Welcome...

The top five planning law cases you need to know

Wednesday, 25 May 2022

SHOOSMITHS

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Types of challenge

- Judicial Review
- Statutory Challenge;
- Local Plan/Neighbourhood Plan Challenges.

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Judicial review

- Challenges to decision of public bodies such as a local planning authority;
- Time limit: (Normally) 6 weeks from the date of the decision; (But see also NP challenge periods).
- Defendant: local planning authority or body who made the decision;
- Second Defendant/Interested Parties: e.g. applicants for the planning permission.

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Statutory challenges

- Such as challenges to s.78 appeal decision letters under s.288 Town and Country Planning Act 1990 (as amended);
- Time limit: 6 weeks from the date of the decision to make application
- Who can challenge: a person aggrieved by the SoS/Inspector decision to grant/refuse planning permission;

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Court Process

Two stages:

Court "Permission" Stage:

- Application for the Court's Permission to proceed
- Case has to be "arguable"
- Judge considers papers filed with Claim.

Court "Substantive Hearing" Stage:

- If Permission granted the matter will proceed to a substantive/full Hearing - decided "on the merits"
- It Permission refused at first stage - application can be re-considered at short hearing.

Common grounds of challenge

- Normally mistakes in applying/not applying:
  - The law;
  - National policy and guidance (NPPF and PPG);
  - Local plan policy.
- Translate into:
- Decision maker acting *ultra vires* and/or irrationally and/or decision is (Wednesbury) unreasonable.
- Took something into account that should not have done or failed to take into account something.

But this is not a re-run of the application/S 78 appeal- Court will not interfere with *"Planning Judgement".*

Court Powers

Broadly speaking…

- Dismiss Claim; or
- Quash decision which then must be re-determined

But note…Court discretion is wide…

Section 31(2A) of Senior Courts Act 1981 provides that ***the court must refuse to grant relief*** on an application for judicial review…***if it appears to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred***

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Your panel today

Connect with our panel members by scanning the relevant QR code below.

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CASE 1 – Neighbourhood Plans

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R (oao Fylde Coast Farms Ltd) v Fylde BC [2021] UKSC 18

Landmark Chambers

- Relevance –
  - SC had to consider whether alleged legal errors in a local planning authority's consideration of an examiner's report and the holding of a referendum in the making of a neighbourhood plan or order must be challenged at each respective stage or whether it can be challenged at the end of the process (i.e. once the neighbourhood plan or order plan has been made).
  - Usefully sets out and summarises the various statutory steps in the making of a neighbourhood plan and analyses the effect of section 61N of the Town and Country Planning Act 1990 on challenges brought to the making of a neighbourhood plan.

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Facts

- The examiner of the St Anne's on Sea NP recommended in his report dated 10 August 2016 the inclusion of Oyston Estate's site within the settlement boundary.
- Following its consideration of the examiner's report on 2 March 2017, Fylde BC decided not to follow the examiner's recommendation and the NP went to referendum without including the site within the settlement boundary.
- Referendum held on 4 May 2017 and NP made on 26 May 2017.
- Oyston Estates challenged the making of the NP by judicial review on 6 July 2017 on the basis that Fylde Borough Council had acted unlawfully in refusing to follow the examiner's recommendation.

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Proceedings in HC

- In its AoS, Fylde Borough Council maintained claim was unarguable as brought out of time because it was a challenge to the consideration given to the examiner's report on 2 March 2017 and in accordance with section 61N(2) of the Town and Country Planning Act 1990 a claim had to be brought within six weeks of that date (i.e. by 13 April 2017).
- Lang J directed a preliminary hearing on the question whether the claim was brought within time.
- Kerr J held that it was brought out of time.
- Court of Appeal dismissed Oyston Estate's appeal.

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Issue

- The issue for SC was whether section 61N is permissive or merely restrictive in its purpose and effect: ie does it create new or replacement rights of public law challenge (subject to procedural conditions) or simply impose new restrictions as conditions for the exercise of rights which arise anyway from the general law.

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NP Process

- Designating a neighbourhood area.
- Pre-submission preparation and consultation on NP.
- Submission of a NP.
- Consideration of NP by an independent examiner.
- Consideration of the examiner's report.
- Holding a local referendum.
- Making the NP.

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Outcome

- Held s. 61N was restrictive in its nature. i.e. did not create new rights but restrictions as conditions for the exercise of existing rights.
- Decisive to SC's conclusion was that the choice between a "challenge early" or "wait to the end" approach to the multi-stage process of public administration applicable to NPs was a matter for Parliament to decide and provided that the choice had been made with sufficient clarity, it must be respected.
- The express recognition in s. 61N that there may be public law challenges to acts or omissions in the NP process when considering the examiner's report, the holding of a referendum and the formal making of a neighbourhood plan did not create fresh rights and only imposed conditions on existing rights by requiring that the challenge is brought by JR and within 6 weeks.

