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Welcome to Landmark Chambers' Planning High Court Challenges Annual Conference, Part 3

The recording may be accessed here.

Your speakers today are…

Landmark Chambers

Matthew Reed QC (Chair)

David Elvin QC

Topic:
COVID-19 and the Planning Court

Sasha White QC

Topic:
Bias and predetermination in planning law: *The lessons of Westferry and beyond*

Your speakers today are…

Landmark Chambers

James Maurici QC

Topic:
Practice and Procedure Update

Kate Olley

Topic:
The implications of the Environment Bill for High Court Legal Challenges

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COVID-19 and the Planning Court

David Elvin QC

View from the top

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- As the LCJ wrote in his Annual Report "*The last seven months have been dominated by the courts' response to the COVID-19 pandemic.*" www.judiciary.uk/announcements/lord-chief-justices-annual-report-2020/. He added:
  - "The judiciary have learned and continue to learn from the different ways it has become necessary to operate, including through short surveys. In a few areas, it became clear that audio and video hearings were less suitable and judges have adapted practices and guidance accordingly. For example, some litigants did not have access to sufficiently robust technology to engage in the hearings and in the absence of the formality of the courtroom some have found it challenging to understand the seriousness of the cases in which they were involved.
  - For many hearings however remote technology has been very effective, demonstrating the widespread benefits to be gained from modernisation, for example by removing the need to attend court and tribunal centres for short hearings. Although remote hearings are not always as efficient as physical hearings (they are more tiring; can be slowed by technical difficulties; and do not allow for parties to come together in the margins of the hearing to resolve issues outside of court) the convenience offsets some of the negative aspects. It was clear that many procedural hearings, relatively short hearings and some of those involving argument rather than contested evidence were satisfactorily conducted remotely, although decisions on this still need to be taken by judges on a case-by-case basis in the interest of justice. "

Compendium of guidance

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- General compendium of guidance across all jurisdictions (including the Upper Tribunal) –
- https://www.judiciary.uk/coronavirus-covid-19-advice-and-guidance/
- 17.11.20 revised guidance on "Wearing facemasks in courts"
  - "Cases are being heard in courtrooms where social-distancing requirements are in place and there is no requirement upon anyone to wear facemasks.
  - Court users may wish to wear a mask in the courtroom. There is no difficulty with this, even when socially distanced, as Judges and magistrates understand that it is important that court users feel comfortable taking part in the proceedings, whilst bearing in mind that anyone who is speaking in court must be audible.
  - It is likely that witnesses will be asked to remove their mask while giving evidence.
  - There is no prohibition upon judges or magistrates wearing facemasks, even when socially distanced "

COVID-19 procedures

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- CPR PD 51Y (Video or audio hearings during the Coronavirus Pandemic) dealing with the need for hearings in private but that attendance by the media etc may make them public
- Civil Justice in England and Wales Protocol regarding remote hearings (26 March 2020, updated 31 March 2020): https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil_.GenerallyApplicableVersion.f-amend-26_03_20-1.pdf
- See also HMCTS guidance: https://www.gov.uk/guidance/hmcts-telephone-and-video-hearings-during-coronavirus-outbreak. The Court is using multiple platforms at present and the choice may vary from case to case. The Court will arrange recordings of the hearing and for any party to do so without the judge's permission is a contempt of court.
- The Administrative Court office guide – COVID-19 measures (updated October 2020): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/925996/RCJ_Administrative_Court_Information_for_Court_Users.pdf
- The Admin court guidance includes in addition to guidance in urgent cases requirements that all filing must be done electronically at present but makes it clear that
  - "It remains the responsibility of the party sending an application or claim to ensure that it is filed within the applicable time limits."

Planning Court tips

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- Informal advice ("top tips") was given by Holgate J., the Planning Liaison Judge, on 8 April 2020 early during the lockdown due to the Covid-19 pandemic (together with reminders to consider the formal court guidance) circulated to PEBA, the Law Society, the JPL and printed in the **Planning Encyclopedia's April 2020 Bulletin**. These included (others are referred to later):
  - "1. To help remote hearings go smoothly and not take up more time than normal, the judges need to be able to make best use of pre-reading time (typically on the Monday of the week in which the hearing takes place). For that we would welcome succinct skeletons cross-referenced to key passages in the bundle and accompanied by an agreed, focused list of essential reading (e.g. pages and paras).
  - 6. The need for the court to make best use of its resources in the interests of all users is now all the more critical. Parties and their advisers are expected to keep under the review the merits of their cases and grounds of challenge. Points which do not have worthwhile merit really should be abandoned as far in advance of the hearing as possible and the time estimate reduced if appropriate."
- He added guidance in respect of dealing with claims that were to be withdrawn – that a claimant seeking to withdraw a claim should "do so well in advance of the hearing" and the procedure to be followed, expecting quick responses, as already set out in the Administrative Court Guide.

