Landmark CHAMBERS

PLANNING APPEALS: HIGH COURT CHALLENGES

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TOPICS

(1) The right to challenge an appeal decision

(2) The scope of any challenge

(3) Procedural requirements and costs

(4) Appeals

(1) THE RIGHT TO CHALLENGE AN APPEAL DECISION

- **S.288 of TCPA 1990** - a claim under which can be made by a person aggrieved and is known as a planning statutory review and is very similar to JR. CPR Part 8 and PD 8C and PDs 54D & 54E.
- **Costs decision**: a person can now challenge a costs order under s. 288(1A) – separately from or together with a substantive claim
- Claims made in the **Planning Court** which started work in April 2014 and the jurisdiction of which is set out in Pt 54.21(2)(a) of the CPR. Don't forget potential categorisation as "**significant**".
- Need for **permission** since 26 October 2015 – as for JR, on the papers initially with right to renew at an oral hearing.
- Filter system – to remove **unarguable** cases. If claim is considered TWM (CPR r.23.12) the claimant not entitlement to reconsideration at a hearing – but there is a right of appeal, as returned to below.

(2) SCOPE OF ANY CHALLENGE: PRINCIPLES

- The **golden rule** is of course that the planning merits of any decision are for the decision maker.
- A challenge is **not** a re-run of the planning merits: for the principles which apply see *R (oao of Bloor Homes) v SSCLG* [2014] EWHC 754 (Admin) at [19].
- This (and the wording of the NPPF) has led to claimants employing more and more sophisticated and "nit-picking" arguments – "**Excessive legalism"** (*Barwood Strategic Land v East Staffordshire* [2017] EWCA Civ 893 per Lindblom LJ at [50]).
- A prime example of this is is of course found in Suffolk Coastal DC v *Hopkins Homes Ltd* [2017] UKSC 37 in the Supreme Court – see [22] – [26].

Suffolk Coastal DC v Hopkins Homes Ltd. [2017] UKSC 37

25 ……Even where there are disputes over interpretation, they may well **not be determinative** of the outcome. (As will appear, the present can be seen as such a case.) Furthermore, the courts should respect the expertise of the **specialist planning inspectors**, and start at least from the presumption that they will have understood the policy framework correctly. With the support and guidance of the Planning Inspectorate, they have primary responsibility for resolving disputes between planning authorities, developers and others, over the practical application of the policies, national or local

26. Recourse to the courts may sometimes be needed to resolve distinct issues of law, or to ensure consistency of interpretation in relation to specific policies, as in the *Tesco* case……the judges are entitled to **look to applicants**, seeking to rely on matters of planning policy in applications to quash planning decisions (at local or appellate level), to **distinguish clearly** between issues of interpretation of policy, appropriate for judicial analysis, and issues of judgement in the application of that policy; and not to elide the two.

SCOPE OF CHALLENGE: CONSISTENCY EXCEPTION

Baroness Cumberlege of Newick v SSCLG [2017] EWHC 2057 (Admin) at [43]. S.288 application by neighbour to quash grant of pp on appeal for up to 50 dwellings:

- Public law principle that policy must be consistently applied (for planning see *North Wiltshire DC v SSEnv* (1993) P&CR 137)
- The LP was adopted after the inquiry – development in breach of policy CT1 being outside the settlement boundary.
- However, SoS found that policy was out of date and applied the NPPF[14] tilted balance.
- However, 10 weeks earlier the SoS had found that the policy should be regarded as as up to date in respect of a separate proposal. SOS conceded but developer contested claim.

Consistency (2)

- In granting planning permission for residential development on the basis that a relevant local development plan policy was out of date, the secretary of state failed to take account of a previous finding that the policy was up to date. That finding was a material consideration which no reasonable decision-maker would have failed to take into account, and the grant of permission was therefore unlawful.

- That can apply, depending upon the circumstances, even if previous decision not brought to SoS's attention.

SoS Disagreeing with Inspector

Gladman v Secretary of State for Communities and Local Government [2017] EWHC 2448 (Admin)

- The High Court quashed the decision of the Secretary of State for Communities and Local Government (SCLG) to dismiss Gladman's appeal against the refusal of planning permission.

- The decision was based on the fact that the SCLG failed to provide an opportunity to the parties to the inquiry to challenge his findings in respect of the LPA's housing land supply, which differed from those of the inspector at the inquiry.

