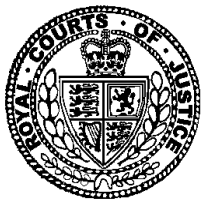

Neutral Citation Number: [2022] EWCA Civ 1304

Case No: CA-2021-003175

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
(PLANNING COURT)
MRS JUSTICE THORNTON
[2021] EWHC 3047 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06 October 2022

Before:

SIR KEITH LINDBLOM
(SENIOR PRESIDENT OF TRIBUNALS)
LORD JUSTICE HOLROYDE
(VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION))
and
LORD JUSTICE COULSON

- -

Between:

ARNOLD WHITE ESTATES LTD. — **Appellant**

– and –

THE FORESTRY COMMISSION — **Respondent**

- -
- -

David Elvin K.C. and **David Hercock** (instructed by **Gosschalks LLP**) for the **Appellant**
Zack Simons and **Anjoli Foster** (instructed by the **Treasury Solicitor**) for the **Respondent**

Hearing date: 28 June 2022

- -

Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be not before 4pm on Thursday 6 October 2022

The Senior President of Tribunals:

Introduction

1. When a notice has been issued by the Forestry Commission under section 24 of the Forestry Act 1967 for a breach of restocking conditions on a felling licence which has been relied upon as authorising the felling of trees on a site, what is the effect on that notice if planning permission is subsequently granted for a development whose construction would make it impossible to comply with those conditions? That question arises in this case.

2. With permission to appeal granted by Lord Justice Lewison, the appellant, Arnold White Estates Ltd., appeals against the order of Mrs Justice Thornton dated 4 November 2021 by which she refused a renewed application for permission to apply for judicial review of a "decision" of the respondent, the Forestry Commission, said to be contained in a letter dated 1 April 2021. The "decision", it is said, was the Forestry Commission's determination of the "legal position" under section 24 of the 1967 Act: that a planning permission cannot be acted upon if to do so would make it impossible to comply with the conditions on a notice issued under that provision, that planning permission does not remove the requirements of an extant and implemented felling licence, and that the Forestry Commission does not have the power to amend or withdraw such a notice once it has been issued.

3. Arnold White Estates contends that the Forestry Commission acted unlawfully in maintaining a section 24 notice it had issued on 28 July 2020 to enforce compliance with restocking conditions on a felling licence granted in October 2018 for woodland at Ilford Park, near Newton Abbot in Devon. Outline planning permission for mixed use development on the land had been granted in June 2016. A further planning permission, for an access road and drainage works, was granted in September 2020.

4. The claim for judicial review was issued on 18 June 2021. Permission to apply was refused on the papers on 13 August 2021 by Sir Ross Cranston, sitting as a deputy High Court judge. He found the claim to be "out of time", and that it must fail for that reason alone. But he would otherwise have refused the application for permission on its merits. Refusing the renewed application, Thornton J. also held that the claim was "out of time". And she too went on to reject all three grounds of claim as unarguable.

5. Permission to appeal was granted on three of the six grounds in the appellant's notice (grounds 1, 2 and 3). Lewison L.J. also ordered that the case be retained in this court.

The main issues in the appeal

6. Two issues arise. First, was the claim brought too late, so that it should be dismissed for that reason in any event (grounds 1 and 2)? And secondly, if not, did the Forestry Commission act unlawfully in maintaining the section 24 notice (ground 3)?

The statutory framework

7. Charles Mynors' authoritative textbook "The Law of Trees, Forests and Hedges" (second edition, 2011) explains in Chapter 18, "Felling Licences", that the control of felling was introduced during the Second World War "as a means of ensuring a strategic reserve of standing timber – which was … vital for the war effort", but that "[the] policy behind the legislation has changed dramatically" since its inception. In *R. (on the application of Grundy & Co. Excavations Ltd.) v Halton Division Magistrates' Court* [2003] EWHC 272 (Admin.) the Divisional Court said (at p.103C) that the Forestry Act 1967 is "concerned with an issue of public concern, namely the preservation of the country's natural heritage". Mynors observes that "the felling licence regime … is now aimed at preserving and enhancing the amenity provided by woodlands and forests …".

8. The statutory role of the Forestry Commission is described in section 1 of the 1967 Act. As the "appropriate forestry authority" in England (section 1(1A)), it is "charged with the general duty of promoting the interests of forestry, the development of afforestation and the production and supply of timber and other forest products" (section 1(2)). Its duties include "promoting the establishment and maintenance … of adequate reserves of growing trees" (section 1(3)). It must "endeavour to achieve a reasonable balance between … (a) the development of afforestation, [and] the management of forests, and … (b) the conservation and enhancement of natural beauty and the conservation of flora, fauna and geological or physiographical features of special interest" (section 1(3A)).

9. In Part II of the 1967 Act, "Power to Control Felling of Trees", section 9, "Requirement of licence for felling", provides:

> "(1) A felling licence granted by the appropriate forestry authority shall be required for the felling of growing trees, except in a case where by or under the following provisions of this Part of this Act this subsection is expressed not to apply.
>
> …
>
> (4) Subsection (1) above does not apply to any felling which –
>
> (a) is for the prevention of danger or the prevention or abatement of a nuisance;
>
> (b) is in compliance with any obligation imposed by or under an Act of Parliament, including this Act;
>
> (c) is carried out by, or at the request of, an electricity operator, because the tree is or will be in such close proximity to an electric line or electrical plant which is kept installed or is being or is to be installed by the operator as to have the effect mentioned in paragraph 9(1)(a) or (b) of Schedule 4 to the Electricity Act 1989;
>
> (d) is immediately required for the purpose of carrying out development authorised by planning permission granted or deemed to be granted under

> the Town and Country Planning Act 1990 or the enactments replaced by that Act.
>
> …".

10. Section 10, "Application for felling licence and decision of Commissioners thereon", states:

> "(1) An application for a felling licence may be made to the appropriate forestry authority … by a person having such an estate or interest in the land on which the trees are growing as enables him, with or without the consent of any other person, to fell the trees.
>
> (2) Subject to the provisions of this Act … , the appropriate forestry authority may on any such application grant the licence, or grant it subject to conditions, or refuse it, but shall grant it unconditionally except in a case where it appears to them to be expedient to do otherwise –
>
> (a) in the interests of good forestry or agriculture or the amenities of the district, or
> (b) for the purpose of complying with [its] duty of promoting the establishment and maintenance of adequate reserves of growing trees.
>
> …".

11. Section 12, "Conditional licences", provides:

> "(1) The conditions which may … be attached to a felling licence are such as the appropriate forestry authority, after consultation with the applicant for the licence, determine to be expedient for securing –
>
> (a) the restocking or stocking with trees of the land on which the felling is to take place, or of such other land as may be agreed between the appropriate forestry authority and the applicant, and
>
> (b) the maintenance of those trees in accordance with the rules and practice of good forestry for a period not exceeding ten years.
>
> …".

