Landmark CHAMBERS

JUDICIAL REVIEW OF LOCAL LEVEL PLANNING DECISIONS: CURRENT ISSUES

Rupert Warren QC

Themes

- Continuing increase in the use of JR by all stakeholders in the process
- Underpinned by PCO regime in many cases
- EIA and SEA to the fore, due to evolving law and costs protection
- Novel approaches to requiring LPA action rather than quashing decisions
- *Tesco v Dundee* having an effect also since it increases the arguability of points about policy interpretation
- Indications that judges are flexing muscles on discretion to refuse relief.

Substantive and procedural

Substantive:

- Examples of misdirection cases
- Materiality in planning cases
- Relationship between planning and other regimes
- EIA cases
- Inaction by LPA cases

Procedural

- Witness statement evidence
- Discretion of the court

Challenges involving misdirection of the committee

- Basic principles in *Oxton Farms* and *Siraj* – was the committee seriously misled, having regard to what was said at the meeting as well as in the ORC

- *R(E&A Estates) v LB Barking* [2012] EWHC 3744 (Admin): planning permission for an extension to IP's store quashed because (a) the officers had not referred to the AAP policy encouraging IP to relocate to C's sequentially-preferable site, and (b) the negative effect on IP's willingness to move to C's site had not been adequately drawn to the members' attention. *NB* that after draft judgment, it emerged that C had (on first day of hearing) contracted with IP's main competitor to develop C's site. However, Wilkie J declined to exercise discretion not to quash the permission.

More misdirection

- In *R(Midcounties Co-operative) v Forest of Dean Council* [2013] EWHC 1908 (Admin):
- Planning permissions for out of town retail store quashed on basis of (1) failure to grapple with the planning history, particularly whether SoS refusal in 1999 could be distinguished now, and (2) failures properly to apply the relevant policy in recommendations to the members

A great deal of misdirection

- *R(Cherkley Campaign Ltd) v Mole Valley DC* [2013] EWHC 2582 is on its way to the CA (March 2014), but it is a singular example. The Court held inter alia that:
- The ORC misled the committee by confusing "need" for golf facilities with "demand" for them.
- The judgment that there was a need – in Surrey! – for golf courses was perverse
- The committee failed to apply national policy on the protection of the AONB properly (the "exceptional circumstances" test in NPPF 116) and reached a perverse decision on impact
- The committee failed to recognise that the proposal was "inappropriate development" in the GB

Survivors, 1: reading the ORC correctly

- In *R(Marshall Street Regeneration Ltd) v Westminster City Council* [2013] EWHC 2764 (Admin), the Court rejected a challenge that the LPA had lost sight of the key restraint policy relating to unlisted buildings in the CA
- The ORC was sufficiently detailed to discern that the right questions were being asked (at [28])
- Some weight was given to the knowledge and awareness that the members may have of the importance of the buildings ([30])
- The ORC did not misread the expression "no adverse effect" - they took it to mean just that, but applied it having regard to conditions and protection of amenity ([41],[44],[51])
- Alternatives were not a necessary material consideration – nothing exceptional required a review of alternatives in line with the principle in *R(Mount Cook) v Westminster CC* [2004] 2 P&CR 22 ([68])

Survivors, 2: relying on other controls as part of the planning judgment

- In *R(Hayden) v Erewash BC* [2013] EWHC 3527, permission for a side extension to a house in a former mining area was challenged on the basis that the members had been wrongly advised to ignore the issue of ground stability because it would be dealt with through the application of Building Regs and Party Wall legislation
- The court held that the report in fact said that due to those concerns the stability issue "should" not affect the outcome of the application, not "could" not, in the sense of being legally irrelevant (contrasting *R(Copeland) v LB Tower Hamlets* [2010] EWHC 1845 Admin)

