Landmark Chambers

Case law update 2019

Sasha White QC and Luke Wilcox

Topics to be covered

- Interpretation of policy
- S. 73 and s. 96A applications
- Material considerations
- Heritage
- Procedure and time limits

Not a comprehensive review of all planning cases … sorry if we've missed your favourite!

Landmark Chambers

The interpretation of planning policy

Monkhill Ltd v SSHCLG [2019] EWHC 1993 (Admin)

Landmark Chambers

- Monkhill applied for, and was refused, PP for residential development in an AONB
- No 5yhls, so NPPF para 11(d) tilted balance engaged
- But Inspector identified harm to AONB, gave that harm great weight, and as a result disapplied the tilted balance, in reliance on fn 6
- Issue – does the first limb of NPPF para 172 provide a “clear reason for refusal” for para 11 tilted balance purposes?

Holgate J's "practical summary" (para 45)

Landmark Chambers

- It is, of course, necessary to apply s.38(6) in any event;
- If the proposal accords with the policies of an up-to-date development plan taken as a whole, then unless other considerations indicate otherwise, planning permission should be granted without delay (paragraph 11(c) of the NPPF);
- If the case does not fall within paragraph 11(c), the next step is to consider whether paragraph 11(d) applies. This requires examining whether there are no relevant development plan policies or whether the most important development plan policies for determining the application are out-of-date;
- If paragraph 11(d) does apply, then the next question is whether one or more "Footnote 6" policies are relevant to the determination of the application or appeal (limb (i));
- If there are no relevant "Footnote 6" policies so that limb (i) does not apply, the decision-taker should proceed to limb (ii) and determine the application by applying the tilted balance (and s.38(6));
- If limb (i) does apply, the decision-taker must consider whether the application of the relevant "Footnote 6" policy (or policies) provides a clear reason to refuse permission for the development;
- If it does, then permission should be refused (subject to applying s.38(6) as explained in paragraph 39 (11) to (12) above). Limb (ii) is irrelevant in this situation and must not be applied;
- If it does not, then the decision-taker should proceed to limb (ii) and determine the application by applying the tilted balance (and s.38(6)).

Monkhill Ltd v SSHCLG [2019] EWHC 1993 (Admin)

Landmark Chambers

- Held:
  - Important to interpret the NPPF in a practical, straightforward way
  - First part of NPPF para 172 can provide a clear reason for refusal for NPPF para 11(d) purposes. Read as a whole and in context, the attribution of “great weight” to protecting AONBs connotes a simple planning balance, and it is implicit that if the harms outweigh, refusal should follow.

Paul Newman New Homes Ltd v SSHCLG [2019] EWHC 2637 (Admin)

Landmark Chambers

- Another case on meaning of NPPF para 11(d)

- Some DP policies most important to deciding application were out of date.

- But:
  - Inspector found a residential proposal to be contrary to the DP's rural character policy, which was up-to-date and relevant
  - LPA could show 5 year HLS

- Inspector thus held that para 11(d) tilted balance was not triggered

Paul Newman New Homes Ltd v SSHCLG [2019] EWHC 2637 (Admin)

Landmark Chambers

- Held (Sir Duncan Ouseley):
  - Where one or more relevant DP policies exist, tilted balance not engaged by “no relevant policies” trigger
  - Relevance means *“no more than some real role in the determination”* (para 32)
  - DP policy not “out of date” just because it is time-expired

Paul Newman New Homes Ltd v SSHCLG [2019] EWHC 2637 (Admin)

Landmark Chambers

- On the second limb (para 35):

"The first task is to identify the basket of policies from the development plan which constitute those most important for determining the application. The second task is to decide whether that basket, viewed overall, is out of date; the fact that one or more of the policies in the basket might themselves be out of date would be relevant to but not necessarily determinative of whether the basket of most important policies was itself overall out of date.

…

I do not consider that the plural "policies" means that a single up to date policy, even if plainly by itself the most important for determining the application, cannot suffice to block the second trigger; the plural encompasses the singular, as is a commonplace construction."

Satnam Millenium Ltd v SSHCLG [2019] EWHC 2631 (Admin)

Landmark Chambers

- Application for 1,200 dwellings.