12. Section 15, "Trees subject to preservation order under Planning Acts", provides that where the Forestry Commission proposes to grant a felling licence for a tree to which a tree preservation order relates, it must "give notice in writing to the authority by whom the order was made" (subsection (1)(a)), and "may in any case refer the application to the … authority" (subsection (1)(b)). Where the authority objects to the felling, the matter is to be referred to the Minister, and "the application shall then be dealt with under the Town and Country Planning Acts". If the Minister consents to the felling, no felling licence will be required (subsection (2)). Where an application is referred under subsection (1)(b), it "shall be dealt with under the Town and Country Planning Acts" (subsection (3)(a)) and "so long as the tree preservation order applying to the trees remains in force, section 9(1) shall not apply so as to require a

felling licence for the felling of any trees to which the application relates" (subsection (3)(b)).

13. Section 16, "Review of refusal or conditions of licence", enables the decision of the Forestry Commission on an application for a felling licence to be "reviewed where they refuse to grant a felling licence or grant it subject to conditions" (section 16(1)). A "person aggrieved by the refusal or conditions may by a notice served within the prescribed time and in the prescribed manner request the Minister … to refer the matter to a committee appointed in accordance with section 27" and "the committee … shall … make a report on the reference to the Minister" (section 16(2)). The Minister "shall, after considering the committee's report, confirm the decision of [the Forestry Commission] on the application, or reverse or modify that decision and direct [the Forestry Commission] to give effect to the reversal or modification" (section 16(3)).

14. Under section 17(1), felling "without the authority of a felling licence" is a criminal offence. Section 17A gives the Forestry Commission a power to serve a restocking notice on a person who carries out unauthorised felling. Section 17B provides for appeals against such restocking notices, which are to be determined by the Minister. It gives the Minister a power to "direct the appropriate forestry authority to withdraw the notice or to notify the objector that it shall have effect subject to such modification as the Minister shall direct" (section 17B(2)).

15. Section 18 gives the Forestry Commission the power to make "felling directions". Section 20, "Review of felling directions", allows a person aggrieved by a felling direction, on the ground that the felling is not expedient, to request the Minister to refer the matter to a committee (section 20(1)). The committee is then to report to the Forestry Commission, which "shall confirm, withdraw or modify the directions in accordance with the report" (section 20(2)).

16. Section 24, "Notice to require compliance with conditions or directions", provides:

> "(1) The provisions of this section shall apply if –
>
> (a) any works required to be carried out in accordance with conditions of a felling licence are not so carried out; or
>
> (b) any felling directions given by the appropriate forestry authority are not complied with.
>
> (2) The appropriate forestry authority may give to the person responsible a notice requiring such steps as may be specified therein to be taken within such time (not being less than the prescribed period after the notice has become operative) as may be so specified for remedying the default; and for purposes of this subsection, "the person responsible" is –
>
> (a) in the case of non-compliance with conditions of a felling licence, the person specified in subsection (2A); and
>
> (b) in the case of non-compliance with felling directions, the owner of the trees.

(2A) The person referred to in subsection (2)(a) is –

(a) where the licence relates to land in England and Wales –
(i) the applicant for the licence, if on the date the notice is served he has such estate or interest in the land as is referred to in section 10(1) of this Act; or
(ii) in any other case, the owner of the land

…

(3) If after the expiration of time specified in the notice any steps required by the notice have not been taken, the appropriate forestry authority may, subject to the following section, enter on the land and take those steps.

(4) Without prejudice to the powers of the appropriate forestry authority under the foregoing subsection, a person who without reasonable excuse fails to take any steps required by a notice given to him under this section shall be guilty of an offence and be liable on summary conviction to a fine not exceeding level 5 on the standard scale, and proceedings in respect of such an offence may be instituted within six months of the first discovery of the offence by the person taking the proceedings, provided that no proceedings shall be instituted more than two years after the date of the offence.

…".

17. Section 25, "Appeal against notice under s. 24", provides:

"(1) If a person to whom a notice under section 24 is given claims –

(a) that the works in question have been carried out in accordance with the conditions of the felling licence or, in the case of felling directions, that they have been complied with; or

(b) that the steps required by the notice to be taken are not required by the conditions or directions,

he may by a notice served on the Minister where the notice is given in respect of land or trees in England or Wales, in the prescribed manner and within the prescribed period after the receipt of the notice under section 24, request the Minister to refer the matter to a committee appointed in accordance with section 27 below.

(2) A notice under section 24 shall be inoperative until the expiration of the prescribed period for the purposes of subsection (1) above and, where a request to the Minister under that subsection is made, until the conclusion of any proceedings under this section in pursuance of the request.

(3) Where such a request is made by a person receiving a notice under section 24, the Minister shall, unless he is of opinion that the grounds for the request are frivolous, refer the matter accordingly to a committee so appointed.

(4) The committee to whom a matter is referred under this section, after complying with section 27(3), shall make a report on the reference to the

> Minister … who shall, after considering the report, confirm or cancel the notice to which the reference relates."

Such an appeal must be made within three months of the receipt of the section 24 notice.

The Forestry Commission's guidance

18. In the Forestry Commission's guidance document entitled "Tree felling – Getting permission", published in 2020, section 1.1 states:

> "Important background:
>
> 1.1 Once a felling licence has been issued it cannot be withdrawn. And once tree felling has started a felling licence cannot be amended."

19. Section 2.7 states:

> "2.7 Development
>
> An exception applies where the felling of trees is immediately required for the purpose of carrying out development that is authorised by the approval of full planning permission … . The approved planning permission will detail the extent of the approved development and may also define the trees that are allowed to be felled or those that must be retained. Any tree felling outside that boundary will require a licence.
>
> The development exception can relate to individual or groups of trees or woodland, and for trees to be exempt from the need for a felling licence at least one of the following conditions must be met:
>
> - trees must be explicitly identified in the planning consent as being permitted for removal;
> - the trees must stand within the footprint of the proposed development; or
> - the removal of the trees must be necessary in order to carry out the development (e.g. they block an access route to which there is no alternative, or lie in such close proximity to the proposed development that they prevent the carrying out of that development).
>
> The exception does not simply extend to all trees within the boundary of the fully approved proposed development.
>
> Outline planning permission: This status is not sufficient to demonstrate that the felling of trees is immediately required for the purposes of development. A felling licence will be required in these circumstances, unless another reason for exception applies.
>
> …".