Planning Court tips (2)

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- Holgate J's tips 2-5:
  - "2. Bundles need to be limited to material which really is essential for the legal argument on both sides. By way of example, we do not normally need to be given the whole of the NPPF, or a development plan, or (where relevant) proofs of evidence or closing submissions at an inquiry. The inclusion of peripheral material make navigability more difficult. The requirement in the Protocol for a core bundle is crucial. In many cases a really well-chosen, agreed core bundle (or what [Lord] Carnwath once called a micro bundle) may be all that is really needed.
  - 3. Bundles of authorities should be confined to essential material and need not duplicate decisions in the ICLR casebook.
  - 4. It is essential that a bundle has a good index, a single set of numerical, continuous pagination and hyperlinks. Sophisticated pagination does not work.
  - 5. If parties follow the protocols this will also help judges when they come to prepare reserved judgments."

Bundles (1)

- ***Thurloe Lodge Limited v RBKC*** [2020] EWHC 2381 (Admin) (permission to appeal refused by the CA 13.11.20) the Deputy Judge made a number of comments relevant to remote hearings, in that case in the context of JR of a local authority grant of planning permission. He set out Holgate J's informal guidance at [17] and added in the case of the trial bundle -
  - *"it is relevant to note the importance to the court in undertaking its preparation of the case to have a pdf bundle that is readily navigable by the software. The electronic bundles should be paginated sequentially so that the page numbers shown on the digital bundle correspond with the page count shown by the software and that the bookmarks/tabs used for individual documents actually work so that the documents can be found with ease. Care also needs to be taken with the length of the bundle which in this case, even allowing for the extended arguments over the scope of evidence admissible for the purposes of the exercise of the Court's discretion, was too lengthy (at over 1000 pages) and included many documents that were neither referred to nor relied upon for the purposes of this challenge"*

Bundles (2)

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- The Administrative Court office guide – COVID-19 measures (above) has detailed guidance in respect of bundles required for applications for *urgent/immediate consideration*, but the Deputy Judge said in ***Thurloe Lodge*** that "*there are requirements as to what is needed to enable ease of use by the Court which appear to me to be of general application*" referring to (b), (c), (d), (e), (f), (g) and (h).
- In ***Thurloe Lodge*** the Deputy Judge considered [14]-[16] the bundle did not comply with (b), (c) and (h).
  - "*(b) must be numbered in ascending order regardless of whether multiple documents have been combined together (the original page numbers of the document will be ignored and just the bundle page number will be referred to)*
  - *Index pages and authorities must be numbered as part of the single PDF document (they are not to be skipped; they are part of the single PDF and must be numbered).*
  - *The index page must be hyperlinked to the pages or documents it refers to*"

Bundles (3)

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- COVID-19 guidance has been updated since the ***Thurloe Lodge*** judgment and includes guidance for non-urgent cases, where parties are represented which appears, at least in a number of cases encountered recently, not always observed by the parties:
  - "5. Documents being uploaded must be in PDF format only, any other format will not be accepted by the system. The file size restriction (20MB) that applies to immediate applications applies to all non-urgent interlocutory applications.
  - 6. The file size restriction does not apply to non-urgent applications for judicial review or appeals. If the papers in support of an application for judicial review or an appeal exceed 20MB, the claimant/appellant should file:

    (a) a core bundle (no larger than 20MB) which includes, as a minimum, the Claim Form and Grounds/Notice of Appeal and Grounds, the decision challenged, documents regarded as essential to the claim/appeal, the letter before claim and the response, and the witness statement (or primary witness statement) in support of the claim/appeal; and

    (b) a further bundle containing any remaining documents.
  - 7. The guidance on the format of electronic bundles above, at Section B, applies to any bundle lodged in relation to non-urgent work. Each bundle must comply with the formatting requirements."

Bundle of authorities

- See Holgate J tip 3
- In ***Thurloe Lodge*** the Deputy Judge also criticised the use of authorities referring to-
  - *"The authorities bundle also included, unnecessarily, a number of authorities that are readily available in the ICLR's Leading Planning Cases which undermines the purpose of that volume, as set out by Holgate J. above and in the Foreword:*
    - *"This book gathers together the key cases which are referred to frequently in the Planning Court. Arrangements have been made so that judges hearing cases in the Planning Court will normally have access to the book, so that these cases will not need to be copied into bundles of authorities. Use of this book will also ensure that the court has cited to it the preferred reports of these cases, in accordance with Practice Direction (Citation of Authorities) [2012] 1 WLR 780"."*
- A number of judges, including the Planning Liaison Judge, expect that if cases are reported, the reported version of the case should be used and not simply a transcript under the neutral case citation

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Bias and predetermination in planning law:
The lessons of Westferry and beyond

