

**Welcome to Landmark Chambers’
‘What’s new in infrastructure development?’
webinar**

The recording may be accessed [here](#).

Your speakers today are...



Tim Mould QC (Chair)

Topic:
Climate change
after Plan B



Neil Cameron QC

Topic:
Transport and
Works Act
orders



Jacqueline Lean

Topic:
Implementation
and delivery -
some current
issues

Your speakers today are...



Topic:
Habitats and Net
Gain

Richard Turney



Topic:
The Sawkill case
- gaining entry
for survey

Andrew Byass



Topic:
The Stonehenge
case - assessing
alternative
schemes

Heather Sargent

Habitats and Net Gain



Richard Turney

- Habitats protection
- Net gain & the Environment Bill

Habitats

- Effect of Habitats Regulations is largely unchanged after Brexit
- Common issues for major infrastructure:
 - Combined effect of precautionary assessment and Rochdale envelope
 - Addressing “de minimis” impacts
 - Habitats in poor condition
 - Developing a derogation case

Hornsea 3 – an example

- ExA recommended refusal on habitats grounds
- SoS engaged in further consultation on habitats grounds:

“6.3 The Secretary of State is clear that the development consent process for nationally significant infrastructure projects is not designed for consultation on complex issues, such as HRA, to take place after the conclusion of the examination. On occasion, as a pragmatic response to particular circumstances, he may undertake such consultation, but no reliance should be placed on the fact that he will always do so. In this instance, he has, on balance, accepted that the situation in respect of potential significant adverse effects on the sites referred to in para 6.2 was novel...”

Hornsea 3

- Key issue for the ExA was the impact on two SACs from the export cable: in the absence of compensation, it recommended refusal
- SoS took a different view, concluding that an impact on the Flamborough and Filey Coast SPA could also not be ruled out
- SoS went on to apply IROPI test concluding:
 - No alternatives
 - IROPI due to need for renewable energy
 - Accepted the applicant's Kittiwake and Sandbanks Compensation Strategies

Future changes

- Reform of Habitats Regs currently uncertain
- Environment Bill contains new measures including “protected sites strategies” which must be developed by Natural England
- Perhaps a growing need to consider IROPI/compensation at early stages of the project development

Biodiversity Net Gain

- Currently no requirement to deliver net gain
- Confirmed in consultation on Energy NPS suite. Draft EN-1 says:

“4.5.2 Although achieving biodiversity net gain is not an obligation for projects under the Planning Act 2008, energy NSIP proposals should seek opportunities to contribute to and enhance the natural environment by providing net gains for biodiversity where possible. Applicants are encouraged to use the most current version of the Defra biodiversity metric to calculate their biodiversity baseline and inform their biodiversity net gain outcomes and to present this data as part of their application. Biodiversity net gain should be applied in conjunction with the mitigation hierarchy and does not change or replace existing environmental obligations.”

BNG & the Environment Bill

- Recent amendments to Environment Bill contemplate BNG obligations being placed on schemes consented under the PA 2008
- Provision anticipates that such changes may take place outside of the NPS designation process through a “biodiversity gain statement”
- The BGS will set a % for net gain for a type or types of project and specify the manner in which that can be met
- BGS will then be given effect through changes to the determination provisions PA 2008

BNG and land requirements

- Ongoing issue as to whether can acquire land compulsorily to deliver BNG
- Where it is not *required* to achieve development consent, may be challenging
- However, note the Cleve Hill Solar Park DCO decision where the SoS accepted that a CA plot could be included to deliver BNG
- Likely to be more straightforward when BGSs are made

Conclusion and a way forward?

- If projects now anticipate BNG requirement in the future, may serve to protect against implementation of BGS regime
- In the meantime, may be a positive for the development in the planning balance (and in terms of addressing objections)
- In some circumstances a BNG “concept” might be repurposed as a compensatory measure if effects on designated sites cannot be ruled out