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Cont'd

- Oyston Estate's claim had sought to challenge FBC's earlier decision not to accept the examiner's recommendation to include its site within the settlement boundary and, therefore, s. 61N(2) applied such that the claim was made out of time.
- The multiplicity of claims that might result if a challenge had to be brought at each stage of the neighbourhood plan process and not simply at the end could be managed by the court using its case management powers.

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Implications

Landmark Chambers

- Alleged errors in a lpa's consideration of a NP or the holding of a referendum must be challenged within 6 weeks of those errors being made at those stages and applicant cannot wait until the end of the process when the NP is formally made.
- Doing so runs the risk that the claim will have been made out of time.
- Those contemplating challenging a NP must be astute to each stage of that process and bring a challenge at the appropriate time.
- Someone wishing to challenge a NP because of an earlier defect in the consideration given by the lpa to an examiner's report or the holding of a referendum cannot wait until after the plan is made. Someone resisting a challenge to making of a NP need to consider whether the substance of the challenge relates to an earlier stage and is out of time.

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Case 2 - Heritage Assets

Statutory Framework

Section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990

S.66(1) imposes a "general duty" as regards listed buildings in the exercise of planning functions…

"*In considering whether to grant planning permission [or permission in principle] for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State* ***shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses.***"

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Case 2 – Heritage Assets

National Policy Framework

Section 16 of the NPPF; paragraphs 194, 195 and 199-202

Para 200: *any harm to, or loss of, the significance of a designated heritage asset…should require* ***clear and convincing justification.***

Para 201: substantial harm (or total loss of significance)*…LPAs should refuse consent, unless it can be demonstrated that the* ***substantial harm or total loss is necessary to achieve substantial public benefits that outweigh that harm or loss.***

Para 202: less than substantial harm*…****this harm should be weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use.***

Case 2 - Heritage Assets

Case Law

Barnwell Manor Wind Energy Ltd v E.Northants DC, English Heritage, National Trust & SSCLG [2014] EWCA Civ 137

Grant of planning permission for a four-turbine wind farm within the setting of a wide range of heritage assets including a National Trust site – Lyveden New Bield (comprising a Grade I listed building, RPG at Grade 1 and a SAM) – probably the finest surviving example of an Elizabethan Garden!

In order to give effect to the statutory duty in s.66(1), a decision-maker should*…****accord considerable importance and weight to the desirability of preserving the listed building and/or its setting*** *when carrying out the balancing exercise.*

Case 2 – Heritage Assets

Assessment of Harm

The assessment of harm is a matter for the decision-maker's planning judgement BUT any finding of harm (whether to a listed building or its setting) must have considerable importance and weight attributed to it by the decision-maker.

This is the case regardless of the degree of harm identified and whether it is "substantial" or "less than substantial".

Para 199 of the NPPF: *when considering the impact of a proposed development on the significance of a designated heritage asset, **great weight should be given to the assets conservation** (and the more important the asset, the greater the weight should be). This is irrespective of whether any potential harm amounts to substantial harm, total loss or less than substantial harm to its significance.*

Case 2 – Heritage Assets

Case Law cont'd

City & Country Bramshill Ltd v SSHCLG and Hart District Council [2021] EWCA Civ 320

Court of Appeal case providing further clarification as regards the assessment of harm and benefit to heritage assets.

The case concerned a 106-hectare site in Hampshire, previously used as a national and international police training college. On it stands a Grade I listed Jacobean mansion – Bramshill House – and various other buildings. It also contains an RPG at Grade I. The proposed development included the conversion of the mansion for residential use.

Bramshill House

Case 2 – Heritage Assets

Key Points

Paras in the NPPF lay down an approach which corresponds with the duty in s.66(1). Therefore, a decision-maker who works through those paras in accordance with their terms will have complied with the s.66(1) duty.

The appellant's case was that an **"internal heritage balance"** should be carried out where elements of heritage harm and benefit are first weighed to establish whether there is any overall heritage harm. It follows that paras 201 & 202 of the NPPF would only be engaged where there is **residual heritage harm** and it is this residual heritage harm which should be weighed against the benefits of a development proposal.

