Written Materials

Planning Law Case Update

(Part 1)

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(Registration details can be found HERE)

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Planning Law Case Update

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

THE ISSUE

1. This was a case which concerned whether proposed development, in the form of a telephone kiosk with an integrated illuminated advertisement panel fell within the scope of development permitted by Pt 16 Class A of Schedule 2 of the GPDO.

THE FACTS

2. NWP own two telephone kiosks on Marylebone Road which they wished to replace with a single kiosk, larger than each of the individual kiosks but not as large as both together. The multi-functional capability of the new kiosk was described as:

    - New telephone equipment with the ability to accept credit/debit card, contactless and/or cash payment;
    - 24 inch LCD display providing an interactive wayfinding capability;
    - Equipment for the provision of public Wi-Fi access points
    - On the reverse side a 1650mm (h) x 928 mm (w) LCD display for digital advertising purposes, recessed behind toughened glass.

3. It was said that the telephone kiosk would "incorporate an internally illuminated digital advertisement panel" and that the replacement telephone kiosk and integrated advertisement display were inextricably linked.

THE LAW

4. NWP considered that the development fell within Part 16 Class A if Schedule 2 to the GPDO such that it was permitted development subject to prior approval from the LPA for its siting and appearance.

5. It was common ground that the installation of a telephone kiosk was development as a building operation for which planning permission was required.

6. At the relevant time, Pt 16 Class A of Sch 2, headed "Electronic communications code operators: Permitted development" permitted,

> "Development by or on behalf of an electronic communications code operator for the purpose of the operator's electronic communications network in, on, over or under land controlled by that operator or in accordance with the electronic communications code, consisting of –
>
> (a) the installation, alteration or replacement of any electronic communications apparatus"

7. "Electronic communications apparatus" is defined in the Communications Act 2003 as follows:

> (1) In this code 'electronic communications apparatus' means –
>
> (a) apparatus designed or adapted for use in connection with the provision of an electronic communications network,
> (b) apparatus designed or adapted for a use which consists of or includes the sending or receiving of communications or other signals that are transmitted by means of an electronic communications network,
> (c) lines, and
> (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"

8. It was common ground that, for these purposes, a telephone kiosk is a "building" and therefore falls within the definition of "structure" and thus "electronic communications apparatus" if, and only if, its "sole purpose…is to enclose other electronic communications apparatus".

THE COURT HELD

9. At Paragraphs 48, Hickinbottom LJ described the Court's approach to the principles in play:

    a. To take advantage of being permitted development, the proposed development must fall entirely within the scope of the GPDO. Mixed use development cannot take advantage of that benefit because, if it were able to do so, the GPDO could and would be used for permitting development for something outside of its scope.

    b. The proposed development in this case includes "electronic communications apparatus" comprising the kiosk itself but it also includes "an integrated advertisement display panel". The panel is not merely ancillary or incidental to the electronic communications apparatus: that part of the development has an entirely different purpose, namely advertising.

    c. Absent the panel, the development would have fallen within Part 16 Class A and would have been permitted development; but with that panel, only part of the proposed development fell within that class.

    d. The true construction of the GPDO means that as a general proposition to be permitted development the whole of the development must fall within the scope of a class in Sch 2 of the GPDO by falling within the relevant definition and satisfying any express restrictions as to "exceptions, conditions and limitations" and therefore a mixed use or dual purpose development where one use or purpose is outside the class cannot generally be permitted development

10. The significance of the decision is wide. The proposed development here had a dual purpose: the use/purpose of the illuminated display panel was for advertising purposes but the use/purpose of the kiosk was electronic communications. Absent the panel, the development would have fallen within Class A of Part 16 and would have been permitted development; but with that panel, only part of the development fell within that class and thus was not permitted development.

11. There will be cases in which the exercise of planning judgment will be required to assess whether the proposed development does or does not fall entirely within a class of permitted development but this was an example of a clear dual purpose which could not properly be considered to fall within the class of permitted development.

HS2: Major infrastructure and Climate Change

R (on the application of Packham) v Secretary of State for Transport [2020] EWCA Civ 1004

THE ISSUE

12. This case concerned a 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, in proceeding with HS2 Phase One after the outcome of a review:

    a. erred in law by misunderstanding or ignoring local environmental concerns and failing to examine the environmental effects of HS2 as it ought to have done; and/or

    b. erred in law by failing to take account of the effect of the project on greenhouse gas emissions between now and 2050 in light of the obligations under the Paris Agreement and the Climate Change Act 2008.

THE FACTS

13. HS2, if fully constructed, will be a high speed railway connecting London, Birmingham, Manchester and Leeds. Its construction is envisaged in phases under an Act of Parliament giving the necessary powers for the construction and operation of each phase.

14. On 21 August 2019, the SST announced a review of the project. On 11 February 2020, after the review had been completed and a report of it submitted to the

Government, the Prime Minister announced the Government's decision that the project would go ahead.

15. The broadcaster, Christopher Packham, is an environmental campaigner. By a Judicial Review claim he challenged the Government's decision to continue with the project. He also sought an interim injunction to prevent the clearance of trees in six ancient woodlands.

THE LAW

16. Section 4(1) of the Climate Change Act 2008 imposes on the Secretary of State a duty to set carbon budgets to cap carbon emissions in a series of five year periods and to ensure that the net United Kingdom carbon account for a budgetary period does not exceed the carbon budget thus ensuring progress towards the 2050 target.

17. Carbon Budgets must be set with a view to meeting the target for 2050 (s. 8(2)). The first five carbon budgets have not been set in legislation, for the period from 2008 to 2032. The sixth for 2033 to 2037 will be set in 2021. The most recent of the Secretary of State's annual statements recorded emissions for 2018.

18. In October 2017 the Secretary of State published the Clean Growth Strategy setting out the Government's proposals for decarbonising the national economy and fixing policy milestones. It does not prescribe one particular "pathway" in the period to 2050 but envisages various means of managing emissions: taxation, regulation, investment in innovation and establishing a UK Emissions Trading Scheme and it leaves the Government to choose how to manage net increases of emissions from major infrastructure projects within its strategy for meeting the target of "net zero" emissions by 2050.

THE COURT HELD

19. The Court emphasised that it was only concerned with whether the decision being challenged was unlawful in some way. It was recognised that members of the public

have strong view on the project but it is not part of the court's role to deal with the pros and cons (Para 7 of Judgment).

20. The *Packham* challenge was directed at a macro-political decision which required only a "low intensity review". The question of whether to proceed with a project such as HS2 was a matter of national political significance appropriately dealt with by the legislature (Paras 47-48 of Judgment). The Court should refrain from anything other than a light touch approach applying the traditional test of "irrationality". The Government was, therefore, entitled to a broad margin of discretion in handling the content of the review report. At Paragraph 52 of the Court's Judgment, the Court determined the reasons for the broad margin of discretion as follows:

    a. The decision was taken at the very highest level of Government. It was largely a matter of political judgment.

    b. At the date of the decision, Cabinet must have been aware of the existence of the 2017 Act and the fact that in the course of the passage of Phase One Bill through Parliament a detailed assessment of environmental impacts had been carried out. That assessment had not precluded the coming into force of the statute.

    c. It was not said that between the Royal Assent and the Cabinet's decision there had been any physical change in circumstances bearing on the assessment of environmental effects that was either capable of undermining the assessment or of affecting the operation of the 2017 Act.

    d. In arriving at the decision, Cabinet had to balance a number of significant and potentially conflicting political, economic, social and environmental considerations.

    e. Largely for that reason there was no single "right" decision. A decision either way might be perfectly reasonable.

    f. The review report had obvious limitations and did not gain full support from the whole panel.

