Landmark CHAMBERS

Environmental Case Law Update

David Forsdick QC
Sasha Blackmore

Landmark Chambers
November 2017

Structure

<u>Current hot topics in environmental caselaw:</u>

- Fracking
- Airports
- Flood risk
- Stop Notices
- Implied Conditions
- Scientific Disputes and Expert Advice
- Environmental "Damage"
- Habitats
- EIA and SEA
- Waste

Fracking cases

(1) R (on the application of Friends of the Earth Ltd and Frack Free Ryedale) v North Yorkshire CC and Third Energy UK Gas Ltd
(2) Preston New Road Action Group v SSCLG
(3) R (on the application of Dean) v Secretary of State for Business, Energy and Industrial Strategy

Frack Free Ryedale

- First fracking operation to be approved in England since a ban was lifted by the UK Government in 2012.
- Lang J rejected argument that Council failed to take account material indirect/secondary/cumulative climate change impacts (from another site)
- Relevant representations before Council when it made its decision; specialist committee; two day Planning Committee meeting; detailed 252 page Officer's Report, with supporting appendices, plus two supplementary reports and an addendum report
- Also rejected a challenge that a financial bond had to be required

Preston New Road Action Group

- First horizontal wells
- Dove J held no indirect, secondary or cumulative impacts as the exploratory works were limited in time and purpose. Any future production works would require a new ES.
- Temporary nature of the harm *could* prevent breach of the relevant policies
- A "*perfectly sensible assumption"* that gas provided would "*simply replace gas"* that would otherwise be consumed and thus "*there is no evidence that there would actually by any increase in gas usage or greenhouse gas emissions*"....
- Contrasted with flaring, which would

Preston New Road Action Group

- Friends of the Earth's evidence:
- Climate change concerns: in the 6 years (2017-2022), project was
  - between 0.007% and 0.01% of the UK's total carbon budget; or
  - between 5% and 9% of Fylde region's total emissions budget.
- Health concerns: essentially a precautionary argument but called expert evidence as to limits in knowledge. Sources of hazards identified as air pollution, contamination of ground and surface water, traffic, dust, noise, odour and lighting and social, environmental and economic effects.
- Held other statutory regimes dealing with those concerns.

Climate change effects

Preston New Road Action Group

- Two procedural points:

(1) Caution with Statements of Common Ground.
  - change in developer's case only crystallized in closing submissions;
  - Local action group not represented all the time;
  - "out of the blue" - fairness argument,
  - rejected on its facts.

(2) Would not have been a remedy that the First Claimant could have sought to reply to developer's submissions, written subsequently to the Inspector, or to the SoS.

Preston New Road Action Group

- Caution: under appeal to the Court of Appeal; judgment is expected very soon.

Dean

- Novel attempt to challenge the scope of Minister's powers and duties under the Petroleum Act 1998 s.3. The case was about whether the Secretary of State had the power to vary a licence. The claimant argued:
- (1) the Act was a complete statutory code governing petroleum licences, which did not confer power on the secretary of state to vary a licence after it had been granted. The Court disagreed; it was not a complete code; it was more than a contractual agreement, it was an interest in land created by deed. It was not like a planning consent; but was an offer of a licence which was agreed. Nothing in the Act indicated it could not be varied. Alternatively, if it was a complete code, there was an implied or inherent provision to vary it.
- (2) The SofS was not empowered to vary the deed on behalf of the Queen. The Court disagreed.