Court of Appeal disagreed – **there is no so-called "*Palmer* principle"** ([2016] EWCA Civ 1061) or justification for reading such a requirement into the statutory/national policy framework. **Paras 201 & 202 of the NPPF are engaged where any element of harm is identified.**

Case 2 – Heritage Assets

Key Points cont'd

A straightforward application of paragraphs 194, 195 and 199-202 of the NPPF is required:

- Identify the significance of the asset and the contribution made by setting to the asset's significance (**setting** = the surroundings in which the asset is experienced).
- Assess whether the development proposal would lead to substantial or less than substantial harm to the significance of the asset.
- Consider whether the harm is outweighed by the public benefits of the development proposal.

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Case 2 – Heritage Assets

Key Points cont'd

No single, correct approach to the balancing of heritage harm against benefits – or other material considerations weighing in favour of a development proposal.

What amounts to "substantial harm" or "less than substantial harm" will always depend on the circumstances – **the assessment of harm and its degree are matters of fact and planning judgement**.

What amounts to a relevant **"public benefit"** is a matter for the decision-maker, so is the weight to be attributed to it – can be heritage or non-heritage related.

The heritage-related balancing exercise contained in the NPPF is not the whole decision-making process, only part of it. There is a broader balancing exercise to be undertaken within the parameters set by the statutory scheme, including those under s.38(6) PCPA 2004.

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Case 3 - Public Sector Equality Duty

S149 Equality Act 2010

(1) A public authority must, in the exercise of its functions, have due regard to the need to—

(a)eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b)advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c)foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

Case 3 – Noise-Public Sector Equality Duty

THE QUEEN (on the application of THE BUDDHIST SOCIETY) WESTMINSTER CITY COUNCIL

DUKES EDUCATION GROUP LIMITED

CO/1584/2020

Public Sector Equality Duty

The Claimant (Buddist Society), occupied premises adjacent to the applicant's premises.

- They challenged Councils' decision to grant planning permission to the interested party to install ventilation and extraction equipment;
- Decision challenged on basis that when taking the decision, the defendant failed to discharge its obligation under section 149 of the Equality Act 2010 namely:

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Public Sector Equality Duty

"In the exercise of its functions to have due regard to the need (a) to eliminate discrimination; (b) advance equality of opportunity; and (c) foster good relations between persons who share a relevant protected characteristic and those who do not".

- Contended that Buddhists are a group sharing a ***relevant protected characteristic***;
- For that reason, when the Council decided the planning application only by reference to considerations of ***local amenity*** (primarily noise and vibration resulting from use of the ventilation and extraction equipment), it failed to comply with its Section 149 obligation.

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Public Sector Equality Duty

- Court held case not arguable.
- The proposal to install/use the equipment was not per se, suggestive of the need to take steps to eliminate discrimination, advance equality of opportunity, or foster good relations.
- The claimant's contention is to the effect that use of the equipment would adversely affect religious activities. That contention was assessed by the defendant, on its merits.
- That consideration is sufficient evidence (again on the facts of this case) of compliance by the defendant with the obligation under section 149 of the Equality Act.

Public Sector Equality Duty

- The OR, which informed the Committee, made reference to the Claimant's objections in respect to noise and vibration and how the Claimant alleged that this would compromise the use of their premises for meditation.
- The OR also made reference to the IP's evidence that had specifically tested noise from the meditation hall. Having regard for these points, the OR acknowledged that the impact would be acceptable.
- Then at the Committee meeting itself, the Claimant's concerns were further addressed, having regard for the fact that the Claimant had submitted a late representation, which had not been factored into the OR. This late objection was provided to councillors.

Public Sector Equality Duty

- The Council's planning committee were informed about the Claimant's evidence, where the Claimant's property was and where the specific meditation hall was located within the property.

And critically…

- The Council's officers informed members that they were imposing an additional condition, which was specifically, ***'in addition to our standard noise conditions'***
- The officer confirmed that the condition being imposed went beyond the standard conditions, having regard to the Claimant's concerns ***to help mitigate the effect that this duct and the unit will have on the amenity of the residents and the Buddhist Society***.

Case 4- EIA

R(oao Finch) v Surrey CC [2022] EWCA Civ 187

Landmark Chambers

- Relevance:
  - Extent/scope of EIA. In particular, whether "downstream" effects have to be assessed.

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Facts

Landmark Chambers

- Project for the commercial extraction of crude oil over 20 years. Total extracted circa. 3.3 million tonnes.
- When the crude oil was brought to the surface, a quantity of natural gas would be produced, and this would be used to provide power for the site during the production phase. Provision would also be made for gas flaring in the event of an emergency and for maintenance.
- Crude oil taken by tankers to refineries for processing.
- Not possible to say where the oil would be refined or where the products of its refinement might be used (either in the UK or elsewhere).
- EIA development. ES assessed greenhouse gas emissions associated with direct releases from construction of well site, production, decommissioning and restoration.

