primarily concerned with the proper interpretation of just one part of the relevant development plan which gave expression to the sequential test. In the context of the case before it, the Court determined that "suitability" meant suitable for the development proposed by the Applicant provided it has had sufficient regard to the need for flexibility. Under current English guidance (PPS 4) consideration of the site's suitability is required and it would appear likely that the same approach would be followed. However, that does not mean that developers can dictate the scale of development and regard also has to be had to impact on existing centres.

Whilst Lord Reed gave the judgment of the Court regard should also be had to the general statement by Lord Hope in respect of the sequential approach – that the "criteria are designed for use in the real world in which the developers wish to operate, not some artificial world in which they have no interest in doing so".

James Findlay Q.C., joint head of Cornerstone Barristers, who is also a member of the Scottish Bar, appeared for Dundee City Council.