Airports

- ***R (Hillingdon London Borough Council) v Secretary of State for Transport***
- S.13(1) of Planning Act 2008

13. Legal challenges relating to national policy statements

(1) A court may entertain proceedings for questioning a national policy statement or anything done, or omitted to be done, by the Secretary of State in the course of preparing such a statement only if – (a) the proceedings are brought by a claim for judicial review, and (b) the claim form is filed before the end of the period of six weeks beginning with the day after – (i) the day on which the statement is designated as a national policy statement for the purposes of this Act or (ii) (if later) the day on which the statement was published

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Airports

- SoS applied successfully for strike out; judicial review could only be brought once the NPS had been published
- The court did not have jurisdiction to hear the challenge yet
- But various questions left open, including

(1) What the starting point for challenge would be ("*anything done, or omitted to be done, by the Secretary of State in the course of preparing")*

(2) What could be within scope "*albeit that there might need to be a fact-sensitive inquiry as to whether a particular act or omission was in the course of preparing an NPS*

Airports

- Two other matters clarified:

(1) Can rely on aims of Government as set out in Explanatory Memorandum as reflecting the will of Parliament

(2) Statements in committee, made in response to points raised in debate and often without considered thought, *"have no role in a Pepper v Hart exercise*"

Flood risk

- ***Watermead Parish Council v Aylesbury Vale DC***
- Court of Appeal upheld complaint that a Planning Officer's Report misunderstood the flood risk polices in the NPPF.
- POR read: "*The proposal relates to an already developed site, and therefore a sequential assessment is unnecessary*"
- The Court of Appeal held that correctly construed, the officer had stated that the sequential test in the NPPF did not apply where the proposal was for a site that already had development on it; this was wrong.
- Rejected argument that POR had, as a matter of his planning judgment, determined that for site-specific reasons there was nothing to be gained from a sequential assessment. If national policy is departed from, the officer must do so "*consciously and for good reason*".

Flood risk

- ***Watermead PC v Aylesbury Vale DC***,
- Note how the case was won at first instance with the substantial help of a very detailed witness statement
- Lindblom LJ: "*I do not think the judge was necessarily wrong to admit the evidence in [the] witness statement, though his decision to do so was perhaps generous to the district council".*

Stop Notices

(1) Re Friends of the Earth Ltd's Application for Judicial Review

(2) Forager Ltd v Natural England

Stop Notices (Friends of the Earth)

- Sand extraction in Loch Neagh.
- Enforcement Notices served; appealed, seeking pp
- Friends of the Earth argued

"the Minister is legally obliged to take effective enforcement action. What he cannot do is to stand aside and allow the notice parties to conduct business as usual. The Dept [is] clear ... ongoing environmental consequences... potentially likely to be significant. Unless a Stop Notice is put in place, enforcement in this case amounts to no more than a paper tiger. What is required is action which requires a cessation of extractive activity.... each shovel full of sand removed from the Lough amounts to still further unlawful development and cannot be put back. The problem... is acute and the issue of the grant of planning permission is likely to involve significant delay... likely significant ongoing damage to the Lough this... is a classic case for the application of the precautionary principle..."

Stop Notices (Friends of the Earth)

- Based on dicta in *Prokopp* per Schiemann LJ

  "I would accept for the purposes of the present appeal that, if a project which falls within the Directive goes ahead without there having been an EIA.. and the national authorities simply stand by and do nothing then this might well amount to a breach of our obligations under the Directive"

Stop Notices (Friends of the Earth)

- High Court rejected case
- Minister had weighed options
- Per Sullivan LJ in ***Ardagh***

  "Given the variety of circumstances in which EIA development might be carried out in breach of the… directive and the wide range of consequences of such a breach, it would be very surprising if there was only one lawful response to a breach, however caused and whatever its environmental consequence… [it]… would be an affront to common sense if retrospective planning permission (correcting the legal error unrelated to EIA) could not be granted in such a case…"

- Action was being taken, per Sullivan LJ in ***Evans***

  "If… time limits on taking enforcement action are not in principle incompatible with a MS's obligations to ensure compliance with the EIA Directive, then the precise nature of the time limits is a matter which falls within the principle of procedural autonomy of the MS, provided that the time limits imposed by the MS comply with the principles of equivalence and effectiveness"

Stop Notices (Friends of the Earth)