21. Against that background, the Court considered whether the Government's decision was flawed by a failure to consider environmental effects. Unsurprisingly, it found that it was not (Paras 54-82):

    a. It was common ground that the Phase One works were lawful and they had been authorised under the 2017 Act. An environmental impact assessment of that phase had been undertaken and petitions against the Bill had been brought by local authorities and by national and local wildlife and woodland trusts. The review could not be divorced from the Parliamentary process by which environmental issues have and will be addressed: the review itself made that clear.

    b. The purpose of the review was to inform the decision on whether HS2 should continue and not to consider the project from scratch. There was no statutory basis for the decision to launch the review and no statutory or policy basis for the terms of reference. How far the review should go on the topics it considered was a "matter of judgment for the chair".

    c. It would be impossible to construct a project on the scale of HS2 Phase One without causing "interference with and loss of significant environmental matters, such as ancient woodland" and this had been authorised in the 2017 Act. Again, the Environmental impacts of Phase One had been addressed in the Parliamentary process. This must have been obvious to the Government when it initiated the review, considered the report and took the decision to proceed.

    d. There was no mention in the terms of reference that the review should carry out that type of assessment itself. They did not mention environmental impacts apart from climate change and it was a matter for judgment as to what topics were considered in the report. The exercise of judgment could only be challenged if Wednesbury unreasonable.

    e. The same test applied to the content of the report itself. It had not been suggested that the panel received any representations on the environmental impacts of Phase One that had not already been addressed in the proceedings on the Bill.

22. The Court also considered whether the Government failed properly to consider the implications of the Paris Agreement and the Climate Change Act. They rejected that ground for the following reasons (Paras 87-104):

    a. The statutory and policy arrangements, while providing a clear strategy for meeting carbon budgets and achieving the target of net zero emissions, leave the Government a good deal of latitude in the action it takes to attain those objectives.

    b. The thrust of the argument related to the considerable emphasis on the decision of the Court of Appeal in the Heathrow third runway case where it was held that the Government's policy commitment to revised climate change targets in the Paris Agreement was an "obviously material" consideration which the Secretary of State had been obliged to take into account when he designated the Airports National Policy Statement. However, the present facts were significantly different: the SoS in the third runway case had expressly conceded he had not taken into account the Paris Agreement because it was not considered relevant at that stage. The ANPS was designated in June 2018 a year before the Climate Change Act was amended to reflect the Paris Agreement whereas the HS2 review took account of the Government's commitment, following the Paris Agreement to a net zero target for 2050.

    c. It was alleged that the review report noted that increases in emissions would occur in the construction period but was silent on their legal consequences. The Court of Appeal rejected this contention and held that it was possible to infer such silence. The panel was well aware of the Government's determination to adhere and give effect to the provisions of the Paris Agreement which had by then been translated into domestic legislation. It explicitly referred to the net zero commitment.

    d. The review also did not neglect the period before 2050 and frankly accepted that the construction of the project would push up carbon emissions for much of the period before 2050. However, it also referred to the longer term potential of HS2 to promote modal shift and pointed out that the whole rail network needed to be decarbonised if the Government is to deliver the net

zero target. The conclusion was one of balance taking into account both the construction and operation of HS2.

e. There was no basis for the review to venture further than it did and to explore the need to restrict the global increase in temperature by that year and the pattern and extent of emissions during the period before.

R (on the application of London Borough of Hillingdon) v Secretary of State for Transport, Secretary of State for Housing, Communities and Local Government

THE ISSUE

23. Hillingdon LBC appealed against the decision of the SoS and High Court that it had erred in refusing to approve certain plans and specifications in accordance with its statutory obligations. The importance in the case lies in establishing the extent to which local authorities have control over aspects of the HS2 project.
24. Far narrower than the challenge in *Packham*, this challenge was concerned with the respective duties and obligations imposed by Parliament through Schedule 17 of the High Speed Rail (London-West Midlands) Act 2017 upon HS2 Limited and local authorities in relation to the implementation of HS2 as it affects localised planning concerns.

25. The dispute relates to the failure of HS2 Ltd to submit any information or evidence, as part of its formal request for approval to Hillingdon LBC which would enable it to conduct its statutory duties to evaluate the plans and specifications for their impact upon relevant planning interests (specifically, archaeological remains). HS2 Ltd argued it was under no such obligation to furnish such information and evidence and that it would conduct investigations into the potential impact of the development on archaeological remains and take all necessary mitigation and modification steps.

THE FACTS

26. On 20 March 2018 Hillingdon LBC refused to grant approval to a request made by HS2 Ltd for approval of plans and specifications for proposed works associated with the creation of the Colne Valley Viaduct South Embankment wetland habitat ecological mitigation. The Planning Inspector recommended that the refusal be upheld but that decision was called in by the Secretary of State and the decision of the Inspector was reversed. That decision was upheld by Land J and there followed the present appeal to the Court of Appeal.

THE LAW

27. A central tenet of Schedule 17 and the associated statutory guidance is that authorities and HS2 should work together in a proportionate, effective and collaborative way which balances important local interests with much broader national interest in the delivery of the HS2 project.

28. Under Paragraph 13 of Schedule 17 to the 2017 Act, Hillingdon LBC is designated a "qualifying authority". To so qualify, the authority had to provide an "undertaking" to the Secretary of State. The terms of the undertaking are set out in the "EMR General Principles Annex 2: Planning Memorandum". This undertaking binds the authority and "must be taken into account" in the determination of matters submitted by HS2 for approval under Schedule 17.

29. Section 20(1) of the 2017 Act grants a deemed planning permission under Part 3 of the TCPA 1990 for the carrying out of development but subject to Schedule 17 which imposes conditions.

30. Paragraph 3(1) of Schedule 17 provides that,

> "If the relevant planning authority is a qualifying authority, development to which this paragraph applies must be carried out in accordance with plans and specifications for the time being approved by that authority."

31. Paragraph 16 of Schedule 17 governs the documents to be submitted to the authority and the authority can refuse to consider a request unless the specified documentation is furnished.

32. Schedule 17 governs the circumstances in which the authority may both grant and refuse approval. Paragraph 3 contains conditions relating to "other construction works" and these include "earthworks". The grounds on which the authority can refuse an application are identified in paragraph 3(6). This includes the ground that "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". Additionally, "if the development does not form part of a scheduled work, that the development ought to and could reasonably, be carried out elsewhere within the development's permitted limits."

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

THE COURT HELD (Paras 68-71)

34. The Court emphasised that Schedule 17 operates on a clear premise that an LPA is under a duty to perform an evaluation of the impact of submitted plans and specification on the identified planning interests. Democratic responsibility and accountability for those decisions rest with the LPA who are addressing themselves to matters of local concern.