20. Under the heading "Restocking conditions after felling", section 6.5 of the guidance document refers to the Government's "general policy against deforestation – the permanent removal of trees or woodland without replanting or regeneration", which is "principally to ensure that woodland cover and timber supply are safeguarded for future generations". It says that "[restocking] conditions will, therefore, normally be included on felling licences … , other than those for areas to be thinned …". Section 6.5.1, under the heading "Felling conditions", states that "[felling] conditions are applied to ensure … that replanting or regeneration of the felled area is undertaken in an identified location; and … that the trees are maintained and encouraged for a period not less than 10 years". Section 6.6, under the heading "How long will your felling licence last?", says that "[a] felling licence will usually contain permissions to fell trees for five years", that "a felling licence associated with a Forestry Commission approved woodland management plan is valid for 10 years", but that "[the] restocking and maintenance conditions of the licence can last much longer than this". Section 6.6.1 says that "[once] trees covered by the felling licence are felled, the associated restocking conditions must be implemented and maintained in order to achieve full regeneration of felled areas".

21. The Forestry Commission has also published guidance online, entitled "Planning applications affecting trees and woodland", which was last revised in April 2020. This states, under the heading "Felling trees on development sites":

> "You need a felling licence from the Forestry Commission to fell trees, unless an exemption applies. Full planning permissions, where standing trees would impede the approved development, do not need to directly specify the trees to be felled in their application. However, where there's a desire to remove standing trees, and those trees are not, for example, within the approved footprint of a structure to be constructed, then those trees would need to be explicitly referenced in the planning application and permission in order to allow for their legal felling. Don't assume that all trees included within the 'red line' of an application are implicitly allowed to be felled.
>
> Outline planning permission doesn't provide an exemption to the regulations that control tree felling in the Forestry Act 1967. This is because, until the reserved matters have been addressed and discharged by your local planning authority, your development may not proceed. Consequently there's no immediate requirement for the tree felling under the planning consent."

The outline planning permissions

22. On 24 January 2013 Teignbridge District Council, as local planning authority, granted outline planning permission for the development of a trunk road service area, a hotel and a restaurant on the land.

23. On 1 June 2016 the council granted a further outline planning permission, for a "mixed use development comprising B2 and B8 employment development (with ancillary B1 office); restaurant/public house; and residential development (including demolition of existing dwellings at Gaverick Court) together with associated landscaping, play space, drainage, car parking and access (amendment to

11/02555/MAJ). Approval sought for access". That outline planning permission was granted subject to 28 conditions. Condition 1 required the approval of reserved matters, namely the "layout, scale, appearance of the buildings and landscaping (in respect of landscaping details not otherwise included within this permission)" to be obtained for each phase of the development "before any development of that phase is commenced". Condition 2 stated that "[applications] for the approval of reserved matters for each phase shall be made to the Local Planning Authority before the expiration of five years from the date of this permission". Condition 4 required the development to be "carried out in accordance with the plans and documents listed below …", which included an "Illustrative Masterplan", a "Vegetation Removals Plan", an "Advance Vegetation Protection Fencing Plan" and a "Woodland Management Plan". The "Illustrative Masterplan" showed the development plots. The "Vegetation Removals Plan" also indicated the removal of trees in those areas, as well as woodland that was to be enhanced and managed. Other conditions, including conditions 23, 25, 26 and 28, required, before development was commenced or the removal of trees on the site undertaken, the submission and approval of details relating to the felling, protection and planting of trees, in the interests of visual amenity, local amenity and biodiversity.

The meeting on 6 June 2018

24. On 6 June 2018 representatives of Arnold White Estates met officers of the Forestry Commission on the site to discuss the application for a felling licence. A note of that meeting was prepared by Arnold White Estates' representatives, but it seems that this was not sent to the Forestry Commission, and the accuracy of some of its content, both as a record of what was said and as a statement of the law, is in dispute. One of the disputed passages says, without attributing the statement:

> "3.1 … There is no requirement to undertake work agreed under a felling licence, but once implemented there is a need to replant. However, a planning permission which then comes into force overrides the need to replant."

The felling licence granted on 19 October 2018

25. Early in 2018 Arnold White Estates made an application to the Forestry Commission for a felling licence for the clearing and thinning of trees on the site. In the application form it was stated that "the area of trees to be clear felled is 10.4 ha providing 2377m³ timber and the area to be thinned is 13.49 ha providing approximately 127.8m³ timber". Detailed proposals for restocking were presented with the application.

26. The felling licence was granted on 19 October 2018. It stated:

> "This licence gives you permission under section 10 of the Forestry Act 1967 as amended to fell the trees described in Part 1 and shown on the attached map.

> Tree felling under this licence has been approved by the Forestry Commission as being in accordance with government policy for the sound management of a renewable resource.
>
> This licence expires on: 19 Oct 2019
>
> … ."

Part 1 described the trees in specified areas which could be thinned or clear felled. Part 2 set out two "restocking conditions" applying to the licensed felling:

> "1. Before 30th June 2020 the land on which the felling took place must be:
>
> a. suitably prepared for restocking
>
> b. Planted with 40% birch (downy/silver) 20% woody shrubs 20% pedunculate/common oak 15% rowan 05% beech to achieve not less than 2000 stems per hectare evenly distributed over the site.
>
> 2. For a period of 10 years from the planting:
>
> a. The plants must be protected against damage and be adequately weeded.
>
> b. Any failure or losses should be replaced as necessary to provide a stocking of not less than 2000 stems per hectare evenly distributed over the site.
>
> c. Any replanting must be maintained in accordance with the rules and practice of good forestry."

Those conditions related to areas 1c (Pitts Plantation) and 2b (Gaverick Copse), shown on the "Operations Map" and the "Restocking Map" attached to the licence, which included the parts of the site on which development was permitted under the outline planning permission of 1 June 2016.

27. Accompanying the licence was a letter from the Forestry Commission, dated 19 October 2018, which stated that "… it is the responsibility of the owner to ensure that conditions are met by the required date(s) specified in the Licence".

The section 24 notice of 28 July 2020

28. After the outline planning permission of 1 June 2016 had been granted, Arnold White Estates did not seek the necessary reserved matters approvals. Relying on the felling licence granted on 19 October 2018, it proceeded, between November 2018 and February 2019, to fell trees on the site with a view to selling cleared plots, for which submissions of reserved matters would later be made by the purchasers. It did not, however, comply with the restocking conditions.

29. On 28 July 2020, some four weeks after the deadline for restocking set by condition 1, the Forestry Commission issued and served on Arnold White Estates a notice under

section 24 of the 1967 Act. The letter enclosing the notice said the site had been inspected on 3 July 2020 by a Woodland Officer, who had found that the required "restocking in compartments 1c and 2b" had not been undertaken. The notice required Arnold White Estates to take the steps specified in the "Schedule of Works", which were, in effect, to comply with the restocking conditions on the felling licence within a period of 15 months – before 28 October 2021. The "Notes" attached to the notice referred to the provisions for appeal under section 25 of the 1967 Act, and to the consequences which might follow from a failure to comply with the notice, stating among other things that "[failure] to take the steps required by this notice may constitute an offence under Section 24(4) of [the 1967 Act] involving liability on summary conviction to a fine equivalent to level 5 on the standard scale".