- Common ground that there was no 5 year HSL, and that the NPPF para 11(d) tilted balance applied

- SoS refused permission on basis that the tilted balance was against the proposal. Based on findings of:
  - Adverse impact on highway safety and efficiency
  - Adverse impact on air quality
  - Non-deliverability of the proposal, so that its benefits (which would otherwise have attracted significant positive weight) would not be realised

Satnam Millenium Ltd v SSHCLG [2019] EWHC 2631 (Admin)

Landmark Chambers

- Claimant challenged on a number of grounds, including misapplicaiton of tilted balance

- Held (Sir Duncan Ouseley): SoS' approach was irrational:

"*If the scheme were not deliverable, although the advantages in relation to the five-year housing supply position and affordable housing could not accrue, neither would the disadvantages. In reality, none of those impacts would occur without the benefits of the scheme. There is no suggestion of how the one could occur without the other. But the impacts of a deliverable scheme were allowed for without the benefits of the scheme which would produce those impacts*."

(para 63)

- Decision quashed accordingly

Canterbury CC v SSCLG [2019] PTSR 1714

Landmark Chambers

- Gladman applied for PP for residential development. DP contained permissive policies which supported residential development in some locations.

- Inspector allowed appeal, on basis that non-compliance with permissive policies did not of itself amount to a DP conflict.

- Dove J quashed decision. Gladman appealed to the CoA

Canterbury CC v SSCLG [2019] PTSR 1714

Landmark Chambers

- Held (Lindblom LJ):
  - When taken together and in context, the DP policies were part of a "comprehensive local plan strategy for housing development". The policies were not therefore just allocations – they created a complete hierarchy
  - Even though individual policies were in permissive terms, the context showed that together *"they formed a suite of policies for housing development, which left out none of the locations where such development"* should occur

Chichester DC v SSHCLG [2019] EWCA Civ 1640

Landmark Chambers

- Developer sought PP for 34 houses beyond settlement boundary of a village.
- LPA refused permission on basis of a conflict with the neighbourhood plan
- Inspector allowed appeal, on basis that whilst the proposal was in conflict with the aims of the NP, it was not contrary to any specific NP policy
- LPA contended that the inspector's distinction between aims and policies was irrational and contrary to (2012) NPPF para 198

Chichester DC v SSHCLG [2019] EWCA Civ 1640

Landmark Chambers

- Appeal failed
- S. 38(6) presumption applies to the whole of the DP, which includes made NP policies as well as adopted DP policies.
- NPPF para 198 reflects the s. 38(6) presumption; it doesn't modify it.
- *Crane* and *Gladman* show that a proposal can be in conflict with a DP even if it doesn't conflict with any specific policies, if it is "*manifestly incompatible with the relevant strategy … this may be a matter of natural and necessary inference from the relevant policies … read sensibly and as a whole*"

Chichester DC v SSHCLG [2019] EWCA Civ 1640

Landmark Chambers

- Here, however, that principle was not engaged. Here, there was a comprehensive strategy, split between the LP and NP. Policies complement and are consistent with each other.

- Thus no need to draw natural and necessary inferences from the policies by reference to the NP's aims. "Legally impeccable" for the inspector to give weight to conflict with the NP's aims, but not to find the proposal contrary to its policies.

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S. 73 and s. 96A applications

Lambeth LBC v SSHCLG [2019] 1 WLR 4317

Landmark Chambers

- Supreme Court's consideration of the nature of s. 73 applications
- Property received PP in 2010 for non-food retail, subject to a condition preventing food sales
- In 2014, s. 73 application to extend range of services. But did not include an express condition preventing food sales.
- Owner of the site then applied for a CLOPUD for unrestricted retail including food.

Lambeth LBC v SSHCLG [2019] 1 WLR 4317

Landmark Chambers

- Issue for the Supreme Court: did the s. 73 application incorporate a condition preventing food sales?

- Held (Lord Carnwath JSC):

  – Yes.

  – Analytical focus is on the ordinary and natural meaning of the words used, in their particular context (para 19)

Lambeth LBC v SSHCLG [2019] 1 WLR 4317

Landmark Chambers

- Difficult to envisage circumstances where a whole new condition could be implied, as opposed to interpreting the breadth of the express conditions.

- Taking the s. 73 permission at face value: "*the obvious, and indeed to my mind the only natural, interpretation of those parts of the document is that the council was approving what was applied for: that is, the variation of one condition from the original wording to the proposed wording, in effect substituting one for the other. There is certainly nothing to indicate an intention to discharge the condition altogether, or in particular to remove the restriction on sale of other than non-food goods*" (para 29)

Lambeth LBC v SSHCLG [2019] 1 WLR 4317

Landmark Chambers

- *Once it is understood that it has been normal and accepted usage to describe section 73 as conferring power to "vary" or "amend" a condition, the reasonable reader would in my view be unlikely to see any difficulty in giving effect to that usage in the manner authorised by the section—that is, as the grant of a new permission subject to the condition as varied. If the document had stopped at that point, I do not think such a reader could have been left in any real doubt about its intended meaning and effect.* (para 33)

Lambeth LBC v SSHCLG [2019] 1 WLR 4317

Landmark Chambers

- As to other conditions from the 2010 permission, they remained valid and binding, "*not because they were incorporated by implication in the new permission, but because there was nothing in the new permission to affect their continued operation*" (para 38)

- Court reaffirmed the "good practice" of LPAs restating, in s. 73 permissions, all of the conditions to which the new planning permission will be subject.