35. Both the Judge below and the Secretary of State erred in concluding that the references in the Statutory Guidance which urged planning authorities to avoid modifying or replicating "controls already in place" served to limit the powers and duties of an authority. It was alleged that the controls already in place related to the Environmental Minimum Requirements ("EMRs") which are the requirements set out in the Environmental Minimum Requirements document relating to Phase One. This document formed part of a contractual commitment between HS2 Ltd and the Secretary of State. HS2 Ltd argued that by virtue of statutory guidance, the EMRs ousted the duty of the authority under Schedule 17 as if they themselves carried investigations and then formed a view on whether there were planning concerns which required to be addressed through mitigation or modification. The statutory guidance then provided that the LPA had no tight to seek to modify or replicate controls already in place under the EMRs.

36. However, the Court held that such guidance, in law, could not have the effect of stripping from an authority the powers and duties it has imposed upon it under statute in relation to "control".

37. It follows that if HS2 Ltd fails to furnish an authority with information and evidence sufficient to enable the authority to perform its duty, then the authority is under no obligation to determine the request. HS2 Ltd has a duty to furnish an authority with such evidence and information as is necessary and adequate to enable the authority to carry out its statutory task. If it does not do that then the correct approach is not to refuse the request for approval but to decline to process the request until such time as adequate information and evidence has been furnished.

Planning Law Case Update

Author: Emma Dring

Dill v SSHCLG [2020] UKSC 20

1. Sections 66 and 72 of the Planning (Listed Buildings and Conservation Areas etc.) Act 1990 ('LBA 90') have generated a formidable body of case law, but the courts are rarely troubled by other parts of the Act. The case of *Dill* is therefore doubly notable, being a Supreme Court judgment which deals with the interpretation of s.1 LBA 90. The Court had to decide whether, in an appeal against a listed building enforcement notice, it was permissible for the inspector to determine whether the listed item was in fact a *"building"*.

2. It has to be acknowledged that, in most cases, this point would be a non-starter. It will usually be obvious that the listed item is indeed a *"building"*. However, in *Dill* the items in question were two urns on pedestals, and they were listed in their own right. The Court referred to Historic England's 'Garden and Park Structures - Listing Selection Guide' as indicating the "extraordinary variety of objects or structures apparently considered for listing".

3. In *Dill*, the Inspector had concluded that the status of the urns and pedestals as *"buildings"* was established by the listing and could not be reconsidered. The appellant argued that this was wrong in law; he was entitled to raise this issue. If the items were not *"buildings"* then they were not *"listed buildings"* and could not be subject to enforcement under the LBA 90. The Secretary of State sought to uphold the Inspector's approach, arguing that any challenge to the validity of the listing could only be pursued through judicial review proceedings.

4. The Court found, without much difficulty, that it was open to an appellant to argue that a listed item was not a *"building"* in an appeal against an enforcement notice (see paras 24-25 of the judgment):

a. There was nothing in the Act which suggested that the inclusion of an item on the list was to be regarded as conclusive as to its status as a *"listed building"*.
b. The definition in s. 1(5) LBA 90 (*"a building which is … included in [the] list"*) contains two "essential elements": the item must be a *"building"*, and it must be *"included in [the] list"*. Therefore "if it is not in truth a building at all, there is nothing to say that mere inclusion in the list will make it so".
c. Contravention of listed building control as a criminal offence, whether or not an enforcement notice is served. In accordance with general principles established in the case of *R v Wicks* [1998] AC 92, "short of a specific provision that the listing is to be treated as 'conclusive' … there is no reason to displace the ordinary presumption that the accused may raise any relevant defence". The same approach would apply in the context of an appeal.

5. If, having considered the issue, an Inspector concluded that the item was not in fact a *"building"*, they could exercise their power under s. 41(6)(c) to amend the list by removing the item from it.

6. Having determined that the status of an item as a *"building"* could be raised in an appeal, the Court then went on to offer some "general guidance as to the legal principles in play" when determining this issue. It noted "a disturbing lack of clarity about the criteria which have been adopted by the relevant authorities, not only in this instance but more generally, in determining whether freestanding items such as these are regarded as qualifying for listing protection".

7. The Court first considered 'curtilage listed' structures and objects. The definition of 'listed building' in s. 5(1)(b) provides that *"any object or structure within the curtilage of the building which, although not fixed to the building, forms part of the land and has done so since before 1 July 1948, shall . . . be treated as part of the building."* (emphasis added)

8. The Court observed (paras 38-39 and 43 of the judgment):

a. The requirement that curtilage listed objects and structures should *"form part of the land"* was "clearly designed to tie this part of the definition … to real property concepts under the common law" (i.e. the distinction between 'fixtures', which are annexed to the land, and chattels).

b. In determining whether an object is a fixture (and thus *"part of the land"*) the correct approach is to consider (1) the method and degree of annexation and (2) the object and purpose of the annexation.
c. "A statue or other ornamental object, which is neither physically attached to the land, nor directly related to the design of the relevant listed building and its setting, cannot be treated as a curtilage structure".

9. Clearly, the tests of method/degree and object/purpose of annexation involve questions of fact and judgement.

10. The Court then turned to consider objects and structures which were not 'curtilage listed' under the extended definition in s. 5(1)(b), but which might be listed or considered for listing in their own right (as in the case of Mr Dill's urns and pedestals). The Court concluded (para 52 of the judgment) that, in determining whether such structures qualified as *"buildings"*, the approach set out in the planning case of *Skerritts of Nottingham Ltd v Secretary of State for the Environment, Transport and the Regions (No 2)* [2000] JPL 1025 should be applied – not least because the definition of *"building"* in the TCPA 90 (*"'Building' includes any structure or erection…"*) also applied to the LBA 90.

11. In *Skerritts* the Court of Appeal confirmed a threefold test of "size, permanence and degree of physical attachment". It was observed that *Skerrits* itself illustrated "the importance of the method of erection ("a sizable and protracted event . . . It is assembled on site, not delivered ready made")". In the listed building context, the "need for something akin to a building operation when the structure is installed" was a "counterpart to the reference to 'works for the demolition' … under section 7… which clearly envisages some form of dismantling … when the item is removed from the site".

12. The general guidance given by the Court in the second half of the judgement is undoubtedly the most interesting aspect of the case. An up to date and authoritative judgment on curtilage listing will be welcomed by practitioners, and the guidance given regarding the identification of *"buildings"* is significant, even if it will not arise in the majority of cases. For one possible contemporary application, consider the status of listed statues which have been, or are intended to be, removed or dismantled following the Black Lives Matter protests. This would require listed building consent, and if done without such consent, could trigger possible enforcement action. But are the statues buildings in the first place? Once dismantled, what is the status of the constituent

parts? Does the statue, separated from its plinth, continue to be protected as a *"listed building"* or part of one?

13. The Court did not reach any concluded view on the status of Mr Dill's urns, considering that this needed to be resolved when the matter was remitted back for a fresh appeal. However, there were "arguments both ways", as follows:

> "On the one hand, it can be said, they comprised a set of elements which had to be assembled together (a "structure"), required a small crane to move them and to assemble them (as an "erection"), and were intended to occupy a stable and near permanent position in situ (with greater permanence than the marquee in Skerritts). On the other hand, they are not particularly large, compared for example with the items considered in the three planning cases. It may also be relevant that the vases themselves, which are the real focus of the special interest, are physically separate. If they had been resting on the ground, rather than a plinth, I doubt if it would have occurred to anyone that they might qualify as buildings. Relevant also is the apparent ease of their installation and removal (as compared for example to the works in Skerritts)." (para 58 of the judgment)

R (Liverpool Open and Green Spaces Community Interest Co) v Liverpool City Council [2020] EWCA Civ 861

14. The *Liverpool* case is an unusual example of an appeal being allowed to proceed despite having become academic between the parties. It concerned two planning permissions granted by the Council. The first permission was for the demolition of existing buildings and construction of new dwellings, and the conversion of a Grade II listed house and stables to apartments, on land designated in the development plan as Green Wedge. The second permission was for the relocation of the miniature railway, which would be displaced by implementation of the first permission.