Sasha White QC and Gwion Lewis

The basics

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- Bias and predetermination = closely related
- Both are aspects of fairness
- Bias
  - Showing, or being perceived to show, inclination or prejudice for or against one party or interest in a way that is unfair
- Predetermination
  - Approaching a decision with a closed mind

Bias: Two types

- Actual bias
  - Very difficult to prove so cases are rare
  - Effectively redundant because unnecessary to allege given apparent bias sufficient
  - Immediately disqualifies a decision-making from continuing
  - Conclusive vitiating factor if proven in relation to a decision
- Apparent bias
  - “Would a fair-minded and informed observer, having considered the facts, conclude that there was a **real possibility** of bias”?
  - The *Magill* test (*Magill v Porter* [2002] 2 AC 357)

Examples

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- Planning committee chairman voting in favour of granting planning permission after having discussions with developer about how to facilitate scheme: ***R (Ghadani) v Harlow DC*** [2004] EWHC 1883
- Voting in favour of a scheme after expressing support for the proposal on another committee: ***Georgiou v Enfield LBC*** [2004] LGR 497 (but now see ***Lewis***: discussed later)
- Possible to express legitimate predisposition towards an outcome without this amounting to apparent bias: ***National Assembly for Wales v Condron*** [2006] EWCA Civ 1573 (Assembly Chair had said before decision: *"I'm going to go with the Inspector")*

Examples (2)

- Freemason not necessarily precluded from voting on planning decision if another freemason has interest in outcome: ***R (Port Regis School Ltd) v North Dorset DC*** [2006] EWHC 742 (Admin)
  - Case shows importance of applying *Magill* test by reference to "informed" observer: i.e. "having considered the facts"
  - Court: many people might assume that freemasons are bound to assist each other, but evidence is that freemasonry is underpinned by impartiality and fairness

Examples (3)

- ***R (Lewis) v Redcar & Cleveland BC*** [2009] 1 WLR 83
  - Remains leading case on pre-determination in planning
  - Voting councillors had previously made strong statements in favour of development
  - High Court found apparent bias/predetermination, mainly because the meeting to vote to grant permission was held during election period, contrary to local authority guidance
  - High Court found that the development had become a party political issue during the election campaign
  - Held: “informed” observer would consider: real possibility of bias

Examples (4)

- ***R (Lewis) v Redcar & Cleveland BC*** (cont.)
  - Court of Appeal: more pragmatic approach
  - Local authority decision-making different from judicial/quasi-judicial decision-making
  - Only limited role for apparent bias/predetermination arguments
  - Elected members would be *"entitled, and indeed expected, to have and to have expressed views on planning views"* [62] (Pill LJ)
  - Can be "*no pretence that such democratically accountable decision-makers are intended to be independent and impartial just as if they were judges or quasi-judges"* [94] (Rix LJ)
  - *"Something more is required*" that *"goes to the appearance of a predetermined, closed mind"*

The Westferry Saga

- Site of former printworks, Isle of Dogs
- Proposal: Residential-led mixed use scheme (1,500 units)
- 3-week public inquiry
- Inspector recommended refusal of planning permission
  - Multiple breaches of the development plan, including heritage impacts
- Secretary of State disagreed, allowed appeal
- Decision issued 1 day before Council due to approve new CIL Charging Schedule to take effect in 3 days

The Westferry Saga (2)

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- New CIL charging schedule would have very substantially increased developer's CIL payment (circa £40m) if planning permission not granted before it took effect
- Pre-action letter: Council asked SoS to explain timing of decision
- SoS responded: admitted that decision expedited to be issued before Council adopted new Charging Schedule
- Council issued claim under s. 288
- Council submitted: "fair-minded and informed observer" would conclude "real possibility" of bias in favour of developer

The Westferry Saga (3)

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- SoS conceded to judgment soon after claim issued
- Planning Court approved consent order agreed between parties quashing SoS's decision and remitting appeal to different Minister
- Council had applied for specific disclosure of various internal communications (including text messages between Minister and developer)
- Concession meant SoS avoided further disclosure in proceedings
- But (redacted) material disclosed in any event ultimately in Parliament following political pressure

The Westferry Saga (4)

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- Successful tactics:
  - Claim pleaded on single ground of apparent bias: no room to concede on other, less “problematic” grounds
  - Council sent SoS pre-action “request for disclosure and compliance with duty of candour” in knowledge that SoS does not engage in standard pre-action correspondence for s. 288 challenges
  - Letter did not set out grounds – focused only on disclosure request
  - SoS resisted any disclosure, contrary to duty of candour at pre-action stage
  - Council then able to rely on SoS’s resistance to disclosure as part of narrative of its case on apparent bias

The Westferry Saga (5)