Finney v Welsh Ministers [2019] EWCA Civ 1868

Landmark Chambers

- Existing PP for two wind turbines. Description of development in existing PP was for turbines “with a tip height of up to 100m”. Also a condition requiring development to be carried out as per plans, which themselves showed a 100m tip height.

- S. 73 application made to vary the plans condition, to introduce new plans with a 125m tip height.

- Inspector granted s. 73 application, but also removed words “with a tip height of 100m” from the description of development

Finney v Welsh Ministers [2019] EWCA Civ 1868

Landmark Chambers

- Court of Appeal quashed inspector's decision:
  - Purpose of s. 73 is to enable developers to avoid a breach of planning control by non-compliance with conditions, i.e. second type of breach only: s. 171A.
  - S. 73(2) limits decision-maker's role to the question of conditions: not therefore open to consider the description of development. If variation sought would introduce a condition inconsistent with the description, then the s. 73 permission cannot be granted in those terms.

R (Fulford PC) v York CC [2019] EWCA Civ 1359

Landmark Chambers

- Concerns scope of s. 96A and non-material amendments
- Outline PP granted for 700 homes, and associated development
- LPA subsequently approved RM, subject to a bat mitigation strategy
- After permission implemented, developer applied for, and LPA granted, a revised bat mitigation plan, in reliance on s. 96A
- PC argued that s. 96A couldn't be used to modify RM approval

R (Fulford PC) v York CC [2019] EWCA Civ 1359

Landmark Chambers

- Held (Lewison LJ):
  - Approval of RM is not itself a permission, and an application for RM is not a planning application (para 24)
  - But an outline PP is a grant of PP, and the conditions attached to a grant are themselves a part of the PP.
  - Conditional approval of RM is itself a condition to which the grant is subject, and thus an integral part of it

R (Fulford PC) v York CC [2019] EWCA Civ 1359

Landmark Chambers

- *"In my judgment, the "planning permission" to which section 96A refers is the package consisting of the grant of planning permission itself, together with any conditions to which the grant is subjected, whether the conditions are imposed at the time of or subsequent to the grant of permission. An application for an amendment to an approval (or conditional approval) of reserved matters is, in my judgment, an application for the alteration of an existing condition; which is expressly permitted by section 96A (3) (b)."*

  (para 35)

- No policy objection to this reading, as by definition it can only be used for non-material changes.

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Material considerations

R (Wright) v Forest of Dean DC [2019] UKSC 53

Landmark Chambers

- LPA granted PP for a wind turbine.
- Application included a covenant by the applicant to donate 4% of turbine's turnover to a local community fund. LPA took account of that commitment as a material consideration in granting PP.
- High Court quashed the permission, on the basis that the donation was not material. CoA agreed.
- Developer and LPA appealed to the Supreme Court

R (Wright) v Forest of Dean DC [2019] UKSC 53

Landmark Chambers

- Held (Lord Sales JSC):
  - PP is required for development, development (here) is a material change in the use of land, and considerations are material if they are material to that change of use (para 31).
  - "*a condition or undertaking that a landowner pay money to a fund to provide for general community benefits unrelated to the proposed change in the character of the use of the development land does not have a sufficient connection with the proposed development as to qualify as a "material consideration" in relation to it*." (para 38)

R (Wright) v Forest of Dean DC [2019] UKSC 53

Landmark Chambers

- "*A principled approach to identifying material considerations in line with the Newbury criteria is important both as a protection for landowners and as a protection for the public interest. It prevents a planning authority from extracting money or other benefits from a landowner as a condition for granting permission to develop its land, when such payment or the provision of such benefits has no sufficient connection with the proposed use of the land. It also prevents a developer from offering to make payments or provide benefits which have no sufficient connection with the proposed use of the land, as a way of buying a planning permission which it would be contrary to the public interest to grant according to the merits of the development itself.*"
  (para 39)

- No reason or need to "update" the *Newbury* criteria, which remain good law.

R (Davison) v Elmbridge BC [2019] JPL 1303

Landmark Chambers

- Developer (the council) sought PP for a football and athletics stadium in the Green Belt. LPA found that the proposal cause harm to GB openness, but granted PP. That PP subsequently quashed in the High Court

- Developer then made another application. LPA granted permission, but this time found there was no harm to the openness of the GB.

