Landmark Chambers

Planning Law Update

25th September 2019

Topics

1) Practice and procedure
2) Scrutiny of Officers' Reports
3) Interpretation of planning permission
4) Heritage
5) Developer incentives
6) CIL Regulations

(1) Practice and Procedure

- Time limits
- Costs
- Jurisdiction

Landmark Chambers

TIME LIMITS

Croke v SSCHLG [2019] EWCA Civ 54

Landmark Chambers

- Strict 6 wk time limit for bringing a JR under s.288 TCPA 1990
- BUT, what happens if:
  - The time limit ends the Wednesday before the Easter Bank Holiday…
  - You miss your train to London to file the Claim Form…
  - You email the documents to a friend to lodge for you but spell their name wrong…**AND**
  - When your friend eventually receives the documents and arrives at the RCJ at 16:25 he is refused entry by the security guard?
- Court of Appeal said …

No extension of time

R (Oyston Estates Ltd) v Flyde BC [2019] EWCA Civ 1152

- 6 wk time limit under s.61N TCPA 1990 for challenging neighbourhood plans
- Facts
  - NP made on 26th May 2017
  - JR claim issued on 6th July 2017 (1 day within the deadline)
  - Claim framed as challenge to NP
  - In fact challenge to decision made much earlier (March 2017) by R following its review of the examiner's report
- Court of Appeal said:
  - s.61N made it possible to raise and resolve legal issues before NP final
  - Claim was therefore out of time and there was no discretion to extend

R (Thornton Hall Hotel Ltd) v Thornton Holdings Ltd [2019] EWCA Civ 737

Landmark Chambers

- So what about a claim brought **more than 5 years** from the date of the challenged decision?
- Facts:
  - LPA resolved to grant permission in December 2011 subject to conditions, including that the permission should be for a limited period of 5 years
  - When permission was granted it omitted the specified conditions
  - This was only discovered when the 5-year period elapsed in 2016
  - The Respondent brought the claim in August 2017
  - The Appellant (applicant) had known about the error and remained silent
- Court of Appeal said:

Exceptional reasons for excusing the delay

Landmark Chambers

COSTS

Campaign to Protect Rural England – Kent Branch v SSHCLG [2019] EWCA Civ 1230

Landmark Chambers

- Where permission to apply for JR is refused:
  1. Adverse costs order in favour of more than one D or IP?
  2. Proper application of Aarhus cap
- A brought a claim against SSHCLG (D1), the Council (D2) with developer named as IP – all three served with claim form, all three filed AoSs
- A sought £10,000 cap on cost liability under CPR Part 45
- Lang J refused permission and awarded costs to D1, D2 and IP assessed in amounts totalling £10,000; this was upheld on papers by HHJ Evans-Gordon
- Court of Appeal upheld the High Court's decision on both points: [37] and [57]-[58]

Landmark Chambers

JURISDICTION

Binning Property Corporation Ltd v SSHCLG [2019] EWCA Civ 250

Landmark Chambers

- Does the Court of Appeal have jurisdiction to hear an appeal against a decision of the High Court under s.289(6) TCPA 1990?
- Court of Appeal said **no**: see [4], [26]
  - Previous authority remains good law – bound to refuse PTA
  - Refusal of leave to appeal under s.289 is not a "judgment or order of the High Court" within s.16 of the Senior Courts Act 1981

(2) Scrutiny of Officers' Reports

- R (Gare) v Babergh DC
- Corbett v Cornwall Council
- Visao Ltd v SSHCLG

R (Gare) v Babergh DC [2019] EWHC 2041

Landmark Chambers

- Council granted permission against officers' advice and only indication of reasons for decision are set out in minutes of committee meeting
- C sought JR on the ground (inter alia) of failure to give reasons
- Martin Rodger QC (sitting as a HCJ) held that:
  - The combination of circumstances in the case required that the Council provide reasons for its decision: [35]-[37]
  - The form in which the Council purported to have given reasons (through a combination of the OR and the minutes of the Committee meeting) was not sufficiently clear to satisfy the duty: [41]-[43]

Corbett v Cornwall Council [2019] EWHC 1022

Landmark Chambers

- Planning permission granted by the Council adopting the reasons in the OR
- One of the issues was whether the OR could be criticised as “significantly or seriously misleading” in a material way
- OR did not discuss that approving the application would amount to making a decision not in accordance with a saved policy in the development plan nor any material planning considerations which might justify such a decision: [21]
- Mr CM Ockleton (VP of UT), in the High Court, held that the OR was inadequate for two reasons: [30]-[31]

