Planning and Environmental Case Law Update

Richard Moules

1. The purpose of this talk is to highlight some recent planning and environmental cases which may be of interest to property lawyers.

(1) *Barr v Biffa Waste Services Ltd*

2. The decision of Coulson J in ***Barr v Biffa Waste Services Ltd*** [2011] EWHC 1003 (TCC) may have far-reaching implications for the law of nuisance. In essence, the case suggests that where an activity is subject to detailed regulatory control there may be no claim in nuisance related to it, at least in the absence of negligence.

3. The claim was brought by householders affected by odour emanating from a landfill site in Ware, Hertfordshire, operated by the defendant. The landfill site in question was the first in the UK to receive 'pre-treated' waste i.e. waste that, in compliance with the Landfill Directive, had first been processed at a transfer station in order to remove recyclable materials. The higher concentration of organic matter in this pre-treated waste made it particularly malodorous. The claimants alleged that the landfill site constituted a nuisance, but they did not allege any negligence on the defendant's part, nor did they allege that the defendant was in breach of its environmental permit.

4. Coulson J identified (at [3]) that the case raised a "clash between two potentially irreconcilable principles":

> "On the one hand, the claimants contend that they have inalienable common law rights in nuisance which have not been affected, let alone excluded, by the relevant environmental and landfill legislation and the detailed terms of Biffa's permit; on the other hand, Biffa submit that it would be unfair and unrealistic if the cascade of legislation and the terms of their permit were ignored, so that they could comply with all their numerous obligations and the detailed provisions of their permit, and still find themselves liable to the claimants in nuisance, as it the legislation and the permit did not exist."

5. First, Coulson J held that the defendant could not benefit from the defence of statutory authority. He distinguished the case law on the basis that Biffa did not have wider statutory obligations to the public like a water utilities company under the Water Industry Act 1991 (***Marcic v Thames Water Utilities*** [2003] UKHL 66), nor did Biffa derive its powers directly from statute (as in ***Allen v Gulf Oil Refining Ltd*** [1981] A.C. 1001). Moreover, Coulson J noted that s.73(6) of the Environmental Protection Act 1990, which provided for certain offences, did so "without prejudice to any liability arising otherwise than under this

subsection". He considered that there was force in the argument that the 1990 Act in fact "preserves… the ability to make a nuisance claim at common law" (at [334]).

6. Secondly, Coulson J held that the detailed statutory regime was not irrelevant though because it went to the question of whether the use of the land was reasonable. He began with the common sense proposition that (at [347]):

> "An activity should not be permitted by one set of specific rules (derived from detailed legislation), yet at the same time give rise to a liability to a third party by reference to the much more general set of principles derived from the common law."

7. Coulson J observed that Biffa's permit expressly recognised that some odour may be caused and he also considered that the statutory defence of having use best available techniques would be undermined if non-negligent nuisance claims could proceed. He therefore held (at [376]) that as a matter of law claims in nuisance are bound to fail where the used of a site is in accordance with an environmental permit as it not unreasonable user of land. Effectively Coulson J was creating a new defence of regulatory compliance.

8. The principle in ***Barr***, if upheld by the Court of Appeal, is unlikely to be confined to the landfill context. Instead, it is likely to apply to all environmental permits that regulate potentially nuisance causing activities. One interesting question though is how this new principle relates to the settled law that the grant of planning permission does not of itself sanction or otherwise endorse an activity which is causing a nuisance to neighbouring properties (see e.g. ***Gillingham BC v Medway (Chatham) Dock Co Ltd*** [1992] 3 All E.R. 923; and ***Wheeler v AJ Saunders Ltd*** [1996] Ch. 19. In ***Hunter v Canary Wharf Ltd*** [1997] A.C. 655, the House of Lords reaffirmed that principle, subject to a limited caveat that whilst compliance with planning permission is not in itself a defence to a nuisance act, "it could change the character of the neighbourhood by which the standard of reasonable user fell to be judged" (p.722, *per* Lord Cooke). It is certainly arguable following ***Barr*** that the effect of planning permission on the possibility of a nuisance claim is more pronounced and that were a complex planning permission is implemented in accordance with detailed conditions and s.106 agreements the developer ought to be protected from non-negligent nuisance claims.