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- Disclosure request:
  - *A copy of all correspondence (including emails), memoranda, file notes, text messaging or other records of communication, submissions and/or advice that includes any reference to, or is otherwise relevant to, the decision of the Secretary of State to allow appeal APP/E5900/W/19/3225474 relating to the land at the former Westferry Printworks site, 235 Westferry Road, London, E14 3QS (including, to be clear, any reference to the Secretary of State's decision-making process, the timing of the Secretary of State's decision, or the related Inspector's report), sent, received, prepared or recorded by:*
  - *any employee or representative of the Planning Casework Unit and/or, beyond that, the Ministry of Housing, Communities & Local Government; and/or*
  - *the Secretary of State for Housing, Communities and Local Government and/or any of his team or representatives*

Apparent bias: How to respond as defendant?

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- No “significant weight” to be given to a witness statement by the decision-maker claiming that the decision was made with an open mind: ***Georgiou*** case
- Evidence:
  - What are “the facts” that the “informed” observer would take into account?
  - Need to explain decision-making structures in an organisation?
  - Evidence of the decision-maker completing training in relation to apparent bias/predetermination?

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The implications of the Environment Bill for High Court Legal Challenges

Kate Olley

The Environment Bill

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- 139 clauses
- 20 Schedules
- 8 Parts including:
  - Environmental Governance (ss1-48) (separate part for Northern Ireland)
  - Waste and Resource Efficiency (ss49-70)
  - Air Quality and Environmental Recall (ss71-76)
  - Water (ss77-91)
  - Nature and Biodiversity (ss92-107) (NB biodiversity gain in planning)
  - Conservation Covenants (ss108-130)
- Part 1 has three chapters: I: Improving the natural environment, II: The Office for Environmental Protection, III: Interpretation of Part 1

Part 1, Chapters 1 and 2

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Improving the Natural Environment

- Environmental Targets
- Environmental improvement plans
- Environmental monitoring
- Policy statement on environmental principles
- Environmental protection: statements and reports

The Office for Environmental Protection

- The OEP
- OEP's Scrutiny and Advice functions
- OEP's Enforcement functions
- Information- disclosures and confidentiality of proceedings

The OEP's enforcement functions

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- ss30-40
- Failure of public authorities to comply with environmental law- complaints- investigations- information notices- decision notices
- Environmental Review
- Judicial Review

Environmental review: cl 37

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What is it and when would it happen?

- Where the OEP has given a decision notice to a public authority it may apply to the court for an environmental review
- But only if- (a) satisfied, on the balance of probabilities, that the authority has failed to comply with environmental law, and (b) it considers that the failure is serious.
- Environmental review- a review of alleged conduct of the authority that is described in the decision notice as constituting a failure to comply with environmental law.
- An application for an environmental review may not be made-

  (a) before the earlier of-

  (i) the end of the period within which the authority must respond to the decision notice in accordance with section 35(3), and

  (ii) the date on which the OEP receives the authority's response to that notice, or

  (b) before the expiry of any time limit which applies to the commencement of judicial review or other similar legal proceedings for questioning the alleged conduct.
- Any restriction imposed by or under any other enactment on questioning the conduct of a public authority in legal proceedings does not apply to an environmental review.

Environmental review: continued

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What does the court do?

- On an environmental review the court must determine whether the authority has failed to comply with environmental law, applying the principles applicable on an application for judicial review.
- If the court finds that the authority has failed to comply with environmental law, it must make a statement to that effect (a "statement of non-compliance").
- A statement of non-compliance does not affect the validity of the conduct in respect of which it is given.
- Where the court makes a statement of non-compliance it may grant any remedy that could be granted by it on a judicial review other than damages, but only if satisfied that granting the remedy would not- (a) be likely to cause substantial hardship to, or substantially prejudice the rights of, any person other than the authority, or (b) be detrimental to good administration.
- In deciding whether to grant a remedy the court must (subject to the above) apply the principles applicable on an application for judicial review.

Environmental review: continued

Then what happens?

- If, on an environmental review, the court has made a statement of noncompliance in respect of a public authority, and the statement has not been overturned on appeal, the authority must publish a statement that sets out the steps it intends to take in light of the review.
- The authority's statement must be published before the end of the 2 month period beginning with the day the review (including any appeal) concludes.
- Also note:
  - "the court" means- (a) in relation to an environmental review arising under the law of England and Wales or Northern Ireland, the High Court, or (b) in relation to an environmental review arising under the law of Scotland, the Court of Session;
  - "the principles applicable on an application for judicial review" means, in relation to an environmental review, the principles that would apply on an application for judicial review in the jurisdiction under which the environmental review arises;
  - "remedy" includes any relief or order.