The Stonehenge case – assessing alternative schemes



Heather Sargent



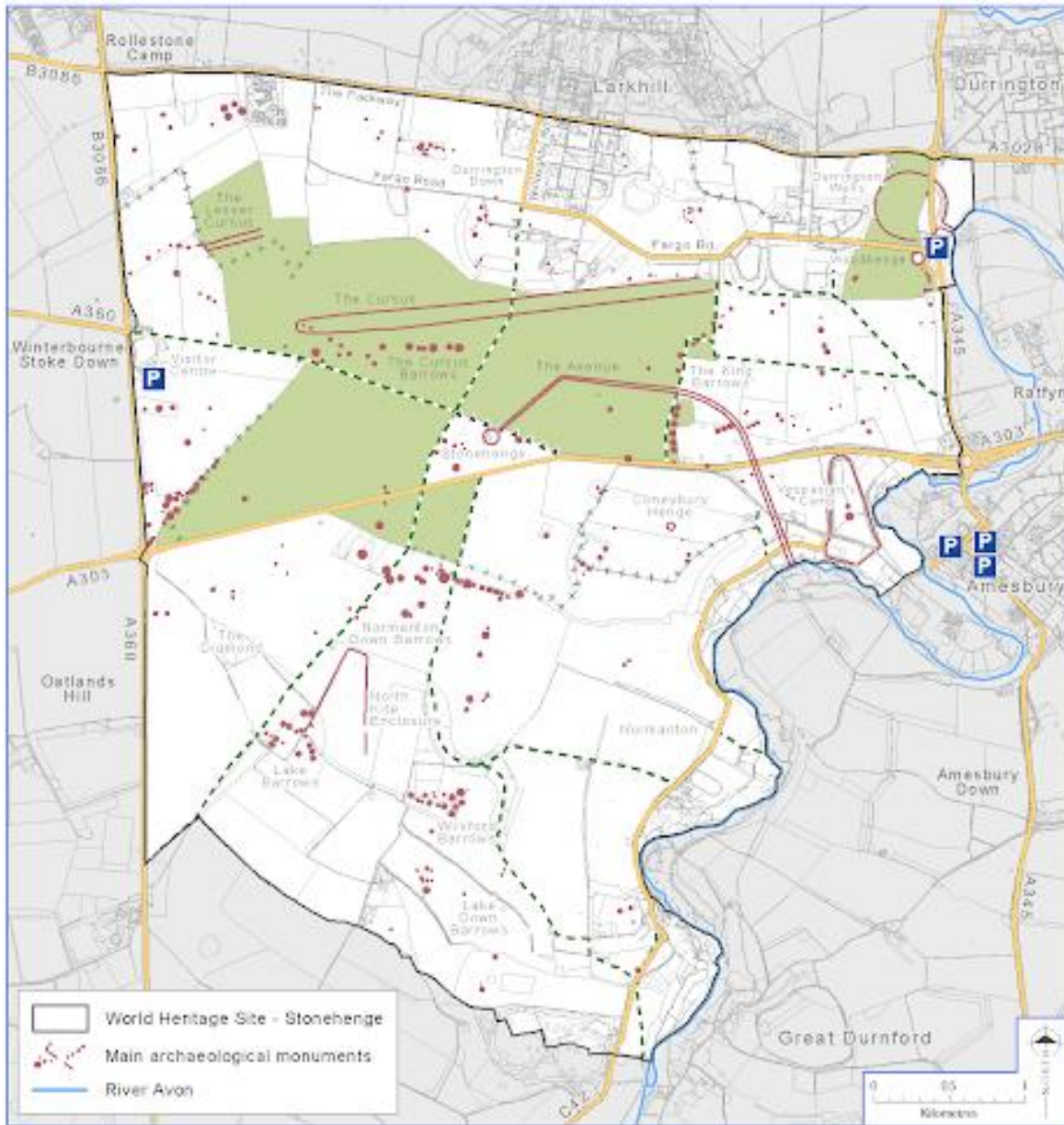
***R (Save Stonehenge
World Heritage Site
Ltd) v Secretary of
State for Transport***

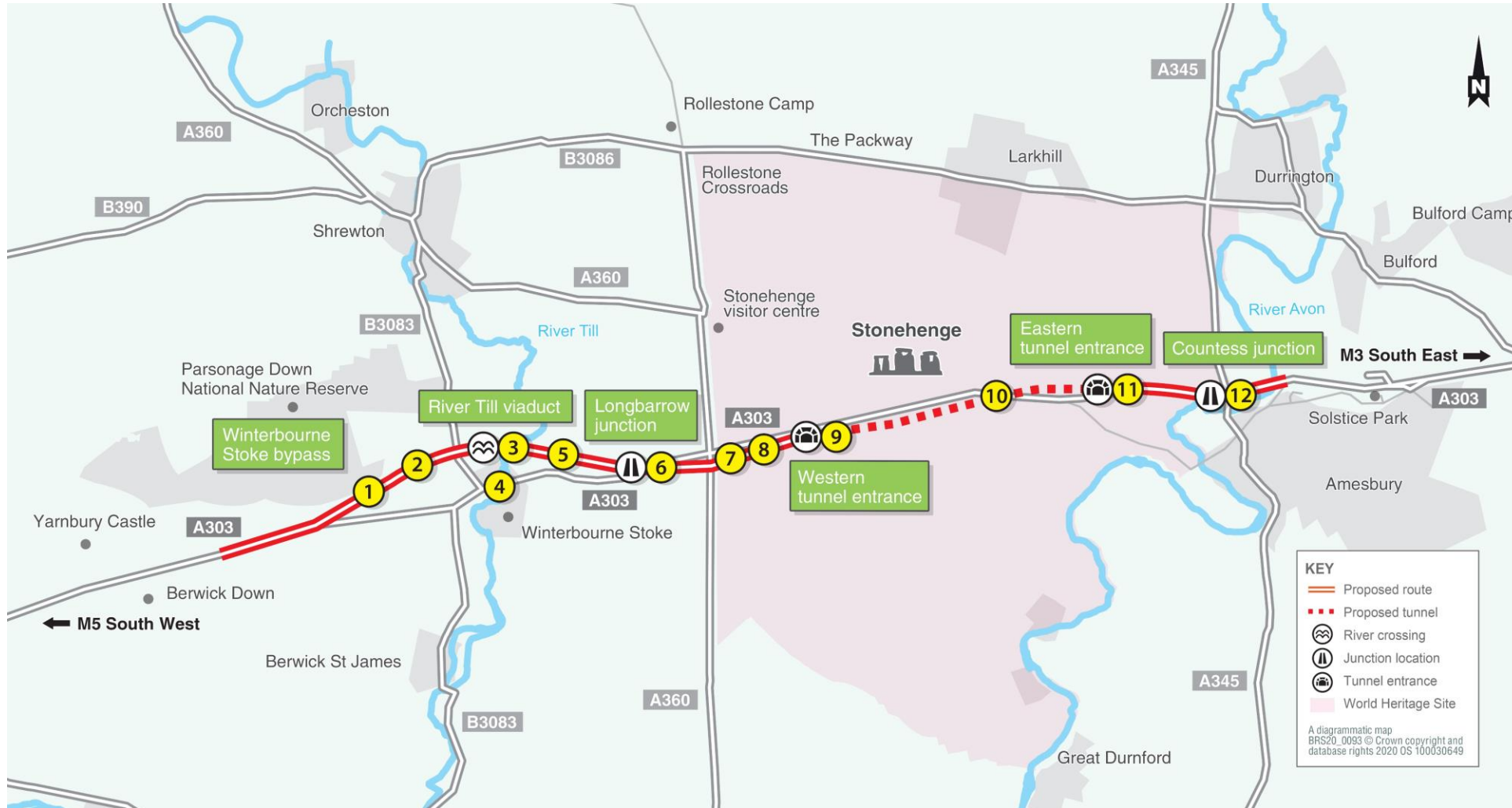
[2021] EWHC 2161
(Admin)