(2) ***Save Britain's Heritage v Secretary of State for Communities and Local Government***

9. The Court of Appeal's recent decision in ***Save Britain's Heritage v Secretary of State for Communities and Local Government*** [2011] EWCA Civ 334, is an important decision

concerning the scope of the Environmental Impact Assessment Directive ("EIA Directive"). The claimant was a campaign group challenging the local planning authority's decision to permit the demolition of the former Mitchell's brewery building in Lancaster. The parties accepted that demolition was capable of having significant effects on the environment, but the local planning authority and the Secretary of State took the view that demolition was not a plan or project which required environmental impact assessment before it could be authorised.

10. The Court of Appeal rejected the Secretary of State's contention and held, taking a purposive approach to the legislation, that the demolition of buildings fell under "other schemes" in the definition of "project" in Article 1(2) of the EIA Directive. The upshot was that paragraphs 2(1)(a) and 2(1)(d) of the Town and Country Planning (Demolition – Description of Buildings) Direction 1995 (which had effectively excluded most demolition from the EIA Directive by providing that demolition of certain descriptions of buildings shall not be taken to be development for the purposes of the Town and Country Planning Act 1990) was unlawful. Consequently, the effect of ***Save*** is that the demolition of any non-domestic building over 50 cubic metres is now classed as development and therefore requires planning permission. This decision will be welcomed by built-heritage campaigners. As Sullivan L.J. noted, it was "a curious, and thoroughly unsatisfactory, feature of [paragraphs 2(1)(a),(d)] that those demolitions which are most likely to have an effect on cultural heritage, the demolition of listed buildings, ancient monuments, and buildings in a conservation area, are effectively excluded from the ambit of the Directive".

(3) Warley

11. The decision in ***R (on the application of Warley) v Wealden DC*** [2011] EWHC 2083 (Admin), is an important decision concerning the validity of so-called "tailpieces" to planning conditions that purport to allow a developer to apply informally (and outside the TCPA 1990) to the local planning authority in order to vary the restrictions of the condition.

12. By way of background, in ***R (on the application of Midcounties Co-operative Limited) v Wyre Forest DC*** [2009] EWHC 964 (Admin), Ouseley J had considered the validity a tailpiece to a condition restricting the floorspace of a food store in these terms:

> "Condition 6
> The food store hereby permitted shall not exceed the following floor space allocations (maxima);

> Gross external –up to 4209 sq metres measured externally
> Nett retail sales –up to 2919 sq metres
> Unless otherwise agreed in writing with the LPA" (emphasis added)

13. He concluded that the tailpiece was unlawful because there were no words purporting to limit its application and "the tail piece on its face does enable development to take place which could be very different in scale and impact from that applied for, assessed or permitted and it enable it to be created by means wholly outside any statutory process" (at [70]). Ouseley J did, however, uphold the tailpiece to another condition to the planning permission because that tailpiece was much more tightly constrained, permitted minor, non-material variations:

> "The development hereby approved shall be carried out strictly in accordance with the following plans/drawings:
> 6046-P07-J dated 22 February 2008
> 6046-P10C dated 22 February 2008
> stamped 'Approved' unless other minor variations are agreed in writing after the date of this permission and before implementation with the Local Planning Authority." (emphasis added)

14. It had been thought by many that the *ratio* of ***Midcounties*** was confined to situations in which the tailpiece would permit the scope of the planning permission to be extended. However, Rabinder Singh Q.C. (as he then was) recently extended the principle in ***R (on the application of Warley) v Wealden DC*** [2011] EWHC 2083 (Admin).