- Issue – was the reasoning for the first (quashed) PP material to the second application, so that the principle of consistency in decision-making was engaged?

R (Davison) v Elmbridge BC [2019] JPL 1303

Landmark Chambers

- Held (Thornton J):
  - A quashed decision is of no legal effect, and the LPA must reconsider it afresh “with a clean slate” (para 48)
  - However, did not follow that the reasoning of the quashed decision was immaterial.
  - Judge distilled the principles:

R (Davison) v Elmbridge BC [2019] JPL 1303

Landmark Chambers

i) The principle of consistency is not limited to the formal decision but extends to the reasoning underlying the decision.

ii) Of itself, a decision quashed by the Courts is incapable of having any legal effect on the rights and duties of the parties. In the planning context, the subsequent decision maker is not bound by the quashed decision and starts afresh taking into account the development plan and other material considerations.

iii) However, the previously quashed decision is capable in law of being a material consideration. Whether, and to what extent, the decision maker is required to take the previously quashed decision into account is a matter for the judgment of the decision maker reviewable on public law grounds. A failure to take into account a previously quashed decision will be unlawful if no reasonable authority could have failed to take it into account

iv) The decision maker may need to analyse the basis on which the previous decision was quashed and take into account the parts of the decision unaffected by the quashing. Difficulties with identifying what has been quashed and what has been left could be a reason not to take the previous decision into account

v) The greater the apparent inconsistency between the decisions the more the need for an explanation of the position.

R (Davison) v Elmbridge BC [2019] JPL 1303

Landmark Chambers

- On the facts:
  - The applications were materially identical, as were the relevant policy frameworks
  - The LPA's view on openness on the first PP was not affected by its quashing: openness impact is a matter of judgment for the LPA, not for the court
  - LPA entitled to reach a different view, but in doing so had to take account of the first PP's reasoning to the contrary
  - PP quashed

Landmark Chambers

Heritage

Dill v SSCLG [2019] PTSR 1214

Landmark Chambers

- Applicant owned property which included two limestone piers. Each topped by an urn. The urns were Listed; applicant unaware of Listing, and removed and sold the urns.

- LPA found out about removal, whereon applicant sought retrospective LB consent for the removal. LPA refused, and commenced enforcement proceedings.

- Applicant appealed, on basis that the urns were not “buildings”, so that LB consent not required and enforcement was unlawful.

Dill v SSCLG [2019] PTSR 1214

Landmark Chambers

- Inspector held that he couldn't go behind the Listing of the urns, and couldn't therefore consider the applicant's points.

- High Court dismissed challenge and appeal.

- Applicant appealed to the CoA

Dill v SSCLG [2019] PTSR 1214

Landmark Chambers

- Held (Hickinbottom LJ):
  - Statutory intention behind s. 1(5) of Listed Buildings Act is that being on the List is determinative of status as a Listed Building
  - Inspector can consider merits of the Listing, and that may lead to de-Listing. But validity of Listing cannot be questioned.
  - *Boddington* and *Winder* distinguished – LB regime is direct and focused, with a high premium on clarity and certainty. No basis for allowing collateral challenge to validity as a defence to enforcement proceedings
- UKSC granted PTA

Tower Hamlets LBC v SSHCLG [2019] EWHC 2219 (Admin)

Landmark Chambers

- Three houses in a Conservation Area demolished without PP
- LPA served enforcement notices, and owner appealed seeking retrospective PP for the demolition
- Inspector applied the NPPF para 196 test, and held that the likely future redevelopment of the site was a public benefit to be weighed in the balance. Inspector allowed appeals and granted PP for the demolition.
- Issue for the High Court: is uncertain future development beyond the ambit of the (deemed) planning application capable of being a public benefit?

Tower Hamlets LBC v SSHCLG [2019] EWHC 2219 (Admin)

Landmark Chambers

- Held (Kerr J):
  - On an enforcement appeal of this kind, inspector could only grant PP for demolition itself
  - On the harm side, the inspector had to focus on the harms flowing from the demolition itself. On the benefit side, the benefits had to flow from the site being vacant
  - Artificiality in the case: the inspector could only consider the demolition as the application, whereas NPPF assumes something will be developed in its place

Tower Hamlets LBC v SSHCLG [2019] EWHC 2219 (Admin)

Landmark Chambers

- However, planning benefits do not have to be certain to be material (*Mansell*), and the likelihood of a future benefit materialising goes to weight, not relevance.

