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Welcome to Part 1 of Landmark Chambers' Planning High Court Challenges webinar series

The recording may be accessed here.

Your speakers today are…

Landmark Chambers

Dan Kolinsky QC (Chair)

Richard Turney

Topic:
Planning Act 2008 challenges: the last year

Andrew Byass

Topic:
Permitted development legal challenges

Your speakers today are…

Landmark Chambers

Heather Sargent

Topic:
EIA and SEA case-law: review of the year

Joel Semakula

Topic:
Where are we on climate change grounds of challenge after Heathrow v FoE?

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Where are we on climate change grounds of challenge after Heathrow v FoE?

Joel Semakula

Heathrow v Friends of the Earth

Friends of the Earth Ltd and others v Heathrow Airport Ltd **[2020] UKSC 52**

- 2018 Airports National Policy Statement ("ANPS") in relation to a third runway at Heathrow was lawful because the SST did have regard to the Paris Agreement and the ANPS required any future development consent application to be assessed against the carbon reduction targets in place at the time.

High Speed Rail for the Win

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Packham v Secretary of State for Transport **[2020] EWCA Civ 1004; [2021] Env LR 10**

- The Government did not fail to consider the implications of the Paris Agreement and the Climate Change Act 2008 in the decision to proceed with HS2 following the Oakervee review.

- The statutory and policy arrangements for achieving net zero by 2050 were said to “leave the Government a good deal of latitude in the action it takes to attain those objectives”: at [87].

Away from trains, on to Roads

Transport Action Network Ltd v SST **[2021] EWHC 2095 (Admin)**

- In the decision to set the Road Investment Strategy 2 (for 2020-2025) (providing for various strategic road network improvement schemes), the SST had not unlawfully failed to take into account the Paris Agreement, the Net Zero duty and the carbon budgets.

- No breach of the requirement in s.3(5) of the Infrastructure Act 2015 to have regard to the effect of the strategy on the environment (which does not specifically include effect on climate change).

To Gas or not to Gas

ClientEarth v SSBEIS **[2021] PTSR 1400**

- Decision to grant development consent for two gas-fired generating units at an existing power station was based on a lawful interpretation of the Overarching National Policy Statement for Energy ("EN-1") as not requiring a quantitative assessment of need.

- **The weight to give to GHG emissions impact is a matter for the decision-maker**, and SoS was entitled to regard it as not being determinative in the balancing exercise.

Wednesbury strikes again

Abbotskerswell Parish Council v Secretary of State for Housing, Communities and Local Government **[2021] EWHC 1633 (Admin)**

- SSHCLH had not erred in granting outline planning permission for a major mixed-use development.

- He had acted rationally in deciding that he had the environmental information reasonably required as to the effect of the proposed development on climate change and biodiversity, and he had not failed to comply with the Conservation of Habitats and Species Regulations 2017 Pt 6 (2) reg.70(3).

A trade is a trade

Elliott-Smith) v SSBEIS **[2021] EWHC 1633 (Admin)**

- Post Brexit, the EU TTS was replaced by the UK Emissions Trading Scheme ("ETS").

- The Court held the ETS did not unlawfully fail to take account of the Paris Agreement (**albeit not expressly referencing it**), and served the statutory purpose in CCA 2008 s.44 of *"limiting or encouraging the limitation of activities"* causing GHG emissions.

Looking Forward

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Finch v Surrey CC **[2021] PTSR 1160**

- Judicial review against the grant of planning permission for 4 new oil wells.
- Issue: whether the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 required an environmental impact assessment ("EIA") to assess the effects of GHG emissions resulting from future combustion of oil produced by the development, typically as a fuel for motor vehicles.
- Holgate J held they do not. Off to the Court of Appeal.

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EIA and SEA case-law: review of the year

Heather Sargent

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EIA

R (o.a.o. Finch) v Surrey CC

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[2020] EWHC 3566 (Admin) [2021] PTSR 1160 – 21 December 2020

Holgate J

- JR of grant of planning permission by Surrey CC to retain and expand the Horse Hill Well Site and to drill four new wells, for the production of hydrocarbons over a 25 year period

- ES assesses the GHG that would be produced from the operation of the development itself but does **not** assess the GHG that would be emitted when the crude oil produced from the site is used by consumers

R (o.a.o. Finch) v Surrey CC

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- Town and Country Planning (Environmental Impact Assessment) Regulations 2017

- Main issue: does the requirement in the 2017 EIA Regulations to provide an ES that describes both the direct **and indirect** likely significant effects of a development, require an assessment of the GHG emissions that result from the use of an end product that is said to have originated from that development?