15. There were two issues before the Court. The first related to the interpretation of Liverpool's Green Wedge policy, and the second related to the discharge of the duty under s. 66(1) Listed Buildings Act.

16. The appeal had become academic because the Mayor had made public statements that the housing scheme was "dead", and this had been confirmed to the Court by way of a formal undertaking that the permissions would not be implemented. Nevertheless, the Court determined that the appeal should proceed because the issues concerning the Green Wedge policy were "of some general importance" (para 11). The interpretation of the policy was not tied to the facts of the case, there was no previous judicial consideration of the policy, and it covers large areas of land. In addition, the Court observed that similar policies were in place in other areas.

17. The Green Wedge policy stated that the Council would not grant planning permission for proposals *"that would affect the predominantly open character of the Green Wedges"*, but that if new built development was permitted, certain criteria would have to be met. The Council argued that *"predominantly open character"* was a qualified, not an absolute, concept. It did not form part of national Green Belt policy. It envisaged that some level of harm could be acceptable. The CIC contended that the concept of *"open character"* was in fact synonymous with the concept of *"openness"* in the NPPF, and so referred to an absence of built development. The policy therefore gave rise to a presumption against development which would harm *"openness"*.

18. The Court summarised some key principles emerging from earlier authorities on the concept of *"openness"* (para 33 of the judgment):

    a. The imperative of preserving *"openness"* "is not a concept of law; it is a broad concept of policy". Its meaning "is to be derived from the words the policy-maker has used, read sensibly in their 'proper context'".
    b. "Applying the policy imperative of preserving the 'openness' of the Green Belt requires realism and common sense". It "involves the exercise of planning judgment", and "an unduly legalistic approach must be avoided".
    c. In principle visual effects can be relevant when considering whether a development will preserve *"openness"*.
    d. In the NPPF, the concept of *"openness"* in paragraph 79 (now 133) "goes to the mere physical presence, or otherwise, of buildings, regardless of any visual impact they might have". That does not mean that, in the context of paragraphs 87 to 90 (now 143-146), harm to *"openness"* cannot be caused by forms of development other than buildings, or cannot be caused by a visual impact - otherwise, those policies would not make sense.

e. There was no indication in paragraphs 87 to 90 (now 143-146) that the visual impact could not be considered, as well as physical or spatial impact. A number of factors are capable of being relevant when applying the concept of *"openness"* to the facts of a case.

19. The Council's argument on the policy was accepted, and it was held that the policy had been correctly interpreted and "lawfully applied in a sequence of rational and clearly reasoned conclusions" (para 38 of the judgment). Importantly, it was observed that the Green Wedge policy "differs materially" from national Green Belt policy: there was no requirement for *"very special circumstances"* and no "very strong presumption against built development". It was noted that the Council also had a different policy covering Green Belt which was more restrictive than the Green Wedge policy.

20. The question of whether the development would unacceptably affect the *"predominantly open character"* of the Green Wedge was "quintessentially a matter of planning judgment", and not limited to considerations of physical and spatial effects. The *"predominantly open character"* of a Green Wedge was itself something for the decision-maker to judge: it was a "qualified" concept which implicitly recognises that the Green Wedges, as designated, were by no means free from built development.

21. It can thus be seen that the key principles summarised by the Court, particularly regarding policy context, were central to the outcome of this case. Although the same or similar words may be used across different policies, it does not necessarily follow that they will always mean exactly the same thing. That can even be the case where the same word is used in different places in the same ground of policies, as in the NPPF. A holistic understanding of the particular policy and surrounding context (including other related policies and the underlying objectives of the policy) will be important.

22. It is easy to state these things as matters of general principle. The task of applying them in practice is unfortunately not so straightforward. There will often be considerable uncertainty as to how a judge will view the matter, if it goes to court. In this case it can be noted that the High Court had taken the opposite view to the Court of Appeal, concluding that since it was "not disputed that these proposals would affect the open character of the [Green Wedge]", the Council was "wrong, without first acknowledging a conflict [with the policy] … to concern itself with the planning judgment as to whether

the development would "unduly" or "in the main" adversely affect the green wedge space" (i.e. the concept of *"openness"* was not a qualified one).

23. The part of the judgement dealing with the s. 66(1) LBA 90 issue is also interesting, in that the Court found that the failure to mention the consultation response from the Council's own Urban Design and Heritage Conservation team (either in the report to committee or in the meeting itself) was, without more, sufficient to rebut the presumption that where relevant paragraphs of the NPPF are referred to, the officer will have discharged the duty in s. 66(1) (para 81 of the judgment).

24. The internal consultation response was from a team with specific expertise, and the need to take account of such expert advice was set out in the NPPF and PPG. The team had raised strong objections to an aspect of the proposals, which was materially different to the assessment presented in the officer's report. Even leaving aside s. 66(1), the consultation response was an "obviously material" consideration which could have affected the outcome, so that the failure to have regard to it was an error of law (paras 74-78 of the judgment) .

25. This should serve as a salutary reminder – if one were needed – that those tasked with writing up committee reports and presenting applications need to take particular care when dealing with issues of heritage. The decision maker must be presented with the full range of views as to the potential for harm. All consultation responses from statutory or internal consultees with particular expertise on a topic (whether heritage or anything else) must at least be accurately summarised, if not reported in full.

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

26. By way of illustration that not all Supreme Court cases involve large, lucrative developments, the *Wright* case involved a proposal for a single wind turbine. The turbine was to be run by a community benefit society. In the words of the Court:

> "The application included a promise that an annual donation would be made to a local community fund, based on 4% of the society's turnover from the operation of the turbine over its projected life of 25 years ("the community fund donation"). In deciding to grant planning permission for the development

> the Council expressly took into account the community fund donation. The Council imposed a condition ("condition 28") that the development be undertaken by a community benefit society with the community fund donation as part of the scheme." (para 2 of the judgment)

27. The policy context for the community fund donation proposal included Para 79 NPPF 2012 (now para 152) which encouraged local authorities to *"support community-led initiatives for renewable and low carbon energy"* and guidance to the same effect in the PPG.

28. There was evidence before the Supreme Court that similar funds elsewhere had been used to fund a variety of community projects including "the creation of a village handyman service, the maintenance of publicly accessible defibrillators in the village, the purchase of waterproof clothing to enable young members of the community to participate in scheduled outdoor activities in inclement weather, and to provide a meal at a local public house for the members of a lunch club for older people in the village and club volunteers". All of these are clearly desirable and of real benefit to the local community.

29. The short issue for the Court was whether the community fund donation was a *"material consideration"* (for the purposes of s. 38(6) PCPA 04 and s. 70(2) TCPA 90).