Holgate J

30 July 2021

WHS boundary and existing route of A303





Proposals

“[t]he Panel pithily described it as the greatest physical change to the Stonehenge landscape in 6000 years and a change which would be permanent and irreversible, unlike a road constructed on the surface”



Western tunnel entrance

Ground 5(iii): unlawful failure to consider the merits of alternative schemes for addressing the harm resulting from the western cutting and portal

Upheld by Holgate J

The approach taken by the ExA to alternatives

- “[C]onsiders that the Applicant has correctly identified all legal and policy requirements relating to the assessment of alternatives applicable to this project”
 - On the facts: alternatives do not have to be assessed under Habitats Directive or Water Framework Directive
 - Sequential and exception tests for flood risk satisfied; scheme is not within a National Park or AONB
- The **only** considerations of alternatives that ExA considers to be relevant:
 - Para. 4.27 of the NPSNN
 - Para. 4.26 of the NPSNN – EIA & reasonable alternatives
 - Alternatives to the compulsory acquisition of land

The approach taken by the ExA to alternatives

- NPSNN para. 4.27
 - “All projects should be subject to an options appraisal. The appraisal should consider viable model alternatives and may also consider other options (in light of the paragraphs 3.23 to 3.27 of this NPS. Where projects have been subject to full options appraisal in achieving their status within Road or Rail Investment Strategies or other appropriate policies or investment plans, option testing need not be considered by the examining authority or the decision maker. **For national road and rail schemes, proportionate option consideration of alternatives will have been undertaken as part of the investment decision making process. It is not necessary for the Examining Authority and the decision maker to reconsider this process, but they should be satisfied that this assessment has been undertaken.**”

The approach taken by the ExA to alternatives

- ExA: “...the ExA is content that the Applicant’s approach to the consideration of alternatives is in accordance with the NPSNN. It is satisfied that the Applicant has undertaken a proportionate consideration of alternatives as part of the investment decision making process. **Since that exercise has been carried out, it is not necessary for this process to be reconsidered by the ExA or the decision maker.**”

The approach taken by the ExA to alternatives

- NPSNN para. 4.26
 - “Applicants should comply with all legal requirements and any policy requirements set out in this NPS on the assessment of alternatives. **In particular:**
 - The EIA Directive requires projects with significant environmental effects to include an outline of the main alternatives studied by the applicant and an indication of the main reasons for the applicant’s choice, taking into account the environmental effects...”
 - ExA is satisfied that the ES meets legal requirements in relation to EIA
 - ExA also considers alternatives in the context of assessing whether the guidance on compulsory purchase has been complied with (this consideration doesn’t address alternatives to the western cutting)

The approach taken by the ExA to alternatives

- ExA's conclusion (PR 7.2.28):

“The ExA is satisfied that the Applicant has carried out a proportionate option consideration of alternatives as part of the investment decision making process which led to the inclusion of the scheme within RIS1. It concludes that the Applicant has complied with the NPSNN, paragraphs 4.26 and 4.27. There are no policy, or legal requirements that would lead the ExA to recommend that consent be refused for the Proposed Development in favour of another alternative.”

SST: the impact of alternatives is “neutral”; relies upon PR 7.2.28 and sees “no reason to disagree with the [Panel’s] reasoning and conclusions on these matters”

The flaw in the approach

- Holgate J
 - “The Panel did not make its **own** appraisal of the relative merits of the proposed scheme and alternatives [...] despite the fact that [it] went on to make a number of strong criticisms of the proposed western section which subsequently drove its recommendation that the application for development consent be refused.” ([252])
 - HE said in the Examination that it had rejected 2 longer tunnel options **not** purely on the grounds of cost but also because they would provide “minimal benefit in heritage terms”
 - Neither Panel nor SST expressed any conclusions on whether a longer tunnel would achieve only “minimal benefits”

The flaw in the approach

- The requirement within para. 4.26 of NPSNN to comply with “all legal requirements” includes any arising from judicial principles set out in case law
- Para. 4.27 of NPSNN does not override para. 4.26:
 - Satisfaction of para. 4.27 of NPSNN (e.g. through full options testing for the purposes of a RIS) does **not** excuse the applicant from meeting any (additional) requirements arising from para. 4.26
 - Cannot circumvent obligations to which para. 4.26 relates (e.g. Habitats Directive) by reliance upon para. 4.27

The flaw in the approach

- There might have been a change in circumstance since the RIS full options appraisal was carried out (e.g. the “additional and controversial” “minimal benefit” issue here)
- “The options testing for a RIS may rely upon a judgment by [HE] with which the Panel disagrees and which therefore undermines reliance upon that exercise and paragraph 4.27 of the NPSNN”
 - On the facts: the Panel disagreed with HE’s assessment of whether there would be harm to the WHS
 - So it was **irrational** for the Panel to treat the options testing carried out by HE as rendering it unnecessary for the Panel to assess the relative merits of alternatives

The flaw in the approach

- In light of the Panel’s conclusion that **substantial** harm would be caused to the WHS, it had to be demonstrated that the substantial harm was **necessary** in order to deliver substantial public benefits outweighing the harm (NPSNN para. 5.133)
 - Holgate J: “In such circumstances, it is obviously material for the decision-maker (and any reporting Inspector or Panel) to consider whether it was unnecessary for that loss or harm to occur in order to deliver those benefits. The test is not merely a balancing exercise between harm and benefit. Accordingly, relevant alternatives for achieving those benefits are an obviously material consideration”

The flaw in the approach

- The SST considers the western section of the scheme would cause **less than substantial** harm – so the necessity test is not engaged – but the SST relies upon the need for the scheme and the benefits that it will bring in striking the overall planning balance
- Holgate J: “The relevant circumstances of the present case are **wholly exceptional**. In this case the relative merits of the alternative tunnel options compared to the western cutting and portals were an obviously material consideration which the SST was required to assess. It was irrational not to do so. This was not merely a relevant consideration which the SST could choose whether or not to take into account. I reach this conclusion for a number of reasons, the cumulative effect of which I judge to be overwhelming”

Lessons for future projects?