Survivors, 3: giving “no weight” to a policy document

- In *R(Wakil) v LB Hammersmith & Fulham* [2013] EWHC 2833, the court rejected a challenge to a grant of planning permission partly based on according an adopted (but challenged) SPD “no weight”
- The court held that it was permissible, in line with the HL decision in *Tesco Stores Ltd v SSE* [1995] 1 WLR 759, to attach no weight to a material consideration which had, in general, the potential to affect the planning decision. It would depend on the circumstances – here, the challenge to the SPD, and the fact that the objectors (later, the Claimants) said that no reliance whatever could be placed on the SPD.
- Permission has been applied for to the CA on this ground (as yet undetermined)

Survivors 3: no relevance (higher risk)

- The court upheld the grant of permission for a wind turbine in *R(Holder) v Gedling BC* [2013] EWHC 1611 (Admin), despite the ORC telling the members in terms to exclude from consideration (a) precedent, (b) alternative sites, (c) the likely energy output of the turbine, and (d) financial benefit of the scheme
- The court held that all 4 potential considerations were rightly considered to be irrelevant on the facts of the case, saying
- "there is nothing in the case law … that precludes an officer from giving guidance and advice to the Council as to what in substance are the considerations material to the planning application in relation to the planning application … on the contrary, there are considerable advantages if the officer does give such guidance and advice because, if it is soundly based, the decision maker is more likely to focus and to concentrate on what is really important and determinative, rather than be distracted by matters which could, hypothetically, be relevant, but which, in the particular case, have no real bearing on the final decision."
- Not sure if appealed – but cp the ratio with the definition of material consideration in *Kides* – "something which might tip the balance to some extent … although plainly it may not be determinative" (at [2002] EWCA Civ 1370 at [121]).

Survivors, 4: the last resort – the error made no difference to the outcome

- In *R(Watson) v LB Richmond upon Thames* [2013] EWCA Civ 513, the challenge was to the permission for the redevelopment of Richmond railway station.
- The court absolved the LPA of a failure to take into account an adverse report by a body set up by the authority as consultative body on matters concerning development in Richmond
- Applying *Kides*, the court held that the report contained nothing that had not been put before the Council already in other material summarise din the ORC.
- At first instance ([2012] EWHC 3881]), the court had rejected a "failure to consider alternatives" challenge – the SRG had made it clear that the LPA considered the proposal accorded with the development plan when read as a whole and therefore there was no need to consider alternatives further, again applying *Mount Cook*.

EIA

- Two quick thoughts –
- *R(Thakeham Village Action Ltd) v Horsham* [2014] EWHC (number awaited): a planning finding that an impact is "significant" is not the same as significance in EIA
- *R(An Taisce) v DECC* [2013] EWHC 4161 (Admin): a regulatory process which leads to the finalisation of the inherent character of the development may be relied on as performing its job when screening for EIA.

Lessons from the ‘misdirection’ cases

- Litigation risk hugely increases if a matter is regarded as irrelevant or immaterial rather than being dealt with as a matter of weight
- The approach in *Holder* is admirable but carries substantial risk in cases where it might be a matter of judgment whether the consideration might be relevant to the outcome
- Full transcript/record of the committee meeting crucial to showing a potential error was corrected/not corrected
- ORCs should tease out all main material planning consequences, however inimical to the recommendation

Cases on Local Authority 'inaction'

- Pressure may come through JR in relation to decisions not to act. In *R(Evans) v Basingstoke & Deane DC* [2013] EWHC 899 (Admin), the court was asked to order the Council to make a discontinuance order under s.102 of the 1990 Act, to remedy an alleged EIA screening error in a permission granted in 2010.
- The court held (1) that enforcement was out of time, and that the s.171B time limits were not incompatible with the EIA Directive because they were effective and certain, and did not rob the EIAD of force; and (2) that, although a s.102 order was not precluded by immunity under the 1990 Act, to impose such a requirement on the LPA would be premature any consideration of that discretionary question by the LPA, especially where no such request had been made by the Claimant
- The CA upheld the judgment in an extempore decision (Sullivan LJ) on 20 November 2013)

Reluctance to force discretionary action (1)