15. The decision in ***Warley*** concerned the following tailpiece condition to a planning permission for tennis court floodlighting:

> "The court lighting hereby approved shall only be on when the courts are in use for playing and/or coaching tennis during the months of September to April inclusive and they shall not be operated after 21:00 hours or before 08:00 hours on any day without prior consent in writing of the LPA" (emphasis added)

16. The description and location of the floodlight development were described in the planning permission as "erection of nine static columns with attached floodlights alongside court numbers 1 and 2 only".

17. Referring to ***Midcounties***, Rabinder Singh Q.C. held that:

> "Very much the same it seems to me, accepting the claimant's argument on this point, can be said about the present case. Paraphrasing what Ouseley J said in my own words, it seems to me that tailpieces of the kind in question in both cases offend against the rule of law. This is because the public, and not only the parties to the particular planning permission concerned,

> are entitled to know in public documents what planning permission relates to a given development, and what therefore is permitted and what is not.
>
> The tailpiece in question leaves wholly uncertain for example who is to grant the variation, according to what criteria which may be non-existent or at least unpublished and secret. On the face of it at least there is nothing to stop, it would seem, an application being made to vary the temporal limitations in condition 2 to such an extent that "any" day could become each and every day, or perhaps each and every day over a sustained period of time.
> For all those reasons, it seems to me, the tailpiece was unlawful. But it is common ground before me that if I came to that conclusion, then it would be possible to delete the tailpiece from condition 2 without having to quash condition 2 in its entirety, still less for this reason having to quash the planning permission as a whole."

18. Thus, it seems that all tailpieces to planning conditions will be invalid unless they are tightly constrained to permit only minor, non-material variations. Given that statutory power now exists (from 1.10.09) for a local planning authority to make non-material variations to a planning permission (s.96A TCPA 1990), it is doubtful that tailpieces will now serve any useful purpose.

(4) *Thomas v Bridgend CBC*

19. The Court of Appeal's decision in ***Thomas v Bridgend CBC*** [2011] EWCA Civ 862 [2011] R.V.R. 241, illustrates the power of the Human Rights Act 1998 to help secure compensation for landowners. The Court held that the rule whereby the right to compensation for adverse impact on value caused by a road scheme would be lost if the road was not adopted within 3 years of being open to the public was incompatible with Article 1 of Protocol 1 ECHR.

20. The facts were straightforward, a developer built a relief road for access to a newly developed site. An agreement was entered into with the local authority under s.278 of the Highways Act 1980 requiring adoption once the road was completed to a satisfactory standard. The road was completed and opened to the public but because of snagging and other defects, adoption did not take place until four years later. Nearby owners claimed compensation under the Land Compensation Act 1973 for diminution in value caused by the effect of the road.

21. However, section 19(3) of the Act precludes compensation where the road is not adopted within three years of being open to the public. The Court of Appeal held that this provision provided a perverse incentive to developers and authorities: the benefit (to a council or a developer) for delaying adoption would be avoidance of claims whereas an efficient council or developer, who concludes the work on time, would be subject to compensation claims.

The Court held that the extinguishment of the right to compensation after 3 years was unlawful because it did not strike a fair balance between public and private interests in breach of Article 1 of Protocol 1 ECHR.

(5) ***R (on the application of Morge) v Hampshire CC***

22. The Supreme Court's decision in ***R (on the application of Morge) v Hampshire CC*** [2011] UKSC 2, is a very important decision on the scope and interpretation of the Habitats Directive (92/43/EEC). It was an appeal against the grant of planning permission for a bus route through an old railway line inhabited by bats. The Supreme Court considered the proper interpretation of Article 12(1)(b) of the Habitats Directive concerning the deliberate disturbance of a species.

23. The Supreme Court took a broader approach than the Court of Appeal and held that whilst consideration had to be given to the effect on the conservation status of the species at population level, this did not mean that only activity which had an effect on the population could constitute disturbance. The correct test for "disturbance" was not whether or not it reduced the population of the relevant species. Instead, all depended on the characteristics and status of the species in question. A disturbance was more likely if the population levels were low rather than stable or increasing. A disturbance was more likely if activities took place at a sensitive season (breeding, migration or hibernation were examples). The rarity and conservation status of the relevant species had to be taken into account.