Judicial review: cl 38

‘Judicial review: powers to apply in urgent cases and to intervene’

- The OEP may apply for judicial review, or a statutory review, in relation to conduct of a public authority (whether or not it has given an information notice or a decision notice to the authority in respect of that conduct) if-

  (a) the OEP considers that the conduct constitutes a serious failure to comply with environmental law, and

  (b) the urgency condition is met.

- The urgency condition is that making an application under subsection (rather than proceeding by way of information, notices, decision notices or environmental review) is necessary to prevent, or mitigate, serious damage to the natural environment or to human health.
- Section 31(2A), (3C) and (3D) of the Senior Courts Act 1981 (High Court to refuse to grant leave or relief where the outcome for the applicant not substantially different) does not apply to an application for judicial review made in England and Wales.

Judicial review: continued

- If, on an application for judicial review or a statutory review, there is a finding that a public authority has failed to comply with environmental law, and the finding has not been overturned on appeal, the authority must publish a statement that sets out the steps it intends to take in light of the finding.
- That statement must be published before the end of the 2 month period beginning with the day the proceedings relating to the application for judicial review or the statutory review (including any appeal) conclude.
- In relation to proceedings (including any appeal) that are:

  (a) in respect of an application for judicial review or a statutory review, and

  (b) relate to an alleged failure by a public authority to comply with environmental law (however the allegation is framed in those proceedings)

  – If the OEP considers that the alleged failure, if it occurred, would be serious, it may apply to *intervene* in the proceedings (whether it considers that the public authority has, or has not, failed to comply with environmental law).

Also

- The reference to an application for judicial review includes an application for the *permission* of the High Court/Court of Session to apply for judicial review
- "statutory review" means a claim for statutory review under-
  - (i) section 287 or 288 of the Town and Country Planning Act 1990,
  - (ii) section 63 of the Planning (Listed Buildings and Conservation Areas) Act 1990,
  - (iii) section 22 of the Planning (Hazardous Substances) Act 1990, or
  - (iv) section 113 of the Planning and Compulsory Purchase Act 2004.

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Practice and Procedure Update

James Maurici QC

Introduction

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Look at cases and other practice points since November 2019 …

1. Alternative remedy;
2. Time limits;
3. Standing;
4. Discontinuance;
5. Listing in the Planning Court;
6. Costs;
7. Relief;
8. Other.

(ii) Alternative remedies

- 2 cases:
  - (1) ***QM Developments (UK) Ltd v Warrington BC*** [2020] EWHC 1511 (Admin); and
  - (2) ***T&P Real Estate Ltd v Sutton LBC*** [2020] EWHC 879 (Ch).

(i) Alternative remedies

- (1) ***QM:***
  - **FACTS**: C obtained a PP for proposed residential development, subject to pre-commencement conditions on remediation work being met as there was a concern re: contaminated land.
  - C built two dwellings on the site, one of which was sold to a couple.
  - The couple commenced a civil action against the C contending that it had failed to discharge the remediation work condition which meant their property could not be resold;
  - C applied for a certificate of lawfulness of existing use or development ("CLEUD") for the property under s. 191 of 1990 Act - LPA failed to issue a decision within the statutory time limits, so C appealed under s.195(1)(b) of the against non-determination. That appeal before PINS and was still awaiting determination.
  - C submitted a second application for a certificate, which the LPA issued with an informative that the remediation work condition had not been fully discharged.
  - C sought JR of that second decision.

(i) Alternative remedies

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- C argued that although the appeal pending before PINS provided it with an alternative remedy:
  - (i) there were exceptional circumstances because only JR could determine whether the informative had a lawful basis, and
  - (ii) the civil action commenced by the couple was incapable of dealing with the complex issues of planning law which were for the Planning Court to resolve.
- Dove J. rejected this:
- C did have alternative remedies available and there were no exceptional circumstances to justify the court considering the application for JR:
- Two points made …

(i) Alternative remedies

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- **(1) S.195 of the 1990 Act contemplated a remedy which should enable a C to obtain the certificate in the terms it considered appropriate through an appeal process where the LPA had reached no decision on the application.**
- Whilst under s.195(1)(a) the opportunity to appeal only arose where an application was refused in full or in part (not if granted but with an informative), s.195(1)(b) provided an appeal against non-determination, and it was that opportunity that the C had taken up in respect of the first application for a certificate and which was still awaiting decision by PINS.
- That would be a full determination on the merits and was clearly an alternative to the application for JR.
- Moreover, the appeal would be determined by one of PINS specialist inspectors, experienced in dealing with enforcement and appeals in relation to certificate applications.