30. No appeal was made against the section 24 notice under section 25.

31. We were told that some restocking has now been undertaken on the site, within the areas to which the section 24 notice applies.

The planning permission granted on 14 September 2020

32. On 14 September 2020 the council granted full planning permission for the construction of an "[access] road from Trago Mills Road including a footway, cycleway, emergency access and strategic Sustainable Drainage Systems". The application for planning permission had been submitted to the council in April 2019. The "Planning Application Site Infrastructure Boundary" plan showed the overlap of the proposed development with those parts of the site in which felling had by now taken place. In the planning officer's delegated report on the proposal, which recommended "conditional approval", the officer recorded, as one of the responses to consultation, the response of the "Tree Officer" that "[there] are no arboricultural objections to the proposal as the majority of the site has now been clear felled".

33. Condition 2 on the planning permission required the development to be carried out in accordance with the approved drawings and documents, which included the "Pitts Plantation & [Gaverick] Copse Infrastructure Works Proposed Utilities" plan, the "Design and Access Statement", "Drawing Numbered NPA 10443 524 Rev B – Ilford Park – Planting Plan – Highways and Infrastructure. Detail Sheet 4 of 5" and the "[Gaverick] Copse Drainage Works Woodland Management Plan". Condition 9 required that "[a] corridor of no less than 15m total depth comprising broadleaf woodland and existing conifer plantation shall remain in situ along the southern boundary bat corridor as identified on landscaping and section plan ref NPA 10443 524 Rev B. Planting Plan – Highways and Infrastructure, Detail Sheet 4 of 5 …". Section 3.1 of the "Design and Access Statement", under the heading "Existing Vegetation Removal", stated that "[to] facilitate the proposed works, there will be the requirement to fell some minimal areas of existing broadleaved and coniferous woodland whilst in other areas … the works are located within areas where the coniferous plantations have already been felled under a Forestry Commission felling licence", and "[the] proposed felling areas are designed to allow the necessary width to construct the proposed works and … any ground levels to be graded to the existing levels".

The correspondence between Arnold White Estates and the Forestry Commission

34. On 13 January 2021 solicitors acting for Arnold White Estates sent a letter to the Forestry Commission, seeking confirmation that "the obligation to re-stock pursuant to the Licence has been superseded and is no longer enforceable". Referring to the proposed felling on the site and the outline planning permission granted in June 2016, they acknowledged that, "[as Arnold White Estates] had only been granted outline planning permission at this stage and the reserved matters had yet to be approved, such felling was not authorised pursuant to the permission and it was necessary for [Arnold White Estates] to obtain a felling licence to ensure that the proposed felling could be carried out lawfully". They referred to the felling that had taken place on the site "pursuant to the September 2020 detailed planning consent", and went on to say:

> "On 28th July 2020, a Restocking Enforcement Notice was served by you on [Arnold White Estates] alleging that [it] had not complied with its restocking obligation in relation to the trees felled in accordance with the Licence. The trees felled in those areas fall within the footprint of the permitted developments and require removal to enable those developments to be carried out in accordance with the permission.
>
> Given [Arnold White Estates'] desire to implement, as soon as they are able, the September 2020 detailed consent to provide roads and services within the site, and thus facilitate the subsequent detailed planning of the individual phases/plots, then it seems to us that the requirement to restock those areas covered by the felling licence is redundant. We should point out that we would expect [Teignbridge District Council] to consider landscaping requirements arising from subsequent reserved matters applications for the individual phases and in the circumstances, we would be grateful if you could please confirm that the Enforcement Notice will now be withdrawn."

35. On 15 January 2021 the Forestry Commission's "Regulations Manager", Ellie Littlejohn, responded, stating:

> "…
>
> Your client should be made aware that planning permission granted by the local planning authority for the same area as a Conditional felling Licence, Restocking or Enforcement Notice (served under section 17A or 24 of the Act respectively) does not remove the duties contained within a Felling Licence or Notice. I.e. while planning permission may make the development of the site lawful, it does not make non-compliance with the Licence or Notice lawful. The Town and Country Planning Act 1990 has no provision which neuters or overrides Felling Licences or Notices served under the Forestry Act. However, this does not prevent the local planning authority from granting planning permission if it is so minded.
>
> Your client should also be aware that if they, or any subsequent owner of the land, enact planning permission which renders it impossible to comply with the conditions of the Enforcement Notice, the Forestry Commission will not accept this is a reasonable excuse for non-compliance and will seek the appropriate enforcement action in relation to that non-compliance.

> Failure to comply with an Enforcement Notice may constitute an offence under section 24(4) of the Forestry Act 1967, involving a summary conviction and an unlimited fine. …
>
> …
>
> With the above in mind, I can confirm that Enforcement Notice EN03/20-21 is correct and remains in effect.
>
> …" (original emphasis).

36. On 28 January 2021 the Chief Executive of Arnold White Estates, Robert Williams, wrote to the Chief Executive of Forestry England, Michael Seddon, expressing his desire to "avoid future abortive time and costs, by agreeing that the Forestry Commission will not seek to enforce the restocking requirement".

37. On 16 February 2021 Ms Littlejohn responded to Mr Williams' letter to Mr Seddon, stating:

> "…
>
> Neither the Forestry Act 1967 (from which felling licences and enforcement notices are derived), nor the Town & Country Planning Act 1990, or any other legislation for that matter, provides for planning permission to supersede the conditions of the felling licence. Planning permission allows development to be carried out in such a way so as not to breach planning law. It has no bearing on the validity of felling licence or enforcement notice conditions that may apply to the land in question.
>
> The enacting of planning permission is also entirely voluntary. This is in contrast to the conditions of a felling licence or enforcement notice, which place a legal duty upon someone; i.e. compliance with those conditions is not voluntary. Absent any statutory provision allowing for planning permission to override the duties contained in a felling licence or enforcement notice, those duties must prevail even if planning permission is granted. I am afraid that if you have been advised otherwise, that advice was given in error.
>
> In alignment with Government policies, given the climate and nature emergencies we are currently responding to, the Forestry Commission plays an important role in the drive to plant more trees, particularly in our towns and cities, and to create more woodland cover across England. As such the Forestry Commission cannot lightly agree to a net loss of woodland cover, however, small, even if planning consent is obtained.
>
> With the above in mind, I can confirm the information I provided on the 15th January 2021 is correct, and that Enforcement Notice EN03/20-21 remains in effect, and that the Forestry Commission will not accept planning consent as a reasonable excuse for non-compliance. In the event of non-compliance with the Notice, the Forestry Commission may seek to take enforcement action."

