Landmark Chambers

SEA and EIA case law review of the year

Matthew Fraser

Cases to cover

Strategic Environmental Assessment ("SEA"):

- *Aireborough Neighbourhood Development Forum v Leeds City Council* [2020] EWHC 1461 (Admin)
- *R (Plan B Earth) v SST* [2020] PTSR 1446

Environmental Impact Assessment ("EIA"):

- *R (Haden) v Shropshire Council* [2020] EWHC 33 (Admin)
- *Kenyon v SSHCLG* [2020] JPL 1189
- *R (ClientEarth) v SSBEIS* [2020] JPL 1438
- *R (XSWFX) v Ealing LPC* [2020] EWHC 1485 (Admin)
- *R (Swire) v SSHCLG* [2020] Env LR 29
- *R (Packham) v SST* [2020] EWCA Civ 1004
- *Gathercole v Suffolk CC* [2020] EWCA Civ 1179
- *Girling v East Suffolk Council* [2020] EWHC 2579 (Admin)
- *London Historic Parks & Gardens Trust v SSHCLG* [2020] EWHC 2580 (Admin)

Landmark Chambers

SEA

Aireborough NDF v Leeds City Council [2020] EWHC 1461 (Admin)

- Challenge under s.113 PCPA 2004 to Leeds Site Allocations Plan
- The plan contained a number of Green Belt housing allocations justified on basis of exceptional circumstances including housing need.
- While the plan was being examined, a significantly lower housing requirement emerged using a new methodology.
- Did the Inspectors breach the SEA Regs by failing to consider and consult upon the “reasonable alternative” of suspending the plan?

Held: it was a “reasonable alternative”, but so obvious that no prejudice arose from the failure to consult (Claimant had made representations on it anyway), so even if the error had not occurred, the outcome would have been the same – so unlawful, but no relief granted: [126]-[130]. Plan quashed on other grounds.

R (Plan B Earth) v SST [2020] PTSR 1446

Landmark Chambers

- Challenge to National Policy Statement ("NPS") for a 3rd runway at Heathrow.
- Claimed breach of SEA Directive by failing to (a) give an outline of relationship between the NPS and other relevant plans/programmes, and (b) identify the characteristics of areas likely to be significantly affected.
- Separate claim that Paris Agreement was a relevant "environmental protection objective" at "international" level: SEA Directive, Annex I, para. (e).

Held: the court's approach to considering the compliance of an environmental report with the SEA Directive must reflect the breadth of the discretion given to a public authority in deciding what information is reasonably required, and should apply the *Wednesbury* irrationality standard of review. Applying that test, there was no breach of the SEA Directive re (a) & (b) above: [136]-[183]. But separate claim re: Paris Agreement upheld: [242]-[247].

Landmark Chambers

EIA

R (Haden) v Shropshire Council [2020] EWHC 33 (Admin)

- Judicial review claim against grant of planning permission for sand and gravel aggregate extraction in the Green Belt.
- Breach of EIA Regulations (reg. 3(4)) by failing to require a further hydrological assessment due to alleged significant effects on groundwater.

Held: read fairly, the local authority's officer's report indicated that it agreed with both the Environment Agency and the applicant that there would be no likely significant effects on groundwater. Given the agreement of the EA, expected to be competent on EIA matters, it was rational for the local authority to have concluded no likely significant effects. The court drew a distinction between a consultee like the EA "questioning levels of assurance, which would not necessarily lead to an objection" and a conclusion of likely significant adverse effects: [39]-[42].

Kenyon v SSHCLG [2020] JPL 1189

- Judicial review claim of a screening direction that residential development of less than 150 homes (near an AQMA) was not "EIA development".
- High Court dismissed claim that SSHCLG had failed to consider the cumulative effects of the proposal taken together with other sites. Appeal to the Court of Appeal on wide ranging grounds.

Held: Appeal dismissed. References to material not available at time of screening direction should be ignored. Coulson LJ at [2]: "*I wondered if the most important point to arise from the appeal hearing was the need to ensure that appeals in cases of this kind do not become another weary trot around a well-worn course*". The reasons in the screening direction, albeit brief, were rational and adequate in view of the non-complex or borderline nature of the case, including on the issue of cumulative effects: [43]-[62], [84]. Precautionary principle only relevant where there is "reasonable doubt": not here [63]-[70].

R (ClientEarth) v SSBEIS [2020] JPL 1438

Landmark Chambers

- Challenge to the grant of a DCO for the construction and operation of two gas-fired generating units at Drax Power Station.
- Grounds inc. breach of Infrastructure Planning (EIA) Regs 2017 regs. 21 & 30 due to failure to consider imposing monitoring measures re: GHG emissions and other matters.