- Short answer: no

R (o.a.o. Finch) v Surrey CC

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- GHG emissions from the use of fuel (the end product) are addressed by Government policy on climate change and energy
  - **Not** necessary by virtue of the 2017 EIA Regulations for the LPA to go further than **applying** those policies in its decision on whether to grant planning permission – **not** necessary for it to require those GHG emissions to be estimated and assessed as part of the EIA of the development

- [101] "the fact that the environmental effects of consuming an end product will flow "inevitably" from the use of a raw material in making that product does not provide a legal test for deciding whether they can properly be treated as effects "of the development"

R (o.a.o. Finch) v Surrey CC

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- "The extraction of a mineral from a site may have environmental consequences remote from that development but which are nevertheless inevitable […] An inevitable consequence may occur after a raw material extracted on the relevant site has passed through one or more developments **elsewhere** which are not the subject of the application for planning permission and which do not form part of the same "project""

- The true legal test: is an effect on the environment, an effect **of the development for which planning permission is sought?**

- "Indirect effects" cover consequences that are "less immediate" but **"they must, nevertheless, be effects which <u>the development itself</u> has on the environment"**

R (o.a.o. Finch) v Surrey CC

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- The clearly expressed wording of the legislation cannot be disregarded: effect must be given to that language even if the result is that some environmental effects are not assessed

- [105]: rejection of proposition that there are no other measures in place within the UK for assessing and reducing GHG emissions from the combustion of oil products in motor vehicles (including net zero target in Climate Change Act 2008)

R (o.a.o. Finch) v Surrey CC

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- [107]: “It has to be recognised that development control and the EIA process have a specific and, to some extent, limited ambit, namely to assess and control proposals for new development and in some circumstances, the retention of existing development. But, because the incidence of planning control depends upon whether planning permission is required, or enforcement action is possible, these regimes do not regulate the environmental effects of the general use of all land in the country”

- [112]: “Essentially, development control and the EIA process are concerned with the use of land for development and the effects of that use. They are not directed at the environmental effects which result from the consumption, or use, of an end product”

R (o.a.o. Finch) v Surrey CC

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- Other points to note:
  - [91]-[94]: the mere fact that an applicant produces an ES that does not comply with the terms of an LPA's **scoping opinion** does not **of itself** amount to a breach of the 2017 EIA Regulations
  - (*Obiter*) [143]: neither para. 183 of the NPPF nor para. 112 of the Minerals PPG allows a LPA (or ES) to disregard a relevant environmental effect "but [they] do allow an authority to exercise judgement as to the extent to which such an effect should be assessed in the development control process, taking into account the existence of other dedicated regulatory regimes"

Pearce v SSBEIS

[2021] EWHC 326 (Admin) [2021] JPL 1229 – 18 February 2021

Holgate J

- JR of the SoS's decision to make the North Vanguard Offshore Wind Farm DCO
- ES prepared by NVL for Vanguard assessed cumulative impacts arising from both Vanguard and Boreas wind farm projects, including landscape and visual impacts from the onshore infrastructure proposed at Necton
- Both the ExA and the SoS decide that consideration of cumulative landscape and visual impacts from Vanguard and Boreas should be deferred to any subsequent examination of the Boreas proposal

Pearce v SSBEIS

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- Can consideration of an environmental effect be deferred to a subsequent consenting process?
  - [109]: yes, **if** the decision-maker has judged that the effect is **not significant** – see e.g. ***ex p Milne*** [2001] Env LR 406
  - Where the decision-maker treats the effect as being **significant** (or does not disagree with the "environmental information" before him/her that it **is** significant): "[a] range, or spectrum, of situations may arise" – helpfully analysed at [110] ff.