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Holgate J

- Challenge to grant of planning permission alleging breach of EIA Regs i.e. a failure to assess the indirect or “downstream” effects of the development.
- Holgate J rejected submission that anything “attributable” to a proposed development, including environmental impacts liable to result from the use and exploitation of a so-called “end product”, should be assessed.
- EIA must address the environmental effects, direct and indirect, of the development for which planning permission is sought (and also any larger project of which that development forms a part), but no requirement to assess matters which are not environmental effects of the development or project and EIA does not include the environmental effects of consumers using (in unknown locations/unrelated to the development site) an end product made in a separate facility from materials to be supplied from the development being assessed.

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Issue for CA

- Whether under EIA Directive” and the EIA Regs it was unlawful for lpa not to require the environmental impact assessment for a crude oil extraction project to include an assessment of the impacts of greenhouse gas emissions resulting from the eventual use of the refined products of that oil as fuel.

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Legal Principles

- EIA directed at a project of development. Concept of a "project" is one to which a broad interpretation should be applied.
- Assessment of the "likely significant effects of the project on the environment" under the EIA Directive extends to the effects of the use of the works as well as their construction.
- EIA must address the particular development, not some further/different project.
- The existence and nature of "indirect", "secondary" or "cumulative" effects depends on the particular facts and circumstances of the development.
- Where EIA has to address the "indirect" effects of a proposed development, it must include a sufficient assessment of such effects

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Judgment

- Essential content/character of the proposed development for extraction of crude oil for commercial purposes and the ultimate use of the products generated by the subsequent refinement of the crude oil was not part of that project. Refinement process was a separate and substantial industrial activity as was distribution and sale of the refined products.
- EIA not an end in itself. It is a process with a specific procedure set out in the EIA Directive/Regs, and it must be carried out in accordance with that procedure. Ultimately, it is a means of informing and strengthening a larger process, i.e determining an application for planning permission for "development".
- What needs to be considered is whether a particular environmental impact is "an effect of the development for which planning permission is sought".

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Cont'd

Landmark Chambers

- EIA Directive/Regs do not compel the assessment of environmental effects resulting from the ultimate consumption/use of an "end product" where those environmental effects are not actually effects "of the proposed development" itself.
- Assessment of the impacts of GHG emissions potentially attributable to the ultimate use of the refined products of the crude oil extracted by the proposed development was one of fact and evaluative judgment for the lpa as the "relevant planning authority" challengeable only on *Wednesbury.*
- Question for the "relevant planning authority" = is there is a sufficient causal connection between the project and a particular impact on the environment for that impact to constitute one of the "indirect significant effects of the proposed development". The fact that certain impacts are inevitable may be relevant to the question of whether they are "effects of the proposed development". Inevitability might make it more likely that they are effects of the development. It does not compel the conclusion that they are.

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Case 5 – Officer's Report

R on the application of SUSAN SULIMAN and BOURNEMOUTH, CHRISTCHURCH AND POOLE COUNCIL and ASTER GROUP LIMITED [2022] EWHC 1196 (Admin)

Mrs Justice Lang re-affirmed the principles to be applied when considering a challenge to a planning officer's report as summarised by the Court of Appeal in *R (Mansell) v Tonbridge & Malling BC* [2019] PTSR 1452, per Lindblom LJ, at para 42: namely…

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Case 5 – Officer's Report

1) The essential principles are as stated by the Court of Appeal in *R. v Selby District Council, ex parte Oxton Farms* [1997] E.G.C.S. 60…

2) The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge…

3) The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made.

4) Minor or inconsequential errors may be excused.

Case 5 – Officer's Report

5) It is only if the advice in the officer's report is such as to misdirect the members in a material way – so that, but for the flawed advice it was given, the committee's decision would or might have been different – that the court will be able to conclude that the decision itself was rendered unlawful by that advice.

6) Where the line is drawn between an officer's advice that is significantly or seriously misleading – misleading in a material way – and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it.

Case 5 – Officer's Report

7) There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact… or has plainly misdirected the members as to the meaning of a relevant policy…

8) There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law…

PLEASE NOTE: Unless there is some distinct and material defect in the officer's advice, the court will not interfere.

These principles apply equally to oral advice given by planning officers at a Committee meeting.

Any Questions

Thank you for joining us...

Connect with our panel members by scanning the relevant QR code below.

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