(i) Alternative remedies

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- The framework of the legislation provided the opportunity for legal questions of the kind raised by C to be determined on appeal by an inspector, along with any associated factual disputes, subject only to supervisory jurisdiction by the court in respect of errors of law.
- There was no justification for bypassing the mechanisms in the statutory framework for determining questions of the kind raised in the application by permitting them to be raised in the context of a JR.
- **(2) The civil litigation between C and the purchasers involved whether parts of the condition remained to be discharged.**
- That question was an issue which the court considering the civil dispute was seised.
- There was no reason why that court was unable or lacked the expertise to resolve that dispute. Therefore, it would be inappropriate for the court to entertain the application for JR.

(i) Alternative remedies

- (2) ***T&P***
- Developer was refused prior approval to change an office building into residential property based on the interpretation of a local authority's direction under the Town and Country Planning (General Permitted Development) (England) Order 2015 art.4 that removed permitted development rights.
- Developer brought CPR Pt 8 proceedings to challenge the refusal.
- Held: the interpretation of the direction was quintessentially an issue of public law, to be challenged via an appeal to PINS.

(ii) Time limits

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- ***South Derbyshire DC v Secretary of State for HCLG*** [2020] EWHC 872 (Admin) [2020] P.T.S.R. 1120:
- Inspector's decision dated 9 October 2019.
- 6 week period for seeking leave to challenge that decision under the 1990 Act, s.288(4B) expired on 20 November.
- Claim including the application for permission, was filed and issued at court on 15 November and posted on 19 November to GLD.
- The local authority had relied on the address for service listed in the hard copy of The White Book 2019.
- The GLD had in fact moved offices in September 2019, but at the time of posting, the hard copy of the White Book did not list the updated address.
- Although the claim form was automatically redirected to the new address, it did not arrive until 21 November 2019.

(ii) Time limits

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- Preliminary issue was the application made within the 6 weeks, as required by s . 288.
- Previous case-law supported view that it had been (making meant issuing not serving – service required by rules not Act and could be extended)
- Issue raised was had the CPR and the Court of Appeal decision in ***Croke*** [2019] PTSR 1406 changes this?
- Held: it did not.
- Service not part of making the application, that instead provided for by CPR PD 8C.
- Power under CPR to extend time.
- ***Croke*** was not about service; nothing in ***Croke*** suggests no power to extend time.
- In terms of non-compliance with service rules: (i) rules couched in mandatory terms; (ii) intend certainty within 6 weeks as to whether claim made; (iii) here LA made reasonable attempts to serve as relied on address in White Book; (iv) short delay caused no prejudice, extension granted.

(iii) Standing

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- ***Aireborough Neighbourhood Development Forum v Leeds City Council*** [2020] 1 W.L.R. 2355
- Issue:
- Does an unincorporated association have capacity to bring a challenge under s. 113 of the 2004 Act to adopt a site allocation plan?
- Forum was designated as a neighbourhood forum under the 1990 Act, s.61F with objectives which included the good planning of the neighbourhood. The designation had expired and its renewal remained pending.
- Argued not “person” aggrieved under s. 113.
- In many cases it had been assumed an unincorporated association could be a C in a JR.
- There was an issue as to such an association could be a C in a statutory review in ***Williams*** [2015] LGR 624 and it was held they could.
- Wider policy led to more flexible approach to standing esp. in planning and environment cases where impact might fall on a group.

(iv) Discontinuance

- ***Westminster City Council v SSHCLG*** [2020] J.P.L. 1162
- FACTS: 2 s. 288 claims brought by the LPA as C
- Substantive hearing of the claim was listed for 5 March 2020.
- On 12 February, C sent a draft consent order with a view to settlement. This did not refer to payment of the S/S's costs, which the C was required to pay in accordance with CPR Pt 38.
- The court was not notified of the intention to settle until 26 February.
- The court directed that a draft order be filed by 28 February explaining the lateness of the settlement, the failure to apply for an extension of time, the delay in sending the consent order to the court and the reasons for C's failure to comply with directions that had been given as to the filing of trial bundles and skeleton arguments.
- C submitted a draft consent order which provided for the discontinuance of both claims, the vacation of the hearing date and, in that version, payment of the S/S's costs.
- No explanation was provided for the procedural failures.
- The matter remained listed for 5 March to allow the parties to explain the reasons for the lateness of the settlement.

(iv) Discontinuance

- HELD by Holgate J.
- (i) Delay in notification of Court
- (1) The parties were obliged to inform the court as soon as possible after becoming aware that a case was likely to settle;
- (ii) The court's ability to deal with its caseload in accordance with the targets in CPR PD 54E depended upon all parties taking a realistic view of their prospects of success. Settlements which occurred at a late stage for no good reason undermined the efficient running of the court in the interest of all users;
- The Administrative Court Judicial Review Guide 2019 para.12.2.1 set out good practice to be followed by parties in order to comply with their duty to help the court and further the overriding objective in CPR r.1.1.