Pearce v SSBEIS

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- In some cases the principles set out in ***R (Larkfleet Limited) v South Kesteven DC*** [2016] Env LR 76 (at [29]-[30], [35]-[38] and [56]) **may** allow a decision-maker properly to defer the assessment of cumulative impacts arising from the subsequent development of a **separate** site, not forming part of the same project
  - E.g. ***R (Littlewood) v Bassetlaw DC*** [2009] Env LR 407

- Circumstances of present case "are clearly distinguishable from ***Littlewood***" ([118])

- SoS's failure to evaluate the information before him on the cumulative impacts of the Vanguard and Boreas substation development = breach of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009

Pearce v SSBEIS

- [122] “The Defendant unlawfully deferred his evaluation of those effects simply because he considered the information on the development for connecting Boreas to the National Grid was “limited”. The Defendant did not go so far as to conclude that an evaluation of cumulative impacts could not be made on the information available, or that it was “inadequate” for that purpose. […] I would add that because he did not address those matters, the Defendant also failed to consider requiring NVL to provide any details he considered to be lacking, or whether NVL could not reasonably be required to provide them under the 2009 Regulations as part of the ES for Vanguard”.

Pearce v SSBEIS

- Deferral is also irrational; and ([143]) “even if it be assumed that it was legally permissible to defer the evaluation of the cumulative impacts at Necton to the examination of the Boreas DCO application, any such decision had to be adequately reasoned”
  - “The bare statement in this case that the information on Boreas was “limited” did not come anywhere near discharging that requirement”

- Holgate J rejects argument that relief should be withheld under s. 31(2A) of the Senior Courts Act 1981

- DL granting DCO is quashed

Abbotskerswell PC v SSHCLG

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[2021] EWHC 555 (Admin) [2021] Env LR 28 – 11 March 2021

Lang J

- Unsuccessful claim for statutory review (s. 288 TCPA 1990) of SoS's decision to grant outline planning permission on appeal for a major mixed use development on the southern fringe of Newton Abbot (including 1,210 dwellings, a primary school, up to 12,650 sq m of employment floorspace & two care homes)

- Ground 1: SoS erred in failing to assess any material environmental information relating to the assessment of GHG emissions and climate change, in breach of the 2011 EIA Directive and the 2011 EIA Regulations

Abbotskerswell PC v SSHCLG

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- Lang J notes ([82]) that the role of the Court in reviewing the adequacy of the assessment in an environmental statement has been recently reviewed by the Supreme Court in ***R (Friends of the Earth Ltd) v Heathrow Airport Ltd*** [2020] UKSC 52 (the Airports NPS litigation - at [142]-[146])

- Rejects argument that the judgment of the Court of Appeal in the Airports NPS litigation (***R (Plan B Earth) v SST*** [2020] EWCA Civ 214 [2020] PTSR 1446 at [137]) establishes that a **more intensive** standard of review should be applied where there is a "patent defect" in the assessment

Abbotskerswell PC v SSHCLG

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- [85]: "…Neither ***Squire*** nor ***Plan B*** established a separate category of unlawfulness based on "patent defect". The deficiencies in the assessment in ***Squire*** demonstrated conventional public law errors (i.e. irrationality and failure to take into account relevant considerations), which resulted in a breach of the requirements of the EIA Directive and regulations"

- [86]: "The adequacy of the ES in this claim falls to be assessed according to conventional ***Wednesbury*** principles, as set out by the Supreme Court in ***Friends of the Earth***"

Abbotskerswell PC v SSHCLG

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- On the GHG argument: under reg. 2 of the 2011 EIA Regulations, the SoS was only required to consider the adequacy of such information on climate change in the ES as "may reasonably be required"

  - In deciding what was "reasonably required" the SoS had a "wide range of autonomous judgment on the adequacy of the information provided" and had to be "free to form a reasonable view of [his/her] own on the nature and amount of information required", subject only to review on ***Wednesbury*** grounds (***Friends of the Earth*** at [144])

Abbotskerswell PC v SSHCLG

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- On the facts: SoS reached a judgement that the information provided on climate change was sufficient; C's criticisms were considered by the SoS but rejected
- SoS's conclusions were rational and lawful
  - N.b. site was allocated for development in the local plan and had "already been through a LP examination and subject to a raft of environmental testing, at that stage, for the Allocation to be adopted"
  - GHG emissions had been considered in the context of the Local Plan, the sustainability appraisal and the SEA
  - Thus "[i]t is apparent that the Secretary of State had climate change issues well in mind, in particular, the sustainability of the Site, transport, flood risks, air quality and a low emissions strategy"