- Court of Appeal overturned High Court
- Court was wrong to have relied on ***Ardagh Glass Ltd*** **-** *sand extraction was "irreplaceable"*
- Minister had approached wrongly by considering no evidence that the dredging is having an impact; the operations were likely to have a significant effect, but it was not known what that effect wil be
- The precautionary principle applies
- "*There should be no planning permission until it is established that there is no unacceptable impact on the environment"*
- Economic impact could be a relevant consideration in determining what measures were expedient and proportionate
- Remitted to the Department to determine with "immediate attention" whether or not to issue a Stop Notice

Forager Ltd v Natural England

- Foraging for sea kale since 2006.
- Keystone species
- NE had sought to stop
- Forager Ltd applied consent 2009, 2012
- Stop Notice issued 2015
- Upheld by FT
- Appeal allowed in part on basis Stop Notice was invalid for not including steps required to comply with it, but not nullity
- FTT had power to correct this defect.
- Accordingly, UT remitted to FTT to decide the limited issue as to what 'steps' should be included

Forager Ltd v Natural England

- The decision provides useful guidance on:
- the standard of proof applicable in environmental civil sanction cases;
- the meaning of the phrases "significant risk" and "serious harm" in Schedule 3 of the 2010 Order; and
- the mens rea required for an offence under s. 28P(6) of the Wildlife and Countryside 1981 Act.

Implying whole new conditions

- ***London Borough of Lambeth v SSCLG.***
- Important case as to the scope for implying a whole new term into a planning condition, following the Supreme Court's decision in ***Trump.***
- In principle a whole new condition could be implied.
- Court rejected that that the scope of ***Trump*** was restricted to an "incomplete condition" , holding *"Although Lord Carnwath observed, at [47], that the **Trump** case, together with the cases cited, concerned "incomplete conditions", I do not consider that his guidance on implication was limited to "incomplete conditions" cases, though in practice such cases will more readily fulfil the legal tests for the implication of terms"*
- A new condition was not imposed in ***Lambeth v SSCLG***; it did not meet the usual high hurdle to impose a new term in the established caselaw.
- Permission has been granted to appeal to the Court of Appeal.

CHALLENGES - SCIENTIFIC DISPUTES

The Issue: Developer justifies scheme by reference to scientific methods which are hotly disputed, novel and untested. Nature conservation organisations (and statutory advisers) express concerns. Government adopts the developer's approach "as a matter of judgment".

Lead to concerns that the decision maker has adopted the science to suit its wish to grant rather than being led by the science. This is often bolstered by FOIA/EIR showing the internal machinations to justify the ultimate decision (as in AQ)

Classic Formulation of Courts Role

- *"It is not the role of the Court to test the ecological and planning judgments made in the course of the decision making process. Assessing the nature, extent and acceptability of the effects that a development will have on the environment is always – apart from the limited scope for review on public law grounds – exclusively a task for the planning decision taker" – Prideaux v. BCC [2013] Env LR 32*

- *"An analysis of apparently competent expert scientific opinion is not a proper subject of judicial review": Mott v. EA [2016] 1 WLR 4338*
-
- *"The Court should be very slow to impugn decisions of facts made by an expert and experienced decision maker… it must surely be even slower to impugn his educated prophecies and predictions" - R v. DG of Telecoms ex p Cellcom [1999].*

- *Have to show "manifest error of approach"*

RSPB v. Scottish Ministers

The Context - Huge Windfarms off Firth of Forth – heavy criticism of scientific approach to impact on birds.

RSPB challenged grant on a wide range of grounds but including on the approach to the science.

Findings of the First Instance Court – on one view a devastating critique of how the Government had approached the science.

First instance – devastating critique?

"moving the goalposts"

New model not understood, peer reviewed or consulted on

Nature conservation advisers major caveats misunderstood

Doubt arose at each stage

Methodological flaws

Skewing flight height data - inherently implausibility

Lack of use of site specific data

Failure to use best scientific information in the field.