- The same outcome in the permission stage of *R(CPRE) v Oxford City Council* (C0/5547/2013, decision of Lewis J on 23 October 2013) – the Claimant argued that s.102 had been requested by the Claimant and since there had been a breach of screening rules, the LPA should be required to issue a s.102 order requiring an ES to be submitted
- This was on the basis that s.102(1)(a), the power to find it "expedient … that any conditions should be imposed on the continuance of a use of land".
- The court did not determine whether this was a good reading of s.102(1)(a), but found that since the IP was submitting a voluntary retrospective ES, whereupon the LPA could consider the use of s.102, it was unnecessary for the Court to order any particular course of action, applying *Wells* [2004] 1 CMLR 31 at [62] to [70]

Reluctance to force discretionary action (2)

- In *R(Baker) v BANES* [2013] EWHC 946 (Admin), the court refused to order the LPA to take immediate enforcement action, since:
- There was no principle that enforcement action was mandatory where a breach of EIA regulations was ongoing
- It would not defeat the purpose of the Directive if the LPA decided not to take enforcement action when the IP was committed to the production of robust environmental information, and no additional advantage accrued to the IP (since enforcement action would simply shift the jurisdiction to the SoS on a ground (a) appeal).
- [See in general *Ardagh Glass Ltd v Chester CC* [2009] EWHC 745 (Admin) at [110]. The exact relationship between the duty to remedy EU breaches under *Wells* and the UK domestic planning legislation is not *acte clair,* according to a remark by Richards LJ in refusing permission for a challenge in *R(Hood) v Redcar* [2013] EWCA Civ 86 at [22]).

Procedural points 1: discretion to quash

- JR is a discretionary field, with the remedy a matter for the court
- Even where EU breaches are concerned, the court may not quash the permission (although the discretion not to is “narrow”).
- Examples: *R(Catt) v Brighton & Hove CC* [2013] EWHC 977 (Admin) (academic challenge because new identical permission granted which had survived JR, and in any event re-screened after pp);
- *R(Burridge) v Breckland DC* [2013] EWCA Civ 228 (project splitting found, but not quashed because (a) result would have been the same anyway and (b) there had been substantial compliance);
- *R(Treagus) v Suffolk CC* [2013] EWHC 950 (Admin) (a breach of environmental requirements occurred but no longer in force at date of JR, and the environmental risk had been shown to be immaterial in any event);
- See also *R(Gibson) v Harrow Council* [2013] EWHC 3449 (Admin) and
- *R(Wildie) v Wakefield MBC* [2013] EWHC 2769 (Admin) (part quashing of a permission possible in principle but not on the facts)

Procedural Points 2: Witness evidence

- Usual rule is not to lodge WS in a JR, but that is more honoured in the breach. Recent examples support the worth of WS evidence:
- *Burridge* and *Holder* (what was considered in screening exercise), though NB in *Burridge* the dissenting judge strongly deprecated the use of WS evidence: so clearly a risk;
- *Baker* and *CPRE* (the current factual position, going to discretion)

Summary

SCREEN EARLY AND OFTEN

WEIGHT NOT IMMATERIALITY

OFFICERS' REPORT TO COVER ALL OBVIOUS CONSEQUENCES OF THE APPROVAL

TAKE BACK TO COMMITTEE IF IN DOUBT

IF JR MADE, CONSIDER CAREFULLY THE ISSUE OF EVIDENCE

BUILD PERMISSION/SUBSTANTIVE/CA (THE TEST IS ONLY "REALISTIC PROSPECT OF SUCCESS") INTO TIMESCALES

- Rupert Warren QC specialises in planning and related areas at Landmark Chambers

- He appeared in *R(Estates & Agency Ltd) v Barking LBC* for Tesco Stores*; R(CPRE) v Oxford City Council* for Oxford University*; R(Wakil) v LB Hammersmith & Fulham* for Orion and *R(Watson) v LB Richmond upon Thames* for the LPA.

- *These slides are for education purposes and are generalised. They should not be relied on as legal advice in any particular case; rather, specific legal advice should be sought*.