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SEA

R (o.a.o. Rights: Community: Action) v SSHCLG

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[2020] EWHC 3073 (Admin) [2021] PTSR 553 – 17 November 2020

Divisional Court: Lewis LJ, Holgate J

- JR seeking to quash the SIs that introduced Use Class E and certain PD rights

R (o.a.o. Rights: Community: Action) v SSHCLG

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- [79]: “From the statutory framework it can be seen that a plan or programme is only required to be the subject of an environmental assessment if all four of the following requirements are satisfied:
  - (1) the plan or programme must be subject to preparation or adoption by an authority at national, regional, or local level, or be prepared by an authority for adoption, through a legislative procedure by Parliament or Government;
  - (2) the plan or programme must be required by legislative, regulatory or administrative provisions;
  - **(3) the plan or programme must set the framework for future development consents of projects**; and
  - (4) the plan or programme must be likely to have significant environmental effects.

R (o.a.o. Rights: Community: Action) v SSHCLG

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- Claim dismissed: on the SEA ground of challenge, the DC concludes that none of the 3 SIs constitutes a “plan or programme” that “sets the framework for future development consents” within the meaning of art. 3(4) of the SEA Directive

R (o.a.o. Friends of the Earth Ltd) v Heathrow Airport Ltd

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[2020] UKSC 52 [2021] 2 All E.R. 967– 16 December 2020

Supreme Court

- FoE and Plan B complain that the environmental report that the SST was required under the SEA Directive to prepare and publish was defective, in that it did not make reference to the Paris Agreement
  - Supreme Court: Divisional Court was right to reject that complaint

R (o.a.o. Friends of the Earth Ltd) v Heathrow Airport Ltd

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- Broader points on SEA:
  - [66]: SC agrees with Singh J in ***Cogent Land LLP v Rochford DC*** [2013] 1 P&CR 2 that a defect in the adequacy of an environmental report prepared for the purposes of the SEA Directive may be cured by the production of supplementary material by the plan-making authority, subject to there being consultation on that material
  - [67]: "It follows that [SEA] may properly involve an iterative process; and that it is permissible for a plan-making authority to introduce alterations to its draft plan subject to complying with the information requirements in art. 5 and the consultation requirements in arts. 6 and 7"

R (o.a.o. Friends of the Earth Ltd) v Heathrow Airport Ltd

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- [142]: art. 5(2) and (3) of the SEA Directive confer a discretion on the SoS regarding the information to include in an environmental report **and** the approach to be followed in deciding whether the SoS has exercised his discretion unlawfully is the ***Blewett*** approach, as established in relation to the adequacy of an ES in the EIA context

- I.e. ([144]) the standard of review is "conventional" ***Wednesbury***

R (o.a.o. Friends of the Earth Ltd) v Heathrow Airport Ltd

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- [146]: the public authority responsible for promulgating an environmental report should have **a significant editorial discretion** in compiling the report, to ensure that it is **properly focused on the key environmental and other factors which might have a bearing on the proposed plan or project**
  - Absent such a discretion: risk of excessively defensive approach to drafting environmental reports; risk of report being **excessively burdened with irrelevant or unfocused information**, which would undermine their utility **in informing the general public in such a way that the public is able to understand the key issues and comment on them**
  - In short: risk of the public being "drowned in unhelpful detail" and "losing sight of the wood for the trees"

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Permitted development legal challenges

Andrew Byass

Introduction

- ***Gluck v SSHCLG*** [2021] PTSR 1004:
  - When and how may time be extended for the consideration of prior approval applications?
- ***Smolas v Herefordshire Council*** [2021] EWHC 1663 (Admin):
  - When may prior approval applications be refused for failure to meet definitional requirements?
  - What information should an applicant provide in support of an application?
  - What is the scope of any appeal against refusal?
- ***Smolas*** involved a review of some other recent decisions: ***Keenan v Woking BC*** [2017] EWCA Civ 438; ***R (Marshall) v East Dorset DC*** [2018] EWHC 226 (Admin); and ***New World Payphones Ltd v Westminster CC*** [2019] EWCA Civ 2250

Gluck v SSHCLG

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- ***Gluck*** was concerned with Article 7 of the GPDO, in force to 1st August 2020

"*Where, in relation to development permitted by any Class in Schedule 2 which is expressed to be subject to prior approval, an application has been made to a local planning authority for such approval or a determination as to whether such approval is required, the decision in relation to the application must be made by the authority—*

(a) within the period specified in the relevant provision of Schedule 2,

(b) where no period is specified, within a period of 8 weeks beginning with the day immediately following that on which the application is received by the authority, or

(c) within such longer period as may be agreed by the applicant and the authority in writing."