30. Mr Wright, a local objector, argued that it was not, and that the Council had acted unlawfully by taking it into account. He was successful in the High Court and in the Court of Appeal.

31. The Secretary of State intervened in the appeal (at the invitation of the Court) and argued in support of the appellants, to the effect that the Council had been entitled to take the community benefits into account. The Secretary of State invited the court to "update *Newbury* to a modern and expanded understanding of planning purposes". The *Newbury* case established the familiar threefold test that planning conditions (which, if lawfully imposed, can be treated as a material consideration in favour of an application) must be "for a planning purpose … must fairly and reasonably relate to the development permitted … [and] must not be so unreasonable that no reasonable planning authority could have imposed them".

32. The Court reviewed the case law on the principle that planning permission cannot be brought or sold, noting that in *R v Plymouth City Council* (1993) 67 P&CR 78 it had been confirmed that "there is a public interest in not allowing planning permissions to be sold in exchange for benefits which are not planning considerations or do not relate to the proposed development". On this basis,

> "a condition or undertaking that a landowner pay money to a fund to provide for general community benefits unrelated to the proposed change in the character of the use of the development land does not have a sufficient connection with the proposed development as to qualify as a 'material consideration' in relation to it." (para 38 of the judgment)

33. A series of cases were relied on by the developer as showing that policy could influence the question of what was a "material consideration", but the Court concluded that on a proper analysis they did not support the point (paras 51-57 of the judgment). In each case the subject of the policy was directly related to the use of land and therefore a "material consideration". In each case the court had been concerned with the different issue of whether the policy provided sufficient legal basis to justify the grant of permission.

34. The Court's view was that the principled approach set out in *Newbury* was important to protect both landowners (from the prospect of local authorities extracting money for unrelated purposes) and the public interest (from the prospect of planning permission being bought). In both cases, the approach upheld the principle that applications should be determined on their planning merits (para 39 of the judgment).

35. It was therefore not necessary or appropriate to 'update' the meaning of a "material consideration" in line with government policy. It was also noted that the meaning of the statutory term was a matter of law, and where Parliament had in the past sought to expand the ambit of material considerations it had done so by amending s. 70(2) TCPA 90 (para 45 of the judgment).

36. On the established principles, it was clear that the community benefits promised by the developer, in the form of payments to the local community, did not qualify as "material considerations" for the purposes of s. 70(2) TCPA 90 and s. 38(6) PCPA 04. They "were not proposed as a means of pursuing any proper planning purpose, but for the ulterior

purpose of providing general benefits to the community". The benefits did not affect the use of land, "they were proffered as a general inducement to the Council to grant planning permission and constituted a method of seeking to buy the permission sought" – and in this regard it did not matter if the scheme was regarded as commercial and profit-making or purely community-run (para 44 of the judgment).

37. *Wright* clearly breaks no new ground. It serves as a powerful endorsement of existing principles on the extent to which financial considerations may be "material" to the decision to grant planning permission. In some ways it is surprising that the case made it to the Supreme Court: the law is well settled and the High Court and Court of Appeal had already correctly applied it and reached the same conclusion the Supreme Court later did. The financial benefits in question seem fairly obviously to have been unrelated to the development of land. This is a timely reminder that, no matter how desirable the benefits associated with an application are perceived to be, unless they can be tied directly to the use of the land and to proper planning purposes, they cannot form part of the reasons for granting permission.

Planning Law Case Update

Author: John Fitzsimons

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

THE ISSUE

1. This case involved the high-profile question of the addition of a third "north west" runway at Heathrow Airport. A decision in favour of the proposal had been made pursuant to the policy set out in the "Airports National Policy Statement: new runway capacity and infrastructure at airports in the South East of England" ("ANPS"). The ANPS was designated under s.5 of the Planning Act 2008.

2. The case involved four separate claims all of which were dismissed when heard together by a Divisional Court [2019] EWHC 1070 (Admin) last year. The challenge brought to the Court of Appeal raised a variety of issues in respect of the Habitats Directive, SEA Directive, Climate Change, and Relief.

3. Although there are lots of particularly interesting aspects of the Court of Appeal's judgment, it is the decision it took to allow the appeal in respect of the climate change questions, in particular the duty to take account of the Paris Agreement as "Government policy" which merits the most attention. It is also particularly interesting in the approach that is taken to the question of relief.

THE COURT HELD

Habitats Directive

4. The key issues in respect of the Habitats Directive concerned the rejection by the Secretary of State of the Gatwick Airport scheme as an alternative to the north-west runway scheme at Heathrow. In particular, there was an allegation of unlawfulness in the Secretary of State's rejection of the Gatwick proposal as an alternative solution on the basis that it would not meet the 'hub objective' contrary to the assessment requirements of the Article 6(3) and 6(4) of the Habitats Directive.

5. The Court first had to determine the necessary standard of review when determining challenges involving assessments taken pursuant to EU legislation concerned with environmental protection. It concluded that the standard of review was *Wednesbury* unreasonableness. In doing so it noted that the Article 6(3) and 6(4) of the Habitats Directive do not provide for a particular standard of review and rejected an argument that a different approach involving a more intensive standard of review was required in light of the decision of the CJEU in *Craeynest* [2020] Env LR 4 [75].

6. On this point, Lord Justice Lindblom was emphatic about the "clear strand of EU case law that respects the discretion of Member States to lay down procedural rules for the protection of EU law rights." As "Wednesbury" is the applicable standard in normal judicial review proceedings, there was "no justification for applying a more intense standard…to the operation of the provisions of article 6(4) of the Habitats Directive" [75].

7. Second, having established the necessary standard of review, the Court turned to the Secretary of State's consideration of "alternatives" for the purposes of Article 6(4) of the Habitats Directive. Those familiar with Article 6(4) will know that the existence of an alternative means that a developer cannot rely on the existence of imperative reasons of overriding public importance ("IROPI") to justify development which would have an adverse effect on the integrity of sites protected by the Habitats Directive.

8. On this question, the Court concluded that:

    a. The objective of maintaining the UK's hub status ('the hub objective') had been a central aim throughout the national policy statement process [87];
    b. It had been the consistent view of the Secretary of State that the Gatwick proposal was not only incompatible but inimical to the hub objective [88];
    c. It was therefore open to the Secretary of State to conclude that the Gatwick scheme was not a realistic "alternative solution" under article 6(4) [88];
    d. As such, there had been no breach of the Habitats Directive.

9. In summary, the Court noted that the "hub objective" was clearly a "genuine and critical" objective of the ANPS. Given this context, "since there was a clear and

unassailable finding that expansion at Gatwick 'would not enhance, and would consequently threaten, the UK's global aviation hub status', [it]…could not realistically qualify as an 'alternative solution' under article 6(4)." Any accusation that the Secretary of State had constructed the hub objective in a deliberate and narrow way to exclude other options was dismissed [93].

10. Finally, it was argued that it was inconsistent and unlawful for the Secretary of State to rule out the Gatwick scheme as an "alternative solution" for the purposes of article 6(4) Habitats Directive while continuing to consider it as a "reasonable alternative" for the purposes of the assessments required under the SEA Directive.