- Para. 4.27 NPSNN does not override para. 4.26 NPSNN
- The judicial principles that are included within the para. 4.26 “legal requirements” include the *Trusthouse Forte* principles on consideration of alternatives:
 - Where there are clear planning objections to development upon a particular site then “it may well be relevant **and indeed necessary**” to consider whether there is a more appropriate site elsewhere
 - “This is particularly so where the development is bound to have significant adverse effects and where the major argument advanced in support of the application is that the need for the development outweighs the planning disadvantages inherent in it”
- The facts in *Stonehenge*: wholly exceptional but still relevant to future projects?

The Sawkill case - gaining entry for survey



Andrew Byass

Introduction

- 1) ***R (Sawkill) v Highways England*** [2020] 1 WLR 3661, and the availability of powers of entry to public or quasi-public organisations already with a “particular standing”
- 2) Availability of powers of entry to private bodies
- 3) Enforcing powers of entry - practicalities

(1) Sawkill

- A303 tunnel intended to pass through a chalk aquifer underneath the Claimant's land
- National Highways (or Highways England as it then was) sought entry to undertake pumping tests to understand the transmissivity of the aquifer
- Two issues arose:
 - 1) Was National Highways able to rely on the powers of entry provided by s. 172 Housing & Planning Act 2016 (the simple route) or was it required to rely on s. 53 Planning Act 2008 (the less simple route; first requiring the Secretary of State's approval)?
 - 2) Did the pumping tests amount to a "survey" for the purposes of either provision?

(1) Sawkill

- S. 172 2016 Act

“(1) A person authorised in writing by an acquiring authority may enter and survey or value land in connection with a proposal to acquire an interest in or a right over land.

...

(6) In this section and sections 173 to 178 -

(a) “acquiring authority” means a person who could be authorised to acquire compulsorily the land to which the proposal mentioned in subsection (1) relates (regardless of whether the proposal is to acquire an interest in or a right over the land or to take temporary possession of it), and

(b) “owner” has the meaning given in section 7 of the Acquisition of Land Act 1981.

(1) Sawkill

- S. 53 2008 Act

“(1) Any person **duly authorised in writing by the Secretary of State** may at any reasonable time enter any land for the purpose of surveying and taking levels of it, or in order to facilitate compliance with the provisions mentioned in subsection (1A), in connection with—

(a) an application for an order granting development consent, whether in relation to that or any other land, that has been accepted by the Secretary of State,

(b) a proposed application for an order granting development consent, or

(c) an order granting development consent that includes provision authorising the compulsory acquisition of that land or of an interest in it or right over it...”

(1) Sawkill

- **Issue 1**: Mr Sawkill's argument was that the 2008 Act provided a complete code which governed all actions regarding applications for DCOs, such that only the survey powers in the 2008 Act were available to National Highways
- He relied upon a principle of statutory interpretation that the general words in a later statute (here the Housing and Planning Act 2016) cannot exclude the specific provisions of an earlier statute (the 2008 Act)
- National Highways: said, no. It is simply the case that the powers overlap. NH can choose between them as it sees fit.
- The consequence: legally likely little or nothing since the survey powers in both Acts are largely the same, BUT it would lead to delay and put landowners in a better bargaining position in terms of negotiating licences for survey, and potentially in respect of compulsory acquisition negotiations

(1) Sawkill

- Mr Sawkill relied in support of his arguments on guidance from PINS “The Planning Act 2008 (as amended), Section 53: Rights of entry, Frequently asked questions (FAQ)”
- “In the case of a prospective DCO, the policy intention is that the power of entry in s53 of the Planning Act 2008 should be used. ... The Inspectorate notes the principle of statutory interpretation that where a general enactment covers a situation for which specific provision is made by another enactment contained in an earlier Act, it is presumed that the situation is intended to continue to be dealt with by the specific provision rather than the later general one.”

(1) Sawkill

- Mr Sawkill advanced several arguments:
 - The 2008 Act provided a complete code
 - The 2008 Act provides for supervision by the Secretary of State, which is an important procedural safeguard to prevent unnecessary intrusion upon a private landowner's property
 - There are related specific powers relating to survey in the 2008 Act which makes clear that Parliament's intention for the s. 53 procedure to be relied upon
- Dove J rejected all the arguments

(1) *Sawkill*

- The powers of survey in s. 172 and s. 53 should be understood to be overlapping powers, akin to the position in other statutory contexts in which the same conclusion (of simple overlapping of powers) has been reached, e.g. *Cusack* [2013] 1 WLR 2022
- As a matter of straightforward statutory construction, both provisions were able to be relied upon by National Highways, including because there is no material difference between the scope of the powers of survey under the respective provisions
- In so far as the crux of the argument boiled down to the greater procedural protection under s. 53 (given the need for Secretary of State approval to rely on powers of survey), this was both not determinative and readily explicable

(1) Sawkill

- “44... the existence of the difference between the two powers constituted by the need for the Secretary of State’s approval under section 53 of the 2008 Act is not determinative of the point, and is readily explicable. The power to use section 172 of the 2016 Act has been granted by Parliament specifically to the defendant, in particular, in its role as an acquiring authority: **it is therefore an organisation with a particular standing, to which the statutory power has been granted.** By contrast it is open to any individual to make an application for a DCO and to pursue it through the provisions of the 2008 Act. When that fact is borne in mind, the need for supervision by the Secretary of State in cases where the power under section 53 is invoked can be readily understood...”