    (1) Should have made clear that development was contrary to Policy 14

    (2) No consideration of special requirements in relation to an AGLV

Visao Ltd v SSHCLG [2019] EWHC 276

Landmark Chambers

- s.288 application to quash Inspector's decision dismissing C's appeal against the Council's refusal of planning permission
- One of the grounds of challenge was that the Inspector failed to provide adequate reasons for refusing permission on highways ground
- Neil Cameron QC (sitting as a Deputy HCJ) held that:
  - The view of the highway authority that the proposals were acceptable were "highly material" – departure from it would require "cogent and compelling reasons": [65]
  - The reasoning given would not enable C to assess its prospects of obtaining some alternative permission: [66]
  - C had therefore suffered "genuine and substantial prejudice" as a result of the deficient reasoning

(3) Interpretation of Planning Permission

- Lambeth LBC v SSHCLG
- Swindon BC v SSHCLG

Lambeth LBC v SSHCLG [2019] UKSC 33

Landmark Chambers

- Council approved an application to vary a planning condition under s.73
- Original condition allowed for specified retail uses but "no other purpose (including the retail sale of food and drink…)"
- Decision notice set out the "proposed wording" as follows:

  > "The retail unit hereby permitted shall be used for the sale and display of non-food goods only and … for no other goods"

- **BUT** no condition securing the proposed restriction on use or referring back to the original condition was included in the decision notice
- C applied for Certificate of Lawfulness for sale of food products; refused by Council; granted by Inspector; upheld by CA
- **UKSC disagreed**: [29]-[35]

Swindon BC v SSHCLG [2019] EWHC 1677

Landmark Chambers

- Construction of a condition in a planning permission which required the access roads to be “constructed in such a manner as to ensure that each unit is served by fully functional highway”
- The question was whether it would be lawful to have private access roads
- Useful summary of principles to be applied in construing a planning permission at [29]-[32]
- Andrews J considered the use of the word “highway” in planning statute and practice noting that there was no instance in which it had been interpreted as meaning a private road: [58]
- Concluded that “highway” was intended to be used in its ordinary sense and not as a synonym for road – therefore public access was essential: [70]

(4) Heritage

- Tower Hamlets v SSHCLG
- Pagham Parish Council v Arun DC

Tower Hamlets v SSHCLG [2019] EWHC 2219

Landmark Chambers

- Can the demolition of 3 unlisted buildings in a conservation area do more good than harm?
  - Despite there being no permission to demolish the houses…
  - Despite it being a criminal offence…
  - Despite there being no viable plans to develop the site…
- Planning Inspector said **yes**
- Upheld by Kerr J

  "These provisions refer not to the ashes from which the phoenix will rise, but to the phoenix that will rise from them"

Pagham Parish Council v Arun DC [2019] EWHC 1721

Landmark Chambers

- JR of grant of permission for development of 400 dwellings on a site close to number of Grade I listed buildings
- **Statutory duty under s.66(1)** Listed Buildings Act 1990: not for LPA to establish that it had complied with the duty for but claimant to demonstrate that there was at least substantial doubt that it had: [12], [65]

(5) CIL Regulations

- R (Giordano Ltd) v London Borough of Camden

R (Giordano Ltd) v London Borough of Camden

Landmark Chambers

- When does a development qualify for credit under reg. 40(7)(ii) of the CIL Regulations 2010 on the basis that the scheme is one which was "able to be carried on lawfully and permanently without further planning permission"?
  - A had a PP from 2011 on which no CIL was payable because pre-dated the introduction of any charging schedule
  - A then sought PP for an alternative scheme – granted in 2017; Council served a notice that revised development was liable to £5.5k in CIL
- CA held that all reg.40(7)(ii) required was that the part of the building in respect of which CIL credit was claimed **could** lawfully be used for the proposed use with no requirement of physical adaptation or current use: [30]
- Also helpful guidance on construction of CIL Regs more generally

(6) Developer Incentives

- R (Wright) v Resilient Energy Ltd (UKSC)

R (Wright) v Resilient Energy Ltd

Landmark Chambers

- Can a Council lawfully take into account the provision of community benefit fund to be derived from the operation of a wind turbine as a material consideration when considering whether to grant permission for the turbine?
- High Court and Court of Appeal said no: (1) not designed to address a planning purpose + (2) no real connection between development and gift = not material in a planning sense
- Supreme Court heard the appeal in July

Questions?

Landmark Chambers
Registered office:
180 Fleet Street, London
EC4A 2HG | DX: 1042 (LDE)

London
+44 (0) 20 7430 1221

Birmingham
+44 (0) 121 752 0800

Contact
clerks@landmarkchambers.co.uk

www.landmarkchambers.co.uk
@Landmark_LC

Landmark Chambers

Thank you for listening

kziya@landmarkchambers.co.uk

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

Birmingham
4th Floor, 2 Cornwall Street
Birmingham, B3 2DL
+44 (0)121 752 0800

Contact us
clerks@landmarkchambers.co.uk
www.landmarkchambers.co.uk

Follow us
Landmark_LC
Landmark Chambers