Gluck v SSHCLG

Landmark Chambers

- After 1st August 2020, Article 7(c) amended to include the underlined text:

"(c) within such longer period than is referred to in paragraph (a) or (b) ***as may be agreed by the applicant and the authority in writing****."*

- The amendment resolved the first issue raised by ***Gluck***, namely whether sub-paragraph (c) applied to both sub-paragraphs (a) and (b). The Claimant's argument was that where a period was specified in Schedule 2, such that the default 8 week period in sub-paragraph (b) did not apply, then it was not possible to extend time
- Both the High Court (Holgate J) and the Court of Appeal rejected that argument

Gluck v SSHCLG

Landmark Chambers

- Court of Appeal said that there were both matters of textual interpretation and common sense which supported extensions of time being able to be agreed.
- Textual, because if sub-paragraph (c) applied only to sub-paragraph (b), these sub-paragraphs surely could and would have been combined
- Common sense, because otherwise an extension could not be agreed, even "*where both a developer and the local planning authority wanted to do so, for example to allow the developer to supply further information or to hold discussions with the local planning authority or consultees",* at [30]
- The second issue in ***Gluck*** was more difficult. That issue was what is necessary to show that a longer period is "*agreed by the applicant and the authority in writing*"

Gluck v SSHCLG

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- The Court of Appeal split on this issue. But first the facts:
  - 27th April 2018: the applicant and the authority agreed orally that time should be extended
  - The same day the applicant's planning consultant wrote to confirm the oral agreement. The authority did not expressly confirm that agreement in response
  - 7th May 2018 (after initial time for determination had expired): the applicant's solicitors wrote to the authority (opportunistically?) saying since there was no "*expression of agreement to an extension of time … [there] was therefore no written agreement to extend time*"

Gluck v SSHCLG

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- Newey LJ was in the minority. He held at [38] that there must be something in writing from both the applicant and the Council confirming the agreement, even if the agreement was made orally
- Hickinbottom LJ and Henderson LJ disagreed with Newey LJ. They were keen to avoid unnecessary complication, and to maintain planning as a flexible process, without excessive rigidity or formula. At [51]:

"… article 7(c) requires no more than for the agreement to be evidenced in writing, and I would not be minded to put a gloss on it … Consequently, if (for example) an applicant and an authority orally agree to an extension, and that agreement is acknowledged in writing by the applicant, the applicant could not then, in the absence of something in writing from the authority, say that deemed planning permission had been granted under the GPDO by the effluxion of the unextended period…"

Smolas v Herefordshire Council

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- Two principal issues:
  - Upon receipt of an application for determination of whether prior approval is required, is it lawful for a planning authority to determine whether the proposed development satisfies the definitional requirements of the permitted development class in issue, or is the local authority limited to considering the prior approval issues?
  - Did the Council's decision that the definitional requirements were not met amount to an impermissible reversal of the burden of proof and/or had the applicant provided sufficient information in any event?
- Part of the Council's response to the JR claim was that the claimant had an alternative remedy in the form of an appeal to the Secretary of State against the refusal of prior approval. PINS agreed, but the JR continued…

Smolas v Herefordshire Council

Landmark Chambers

- What is meant by definitional requirements? ***Smolas*** was concerned with an application whether prior approval was required for a proposed agricultural building, under Schedule 2, Part 6 of the GPDO
- Class A of Part 6 permits the erection of buildings "*which are reasonably necessary for the purposes of agriculture within that unit*"
- Paragraph A.2 provides for the conditions applicable to this class, and includes that before beginning development an application must be made to the local authority for a determination as to whether prior approval will be required for the "*siting, design and external appearance of the building*"
- The Council refused the application not for an prior approval reasons (i.e. siting, design, external appearance), but instead because it was not satisfied that the particular building proposed was "*reasonably necessary for the purposes of agriculture within that unit*"