(1) Sawkill

- The second issue related to the scope of the power to enter land to survey
- The issue with the proposed pumping tests was not the boring of holes on the Claimant's land, but the significant discharge of water required to see how rapidly the chalk aquifer's would refill
- While this was undoubtedly an intrusion upon a landowner's possession and enjoyment of his land, that was no different, for example, to an archaeological survey which may involve an extensive array of trial trenches, and could be equally if not more intrusive
- Compensation is payable for loss and damage; this is the appropriate remedy for a landowner in a position akin to Mr Sawkill

(2) Powers of survey for private bodies

- Dove J's reasoning begs the question: what if you are a private entity intending to apply for a DCO and you are not an "organisation with a particular standing"?
- There is a short and a long answer...
- The short: the language in s. 172 is clear. An "acquiring authority" means a person who **could be** authorised to acquire compulsorily the land to which the proposal mentioned in subsection (1) relates ...” Any private entity “could be authorised” to compulsorily acquire land for the purposes of a DCO
- Dove J's comments should not be followed
- The long answer is more nuanced...

(2) Powers of survey for private bodies

- The legislative history may suggest a more restrictive approach is required to the availability of powers of entry to private entities, even those intending to undertake nationally significant infrastructure projects
- When first enacted, s. 172 acquiring authority bore the same meaning as found in s. 7 of the Acquisition of Land Act 1981
- The amendment of s. 172 to the present definition was consequential upon the partial introduction of powers which provided for the temporary possession of land by s. 18 of the Neighbourhood Planning Act 2017, and related powers of entry to survey under s. 26 of the 2017 Act; since the previous definition was tied to the ALA, a new definition was needed
- Arguably, then, there was no intention to broaden the scope of those able to rely upon the powers of s. 172

(2) Powers of survey for private bodies

- The Explanatory Memorandum to the NPA 2017 says this:
- Section 26 “...also extends the right to enter and survey land in section 172 of the Housing and Planning Act 2016 by making it available in connection with a proposal to take temporary possession under section 18 of the Act. A consequential amendment is also made to the definition of "acquiring authority" in section 172 of the Housing and Planning Act 2016 to clarify its meaning in this context.”
- Many private entities can be provided compulsory purchase powers under orders or directions made by the Secretary of State, e.g. the granting of an Electricity Generation Licence, and would avoid this potential pitfall

(3) Enforcing powers of entry - practicalities

- Section 172(1) provides that a person authorised in writing by an acquiring authority (i.e. which includes a person who **could be** authorised to compulsorily acquire land) may enter land for survey
- So the only necessary preliminary requirement to enter private land is a relevant written authorisation
- But what if a private landowner refuses?
- Section 173 can then bite:

(3) Enforcing powers of entry - practicalities

“s. 173 Warrant authorising use of force to enter and survey land

A justice of the peace may issue a warrant authorising a person to use force in the exercise of the power conferred by section 172(1) if satisfied-

- (a) that another person has prevented or is likely to prevent the exercise of that power, and
- (b) that it is reasonable to use force in the exercise of that power”

(3) Enforcing powers of entry - practicalities

- The application is made to the Magistrate’s Court, where the procedural rules are not at all straightforward for this type of application
- CrimPR 47 – Investigation Orders and Warrants; CrimPR 47.34 addresses applications for warrants under “any other power”
- Be prepared for a judge unfamiliar with the power in issue, its requirements, and the necessity for any order
- The warrant issued authorises the use of such force as may be “reasonably necessary” to enter for surveys, i.e. it authorises forcible entry on to privately owned land, so the judge will need persuading
- It will be necessary to demonstrate that there is a real “proposal to acquire an interest in or a right over land”, so 2008 Act provisions / powers will require explanation

Q&A

We will now answer as many questions as possible.

Please feel free to continue sending any questions you may have via the Q&A section which can be found along the top or bottom of your screen.

Climate change after Plan B



Tim Mould QC

Perspectives on climate change

- Political – the environment, economic and social challenge of global warming
- Legal – the Climate Change Act 2008; the Net Zero Target Amendment Order 2019
- Government Policy – The Clean Air Strategy
- International – treaty commitments – the Paris Agreement
- Need assessment for major projects - National Policy Statements
- Authorisation of major projects – DCOs

Legal Response to Climate Change

- Climate Change Act 2008
- The Committee on Climate Change
- The Mandatory Target for UK carbon change
- Setting periodic carbon budgets to cap UK carbon emissions in a series of 5 year periods
- Advisory role of CCC
- Objective to move progressively towards 2050 target
- Section 10 considerations – economic circumstances, UK technology etc
- Carbon budgets are laid before Parliament
- Annual emissions statement laid before Parliament

Policy Response to Climate Change

- Clean Air Strategy 2019
- Government policy for decarbonizing the national economy
- Proposals for spreading decarbonization through the economy – illustrative pathways
- Not prescriptive
- Identifies means of managing emissions – taxation, technology, emissions trading schemes
- Choices for Government on management of emissions from major infrastructure projects within strategy for achieving 2050 net zero target