Gladman v SSCLG (2)

- Proposal for residential development (up to 180 dwellings) outside settlement boundary, the policies relating to which were found by the Inspector to be out of date
- Inspector found HLS of in the region of 3.73 yrs and applying the the tilted balance found the benefits outweighed the landscape, visual and agricultural land impacts and recommended grant of pp. She took into account the degree of shortfall.
- SoS accepted the need but said this did not translate directly onto a need for housing on this specific site.
- Further, SoS referred to the Council's website as showing that the HLS had moved on – now 5.16/5.4 yrs HLS. SoS said this was not yet robust (no consultation) and assumed between 3.7 and 5hrs and said tilted balance still applied.

Gladman v SSCLG (3)

- SoS found the relevant policies (including emerging policy) to be up-to-date, having regard to NPPF[49]. He found the countryside policy was consistent with aim in NPPF of protecting the countryside.
- SoS gave significant weight to conflict with countryside policies in terms of visual effects – mod weight to landscape and agricultural land impact and that adverse impacts would substantially outweigh the benefits. Appeal dismissed.
- Mr J Jay held that the SoS had differed from the Inspector on a matter of fact and thus rule 17(5) of the 2000 Procedure Rules applied.SoS should have sought further representations from the parties and did not. Decision quashed.

(3) SOME PROCEDURAL ASPECTS FOR AND COSTS OF A CLAIM

- *Croke v SSCLG and Aylesbury Vale District Council* [2016] EWHC 2484 (Admin). Permission refused as being out of time. Permission to appeal granted by CA.
- LJ Hickinbottom noted that previous cases all concerned circumstances in which a time limit for doing something at court expires on a Sunday, Bank Holiday or other *"dies non"* on which the court is closed for the day, days of business in the High Court being regulated by para. 2 of CPR PD 2A.
- This case raised whether the principle extended to a case where the court was closed, or not otherwise functioning, for less than the whole of the final day on which a claim must be issued or "made" .
- Also per Hickinbottom LJ *"Judge Robinson proceeded on the basis that there was no jurisdiction for the court to extend time. In my view, that is not strictly the case: even where a time limit is strict, there remains a* ***residual jurisdiction*** *in the court to extend time, e.g. to avoid a breach of human rights"*

COSTS - PCOs

- *R (oao RSPB v Secretary of State for Justice (2) Lord Chancellor (Defendants) & Civil Procedure Rules Committee (Interested Party)* [2017] EWHC 2309 (Admin)
- The provisions of the Rules in relation to varying the default costs caps were therefore consistent with the applicable EU law when considered in the context of the surrounding procedural rules and practices (see paras. 28, 36-41 of judgment)
- The Rules should provide for hearings relating to variation of the costs caps to be in private in the first instance (paras. 51-57).
- There was a consensus between the parties that all of the costs involved in bringing a case, including a claimant's own costs, could properly be taken into account in assessing whether the default costs caps were appropriate.

SCOPE OF CHALLENGE: PROCEDURAL IRREGULARITY

- *Akhtar* [2017] EWHC 1840 (Admin) - PINS entitled to exclude late representations from Appellant in an enforcement appeal:

  The SOS had not acted unfairly or irrationally in refusing to accept the appellant's late representations. The Town and Country Planning (Enforcement) (Written Representations Procedure) (England) Regulations 2002 and Procedural Guide made it clear that he could disregard information submitted outside the normal time limits. It was plainly important for the **effective and efficient administration of appeals that there were time limits for submission of documents that should be abided by unless there was a very good reason**.

(4) APPEALS

- Permission to appeal is required – for an appeal against a refusal of permission (CPR r.52.15B) and re. a full decision (CPR r.52.3)
- If permission not sought from or refused by the High Court – can seek permission from the CA of appeal but significant change in the procedure and rights relating to that:
- Under CPR r.52.5 (from 3 October 2016) such an application for permission will normally only be considered on the papers unless save at the J's discretion and where the J considers it cannot fairly be considered without an oral hearing.
- Where the refusal of permission records that the review is TWM ("truly bound to fail" – *Hossain v SS Home Department* [2016] EWCA Civ 82 & CPR 52.15B(2)*)* permission may be sought from the CA within 7 days of service on the claimant of the H Ct refusal.

The Final word?

- There is no further appeal from the Court's of appeal's refusal of permission
- Is than an end of the matter? Is there anything else a Claimant can do?
- CPR Pt. 52.30 – Reopening of Final Appeals:

  The Court of Appeal or the High Court will not reopen a final determination of any appeal unless—

  (a) it is necessary to do so in order to avoid real injustice;

  (b) the circumstances are exceptional and make it appropriate to reopen the appeal; and

  (c) there is no alternative effective remedy.

- Recent case on screening in which this was raised. Permission refused on the papers. Claimant very dissatisfied and is seeking review generally and under CPR Pt. 52.30 and contends that the system leads to unfairness as reasons for refusal are often brief.