Held: no specific duty to give reasons re: monitoring, and nobody had suggested GHG emissions monitoring during the DCO examination, which was unsurprising given the need to obtain a GHG Permit from the EA under the GHG Emissions Trading Scheme Regs 2012, which would enable GHG emissions to be separately monitored and controlled. Anti-duplication provision in reg. 21(3)(c). No breach of reg. 21 – even if there had been, no prejudice. [198]-[221].

R (XSWFX) v Ealing LPC [2020] EWHC 1485 (Admin)

Landmark Chambers

- Judicial review claim against discharge of ecological pre-commencement conditions for redevelopment of Warren Farm (MOL in West London) as training facility for Queens Park Rangers football club, alleging failure to consider whether EIA required. The original grant of PP had not had an EIA.

Held (permission decision only): Requirement to screen for EIA applies to "subsequent applications", inc. applications under a condition: reg. 5-9, and screening opinions must in any event be kept under review. Council accepted that it failed to screen for EIA before discharging conditions, but argued it was "highly likely" would have done so even if they had. This was rejected – C's ecological evidence meant it was not highly likely that the screening opinion would have been negative. Permission granted. Claim subsequently conceded.

R (Swire) v SSHCLG [2020] Env LR 29

Landmark Chambers

- Judicial review claim of negative EIA screening direction for a 20-home development on one of four sites used for the disposal of cattle infected by BSE ("mad cow disease"). Developer's contamination reports submitted with application did not make any reference to this former use.
- Resolution to grant outline planning permission granted with contamination remediation conditions. Screening direction held that any contamination problems could be addressed by the conditions.

Held: screening decisions needed to be based on sufficient evidence of impacts and potential remedial measures to make an informed judgment about whether EIA needed. Evidence before SoS was "very limited" in respect of the BSE-related contamination. Effectiveness of the conditions could not be predicted with confidence: [90], [91], [106] and [111].

R (Packham) v SST [2020] EWCA Civ 1004

Landmark Chambers

- Judicial review claim against the decision to continue with HS2 following the project review completed on 11 February 2020. One ground of claim was that the decision was predicated on a flawed assumption that the review had re-assessed the environmental effects of HS2, when it had not.

Held: (dismissing appeal against refusal of permission) the Government was under no misapprehension about the scope of the review. It was not part of the legislative process for approval of the project, and therefore did not engage EIA legislation. The review panel had not been asked to undertake a comprehensive environmental assessment. Such a task would have been onerous and unnecessary given the EIA already undertaken for Phase One prior to the HS2 Act 2017. No suggestion either of any new or different environmental impacts. [60]-[82].

Gathercole v Suffolk CC [2020] EWCA Civ 1179

Landmark Chambers

- Judicial review claim against the grant of planning permission for a new primary school, raising issue of adequacy of assessment of effect of noise impact of nearby airfield on children, and whether the effects of the identified alternative sites were assessed properly in the Environmental Statement (ES).

Held: No contemporaneous complaint about the adequacy of the ES re: alternative sites. EIA Directive art. 5(3)(d) only required an outline of main alternatives, and main reasons for choice, not a detailed assessment of each main alternative. Question of sufficiency of information was a matter for the decision-maker, not the court. The decision to choose the preferred site was not irrational, and any inadequacy in ES would not have affected the decision.

Girling v East Suffolk Council [2020] EWHC 2579 (Admin)

- Judicial review claim against grant of planning permission for replacement facilities at Sizewell B nuclear power station (SZB) that are intended for use as part of future Sizewell C station (SZC). The DCO for SZC is pending examination.
- The proposal is for the works to begin before DCO decision, to avoid future delays to SZC implementation.
- Claim that the EIA had been unlawfully undertaken without up-to-date information on breeding birds, which was required by reg. 26(2) of EIA Regs.

Held: reg. 26(2) was not a duty to ensure all information was up-to-date, but only that "reasoned conclusion" on significant environmental effects was up-to-date. Council's view that the bird information was sufficiently up-to-date was not irrational, which was the high standard required: [56]-[58].

London Historic Parks & Gardens Trust v SSHCLG [2020] EWHC 2580 (Admin)

- Judicial review claim against handling arrangements for determining SSHCLG's planning application for Holocaust Memorial. Argued that: (a) UK had failed to adequately transpose requirement in art. 9a of EIA Directive for independence and objectivity when carrying out EIA of own projects; (b) if reg. 64(2) of EIA Regs constituted adequate transposition, the proposed arrangements failed to comply with it.

Held: (a) reg. 64(2) lawfully transposed art. 9a of the EIA Directive; (b) the handling arrangements needed to be amended to comply with reg. 64(2), and then published. [125]-[139].

Thank you for listening

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