UK Government treaty commitments

- The Paris Agreement
- Signatory parties agreed to prepare, communicate and maintain successive nationally determined contributions (NDCs) they intended to achieve and to pursue domestic measures to achieve their NDCs
- No obligation on parties to adopt binding domestic targets to ensure NDCs are met
- Paris set a global target – hold global average temperatures to well below 2% above pre-industrial levels and to pursue efforts to limit temperature increases to 1.5% above those levels
- Commitment to achieve long term balance between emissions and removal

Ministerial statements on Paris

- Enshrine the Paris goal of net zero emissions in UK law
- Question for government is not whether we do it but how we do it
- Following ratification by UK Government of Paris Agreement, CCC advised that then current statutory carbon reduction target did not require to be changed
- Draft Airports National Policy Statement (ANPS)
- Secretary of State took account of existing domestic carbon reduction targets and advice of statutory advisory body on climate change – the CCC
- ANPS adopted June 2018

Issue before the Supreme Court

- Did the ministerial statements on Paris agreement and UK response show that Paris Agreement was “government policy” for the purposes of preparation of the ANPS under the Planning Act 2008
- Court of Appeal held that this was the case
- Court of Appeal concluded that Secretary of State had failed to explain how ANPS took account of government policy, committing to implementing emissions reductions targets in Paris Agreement
- Heathrow Airport Limited challenged that analysis as based on a misconception of what constitutes “government policy” in context of PA 2008 and NPS preparation

Supreme Court – what is government policy?

- Judgment [105]-[108]
- Purposive approach rooted in the statutory context in which the question arises
- Relevant statutory purpose here is to ensure a degree of coherence between policy set out in NPS and established government policies relating to mitigation of and adaptation to climate change
- Policies which have been cleared by the relevant departments on a government wide basis – the “write round” process
- The “bear trap” – practical difficulties and risks of CA approach
- Epitome – formal written statement of established policy

Paris and the ministerial statements

- Ministerial statement not “government policy”
- Civil servants not required by law to “trawl through Hansard and press statements” when preparing and consulting on draft NPS
- Paris Agreement not “government policy”
- Ratification of treaty is “an act on the international plane”
- UK obligations in international law but are not part of UK law and give rise to no legal rights or obligations in domestic law – the Gina Miller case
- Requires domestic law-making steps which are uncertain and unspecified at the time of ratification

Consequences

- Legal and policy arrangements on climate change provide clear strategy for meeting carbon budgets and achieving net zero target by 2050
- Government has “good deal of latitude” in the action it takes to attain those objectives as part of economy wide transition
- Likely emissions resulting from construction and operation of major projects to be considered under that statutory and policy framework
- Government is responsible for policy choices on how to manage the impact of such projects as part of that transition
- R (Packham) v Secretary of State and Prime Minister [2020] at [87]
- Focus on the project and leave the grand gesture to politics

Implementation and delivery - some current issues



Jacqueline Lean

Overview

- Public rights of way
- Changes to the consented scheme / detailed design developments
- Actions seeking to prevent scheme implementation

Public Rights of Way (1)

- Consent for an infrastructure project will often involve the need to divert or extinguish existing PROW
 - TWA 1991: s.5(6)
 - PA 2008: s.136
 - High Speed Rail (London to West Midlands) Act 2017 Sch 4
- The consent will often provide that:
 - The highway may not be stopped up / rights extinguished until the specified substitute is provided
 - The highway is to be completed to the “reasonable satisfaction” of the highway authority

Public Rights of Way (2)

- Issues:
 - Not a general power to extinguish a PROW on provision of a substitute. Substitute will be specified – to varying degrees of particularity – in consent itself: eg, description in schedule, and/or as shown on rights of way plans
 - Consent will not include the level of detail required for a modification order under s.53 of the Wildlife and Countryside Act 1981
 - Consent may not provide for dispute resolution between nominated undertaker and local highway authority

Public Rights of Way (3)

- Changes to the proposed new PROW?
 - Unlikely to be able to rely on any general provision permitting construction of works within LOD if material departure from replacement specified in Schedule / shown on identified plans
 - A replacement / substitute PROW not in accordance with that specified in/through the Order not effective to extinguish existing rights as provided for in the Order

Public Rights of Way (4)

- How can this be resolved?
 - DCO: potential to apply for non-material amendment under PA 2008 Schedule 6, but:
 - May be excessive depending on changes required
 - In the discretion of the Secretary of State
 - Application under Highways Act 1980:
 - S.119: diversion of footpaths, bridleways and restricted byways
 - S.118: stopping up of footpaths and bridleways
 - S.116: stopping up/diversion on application to Magistrates Court
 - S.118A/s.119A: stopping up/diversion of PROW across railways
 - S.25: public path creation agreements

Public Rights of Way (5)

- Recording changes on Definitive Map and Statement:
 - S.53(2)(b) Wildlife and Countryside Act 1981
 - ‘Legal event’ modification under s.53(3)(a). The ‘legal event’ will be the coming into operation of the enactment/instrument by which PROW is extinguished, diverted or created.
 - S.54(4): “ *The modifications which may be made by an order under subsection (2) shall include the addition to the statement of particulars as to—(a) the position and width of any public path, restricted byway or byway open to all traffic which is or is to be shown on the map; and (b) any limitations or conditions affecting the public right of way thereover.*”
 - That detail will not usually be included in consent. How can the local highway authority obtain it?