- Follows that the inspector's decision could only be challenged on rationality grounds.

- Challenge thus failed.

Landmark Chambers

Timing and procedure

Croke v SSHCLG [2019] PTSR 1406

Landmark Chambers

- Concerned limitation period for s. 288 challenges.

- Deadline for issuing claim was Weds 23 March. Appellant intended to issue on that day; but:

  – Missed his train, so delayed
  – Emailed form to agent, but mistyped email address
  – By the time agent arrived, it was 16:25 and security refused him entry
  – Appellant attended on 24th, but had used the wrong form and had to return the next working day – 29 March, when the claim form was issued.

Croke v SSHCLG [2019] PTSR 1406

Landmark Chambers

- Held (Lindblom LJ):
  - Time limits in s. 288 are strict
  - Limited extensions only where court office closed on deadline day
  - No basis for extending that principle, which is based on the certainty of the calendar, to unexpected and unpredictable events which prevent the claimant from getting to the court office on time.
  - Very limited possibility of exceptional extensions on human rights grounds; but not here.

R (Oyston Estates Ltd) v Fylde BC [2019] 1 WLR 5484

Landmark Chambers

- Court of Appeal clarified time limits for challenging neighbourhood plans
- NP examiner recommended a draft NP be submitted to referendum, with a modification include Oyston's land in the settlement boundary.
- LPA submitted plan to referendum without the modification, then made the plan.
- Within 6 weeks, claimant challenged making of the plan without the modification

R (Oyston Estates Ltd) v Fylde BC [2019] 1 WLR 5484

Landmark Chambers

- Held (Lindblom LJ):
  - Issue turned on proper interpretation of s. 61N of the TCPA 1990
  - S. 61N creates a bespoke, comprehensive and self-contained scheme for NP legal challenges
  - That scheme creates three stages of challenge, each with its own time limits. Stages are restrictive – can only challenge a stage within 6 weeks of the decision
  - Challenge refused permission as out of time

R (Thornton Hall Hotel Ltd) v Wirral MBC [2019] JPL 1100

Landmark Chambers

- Thornton Holdings applied for PP for three wedding marquees on its land.
- LPA resolved to grant, but subject to a number of conditions including a five year limitation on the permission.
- PP as granted erroneously omitted all the conditions.
- Five years later, marquees remained in place. Thornton Hall Hotel, a neighbouring landowner and competitor, discovered the error, and promptly applied for JR (5.5 years after the grant!)

R (Thornton Hall Hotel Ltd) v Wirral MBC [2019] JPL 1100

Landmark Chambers

- High Court extended time and quashed the PP. Thornton Holdings appealed.

- Court of Appeal dismissed appeal:

  - Comprehensive review of the law: para 21
  - Situation was “extremely unusual” … in fact “unique”
  - No question but that the decision was issued without authority
  - And effect of error did not manifest until 5 years after the grant
  - Thornton Holdings were aware of the error

R (Thornton Hall Hotel Ltd) v Wirral MBC [2019] JPL 1100

Landmark Chambers

- In all those circumstances, decision to extend time was correct
- High Court was also correct not to withhold relief, but to quash the decision.
- Court of Appeal stressed that "*here the circumstances are most exceptional. They are wholly extraordinary. This is a case where it can truly be said that the exception proves the rule*." (para 51)

CPRE Kent Branch v SSHCLG [2019] EWCA Civ 1230

Landmark Chambers

- Claimant sought permission to challenge Maidstone BC's adoption of new local plan

- Served claim form on:
  - SSHCLG
  - Maidstone BC
  - Roxhill (promoter of major allocation in the plan)

- PTA refused

CPRE Kent Branch v SSHCLG [2019] EWCA Civ 1230

Landmark Chambers

- Issues for the CoA:
  - When can the courts make multiple costs orders against a claimant on refusal of PTA?
  - Operation of Aarhus costs cap in such cases

CPRE Kent Branch v SSHCLG [2019] EWCA Civ 1230

Landmark Chambers

- Held (Couson LJ):
  - Multiple costs orders permissible on refusal of PTA – on a proper reading, that was the effect of both *Mount Cook* and *Luton*
  - *Bolton* principles must be read in light of these subsequent developments in the law, and in light of CPR Part 54. Key issue is proportionality
  - Law the same in statutory challenges as in planning JRs

CPRE Kent Branch v SSHCLG [2019] EWCA Civ 1230

Landmark Chambers

- Held (Couson LJ):
  - Aarhus cap applies, without modification, at the PTA stage. No basis for imposing a lower cap just because the matter did not proceed to a substantive hearing

Landmark Chambers

Thank you for listening

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