24. The Supreme Court also considered the obligations of a planning committee under Regulation 3(4) of the Conservation (Natural Habitats) Regulations 1994 (now replaced by the Conservation of Habitats and Species Regulations 2010) which required authorities to "have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions". The Court held that there was no reason not to grant planning permission unless the committee concluded that the development would be likely to offence Article 12(1) and was unlikely to be licensed by Natural England (which has primary responsibility for ensuring compliance with the Directive). If Natural England were satisfied that the development would comply with Article 12, the committee were entitled to presume that this was so.

(6) ***BDW Trading Ltd (t/a Barratt Homes) v Spooner***

25. Local residents and pressure groups often try to sterilise land by registering it as a town or village green. The decision in ***BDW Trading Ltd (t/a Barratt Homes) v Spooner*** [2011] EWHC 1486, shows, however, that if property has been appropriated for planning purposes by a local authority, it will be developable, even though it may have been registered as a town or village green.

26. In ***BDW Trading Ltd***, a council-owned site was granted planning consent in June 2006 for residential development. In March 2007 the council "appropriated" the plan for planning purposes under s.122 of the Local Government Act 1972. In October 2007 the council sold the land to a developer for over £10 million. The local action group wished to preserve its existing recreational use. They instructed their solicitors who wrote to the developer in July 2008 indicating their intention to apply for registration as a village green. The application for registration was made in July 2009. The developer, in March 2010, obtained approval of details required under the planning consent and commenced building works. The village green inquiry was held in November 2010 and in January 2011 registration was recommended. The developer applied for a declaration that the appropriation for planning purposes superseded the registration as a village green. Judge Seys-Lewellyn QC (sitting at the Cardiff District Registry of the High Court) held that the specific wording of s.241 of the TCPA 1990 made clear that appropriation for planning purposes overrides registration as a common or village green.

27. On the facts, planning permission had been granted *before* attempts to register the land as a village green. One interesting question is what would happen if the order were reversed. Could a village green be sold to a local planning authority, be appropriated for planning purposes and then be granted planning permission which overrides registration as a village green?

(7) ***Secretary of State for Communities and Local Government v Welwyn Hatfield BC***

28. The infamous case of ***Secretary of State for Communities and Local Government v Welwyn Hatfield BC*** [2011] UKSC 15, concerned Mr Beesley's house disguised in a barn. In 2001 Mr Beesley has applied for and obtained planning permission to construct a hay barn for grazing and haymaking on land in the green belt. In 2002 he constructed a building which, from the outside, looked like the permitted barn. However, internally, the structure was a fully-fitted out dwelling house with a garage, living room, study, bedrooms, bathrooms and a gym. Mr

Beesley moved into the house with his wife in August 2002 and lived there continuously for four years. He then applied for a certificate of lawfulness for the use of the building as a dwellinghouse, contending that after four years his breach of planning control was immune from enforcement.

29. The Supreme Court held that even if there had been a change of use, Mr Beesley would have been precluded from relying on s.171B(2) as a result of his deceit in obtaining the planning permission. His dishonest conduct meant therefore that he could not rely on the four years' use. The Localism Bill proposes amendments to the TCPA 1990 (s.171A-171BC) which provide for "planning enforcement orders" which stop the clock where a court is satisfied that a person's actions have contributed to or resulted in concealment of breaches of planning control.