11. This argument was dismissed on the basis that the SEA Directive requires public consultation on the contents of environmental reports which could not effectively be carried out unless all "reasonable alternatives" were put in the public domain, whereas the Habitats Directive imposes no such duty. The Court noted that as such, the provisions in the Directives were different "in substance and effect" [116]. As such, the Habitats Directive had not been breached.

SEA Directive

12. Turning to the SEA Directive, the Court heard argument that article 5 and Annex I of the SEA Directive impose requirements justifying a more intensive review than traditional public law principles dictate. However, the Secretary of State submitted that no such hard-edged legal requirements were set down by the Directive [134].

13. The Court noted that in its view, "the court's role in ensuring that an authority…has complied with the requirements of article 5 and Annex I when preparing an environmental report, must reflect the breadth of the discretion given to it to decide what information may reasonably be required when taking into account the considerations referred to:

    a. Current knowledge and methods of assessment;
    b. The contents and level of detail in the plan or programme;
    c. Its stage in the decision-making process;

d. The extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment [136].

14. The Court noted that these requirements "leave the authority with a wide range of autonomous judgment on the adequacy of the information provided. It is not for the court to fix this range of judgment more tightly than is necessary." It followed that the Court endorsed a 'conventional 'Wednesbury' standard of review" [136]. The approach taken in *Blewett*, by Sullivan J, as he then was, thus remains good law in the context of reviewing compliance with the SEA Directive [143].

15. Having adopted this standard of review, the Court applied it to the further SEA grounds of challenge and found that on the particular facts of the case, the SEA Directive had not been breached. In this regard, it is notable that the Court reiterated how the Secretary of State's approach was a "classic exercise of planning judgment, in the kind of issue [the use of indicative flight paths in the noise assessment] for which the court will allow the decision-maker a substantial 'margin of appreciation'" [177].

Climate Change Issues

16. As noted above, it was the climate change issues that won the day in this case for the Appellants. A number of climate change arguments were raised but the key submission was that in respect of the Government's commitment to the Paris Agreement. The Paris Agreement enshrines a firm commitment to restricting the increase in the global average temperature to "well below 2 degrees Celsius above pre-industrial levels and [to pursue] efforts to limit the temperature increase to 1.5 degrees Celsius above pre-industrial level" – Article 2(1)(a).

17. The argument was that this constitutes government policy on climate change, which the Secretary of State was required to take into account; and furthermore, that the Secretary of State breached the SEA Directive in failing to consider the Paris Agreement [184].

18. It was common ground that the Secretary of State had not taken the Paris Agreement into account in the course of making his decision to designate the ANPS [186]. The Secretary of State had relied on the duty in section 1 of the Climate Change Act 2008, obliging him to ensure that the net UK carbon account for the year 2050 was at least 80% lower than the 1990 baseline, meaning that there was a target to reduce emissions by 2050 to at most 80% relative to 1990 levels.

19. The focus of the argument was on section 5(8) of the Planning Act 2008. This provides that the reasons for the policy set out in a national policy statement (as required by s5(7)), must include an explanation of how the policy set out in the statement takes account of Government policy relating to the mitigation of, and adaption to, climate change. The Appellants argued that the Paris Agreement was "Government policy" that fell within the scope of this provision.

20. The Court agreed. It observed that the words "Government policy" are words of the ordinary English language and they do not have any specific technical meaning. They should thus be applied in their ordinary sense to the facts of a given situation [227]. However, the Court was clear that "the concept of policy is necessarily broader than legislation" [227].

21. The Court further noted that there was no inconsistency between the Climate Change Act and the Paris Agreement, given the Act sets out a target of "at least" an 80% reduction by 2050. It was thus not correct for the Divisional Court to conclude that the Secretary of State was somehow being required to take a position inconsistent with what was required by statute [225].

22. The Court also explained its view that this was not giving effect to an unincorporated international agreement by "the back door". Instead, it stated firmly that any such debate does not bear on the proper interpretation of s5(8) which does not require the Secretary of State to act *in accordance* with a particular policy; but simply requires that he take account of it and explain how it has been taken into account [226].

23. As the Secretary of State failed take account of the Paris Agreement (deliberately so, having taken legal advice), this was a "material misdirection of law at an important stage

in the process. That misdirection then fed through the rest of the decision-making process and was fatal to the decision to designate the ANPS itself" [227].

24. The Court thus concluded that the Government's commitment to the Paris Agreement was "clearly part of 'Government policy'…[as a result of] the solemn act of the United Kingdom's ratification of that international agreement in November 2016" and "firm statements re-iterating Government policy of adherence to the Paris Agreement by relevant Ministers…" [228].

25. The Court was at pains to emphasise that all it was requiring was that the executive take account of its own policy commitments as required by the will of Parliament expressed through section 5(8); nothing more than this [229-230]. The failure to take into account the policy was enough to vitiate the ANPS [233].

26. The Court further held that the Paris Agreement was a consideration of such obvious materiality that the Secretary of State had no discretion as to whether to take it into account [237] and the failure to take into account the Paris Agreement was also a breach of the SEA Directive [247].

Relief

27. Having identified errors of law, the Court then turned to its discretion and s31(2A) Senior Courts Act 1981 to grant relief. It refused to withhold relief, noting that despite the amendments made to section 31 by section 84 of the Criminal Justice and Courts Act 2015:

> "Parliament has not altered the fundamental relationship between the courts and the executive. In particular, courts should still be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of a public decision…if there has been an error of law, for example in the approach the executive has taken to its decision-making process, it will often be difficult or impossible for a court to conclude that it is 'highly likely' that the outcome would not have been 'substantially different' if the executive had gone about the decision-making process in accordance with the law" [273].

28. While the Secretary of State did not contend that relief should be refused if the court found that that a ground of challenge relating to the Paris Agreement succeeded, Heathrow Airport Limited had made such a contention [274]. This argument was not accepted by the Court. It noted in particular that "it is incumbent on the Government to approach the decision-making process in accordance with the law at each stage" [275] and that "in any event, this is one of those cases in which it would be right for this court to grant a remedy on grounds of 'exceptional public interest'" [277].

29. Despite these clear statements of principle, in granting relief the Court declined to quash the ANPS. This was despite the fact that this was the remedy sought by the Appellants and the Secretary of State had declined to suggest any particular remedy when invited to do so [279].

30. Instead, the Court simply made a declaration, the effect of which was to declare the designation decision unlawful and to prevent the ANPS from having any legal effect unless and until the Secretary of State has undertaken a review of it in accordance with the statutory provision [280]. The only reason the Court appeared to give for not quashing the ANPS was that it did not consider "that in the particular circumstances of this case, given our conclusions on the issues of the SEA Directive and the Habitats Directive, it is necessary or appropriate to quash the ANPS at this stage" [280].

Supreme Court Appeal

31. Those following this case will be aware that the Supreme Court granted permission to Heathrow Airport Limited to appeal on the sole issue of whether or not taking into account the Paris Agreement was lawful. It is understood that the appeal was heard by the Supreme Court on 7/8th October 2020.

32. Heathrow Airport Limited has sought to argue in particular that the Court of Appeal's conclusion that the Paris Agreement was not "Government policy" for the purposes of s5(8) of the Planning Act 2008 was wrong as treaties are not Government policy for the purposes of that provision, Government policy was in any event bound by the Climate Change Act 2008 s1, and the ANPS was in any event consistent with the Paris Agreement.