Smolas v Herefordshire Council

Landmark Chambers

- The Claimant's argument, quite simply, was that refusing prior approval on the basis that definitional requirements were not satisfied was outside the Council's powers. If it thought that the definitional requirements were not met, then it could express a view to that effect, but it could not refuse the prior approval application on that basis.
- If the Council expressed such a view, the applicant could seek a lawful development certificate to resolve the issue, and if it did not do that but instead relied on the prior approval and proceeded with development, then the Council could take enforcement action.
- Reliance was placed on the High Court's decision in ***Marshall***, which sought to apply the Court of Appeal's decision in ***Keenan***

Smolas v Herefordshire Council

Landmark Chambers

- ***Keenan*** was also about Part 6, but about a hard core track. The local authority failed to make a determination in response to the prior notification application, meaning that prior approval was deemed to be granted
- The argument made by the Claimant was that meant he was authorised to build the hard core track. The Court of Appeal rejected that argument. It held at [36] that the GPDO does not "*confer upon the authority a power to grant planning permission for development outside the defined class of permitted development*"
- Part of the Court's reasoning was that the provisions in the GPDO relating to prior approval (i.e. those in paragraph A.2 Conditions) "*do not expressly, or implicitly, engage any other question, such as whether the development is "reasonably necessary", respectively, for the purposes of agriculture within the agricultural unit*"

Smolas v Herefordshire Council

Landmark Chambers

- ***Marshall*** considered and applied ***Keenan***. The Court accepted the local authority's argument that the effect of ***Keenan*** was that "*a local planning authority does not have power under the prior approval provisions of the GPDO, or indeed any other provision of the GPDO, to determine whether or not the proposed development comes within the description of the relevant class in the GPDO*": at [44].
- What if a local authority thought the definitional requirements were not met? The applicant could apply for a lawful development certificate, and if the applicant did not do so, the local authority could take enforcement action.
- Compared to simply refusing the prior approval application, these approaches involve extra costs and resources and involve greater risk of unauthorised development taking place

Smolas v Herefordshire Council

Landmark Chambers

- ***New World Payphones*** is the next in time judgment. It did not consider ***Marshall***, but it did consider and apply ***Keenan***
- In substance, ***Payphones*** confirmed that the statements in ***Keenan*** about the prior approval provisions not expressly or implicitly engaging any other question were confined to the stage when an authority is actually considering the prior approval questions, for example, of siting, design and external appearance
- Remember that ***Keenan*** was a non-determination and so deemed approval case
- ***Keenan*** did not purport to decide whether the definitional requirements could never be considered when an application is made to a local authority for determination as to whether prior approval is required

Smolas v Herefordshire Council

Landmark Chambers

- *Per* Hickinbottom LJ, at [49]:

"… In Keenan (at [36]), Lindblom LJ said that an application to a local planning authority for a determination as to whether its "prior approval" would be required does not impose on the authority a duty to decide whether the proposed development is in fact permitted development under the GPDO. But the thrust of that paragraph of Lindblom LJ's judgment was that, by requiring a developer to seek prior approval limited to restricted planning issues, that did not confer upon the authority a power to grant planning permission for development outside the defined class of permitted development. On an application to an authority for a determination as to whether its "prior approval" is required, then the authority is bound to consider and determine whether the development otherwise falls within the definitional scope of the particular class of permitted development."

Smolas v Herefordshire Council

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- ***Smolas*** – judgment handed down 21st June 2021; also judgment of Lang J (who was the judge in ***Marshall***)
- On issue 1, the Claimant relied upon (a) the statement in ***Keenan*** that considering prior approval did not engage any other issues, (b) the judgment in ***Marshall*** and (c) that ***New World Payphones*** could be distinguished since it was concerned with a different part of the GPDO
- All arguments were rejected and the Court applied ***New World Payphones***. A local authority is required to consider definitional requirements. Much like in ***Gluck***, the common sense of this outcome won through

Smolas v Herefordshire Council

- Issue 2 turned on the particular facts. There are two matters of note: (1) the application form used by the Council was the standard form from the Planning Portal, which sought information about whether the building was reasonably necessary (i.e. the definitional requirement), and (2) PINS had confirmed that the whole dispute could have been resolved on an appeal, so the JR was unnecessary
- The final word? The Court of Appeal has refused permission to appeal. Coulson LJ held the Court was bound by ***New World Payphones***. But anyway that the Claimant's arguments were contrary to common sense: there "*would be no purpose in requiring a local planning authority to grant prior approval … when that proposed development did not meet definitional requirements*"

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Planning Act 2008 challenges: the last year

Richard Turney

Introduction

- Busy year for infrastructure related challenges in the Courts
- Both policy-making and NSIP decision-making under scrutiny
- Trend may well continue: is the system starting to be more exposed to challenge?