38. On 3 March 2021 Mr Williams wrote to the Chair of the Forestry Commission, Sir William Worsley, stating:

> "Given my very clear statement of intent to ignore the restocking and maintenance requirements and Ms Littlejohn's directions, you may wish to seek an injunction or a court order against us. I would take any failure to put the matter before the courts as confirmation that you accept our position in this matter and that maintenance of the areas that have already been restocked (an action that I have taken at considerable cost to save both parties' legal fees) will be seen to be unnecessary."

39. On 1 April 2021 James Murdoch, the "National Regulations Team Manager" of the Forestry Commission responded to Mr Williams, stating:

> "…
>
> I can confirm that the legal position set out in Ms Littlejohn's correspondence of 16 February 2021 is accurate. There is no statutory position that allows for the legal duties contained within an Enforcement Notice served under the Forestry Act 1967 to be set aside in any way by the granting of planning permission.
>
> I should also note that the Forestry Commission does not have the statutory power to amend or revoke an Enforcement Notice once it has been served.
>
> … Any decision by the Forestry Commission to instigate a criminal investigation in relation to non-compliance with an Enforcement Notice is reserved until after the expiry of that Notice and an inspection of the site has been undertaken by the Commission. I can also confirm that, following a criminal investigation, the decision to initiate proceedings rests with the Crown Prosecution Service, not the Forestry Commission. …
>
> As I have noted, the Commission will reserve taking a decision on whether to escalate this matter until after the compliance date stated within the Notice – 28 October 2021 – and a subsequent inspection. Only at this point will the Commission determine if it is appropriate to commit resources to a criminal investigation.
>
> I note your invitation to seek an injunction against you. The Commission does not consider this to be a good use of public funds, particularly as the situation has been made clear to you in this, and other, correspondence on behalf of the Commission. This does not amount to an acceptance of your position in this matter. As I have noted, a decision on this has yet to be made."

40. On 21 May 2021 Arnold White Estates' solicitors sent to the Forestry Commission a letter before claim, to which the Forestry Commission responded on 3 June 2021.

41. On 1 June 2021 Arnold White Estates submitted applications for approval of reserved matters approval, to comply with condition 2 on the 2016 outline planning permission.

The claim for judicial review

42. The claim for judicial review was issued on 18 June 2021. In section 3 of the claim form "Details of the decision to be judicially reviewed", the subject of the challenge was described in this way:

> "The decision communicated by way of letter dated 1 April 2021 from Mr James Murdoch … , which stated that:
>
> > 1. The legal position as set out previously by Ellie Littlejohn was accurate i.e. that planning permission cannot be enacted by the Claimant, or any subsequent owner of the site, where it would render it impossible to comply with the conditions of the notice served under section 24 of the Forestry Act 1967 and that the enacting of planning permission does not remove the duties contained in a felling licence or an enforcement notice; and
> >
> > 2. The Defendant does not have the statutory power to amend or revoke an enforcement notice once it has been served."

43. In section 8 of the claim form the details of the remedy sought were set out, including an order quashing the Forestry Commission's "decision" and an order "to the effect that the conditions on the felling licence and the Notice should be withdrawn by [it]", and declarations that the Forestry Commission's position was wrong in law, that the conditions on a felling licence "do not preclude the carrying out of development at the Site as authorised by planning permission", that it would be unlawful to enforce compliance with the conditions on the licence in the circumstances, that the Forestry Commission had the power to withdraw the conditions on the felling licence and the section 24 notice, and that both would be extinguished upon the sale of the site.

The decisions in the court below

44. In his reasons for refusing permission on the papers, Sir Ross Cranston observed that "[given] that the Forestry Commission's decision to issue the [section 24] notice was in July 2020, this application is out of time and for that reason alone fails". He also considered the substance of the claim, and saw no merit in it.

45. Having heard oral submissions on the renewed application, Thornton J. reached the same conclusions; the claim was both out of time and unarguable. In her succinct judgment she said that the letter from Mr Murdoch to Arnold White Estates dated 1 April 2021 was "simply a letter setting out the Forestry Commission's unchanged view of the statutory framework in relation to its decision in July 2020, to issue the notice under section 24", and the "relevant decision" was "the Forestry Commission's decision to issue the notice in 2020". Accordingly, in her view, the claim was "out of time, and fails on this basis" (paragraph 9). On the merits she concluded that "[the] Forestry Act does not provide for the general proposition advanced, … that the grant of planning permission renders the felling notice redundant". The statutory scheme left three options for Arnold White Estates once the section 24 notice had been issued: "comply with it, appeal to the Minister, or do neither and risk prosecution" (paragraph

11). The grant of planning permission, she said, "has no bearing on the validity of a felling licence, or an enforcement notice under the Act, save as provided for in section 9(4), an exception which it was common ground does not apply in this case" (paragraph 12). It was not arguable that there was an implied power to withdraw a section 24 notice. The 1967 Act provided expressly for withdrawal in other contexts, but not in this. The "regime for section 24 notices", said the judge, "is for an appeal to the Minister" (paragraph 13).

Was the claim for judicial review brought too late?

46. Under Part 54.5 of the Civil Procedure Rules, a claim for judicial review must be filed both "(a) promptly" and "(b) in any event not later than 3 months after the grounds to make the claim first arose". The notes in paragraph 54.5.1 of the White Book emphasise that a claimant "must … challenge the substantive decision that is the real basis of their complaint". They add that the claimant "may … fail to bring a challenge to a particular decision, and may then seek to challenge some later ancillary or consequential decision or approval of the earlier decision on the ground that the later decision is unlawful as it is based on the original decision which is also unlawful", and that "[in] such situations the courts may find that the time-limit begins to run from the date of the earlier decision".

47. The relevant principles are familiar, though we were not shown any case in which they have been applied to a claim for judicial review concerning a notice issued under section 24 of the 1967 Act. In *R. (on the application of Thornton Hall Hotel Ltd.) v Wirral Metropolitan Borough Council* [2019] EWCA Civ 737, a case concerning an extremely late challenge to a grant of planning permission, the Court of Appeal said that "[what] is required to satisfy the requirements of promptness will vary from case to case" and "depends on all the circumstances", but "[the] court will not generally exercise its discretion to extend time on the basis of legal advice that the claimant might or should have received" (see the judgment of the court at paragraph 21(4) and (5)).

48. Mr David Elvin K.C., who appeared on behalf of Arnold White Estates before us, though not in the court below, submitted that the subject of the challenge in this case is not, as Thornton J. held, the Forestry Commission's decision to issue the section 24 notice on 28 July 2020 but its decision not to withdraw that notice when requested to do so in the correspondence between January and April 2021. Arnold White Estates was finally made aware of the Forestry Commission's decision only on 1 April 2021, when Mr Murdoch wrote contending that the legal position set out by Ms Littlejohn in the correspondence was accurate. There was, therefore, no undue delay in bringing the claim, and it was not out of time. Indeed, the decision not to withdraw the section 24 notice represented a continuing state of unlawfulness, which could properly be challenged by a claim for judicial review when it was, and indeed for as long as it might persist. Mr Elvin referred to the judgment of Mr Justice Kerr in *R. (on the application of Fire Brigades Union) v. South Yorkshire Fire and Rescue Authority* [2018] 3 C.M.L.R. 27, in which he said (at paragraph 142) that "the case for relief is stronger where there is no plan to put an end to the unlawful conduct and every intention of continuing with it".