(8) *R v Luigi del Basso*

30. Another interesting planning enforcement case is the Court of Appeal's decision in ***R v Luigi del Basso*** [2010] EWCA Crim 1119, which concerned the confiscation of proceeds of crime. The appellants had been found guilty of breaching the terms of a planning enforcement notice requiring them to cease using a car park as a park and ride facility for Stansted Airport. When operating the park and ride facility they had traded as Bishop's Stortford Football Club's Parking Association and the income had largely been used to bankroll the football club. The appellants were convicted and fined for breach of a planning enforcement notice, but they continued to expand the unauthorised business use. A second prosecution was brought and they pleaded guilty, but this time confiscation proceedings were also brought in respect of the £1.88m they had received from operating the park and ride facility.

31. The appellants appealed against the confiscation order contending that (i) they had not benefited from their criminal acts, since the proceeds had been spent on administering the parking facility (including VAT, national insurance contributions, business rates and rent that went to support the football club) and this was a legitimate and altruistic motive; (ii) that the benefit should be equated with net profit, rather than turnover; and (iii) that the application for a confiscation order was an abuse of process because it was "oppressive".

32. The Court of Appeal dismissed the appeal, holding that it was clear that "the legislation looks at the property coming to an offender which is his and not what happens to it subsequently" (at [38]). The appellants' altruistic disposal of their income was therefore irrelevant. Indeed, if the position were otherwise the court would have to make extremely difficult value judgments when considering what an offender did subsequently with the proceeds of crime. The Court of Appeal also rejected the argument that the confiscation order application had been an abuse of process. It held that the appellants had been under a duty to comply with the planning enforcement notices and they had twice chosen not to. Confiscation measures were therefore entirely justified.

33. The Proceeds of Crime Act 2002 can also be invoked in the case of environmental offences, as is illustrated by a recent decision of HHJ de Bertodano: ***R v M Dickerson Ltd*** (Leicester Crown Court, 31 January 2011). The defendant was guilty of operating a waste processing site without a permit under the **REGS**. The defendant's benefit was calculated to be £25,305 in respect of avoided costs of paying for the necessary permit, £198,147 in respect of waste deposits and £34,675 VAT (a total of £258,127).

34. The defendant contended that it would have received the same benefit in respect of waste deposits and VAT had it operated legally. The judge agreed and she only made a confiscation order for the £25,305 saved by not obtaining a permit. The criminal conduct to which the defendant had pleaded guilty was operating without a licence and therefore the avoided costs were the only "true benefit" that flowed from the offence. This important decision will, if followed, insulate some unlicensed operators from the most serious consequences of the Proceeds of Crime Act 2002.

(9) ***Tile Wise Ltd v South Somerset DC***

35. The decision in ***Tile Wise Ltd v South Somerset DC*** [2010] EWHC 1618 (Admin) is an important reminder of the breadth of the controls over advertising. The court held that the display of an advertisement on a vehicle would not be exempt from the need for planning permission by virtue of Class B in Schedule 1 of the Advertising Regulations 2007 if the principal use of the vehicle <u>at the time of display</u> was advertising; the usual use of the vehicle at other times was not relevant. Thus, a business that placed advertising boards on its vehicles at times when it did not need to use them could not benefit from the exemption.

(10) ***R (on the application of Health and Safety Executive) v Wolverhampton City Council***

36. The Court of Appeal's decision in ***R (on the application of Health and Safety Executive) v Wolverhampton City Council*** [2010] EWCA Civ 892, gives important guidance on the exercise of a local planning authority's power to revoke a planning permission pursuant to s.97 TCPA 1990.

37. Planning permission had been granted for the erection of four blocks of student flats close to a liquefied petroleum gas facility. The Health and Safety Executive ("HSE") only learned of the planning permission after three of the blocks of flats had already been constructed. Nevertheless, the HSE requested that the council revoke the planning permission under s.97 TCPA 1990. The council refused and the HSE issued judicial review proceedings.

38. The majority of the Court of Appeal (Pill L.J. dissenting) held that the council could have regard to the requirement to pay compensation under s.107 TCPA 1990 in deciding whether to revoke the planning permission under s.97 TCPA 1990. The Supreme Court has granted permission to appeal on this issue.

Richard Moules

Landmark Chambers

180 Fleet Street

EC4A 2HG