Policy-making

- R (Friends of the Earth) v Heathrow Airport Ltd [2020] UKSC 52
- R (Transport Action Network) v SST [2021] EWHC 2095 (Admin)
- More in the pipeline…

Heathrow

- Challenge to Airports NPS reached Supreme Court in October with judgment given in December 2020

- Appeal was brought by HAL after SST decided not to appeal against the Court of Appeal's findings that the Airports NPS had been adopted unlawfully

- Central issue was a point of public law which ultimately turned on the facts of the case: the Secretary of State *had* considered whether the Paris Agreement should be taken into account in deciding whether to designate the NPS, and concluded he did not need to for rational reasons

Heathrow: key findings

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- The “government policy” on climate change in s 5(8) PA 2008 is found in formal statements of policy, not in a trawl of Hansard, and the ratification of Paris was not a statement of government policy for these purposes

- The duty in s 10 PA 2008 to make NPSs “with the objective of contributing to the achievement of sustainable development” did not make the Paris agreement a mandatory material consideration: it was a matter which the S/S was entitled to take into account or which he was entitled, in his discretion, to treat as not requiring separate consideration

- The same was true of the duties under the SEA Directive: the adequacy of the consideration of climate change obligations was a matter for him.

Heathrow: consequences

- See Joel Semakula's talk

- For the NPS regime:
  - Affirms relatively broad discretion on these matters, with compliance to be assessed on normal public law principles
  - Request for s 6 PA 2008 review of ANPS rejected and that decision not challenged
  - However, no doubt more to come on this topic, including "Jet Zero" (consultation concluded in September)

Transport Action Network

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- Not a challenge to an NPS but to the Road Investment Strategy 2
- Set pursuant to a statutory duty in Infrastructure Act 2015 which includes a duty to consider effect on the environment
- The Paris Agreement was not a mandatory material consideration for those purposes
- Matter of judgment as to how far to consider the environmental consequences of road investment: this was not the place to consider the overall effect of the strategic road network on climate change

Policy challenges: what next?

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- Note emerging policies across a range of areas including the Energy NPS "suite"
- Possibility of challenge to those emerging policies
- Note also the threat of challenging the failure to review the energy suite
- CCC advice, and CCA targets and budgets, likely to be more important for these purposes than international agreements

DCO challenges

- Rush of decisions being quashed in past year after many years without a single DCO being quashed
- Manston Airport DCO quashed by consent
- Norfolk Vanguard DCO quashed: Pearce [2021] JPL 1229
- A303 Stonehenge DCO quashed: Save Stonehenge [2021] EWHC 2161 (Admin)

Pearce – Norfolk Vanguard

- Vanguard was proposed to share onshore infrastructure location with Boreas scheme, which was the subject of a subsequent application
- S/S decided that the information regarding Boreas was “limited” and therefore the effects of that scheme should be assessed in the context of that application, and not as cumulative effects with the Vanguard scheme
- Holgate J found that there was a breach of Infrastructure Planning (EIA) Regulations 2009 by failing to have regard to the cumulative effects
- It was irrational not to consider the cumulative effects of Boreas and the reasons for failing to do so were legally inadequate

Stonehenge

Landmark Chambers

- Decision found to be unlawful on several grounds following disagreement with ExA recommendation
- S/S failed to take into account the effect on all heritage assets in departing from the ExA's recommendation
- S/S failed to consider all alternatives, taking an unlawfully narrow view in light of the harm to the World Heritage Site
- Rejected other grounds including reasons and failures to take into account various local policies

But not all bad news for Secretaries of State…

- EFW Group Ltd [2021] EWHC 2697 (Admin)
  - Split decision challenged by applicant
  - Held: misdirection on approach to s 104/105 but made no difference to outcome

- ClientEarth [2021] PTSR 1400
  - Court of Appeal upheld High Court finding that Drax repowering DCO decision was lawful

Conclusions

- Key risks for decision-making
- Likelihood of further challenges

Landmark Chambers

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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