49. I do not accept that argument. In my view, as Mr Zack Simons submitted on behalf of the Forestry Commission, although the claim for judicial review is ostensibly directed at its refusal to withdraw the section 24 notice in the course of the correspondence in the first four months of 2021, and specifically in the letter of 1 April 2021, Arnold White Estates' real grievance here is with the decision to issue the section 24 notice itself on 28 July 2020, and to maintain the notice when a planning permission incompatible with it was granted on 14 September 2020. The substance of the complaint is that, in the circumstances as they were at the time, the decision to enforce compliance with the restocking conditions on the felling licence was misconceived and unlawful.

50. Assuming in favour of Arnold White Estates that, on the facts, its complaint fell outside the clearly defined grounds of a statutory appeal under section 25 against the section 24 notice and that in such circumstances the notice might, in principle, have been susceptible of challenge by a claim for judicial review, I can see no reason why such a claim could not have been brought both "promptly" and not later than three months after the alleged grounds to make it first arose. But that was not done. Having apparently decided that it could not, or would not, pursue an appeal under section 25, Arnold White Estates did not act promptly in commencing proceedings to challenge either the section 24 notice itself or its being maintained after the planning permission of 14 September 2020 was granted. The claim was eventually filed on 18 June 2021, following correspondence initiated by Arnold White Estates through its solicitors almost six months after the section 24 notice was issued and some four months after the September 2020 planning permission was granted. So the claim was not launched promptly and it was also substantially late. It was brought about 11 months after the section 24 notice was issued, and over nine months after the September 2020 planning permission was granted. Such delay, in the circumstances of this case, is in my view unacceptable. No explanation or excuse for it has been offered to the court. Nor has there been any application for an extension of time to permit the claim to be brought more than three months after the Forestry Commission's "decision" was made known to Arnold White Estates. Rather, it is said that the Forestry Commission's stance only hardened into a reviewable decision in Mr Murdoch's letter of 1 April 2021, or was in any event a continuing state of affairs.

51. In agreement with Thornton J. and Sir Ross Cranston in the court below, I do not think the correspondence that took place between January and April 2021 embodied any justiciable decision-making under the statutory scheme in the Forestry Act 1967. It was, in effect, a protracted clarification of the parties' respective positions on the appropriateness of the Forestry Commission's enforcement of the restocking conditions by the section 24 notice, culminating in the last of a series of letters from the Forestry Commission in which it had repeatedly and consistently set out its own understanding of the legal position. The essential point, reiterated several times, was that the subsequent grant of planning permission did not supersede either the requirements of conditions on an extant felling licence which had been relied upon as providing the requisite authorisation for the felling of trees on the site or the enforcement of those requirements by a section 24 notice. None of the Forestry Commission's letters can realistically be seen as formal decision-making under any provision of the 1967 Act. They were not in themselves amenable to judicial review. In short, they were not a "decision". To describe them as such is, in my view, to

create an artificial target for a belated challenge to the section 24 notice itself and its being maintained.

52. I do not accept that, in circumstances such as these, the time for bringing a claim for judicial review can be extended by generating correspondence whose effect, unless some new factor has emerged, is merely to confirm a decision which has been taken previously. To permit the time limit for issuing a claim for judicial review to be circumvented in this way would subvert the certainty which is an essential purpose of that time limit. As Mr Justice Chamberlain said in *Inclusion Housing Community Interest Company v Regulator of Social Housing* [2020] EWHC 346 (Admin) (at paragraph 69), "[a] claimant cannot in general start time running again by writing a letter asking the decision-maker to reconsider and then treating the refusal to reconsider as a new decision", but "where a decision-maker, in response to a request to reconsider, chooses to conduct an internal review – and … tells the requester that it is holding off publishing its final decision while it gives 'serious consideration' to the points made – the position is different …". Unless there is truly a new decision, the clock is not set running again by correspondence which only articulates a decision already made.

53. If claims for judicial review could properly be pursued in a situation such as this, an aggrieved landowner who had been served with a section 24 notice could bring a challenge to the notice well beyond the period of three months after the notice had been served, and thus well after the time for making an appeal under section 25 on the grounds Parliament has provided. This, in my view, would be contrary to the requirements of Part 54.5 of the Civil Procedure Rules, and irreconcilable with the statutory scheme in the 1967 Act.

54. But even if that analysis is incorrect, and, as Mr Elvin submitted, the real target of the challenge is the Forestry Commission's refusal during the 2021 correspondence to withdraw the section 24 notice and this was a "decision" open to challenge by a claim for judicial review, I would not accept that the "decision" in question crystallised only on 1 April 2021 in the letter from Mr Murdoch to Mr Williams.

55. In her letter dated 15 January 2021, in response to Arnold White Estates solicitors' request that the section 24 notice "will now be withdrawn", Ms Littlejohn said that a "planning permission granted by the local planning authority … does not remove the duties contained within a Felling Licence or Notice", and that the "Town and Country Planning Act 1990 has no [provision] which neuters or overrides Felling Licences or Notices served under the Forestry Act". She also confirmed that the section 24 notice "is correct and remains in effect". It was clear in those unambiguous statements on behalf of the Forestry Commission that it was not going to withdraw the section 24 notice. If such statements in correspondence could be regarded as a "decision" not to withdraw the notice, it was at this point, in my view, that the "decision" became definite and clear, and time began to run for any claim for judicial review. Once Arnold White Estates had received the letter of 15 January 2021 there was nothing to stop it issuing proceedings against the "decision" transmitted in that letter. But it chose not to do that, and the claim was eventually issued more than five months later, on 18 June 2021. This too was substantially beyond the three-month period under Part 54.5.

56. It is true that Mr Murdoch's letter of 1 April 2021 contained the first explicit statement on behalf of the Forestry Commission that it did not "have the statutory power to amend or revoke an Enforcement Notice once it has been served". But that, in my view, does not assist Arnold White Estates, because the claim we are dealing with here is not an assault on the Forestry Commission's view about the law on the withdrawal of notices issued under section 24. It is directed at the notice that was actually issued in this case, and the Forestry Commission's refusal to withdraw it. Ms Littlejohn's letter of 15 January 2021 made it plain that the Forestry Commission would not withdraw that notice, even assuming it had the power to do so. And the claim form itself says the decision challenged was communicated in Mr Murdoch's letter of 1 April 2021, "which stated that … [the] legal position as set out previously by Ellie Littlejohn was accurate", and thus seems to acknowledge that the Forestry Commission's understanding of the law had already been stated in earlier correspondence.