Public Rights of Way (6)

- Consent provides that new PROW is to be completed to the reasonable satisfaction of the local highway authority. What if it is not satisfied?
 - Consents do not always make provision for dispute resolution
 - Some resistance to deeming provisions (eg unless notification by highway authority within 28 days to the contrary, new PROW shall be deemed to be completed to their reasonable satisfaction / to have been certified)
 - Particularly an issue where consent establishes ‘principle’ of (eg) diversion but not the detail – and reliance placed in consenting process on local highway authority having to be satisfied

Public Rights of Way (7)

- Practical solution: side agreements
 - Can provide for the process to be followed for PROW to be certified as being completed to reasonable satisfaction of highway authority
 - Can include the details which nominated undertaker is to provide in order for that to occur (eg, the details which would be required for modification order under s.53)
 - Can include requirement to provide details prior to works commencing to new PROW – allowing early identification of any departures from what was authorised under the Order and/or make provision for how such departure are to be addressed
 - Can include dispute resolution procedures
 - Can make provision for legal expenses / costs incurred by local highway authority

Changes to design post consent (1)

- Can be problematic / controversial – particularly where limited scope for public participation at the post-consent stage
- Recent example:
 - *R (on the application of Granger-Taylor) v High Speed Two (HS2) Ltd* [2020] EWHC 1442 (Admin)
 - C challenged changes to emerging design for Euston Approaches under Phase 1 of the HS2 project
 - Decision challenged in the claim was D’s “ongoing failure” to provide C with updated drawings (etc) in respect of the final design of the HS2 railway in that area and to commission and disclose an updated EIA relating to the emerging design proposals

Changes to design post consent (2)

R (on the application of Granger-Taylor) v High Speed Two (HS2) Ltd [2020]
EWHC 1442 (Admin)

- Permission refused on grounds 1 and 2 (failure to provide updated drawings / failure to commission and provide updated EIA) but granted on grounds 3 and 4 – alleged breaches of Article 8 and A1P1 ECHR
- In granting permission, Lang J drew attention to D needing to disclose relevant material as part of its duty of candour, and subsequently made an order for specific disclosure of various categories of documents.
- Claim was ultimately unsuccessful but note what was stated by Jau J at [103]:

Changes to design post consent (3)

“103. Mr Jacobs might have made more of the following passages in the ECtHR's judgment in [Oneryildiz](#) [[Oneryildiz v Turkey](#) [2004] 39 EHRR 25]

"84. The Court reiterates that, in the *Guerra* case, it held that the State had infringed Art.8 of the Convention for failing to communicate to the applicants essential information "that would have enabled them to assess the risks they and their families might run if they continued to live at Manfredonia, a town particularly exposed to danger in the event of an accident at the factory.

85. The Court does not see any aspect in the circumstances of the present case distinguishing it from the circumstances of *Guerra* , taking into account that the reasoning in that judgment is applicable a fortiori in respect of Art.2 and, moreover, fully applies to the present case."

In my view, this reasoning cannot yet be made applicable to the instant case because any risk or danger does not presently exist. However, it should at least be borne in mind for the future as the Stage 2 works progress. Effective communication remains important in this case regardless of any legal requirement.”

Continued objections to the scheme: protests (1)

- Use of injunctions / claim for possession orders well established in context of protests seeking to restrain development
- BUT: some issues have arisen over the past 18 months:
 - Title where land to be used under temporary possession rather than compulsorily acquired
 - Protest on a highway / including a highway

Continued objections to the scheme: protests (2)

- Title where land is used under temporary possessions powers
 - In principle, a possession order is available in such circumstances:
 - Secretary of State for Transport & High Speed Two (HS2) Ltd v Persons Unknown (22nd June 2020) (David Holland QC sitting as a DHCtJ)
 - BUT: may not be available where notices required to be served prior to exercise of those powers have not been served on occupiers – even if those occupiers are trespassers:
 - Secretary of State for Transport & High Speed 2 (HS2) Ltd v Persons Unknown [2021] EWHC 822 (Ch) (Mann J) at 19-21
 - The possession order was, however, made in that case as HS2 Ltd had entered into possession of the surface of the land lawfully as against the legal owners of the site, and thus had a legal claim in possession “*against those who would undoubtedly have been trespassers as against the legal owners*” (paras 34-40)

Continued objections to the scheme: protests (3)

- Protests on or involving highway / PROW:
 - 3 cases to be aware of
 - Secretary of State for Transport v Persons Unknown [2020] EWHC 1437 (Ch)
(David Holland QC sitting as a DH CtJ)
 - » Application to vary and extend an interim injunction which was directed at restraining (inter alia) incidents of trespassing onto the site from the adjoining public highway and incidents of activity on the bell-mouths either on or just off the site on the public highway which had been intended to, and had in fact, obstructed access to and egress from the site
 - Hillingdon Borough Council v Persons Unknown [2020] EWHC 2153 (QB) (Kerr J)
 - » Interim injunction to restrain certain acts on land adjoining the HS2 Harvil Road construction site which included PROW.
 - DPP v Ziegler [2021] UKSC 23
 - » Consideration of Article 10/11 ECHR rights in context of prosecution under s.137 of the Highways Act 1980 (wilful obstruction of highway without lawful authority or excuse)

Continued objections to the scheme: legal challenges

- Emerging trend of applications for injunctive relief to restrain works on environmental grounds
 - *R (oao Packham) v Secretary of State for Transport* [2020] EWHC 829 (Admin)
 - Application for injunction to restrain works in ancient woodlands pending challenge to Government’s decision to proceed with HS2
 - *R (oao Kier) v Natural England* [2021] EWHC 1059 (Admin)
 - Interim injunction granted by Lang J restraining the carrying out of “works or other activities” within a licensed area pending determination of C’s claim challenging a licence granted by NE under reg 55 of the Habitats Regulations for works likely to affect bats in Jones Hill Wood. Interim injunction discharged by Holgate J
 - Forthcoming JR to EA regarding consents granted in association with HS2 tunnelling works in the Chilterns.

Transport and Works Act orders



Neil Cameron QC

HISTORY

In 1838 Parliament was able to deal with the 62 private bills deposited in a session.

By 1991 Parliament was struggling to deal with half that number.