Misunderstood SNCB advice

Methods of assessing population density left out of account

On Appeal

All those matters were for the decision maker. It was for him to judge as to whether adequate science, whether reasonable doubts removed; which science to use, which material considerations on the science to take into account.

On all grounds Court had strayed beyond its remit.

So where now? Blank cheque on scientific judgment to the Decision Maker?

And similar cases

- See also:

- *Bent v. Cambridgeshire County Council* [2017] EWHC 1366 (Admin) 9th June 2017
- Nicholson v. Allerdale [2015] EWHC 2510 (Admin)
- Mynydd v. BIS *[2016] EWHC 2581 (Admin)*

HABITATS – GROWING ROLE OF ART 6(2)?

Art 6(2): Member states shall take appropriate steps to avoid, in the SACs the deterioration of natural habitats and the habitats of species as well as the disturbance of species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive

Art 6(3): Any plan of project not directly connected with or necessary to the management of the Site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the Cos. In the light of the conclusions of the AA, the competent authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned…..

IROPI only applies to Art 6(3) not 6(2).

Long held view of nature conservation organisations that insufficient emphasis is placed on A6(2).

HABITATS 2

Grune Liga Sachsen: *(an* exceptionally difficult case to follow)

Plans approved for a road bridge over river at a time when area not an SAC. So no requirement for an AA but a study showed no adverse effects. Study was not adequate as an AA.

Site then designated as an SCI/SAC. ***Q1: at that point did A6(2) require an AA compliant review before work done?***

After work had begun, state had undertaken review of the consent attempting to follow AA and had to rely on IROPI. ***Q2 – what requirements did A6(2) on the review and to what date do they relate***

Q3: did it make a difference to how that assessment was carried out that the bridge was complete

Habitats (3)

Q1: The *implementation* of the Bridge was covered by A6(2). An obligation to review implementation upon designation could arise under A6(2) - and on review could only proceed if risk of significant deterioration or disturbance had ben excluded. And thus under A6(2), a project approved outside A6(3) before designation had to be the subject of subsequent review to avoid the A6(2) impacts.

Q2: if such a review was carried out, it had to consider the A6(2) impacts of *implementation* and had to comply with A6(3). IROPI could be relied on based on all factors at date of designation

Habitats (3)

Q3: the review had to take into account the risks of significant deterioration or disturbance which might have arisen because of the *implementation.* The assessment was not varied because of the timing.

The case turned largely on its precise facts, but it is a major example of how A6(2) is used to fill gaps in A6(3).

And *Bulgaria* - is highly likely to become a test case on what happens when fail to comply with A6(3) or A6(2); development is completed and then when you retrospectively do AA cannot avoid harm or compensate.

ENVIRONMENTAL DAMAGE

R(Seoint) v. NRW *[2016] EWCA Civ 797*

Llyn Padarn heavily polluted over the years – eutrophication - from agriculture/sewage.

Algae bloom attributed to a one off release from a factory.

Huge historic sediment load (algae) delaying the recovery of the lake because of decomposition of algae starving the lake of oxygen.

Complaints made of Env Damage from STW. STW operating within guidelines but it was said that STW releases should be further restricted to allow recovery of the lake faster.

Court of Appeal – "damage"

has upheld the interpretation of the term "damage" within the meaning of Directive 2004/35 Article 2(2) as meaning:

"a measurable deterioration in the existing state of a natural resource or natural resource service. An operator is required not to cause the condition of the environment to fall below its baseline condition: but there was no requirement to go further, by taking steps to remedy pre-existing damage to the environment or by ensuring an improvement of the natural resources in question from their baseline condition"

EIA/SEA

- Birchall Gardens - *EIA/SO/ Reasons*
- *Goring on Thames* - EIA/SO error/ no difference
- Exemptions from EIA requirements – consents by legislation – requirements – *Stadt Wiener Neustadt*
- *Holiday Extras v. Crawley* [2017] Env LR 21