57. I do not think that the first instance decision in *Fire Brigades Union* is relevant here. In that case there was a clear finding, in the particular circumstances which had arisen through the actions of the defendant fire and rescue authority, that "illegality is continuing and there is a concerted plan to continue the unlawful conduct" (paragraph 142 of the judgment of Kerr J.), and that there had been "a conscious decision to commit a continuing and systematic breach of the law" (paragraph 149). Here there was no "concerted plan" or "conscious decision" of that kind. The Forestry Commission had simply come to the conclusion, acting on its own statutory responsibility for the management of forestry and the control of felling, that it was expedient to enforce compliance with the restocking conditions on the felling licence, had therefore issued a section 24 notice, and had not been persuaded to withdraw that notice. The decision to issue the notice and to maintain it was not motivated by an intention to act inconsistently either with the legislation for forestry or with the legislation for planning. The Forestry Commission had acted in good faith as a public body in the exercise of the statutory functions conferred upon it by the 1967 Act, and, when called upon to do so, in explaining the position it took. This is not comparable to the circumstances that arose in *Fire Brigades Union* (see paragraphs 142 to 149 of the judgment).

58. I would therefore dismiss the appeal on the basis that the claim was issued well out of time and without any proper justification for the delay being presented to the court.

59. It would follow from this conclusion, if my Lords agree, that we do not need to determine the second issue in the appeal, the alleged unlawfulness of the Forestry Commission's "decision" to maintain the section 24 notice. But as that issue was fully argued before us, and in case my Lords differ from my conclusion on delay, I shall state my own views about it.

Did the Forestry Commission act unlawfully in maintaining the section 24 notice?

60. At the hearing, Mr Elvin disavowed any direct challenge either to the felling licence itself or to the section 24 notice. He did not submit that section 9(4)(d) of the 1967 Act provided an exemption from the requirement to obtain a felling licence solely on the basis of the outline planning permission granted by the council on 1 June 2016. I

think he was right not to do so. The felling licence was properly applied for and granted after the outline planning permission was granted, and it was then acted upon. When it was granted, the felling was not "immediately required", in the sense of section 9(4)(d), to enable development authorised by a planning permission to be carried out. That, as I understand it, is common ground in this appeal.

61. His argument on ground 3 of the appeal was essentially that the Forestry Commission's understanding of the 1967 Act would expand the reach of statutory control over felling beyond Parliament's basic intention not to prevent development "immediately required" by a planning permission. The provision in section 9(4)(d) was enacted while the Town and Country Planning Act 1962 was in force. The concept of outline planning permission did not then exist; it was only introduced by the Town and Country Planning Act 1968. After successive amendments to section 9(4)(d), the provision in its present form must be taken to apply to the "multi-stage development consent process" now in being. The particular facts are important (see the judgment of Lord Justice Moses in *Rockall v Department for the Environment, Food and Rural Affairs* [2008] EWHC 2408 (Admin), at paragraphs 17 to 19). In this case, Mr Elvin argued, there was an obvious conflict between the restocking conditions on the felling licence and both the outline planning permission of 1 June 2016 and the full planning permission of 14 September 2020. There was no justification for delaying for a period of ten years development for which outline planning permission had been granted, with reserved matters approvals to follow, when a grant of full planning permission for the same development would have enjoyed the exemption in section 9(4)(d), and when there was already a planning permission for the access road and drainage works which required trees to be removed within parts of the site to which the felling licence relates. The statutory grounds of appeal against a section 24 notice, in section 25, are narrowly drawn. They do not extend to changes in circumstances after the grant of a felling licence or the progress of a development project from the outline stage to the approval of reserved matters. In these circumstances, Mr Elvin submitted, both the felling licence with its restocking conditions and the section 24 notice must yield to the principle behind section 9(4)(d) – that the statutory scheme for felling is not intended to prevent development authorised by a planning permission. On a true understanding of the relevant statutory provisions, the full planning permission granted in this case overrode the requirements in the restocking conditions, which the section 24 notice was issued to enforce.

62. Central to Mr Elvin's argument was the submission that the Forestry Commission's understanding of the statutory scheme failed to recognise that the land use planning system embraces a wider view of the public interest than the regime for felling licences allows. The restrictions on felling under the 1967 Act are intended to protect amenity and sustainability. These are matters squarely within the domain of planning decision-making (see, for example, the policies in paragraphs 131, 174 and 180 of the National Planning Policy Framework). There was nothing for the Forestry Commission to take into account in making a decision on an application for a felling licence beyond the material considerations for a local planning authority in making a planning decision. In this case, when determining the applications for planning permission, the council as local planning authority had considered the proposed removal of trees, and had concluded that the proposed felling was acceptable. The Forestry Commission had not objected to either application.

63. In my view Mr Elvin's argument here is not correct. I do not accept that, on the proper interpretation of the provisions governing felling in the 1967 Act, a subsequent grant of planning permission automatically trumps an extant felling licence, or the conditions imposed upon it.

64. Where Parliament has seen the need to do so, it has expressly provided in the 1967 Act for the interrelationship of the land use planning system and the legislation for forestry. Section 9(4)(d) provides explicitly for the relationship between the requirement for a felling licence in specified circumstances and grants of planning permission. And section 15 provides for the relationship between felling licences and trees with the protection of a tree preservation order.

65. In section 9(4)(d) Parliament has created an exception for felling "immediately required for the purpose of carrying out development authorised by planning permission …". The concept of felling being "immediately required" under this exemption is not, in my view, a difficult one. Felling will be "immediately required" where the planning permission definitely requires it to be done if the development permitted is to proceed, and does not entail any further relevant approval having to be obtained from the local planning authority. This would include a grant of full planning permission or a grant of outline planning permission together with the subsequent approval of reserved matters in a "multi-stage development consent" process. It would exclude an outline planning permission without the necessary approval of reserved matters, which would be only the first stage in such a "multi-stage" process: for example, the outline planning permission granted by the council in June 2016, in which reserved matters approval was required by condition 1 for details of layout, scale, the appearance of the buildings and landscaping in each phase before any development in that phase could be commenced. Those reserved matters approvals, in particular for layout and landscaping, would establish exactly which trees on the site would have to be felled if the development were to proceed. This understanding of section 9(4)(d) is supported in Mynors' "The Law of Trees, Forests and Hedges" (at paragraph 18.2.9) – though, as Mr Elvin pointed out, the text does not consider the potential effect of a subsequent grant of reserved matters approval on the requirements of a felling licence, and section 24 notice, with which it is incompatible.

66. In this case, therefore, where there had been no approval of reserved matters under the outline planning permission of June 2016 in the meantime, there was no statutory exemption from the requirement for a felling licence if trees on the site were to be felled. The application for the felling licence granted in October 2018 was appropriate and necessary. The felling which was subsequently carried out on the site required that formal authorisation under the 1967 Act. It could not have been lawfully undertaken, when it was undertaken, without the statutory licence which had been granted for it, subject to the restocking conditions which the Forestry Commission considered it necessary to impose. This, it seems, is not in dispute.