33. For those interested in reading more about this matter, Plan B has helpfully put all of the pleadings in the Divisional Court, Court of Appeal and Supreme Court on its website here: https://planb.earth/plan-b-v-heathrow-expansion/

R(on the application of ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy [2020] EWHC 1303 (Admin)

THE ISSUE

34. This case involved an application under s118 of the Planning Act 2008 ("PA 2008") for judicial review of the Secretary of State's decision to grant the application made by Drax Power Limited ("Drax") for a development consent order ("DCO") for a "national significant infrastructure project" ("NSIP"): namely the construction and operation of two gas-fired generation units at Drax Power Station, North Yorkshire.

35. The challenge gave rise to important issues on (a) the interpretation of the Overarching National Policy Statement for Energy ("EN-1") and the National Policy Statement for Fossil Fuel Electricity Generating Infrastructure ("EN-2"), both of which applied to the proposal, and (b) their legal effect in the determination of the application for a DCO, particularly as regards the need for the development and greenhouse gas emissions ("GHG").

36. Despite the above, the case is most interesting for its interpretation and application of the principles on material considerations elucidated by Lord Carnwath in his final planning law judgment on the Supreme Court Bench in *R* (*Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] PTSR 221.

THE FACTS

37. Drax had applied under s37 of the Planning Act 2008 for permission to build and operate two gas-fired generating units as identified in Part 3 of EN-1. The application was considered by a two-person panel appointed by the Secretary of State. Following the close of this examination, Drax submitted a letter addressing an amendment to the Climate Change Act 2008 concerning the UK's net zero emissions target.

38. In its report, the panel observed that the power station's environmental statement indicated too low a baseline for the assessment of future emissions from the proposed development and that this would lead to a greater increase in GHG emissions then Drax had estimated. The panel further considered that EN-1 distinguished between the need for energy NSIPs in general and the need for any particular development.

39. Applying the balancing exercise in s104(7) of the Planning Act 2008, the panel concluded that the adverse impacts of the development outweighed the benefits, the case for development consent had not been made out and so consent should be withheld.

40. However, the Secretary of State disagreed. While she did not dispute that the proposed development would have significant adverse environmental impacts through GHGs, she concluded that it would meet a national need which outweighed those impacts. She further decided that EN-1 assumed a general need for fossil fuel generation and did not draw any distinction between that general need and the need for any particular proposed development. She explained that in her view, substantial weight should be given to a project contributing to that need. As a result, she issued the Drax Power (Generating Stations) Order 2019.

41. The Claimant's challenge raised nine grounds in total. These can be summarised as an objection to the development on the ground that the adverse impacts outweighed the benefits, both as assessed under the National Policy Statements ("NPSs") and through the application of the s104(7) balancing exercise. As such, the Claimant argued that the secretary of state had misinterpreted EN-1 on the assessment of "need" for the development and on GHG emissions and misapplied s104(7) PA 2008. The Claimant also argued that the Secretary of State had breached the Infrastructure Planning (EIA) Regulations 2017 ("2017 Regulations"); and erred in taking account of Drax's late submission.

THE COURT HELD

42. The challenge was dismissed by Mr Justice Holgate. Before turning to the individual grounds of challenge, the judge set out his view of the law in light of the Supreme Court's decision in *Samuel Smith*. The Judge explained that:

    a. As per *Samuel Smith*, it is "insufficient for a claimant simply to say that the decision-maker did not take into account a legally relevant consideration. A legally relevant consideration is only something that is *not* irrelevant or immaterial, and therefore something which the decision-maker is *empowered or entitled* to take into account."

    b. "But a decision-maker does not *fail* to take a relevant consideration into account unless he was *under an obligation* to do so. Accordingly, for this type of allegation it is necessary for a claimant to show that the decision-maker was expressly or impliedly required by the legislation (or by a policy which had to be applied) to take the particular consideration into account, or whether on the facts of the case, the matter was so "obviously material", that it was irrational not to have taken it into account."

    c. "It is also plain from the endorsement by the Supreme Court in *Samuel Smith* at [31] of *Derbyshire Dales* at [28], and the cross-reference to *Bolton Metropolitan Borough Council v Secretary of State for the Environment* [2017] PTSR 1063 but solely to page 1071, that principles (2) and (6) in the judgment of Glidewell LJ in *Bolton*…are no longer good law." [99-100]

43. Those principles in *Bolton* which are no longer good law are thus:

    a. The decision-maker ought to take into account a matter which might cause him to reach a different conclusion to that which he would reach if he did not take it into account. Such a matter is relevant to his decision-making process. By the verb "might", I mean where there is a real possibility that he would reach a different conclusion if he did take that consideration into account; and

    b. If the judge concludes that the matter was "fundamental to the decision", or that it is clear that there is a real possibility that the consideration of the matter would have made a difference to the decision, he is thus enabled to hold that

> the decision was not validly made. But if the judge is uncertain whether the matter would have had this effect or was of such importance in the decision-making process, then he does not have before him the material necessary for him to conclude that the decision was invalid.

44. Thus while this judgment has interesting things to say about the correct interpretation of EN-1, the passages at paragraphs 99-100 have a much wider application to all those involved in planning court challenges raising grounds of challenge concerning a failure to consider a relevant consideration.

Assessment of Need

45. Turning to the grounds of challenge, Holgate J first dealt with the question of whether the Secretary of State misinterpreted EN-1 when she rejected the Panel's view that the NPS draws a distinction between the need for energy NSIPs in general and the need for any particular proposed development. In answer to this, the Judge noted that "it is necessary to read EN-1 as a whole, rather than selectively" [129]. In this regard, it was "plain that the NPS…does not require need to be assessed in quantitative terms for any individual application" [129]. It followed that there was no justification for the panel to have regard to quantitative projections in order to assess the contribution of the proposal in meeting the qualitative need identified in the NPS [131].

46. Holgate J characterised the Claimant's challenge as going to the merits of the policy itself. The effect of such a challenge if successful would have meant that any applicant for a DCO for gas-fuelled power generation would need to demonstrate a quantitative need for the proposed development. That would run counter to the reason for the introduction of the PA 2008 and the energy NPSs [135].

47. Holgate J also noted that such "arguments about the current or continuing merits of the policy on need could be relevant to any decision the Secretary of State might be asked to make on whether or not to exercise the power to review the NPS under s.6 Planning Act 2008" [134]. However, "no such decision has been taken and this claim has not been brought as a challenge to an alleged failure to act under s.6" [134].

48. Turning to the question of whether the Secretary of State had a heightened obligation to give fuller reasons in light of her disagreement with the panel, Holgate J noted that

because in his view the panel had misinterpreted EN-1, the Secretary of State had no need to address the reasons given by the panel for attributing no weight to the case on need, because they involved discounting that need by reference to a quantitative assessment [147].

GHG Emissions

49. The Claimant also sought to argue that the Secretary of State misinterpreted EN-1 as requiring the decision-maker to treat the GHG emissions of the proposal either as irrelevant or as having no weight [165]. However, Holgate J dealt with this shortly on the facts by noting that it was plain from certain passages in the decision letter that the Secretary of State did not treat GHG emissions as irrelevant, nor did she treat them as something to which no weight should be given [167].