Solution: get works bills out of Parliament and allow the schemes to be authorised by the Secretary of State aided by an inspector.



Ambit of the TWA Regime (1)

Railways and Tramways:
section 1 TWA

Section 3 TWA

Construction or operation of inland waterway
Works which interfere with rights of
navigation and are of a description in an
order under section 3 – see the 1992 Order

Section 33(2) Planning Act 2008 if DCO
required development may not be authorised
by the TWA



Ambit of the TWA Regime (2)



Section 2

Secretary of State may prescribe modes of guided transport to bring them within section 1

Aim to allow flexibility

Secretary of State has made two orders (1992 order and 1997 amendment)

Ambit of the Regime (3)

Orders made under s.1(1)(d) – guided transport

T+W (Guided Transport Modes) Order 1992 – Article 2

(1) The Secretary of State may make an order relating to, or to matters ancillary to, the construction or operation of a transport system of any of the following kinds, so far as it is in England and

Wales—

- (a) aerial cableway;
- (b) lift;
- (c) magnetic levitation;
- (d) monorail;
- (e) road-based with cable guidance;
- (f) road-based with rail guidance;
- (g) road-based with side guidance;
- (h) track-based with side guidance.

Ambit of the Regime (4)

S.4 of the TWA confers a similar power:

The T+W (Description of Works Interfering with Navigation) Order 1992 – Article 2 provides:

2. Descriptions of works

The Secretary of State hereby prescribes works of the following descriptions for the purposes of

section 3(1)(b)(ii) of the Act:

- (a) barrage; (b) bridge; (c) cable; (cc) fountain; (d) land reclamation;
- (e) navigational aid; (ee) observation structure; (f) offshore installation;
- (g) pier; (h) pipeline; (i) tunnel; (j) utilities structure.

Ambit of Regime (5)

- DCO projects are excluded from the regime
- Otherwise the regime is wide, and can be used for a wide variety of transport projects
- The Secretary of State has the power to make further orders to prescribe further description of works.
- Given the Government's levelling up agenda and transport related infrastructure initiatives (Bus Back Better etc..)- it can be expected that more orders will be made under the TWA

Extent of the Powers (1)

Section 5(1) matters “include those” set out in Schedule 1 TWA

Model Clauses:

Section 8 TWA

Transport and Works (Model Clauses for Railways and Tramways) Order 2006

The ambit of the model clauses gives an indication of the extent of the powers

Compulsory acquisition (paragraph 3 of Schedule 1)

Highways – stopping up, street works etc..

Extent of the Powers (2)

Deemed PP (section 90(2A) TCPA 1990)

Section 15 TWA 1992 – assimilating procedures

Listed building consents, and scheduled monument consents –

The Transport and Works Applications (Listed Buildings, Conservation Areas and Ancient Monuments Procedure) Regulations 1992

Transport Act 1968 (classification and maintenance of Canal and River Trust's and other waterways)

The Transport and Works Applications (Inland Waterways Procedure) Regulations 1993

Extent of the Powers (3)

Section 5(3) TWA 1992

(3) An order under section 1 or 3 above may—

(a) apply, modify or exclude any statutory provision which relates to any matter as to which an order could be made under section 1 or, as the case may be, 3, and

(b) make such amendments, repeals and revocations of statutory provisions of local application as appear to the Secretary of State to be necessary or expedient in consequence of any provision of the order or otherwise in connection with the order;

and for the purposes of this subsection “statutory provision” means provision of an Act of Parliament or of an instrument made under an Act of Parliament.

1.6 of A Guide to TWA Procedures – SofS only prepared to agree to disapplication of statutory requirements in ‘exceptional circumstances’

Advantages and Disadvantages (1)



Inquiry Procedure

Procedure can be lengthy causing

- Delay
- Expense
- Require attendance of witnesses for many days

Advantages and Disadvantages (2)

Inquiry

Clear rules for statements of case and evidence

A promoter can use the initial part of the inquiry to establish the justification for the scheme.

Statutory objectors (section 11(4) TWA 1992) have a right to be heard.

Allows for a thorough examination of the scheme

Advantages and Disadvantages (3)

The influence of policy statements in the decision-making process

There is no equivalent to section 104(3) Planning Act 2008 (in relation to National Policy Statements).

Section 38(6) Planning and Compulsory Purchase Act does not apply to the determination of deemed applications for planning permission

A flexible approach can be taken

Conclusions (1)

The system established by the Transport and Works Act 1992 achieves its intended purposes.

The system could be used more flexibly to make it more effective in operation

Secretary of State

- Greater use of the section 2 powers (guided transport system,)
- Greater use of the section 15 powers (e.g. marine licensing- equivalent to section 149A Planning Act 2008 for DCOs)
- Re-issue the TWA Guide to procedures

Conclusions (2)

Inspectors

PIM – more extensive case management directions

Inquiries

- Effective case management
- Consider more effective use of roundtables (subject to agreement of the parties)

Promoters

More extensive use may be made of section 5(3) TWA



Q&A

We will now answer as many questions as possible.

Please feel free to continue sending any questions you may have via the Q&A section which can be found along the top or bottom of your screen.

Thank you for listening

© Copyright Landmark Chambers 2021

Disclaimer: The contents of this presentation do not constitute legal advice and should not be relied upon as a substitute for legal counsel.

London

180 Fleet Street
London, EC4A 2HG
+44 (0)20 7430 1221

Birmingham

Cornwall Buildings
45 Newhall Street
Birmingham, B3 3QR
+44 (0)121 752 0800

Contact

✉ clerks@landmarkchambers.co.uk
🌐 www.landmarkchambers.co.uk

Follow us

🐦 @Landmark_LC
📘 Landmark Chambers
📺 Landmark Chambers