(iv) Discontinuance

- <u>(ii) Obtaining approval for a consent order:</u>
- Para. 17 of CPR PD 54A set out procedure for obtaining court's approval of a consent order for the disposal of a case.
- The draft legal statement needed to be clear, correct and adequately reasoned. The statement contained in the order might affect the subsequent re-examination of the case by the local planning authority or secretary of state. It might also affect the application of the doctrines of issue estoppel and abuse of process.
- Therefore, the parties had to have a reasonable opportunity to agree the terms of the order and the statement of the legal basis upon which relief was sought and for a judge to consider approving that order. That should be done sufficiently far in advance of any fixed substantive hearing to allow for redeployment of the court's resources.
- A claimant should be reviewing the claim from at least the service of detailed grounds of resistance and any evidence in support to see whether that material affected the assessment of the merits.

(iv) Discontinuance

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- The fact that the parties were discussing the terms of a draft order did not justify a failure to notify the court of a potential settlement; nor should an imminent fixture be retained so as to act as leverage in the discussions. The waste of a fixture delayed access to justice for other users
- Sanctions: court could award costs to mark disapproval;
- Other matters: CPR r.2.11 allowed for time limits to be varied by agreement of the parties. The time limits set by the procedural directions for a trial bundle and skeleton arguments did not exclude or modify the application of r.2.11; however, that was always subject to the parties' obligation to assist the court in furthering the overriding objective;
- Accordingly, agreed extensions of time should not imperil a future hearing date or otherwise disrupt the conduct of the litigation.

Discontinuance and costs

- In the ***M v Croydon*** [2012] 1 WLR 2607 type cases the JR is withdrawn/settled by a consent order but costs not agreed;
- If the C *instead* discontinues different CPR r.38.6 provides *"Unless the court orders otherwise, a claimant who discontinues is liable for the costs which a defendant against whom the claimant discontinues incurred on or before the date on which notice of discontinuance was served on the defendant*."
- For a review of relevant principles see ***Khan v Governor of Mount Prison*** [2020] EWHC 1367 (Admin) include:
  - (1) the burden is on the C to show a good reason for departing from the presumption;
  - (2) the fact that the C would or might well have succeeded at trial is not in itself a sufficient reason for doing so

(v) Listing in the Planning Court

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- 23 September 2020:

"Reminder from the Planning Court to

PEBA Members

Fixing Dates in the Planning Court

Mr Justice Holgate has requested that barristers and their clerks should seek to be much more flexible when fixing dates with the Planning Court.

In the interests of efficient administration and to avoid unnecessary delay, the Court requests that every effort be made to be available for dates suggested by the listing staff.

Your co-operation is appreciated."

(vi) Costs

- 3 cases on Aarhus:
  - (1) ***R (Kent) v Teeside Magistrates Court*** [2020] EWHC 304 (Admin);
  - (2) ***Bertoncini v LB of Hammersmith & Fulham*** [2020] 6 WLUK 174;
  - (3) ***Abbotskerswell Parish Council v SSHCLG***

- NB ***CPRE v SSHCLG*** [2019] EWCA Civ 1230 on multiple parties and Aarhus costs being heard by Supreme Court in January 2021.

(1) *Kent*

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- IP, but not ultimately D, challenged entitlement of C to Aarhus costs protection, and following a hearing Court held it was an Aarhus Convention claim.
- D had in summary grounds disputed claim was Aarhus claim but then adopted neutral stance. IP continued with the point and loses.
- C sought costs of hearing vs IP
- Court held:
- (i) It had jurisdiction to award costs vs an IP notwithstanding that CPR 45.45(3) referred only to a D (followed CPRE on this);
- (ii) The starting point is CPR 44.45(3)(b) is that if the court holds that the claim is an Aarhus Convention claim, the C will normally recover its costs;
- (iii) awarded costs of £24,000 plus VAT (!?!) as the issues raised were unusual and required a large amount of research and preparation.

(2) *Bertoncini*

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- On a paper refusal of permission D argued that the cap (and hence the C's potential costs liability) should be increased from the default £5,000 to £10,000, whereas the IP argued that it should be increased to £20,000.
- On the papers, Judge increased the cap to £20,000 and ordered the C to pay costs totalling £14,991 (of which £10,000 were to be paid to the IP).
- C renewed her permission application to an oral hearing.
- A point of jurisdiction arose, namely whether an IP has standing to apply for a variation to an Aarhus Convention costs cap as there is no express provision to that effect in the CPR.
- HHJ Bird concluded that an IP does have standing to apply for a variation.
- He maintained the cap at £20,000, and ordered the C to pay costs totalling £16,991 (of which £12,000 are to be paid to the IP).