Section 104(7) Balance

50. The Claimant had further argued that the Secretary of State failed to comply with her obligation under s104(7) of the PA 2008 to weigh the adverse impact of the proposed development against its benefits. It argued that instead, the Secretary of State had merely repeated the assessment she had already carried out under s104(3) and thus unduly fettered her discretion [174].

51. However, Holgate J reiterated how both the Claimant and the panel had misunderstood the policy in EN-1 on need. As such, the Secretary of State was legally entitled to reject the panel's approach and to give "substantial weight" to the need case in accordance with the NPS [177]. The judge explained that EN-1 does not state that emissions were not to be taken into account in the DCO process, nor does it prescribe the amount of weight to be given to emissions as a disbenefit, except to say that that factor alone did not justify a refusal of consent [178].

52. Accordingly, when the Secretary of State decided not to give greater weight to GHG emissions because she found there to be "no compelling reason in this instance", she was simply expressing a matter of planning judgment [180].

2017 Regulations and Duty to act fairly

53. The Claimant also pursued an argument that the Secretary of State had breached the 2017 Regulations by failing to consider whether monitoring measures were appropriate pursuant to Reg 21(1)(d). However, on the facts, Holgate J noted that the Secretary of State "had well in mind" this requirement [206]. He further noted that there was no requirement for the Secretary of State to give reasons for a decision not to impose a particular monitoring measure; such a duty would only arise under s116(1) of the PA 2008 in the context of "principal important controversial issues" in the examination [207].

54. Finally, the Claimant had complained that there was a breach of a duty to act fairly because of the fact that regard was had to Drax's late submission without supplying a copy of that letter to other participants in the examination. However, this also failed on the facts as the letter had been provided to officials but not to the Secretary of State, who had no actual knowledge of it. Accordingly, she was not influenced by the letter and in any event the Claimant had not lost an opportunity to advance its case [240 – 244].

55. The challenge was ultimately dismissed but the Claimant has appealed to the Court of Appeal so that Court may well have a chance to grapple with Holgate J's long and detailed judgment in due course. In the meantime, his elucidation of the *Samuel Smith* test in respect of relevant considerations, and his analysis of the correct way to interpret EN-1 are two useful points to note in this judgment.

Kenyon v Secretary of State for Housing, Communities and Local Government [2020] EWCA Civ 302

THE ISSUE

56. This case involved the judicial review of a screening direction given by the Secretary of State that a residential development proposal of 150 houses was not EIA development. It is particularly interesting because of the way in which the Court of Appeal demonstrates the difficulties that claimants have in bringing challenges in relation to the EIA regulations.

FACTS

57. In 2016, the Appellant had requested an EIA screening direction from the Respondent in light of concerns about air pollution levels associated with an application for planning permission for 150 homes. The Secretary of State concluded that the proposed development was not EIA development within the meaning of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011, Reg 2. This was on the basis that the proposed development was not likely to have significant effects on the environment. It followed from this that no environmental statement was required.

58. The challenge came before Mrs Justice Lang in the High Court and all grounds of challenge were dismissed. The Appellant then brought a challenge to the High Court decision on the basis that:

    i. There was an insufficient evidential basis for the finding that the proposed development would have no likely significant effects on the environment;
    ii. There had been a failure to acknowledge that a precautionary approach to EIA decision-making was required in circumstances where it was accepted that the proposal would lead to an increase in traffic and air pollution within the nearby Air Quality Management Area;
    iii. The judge had erred in concluding that the Secretary of State had considered cumulative effects in circumstances where "he had failed to provide any material evidence";
    iv. The judge had failed to have regard to the fact that the first respondent relied upon the proposal being in an urban area; and
    v. The judge had erred in regarding the site in question as an existing development site.

THE COURT HELD

Grounds 1 and 3 – Evidential basis for finding of "no likely significant effects"

59. The Court of Appeal dismissed the challenge. As to Ground 1, Coulson LJ explained that an appellant seeking to argue that the decision-maker reached a conclusion for which there was no evidential basis "faces an uphill task" [43]. This task is even more

difficult in the context of a screening direction which is a "preliminary broad-based assessment of environmental impacts, undertaken by those with relevant training and expertise" [43].

60. In language suggesting a growing impatience bordering on exasperation about overly legalistic challenges, Coulson LJ agreed with Mrs Justice Lang's assessment about the Appellant's approach being "unduly forensic and nit-picking" [45].

61. The judge emphasised how this was a "routine development of residential houses" and "there was nothing unusual about the proposed development" [48]. This led him to reiterate how a decision-maker is not required to "set out in detail all the information and statistics, of which they would have been well aware, and which might be relevant to the question[s]" before them [54]. The decision-maker "must be taken to be familiar with all such information" [54]

62. In the circumstances, the Court concluded that "there was a sufficient evidential basis for the conclusion that…the proposed development was not likely to have a significant effect on the environment" [58].

63. The Court reached a similar view in respect of Ground 3, noting that it was "beyond argument that [the decision-makers] reached their conclusions, that there were no likely significant effects arising from the proposed development…taking into account all relevant considerations…there was a plain evidential basis for that conclusion" [61].

Ground 2 - Precautionary Approach

64. The judgment is also interesting in how it dealt with Ground 2 and the question of the precautionary approach advocated by the Appellant. The precautionary principle has previously been set out in detail in *R(Loader) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 869 at [9] and stems from Recital 2 of EU Directive 2011/92/EU.

65. The Appellant's submission had been that because there was what he described as "inevitable uncertainty" about the air pollution created by the proposed development,

the decision-maker, and the judge, failed to have proper regard to the precautionary principle.

66. Coulson LJ considered such an argument to be "misconceived" [65]. He reiterated how "the precautionary principle will only apply if there is "a reasonable doubt in the mind of the primary decision-maker" (see Beatson LJ in *Evans v Secretary of State* [2013] EWCA Civ 115) [66]. Coulson LJ emphasised how "it is contrary to the principle outlined there to argue that, merely because somebody else has taken a different view to that of the primary decision-maker, it cannot be said that there was no reasonable doubt" [66].

67. It followed that in the present case, as the decision-makers had concluded that the proposed development was not likely to lead to significant effects, "where there was no doubt in the mind of the relevant decision-maker, there is no room for the precautionary principle to operate" [67].

Grounds 4 and 5 – "Urban Area" and "Existing Development Site"

68. Turning to Ground 4, the Court concluded that nowhere in the screening direction was there any suggestion that the potential air pollution from the completed development of the site was treated different because it would occur in an urban environment, as opposed to a rural location. The screening direction was said to have made it plain that the pre-existing urban environment was part of the context in which the development was going to take place, and was therefore a relevant factor to be taken into account when considering whether the effect was likely to be significant [80-82].

69. Ground 5, although not formally abandoned, was not pressed by the Appellant and was dismissed on the basis that it would be "contrary to common sense to suggest that [the site] should somehow be designated or treated in the same way as a greenfield site" [73].

70. *Kenyon* undoubtedly emphasises the continued difficulty that appellants have in challenging decisions taken under the EIA Regulations. The "uphill task" referred to by Coulson LJ is particularly so because of the high-level nature of screening directions or screening opinions.

71. While the judgment is of course fact specific, the now well-established references to an approach of nit-picking by an appellant again serve as a further reminder from the courts that they are not interested in challenges seeking to bring an overly legalistic approach to what are often exercises of planning judgment.

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