



Case law update

Jack Barber & Verity Bell

Planning Day – 6th November 2023



01

Fearne and Others v Board of Trustees of the Tate Gallery [2023] UKSC 4

What is the relationship between the planning system and landowner's private rights?



“... the planning system does not have as its object preventing or compensating violations of private rights in the use of land. Its purpose is to control the development of land in the public interest.”

Lord Leggatt at [109]





02

R (Ashchurch Rural Parish Council) v Tewksbury Borough Council [2023] EWCA Civ 101

When does a particular proposal form part of a wider 'project' for EIA screening purposes?

The bridge to nowhere



- Permission sought for the construction of a new railway bridge only as a pre-requisite to developing later housing development i.e. to ‘unlock’ parcels of land over the railway
- Housing Infrastructure Fund available only for a limited period
- Environmental Impact Assessment Screening Report treated the bridge as a standalone ‘project’, independent of assessment of the highway or residential elements of envisaged housing development
- Planning Committee: environmental impacts of the wider development “*for another day*”

Decision on appeal

01

It was irrational for a decision-maker to treat the prospective benefits of wider development into account as material factors, *without* also taking account of any adverse impact of envisaged development

02

An Officer's Report can unlawfully fetter the discretion of the Committee by excluding potentially material considerations

Ground 3: EIA Screening

- Judge erred in finding that the LPA lawfully considered the bridge was a single “project” for the purpose of the EIA Regulations: the question “*is this application part of a larger project?*” can still be answered even if permission has not yet been sought for that larger project
- *R(Wingfield) v Canterbury City Council* [2019] EWHC 1975 per Lang J: the scope of the “project” is a matter of judgment for the competent planning authority, subject to challenge on *Wednesbury* rationality or other public law error
- There could be no wider development without the bridge; the bridge served no purpose in the absence of the development – none of this information was taken into account in the identification of the “project” for screening purposes



03

***R (Together against
Sizewell C) v SSESNZ [2023]***
EWHC 1526

Can a decision-maker lawfully assess environmental impact before a potable water supply has been identified?

The Context

- Campaign group challenge by judicial review under s.118 Planning Act 2008 the decision of SSBEIS (now SSESNZ) to grant development consent to interested party for a new nuclear power station on the Suffolk coast.
- At DCO, panel of inspectors had produced report recommending grant of consent but for issue re: permanent supply of potable water.
- Defendant sought and received further information and disagreed with panel, concluding that uncertainty over permanent supply of potable water did not prevent grant of development consent.



The Challenge

- SEVEN grounds of challenge, each dismissed in rolled-up hearing:

- Ground 1, 2, 3, and 5 re: water supply

On Ground 1 – “The need for the supply of utilities such as water is common to many, if not all, forms of development. A utility company’s need to make additional provision so as to be able to supply existing and new customers in the future does not mean that that provision (or its method of delivery) is to be treated as forming part of each new development which will depend upon that supply. The consequence would be that where a new supply has yet to be identified by the relevant utility company, decisions on those development projects would have to be delayed until the company is able to define and decide upon a proposal. **That approach would lead to sclerosis in the planning system which it is the objective of the legislation and case law to avoid**” [91].

- Ground 4 re: alternative solutions
 - Ground 6 re: storage of nuclear fuel and defences against flooding – “enhanced margin of appreciation”
 - Ground 7 re: GHG emissions
- PTA granted by Coulson LJ; heard by EWCA last week (1-2 November 2023).



Harris v Environment Agency [2022] EWHC 2264

How wide is the scope of the duty to 'have regard' under Article 6(2) of the Habitats Directive?



Article 6(2) of the Habitats Directive:

Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

Regulation 9 of the Habitats Regulations:

(1) The appropriate authority, the nature conservation bodies and, in relation to the marine area, a competent authority must exercise their functions which are relevant to nature conservation, including marine conservation, so as to secure compliance with the requirements of the Directives....

(3) Without prejudice to the preceding provisions, a competent authority, in exercising any of its functions, must have regard to the requirements of the Directives so far as they may be affected by the exercise of those functions."

Key points

- Regulation 9(3) obligation to “*have regard*” to the Habitats Directive means that the Environment Agency is obliged to take account of the requirements of the Directive, but may depart from its requirements if there is a good reason to do so
- Context: Environment Agency is effectively the sole public body responsible for abstraction licences – the scope for departure from the requirements is considerably narrowed, as there is no other public body to fill the gap
- Obligations under Article 6(2) of the Directive take effect notwithstanding the European Union (Withdrawal) Act 2018



05

C G Fry & Son Ltd v SSLUHC [2023] EWHC 1622

What is the correct approach to the Habitats Directive when applying to discharge a condition?

Purposive approach to the interpretation of the Habitats Regulations 2017

- Claimant sought discharge of conditions relating to phosphate loading of protected water habitats; Council refused on the basis that no Habitats Assessment had been undertaken; Secretary of State dismissed subsequent appeal
- Court found that the Inspector construed the Habitats Regulations 2017 correctly: they mandate that an appropriate assessment be undertaken before a project is consented, *"irrespective of whatever stage the process has reached according to UK planning law"*
- Strict precautionary approach required would be undermined if the assessment was limited to the initial permission stage of a multi-stage process



06

R (Durham County Council and another) v SSLUHC and others [2023] EWHC 1394

Who decides whether a development constitutes an NSIP?



- Claimant LPAs sought declarations that the construction of several solar farms comprised an NSIP, and that the Inspector did not have jurisdiction to determine the appeals under TCPA 1990
- Court can determine whether development consent under the Planning Act 2008 would be required for the projects (i.e. SoS does not have exclusive jurisdiction)
- LPA's power to grant planning permission, and Inspector's jurisdiction to hear appeals, are not dependent on the projects not being an NSIP





Section 106 and the NHS





NHS trusts & s.106

**R (University Hospitals of Leicester NHS Trust) v
Harborough D.C. [2023] EWHC 263 (Admin)**

- Whether NHST established that funding gap meant added pressure of substantial mixed use development would not be funded in first year of occupation by new residents.
- Statutory scheme for funding NHS trusts
- Held NHST had established funding gap and held that HDC had acted lawfully in granting permission without contribution.
- Observations at [147]-[151]

See also **R (Worcestershire Acute Hospitals NHS Trust) v
Malvern Hills D.C. [2023] EWHC 1995 (Admin)**



Looking ahead: 2024