(3) *Abbotskerswell Parish Council v SSHCLG*

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- There is currently an ongoing controversy as to whether the £35,000 Aarhus cap is inclusive or exclusive of VAT.
- Dove J. in an ex tempore judgement held that the cap was exclusive of VAT, applying the approach of Rabinder Singh QC (as he then was) in ***R (Warley) v. Wealden DC*** [2011] EWHC 2083 (Admin).
- S/S considering whether to appeal that decision …

Costs: settlement and IPs

- ***R (Easter) v Mid-Suffolk DC*** [2020] EWCA Civ 1378
- JR by C of PP granted to neighbour, N.
- Shortly before AoS deadline LPA indicated would consent, neither LPA nor N filed AoS and a consent order was under discussion.
- Court order refused permission. C renews.
- N decides to defend and on 5/2/20 makes application to file AoS out of time.
- At oral hearing C granted permission, and given leave to amend claim.
- Consent order agreed with costs to be dealt with in writing.
- Judge on papers says LPA pay costs to 5/2/20 and N pays costs thereafter.
- N appeals

Costs: settlement and IPs

- CA hold:

- (1) confirm ability of Court to decide such matters on the papers, relying on CPR 54.1(2)(a) and 40(6);
- (2) Discretion on costs broad, CA should not substitute its judgment, apply, ***R. (Parveen) v Redbridge LBC*** [2020] EWCA Civ 194;
- (3) Judge entitled to find N had from filing of AoS taken on burden of defending the claim, awarding all costs after that date accorded with “broad justice” even if some of those costs not required by actions of N.

(vii) Relief

- (1) ***Aireborough Neighbourhood Development Forum v Leeds City Council*** [2020] EWHC 2183 (Admin)
- Court finds errors of law in process leading to adoption of Leeds Site Allocation Plan.
- Issue should Court quash under s. 113(7)(a) or remit under s. 113(7)(b).
- S. 113 widened powers of the Court; gave flexibility to decide relief depending on (i) nature of unlawfulness (ii) stage error occurred at; and (iii) expends and delay caused.
- Errors: fundamental, could not be cured by more reasons.
- Remit, take process back to stage where error occurred.
- Remitted all policies on GB allocations of housing.
- No reason why need different inspectors.

(vii) Relief

- (2) ***R. (Plan B Earth) v Secretary of State for Transport*** [2020] EWCA Civ 214
- Airports NPS unlawful for failure to have regard to Paris Agreement (under appeal);
- Court declined to quash;
- CA declared the designation decision unlawful and to prevent the ANPS from having any legal effect unless and until the Secretary of State has undertaken a review of it in accordance with the statutory provisions, including the provisions of sections 6, 7 and 9 of the Planning Act.
- Also refused to make a mandatory order requiring the Secretary of State to undertake a section 6 review, bearing in mind that the Secretary of State has a discretion under section 6(1) to decide to undertake a review "*whenever [he] thinks it appropriate to do so*". But no effect unless reviewed.

(viii) Other

- (1) Setting aside orders on the papers
- Orders (other than on permission) made without a hearing and without all of the parties having explicitly confirmed their consent to the matter being dealt with without an oral hearing;
- Such orders are within CPR 23.8(c) and CPR 23A paragraph 11.2 such that it is to be treated as an application made on the court's own initiative – even if applicant/party seeking to set aside itself asked for paper decision;
- So if don't like order not an appeal; rather an application to set aside, vary or stay that order can be made under CPR rule 3.3(5);
- See ***Collier v Williams*** [2006] 1 WLR 1945 at [32]-[34] and has been followed in a number of cases including ***R (Nolson) v Stevenage BC*** [2020] EWCA Civ 379 at [16] – 18].

(vii) Other

- ***R (Kuznetsov) v Camden LBC*** [2019[EWHC 3910 (Admin)
- Costs order made on papers, application to set aside;
- What is the test to be applied?
- Mostyn J. held that the test was *"the court should give due weight to the decision of the judge who dealt with the matter without a hearing and should be able to identify a good reason for disagreeing with his or her decision"* [24];
- But case-law holding applications to set aside such orders by way of rehearing not review: see e.g. ***Al-Zahra (Pvt) Hospital v DDM*** [2019] EWCA Civ 1103. So can Mostyn J. be correct?

(vii) Other

- <u>(2) Amending grounds</u>
- (1) ***Keep Bourne End Green v Buckinghamshire CC*** [2020] EWHC Admin 1984 Holgate J.: *"11th hour" application to amend the Statement of Facts and Grounds …" " "Because this new point is not arguable, it would be inappropriate for me to give permission for the amendment to be made, quite apart from the lateness of the application"*
- (2) Recent decision of Lang J. on challenge to a tall building in Birmingham CC. Amendment allowed to add ground as not made last minute, made more than 7 days before hearing. NB lateness to do with objections on which it was based not being loaded on to website by Council.

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Q&A

We will now answer as many questions as possible.

Please feel free to continue sending any questions you may have via the Q&A section which can be found along the top or bottom of your screen.

Thank you for listening

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