67. The question that arises, however, concerns the status of a felling licence which is subject to restocking conditions, and which has already been relied upon as authorising the felling of trees on a site, when reserved matters approvals are subsequently issued, or full planning permission is granted, for development which could not be constructed if those conditions were complied with. The thrust of Mr Elvin's argument was that the reserved matters approvals or the grant of full planning permission would then have the effect of removing the need for compliance with the

requirements of the restocking conditions on the felling licence itself and also the corresponding requirements of a statutory notice issued under section 24 of the 1967 Act to enforce compliance with those conditions.

68. I would reject that proposition, for three reasons. The first I have already mentioned. In a carefully constructed and self-contained statutory scheme for the felling of trees, Parliament has explicitly dealt with the relationship between that statutory scheme and the separate statutory scheme for planning. It has provided expressly for the synchronicity between these two regulatory regimes where they are both engaged by proposals for development, reconciling the requirement to apply for a felling licence with the process for granting planning permission. One may assume, I think, that it has sought to legislate as fully as it considered necessary for the different scenarios which might arise.

69. Secondly, Parliament did not provide, either in the 1967 Act or in the planning legislation, that the statutory provisions for felling licences would be disapplied, or the conditions imposed on a felling licence and the corresponding requirements of a section 24 notice annulled, automatically and retrospectively, by a later grant of planning permission which would have engaged the exemption in section 9(4)(d) had it been in place before the felling licence was applied for, granted and acted upon. There is no provision either in section 9(4) or elsewhere in the 1967 Act whose effect is that the granting of planning permission for a development nullifies the requirements of conditions on an extant felling licence where compliance with those requirements would prevent the development from being carried out or completed, or which gives a future grant of planning permission or reserved matters approval the effect of superseding such requirements. And I do not accept that this can somehow be read into the statutory scheme. So significant a change to the statutory arrangements for felling, which would negate action lawfully taken by the Forestry Commission in issuing a felling licence with restocking conditions, and prevent enforcement action under section 24(2), (3) and (4), would surely have required explicit provision to be made in the statute itself or by an amendment to it. As Mr Simons submitted, it would have been possible for Parliament to enact such a provision had it intended to do so, but this it has never done.

70. And thirdly, the fact that in this case the council, when it granted outline planning permission in June 2016, took into account the proposed removal of trees in the light of the "Illustrative Masterplan" submitted with the application, and imposed several conditions requiring the submission and approval of details before felling could proceed, does not affect the operation of the statutory provisions themselves or alter the consequences of the restocking conditions incorporated into the felling licence. Nor does the fact that it was always the overt intention of Arnold White Estates to undertake or facilitate development on the site. It was free to apply when it did for the felling licence, before the reserved matters approvals required under the outline planning permission had been granted. And this was what it chose to do, for commercial reasons. It would equally have been open to it, instead, to seek the required reserved matters approvals or a full planning permission for the same development, and it would then, potentially, have been able to take advantage of the exemption in section 9(4)(d).

71. There is no inherent illogicality in the statutory provisions for felling licences as the Forestry Commission understands them. The land use planning system and the

legislation for forestry comprise separate but co-ordinated statutory schemes. They are among several regulatory regimes which can bear on the progress of development on a site. They do not belong to a legislative hierarchy in which the planning system ranks above, and takes precedence over, the legislation for forestry. Parliament has addressed the interaction between them where it has seen the need to do so, in particular in sections 9(4)(d) and 15 of the 1967 Act. Far from subordinating the statutory regime for felling licences to that for planning permission, the enactment of that regime, which explicitly acknowledges the planning legislation, demonstrates the synergy between them. The duties of the Forestry Commission, set out in section 1 of the 1967 Act, require it to take a national view of forestry, to consider national supplies of timber, and to maintain adequate national reserves of growing trees. They go beyond the role of local planning authorities in discharging their development control functions. They involve considerations which would not necessarily be taken into account by those authorities when determining applications for planning permission. The two statutory schemes are designed to operate together where proposals for development engage them both. And the respective roles of the Forestry Commission and local planning authorities undoubtedly have much in common. But the remit and responsibilities of the latter cannot be said wholly to subsume those of the former.

72. In this case it was clearly the view of the Forestry Commission when it issued the section 24 notice that it would not be consistent with good forestry and thus in the public interest for Arnold White Estates, having had the benefit of the felling authorised in the felling licence granted on 19 October 2018, to be able to avoid the burden of the restocking conditions which had been imposed on that licence as indispensable requirements if the proposed felling was to proceed. Otherwise, in the exercise of its statutory power to do so, the Forestry Commission would not have decided to issue a formal notice to enforce compliance with those conditions. Nor can it be said that the Forestry Commission was doing anything other than lawfully exercising its power to issue that notice, in accordance with its statutory purpose under section 1 of the 1967 Act.

73. I do not accept that it would necessarily be, as Mr Elvin submitted, an absurd result of a section 24 notice being issued and maintained that a grant of planning permission subsequent to the deadline given for compliance in the notice might be rendered difficult or impossible to implement by the enforcement of restocking conditions on a prior felling licence. This is not the consequence of an unfortunate quirk in the relationship between the statutory schemes for forestry and planning. In this case it was a result of the relevant statutory provisions operating on the particular sequence of events that unfolded. When it applied for a felling licence, Arnold White Estates was, it seems, content to accede to the restocking conditions being imposed, and no request was later made for a review of the conditions under section 16. It applied for a felling licence when it did, and carried out the licensed felling when it did, in the absence of reserved matters approvals, because it wanted to sell "cleared plots" which would be more attractive to purchasers. Proceeding in that way was a commercial decision. But it had legal consequences.

74. As Mr Simons submitted, if growing trees were felled under a felling licence with restocking conditions and a grant of full planning permission for development on the land was later applied for, the trees that once stood on the site would not be a

consideration for the local planning authority in determining the application. They would be gone. On the argument put forward for Arnold White Estates, if planning permission were then to be granted it would retrospectively bring the felling of trees on the site within the exemption in section 9(4)(d), and would leave the requirements of the restocking conditions and of the section 24 notice redundant and ineffective. The landowner would have taken advantage of the felling licence, but without complying with his obligation to plant and protect trees on the site in accordance with the restocking conditions which were an integral part of that licence. This would avoid the full and intended effect of the licence which the Forestry Commission had granted. Depending on the particular facts, as Mr Simons contended, it may well undermine the interests of good forestry, compromising effective regulation of the felling of trees by both statutory regimes – forestry and planning. In this case, undoubtedly, it would go against the interests of good forestry as the Forestry Commission perceived them to be when it granted the felling licence, and when it issued the section 24 notice.

75. There is no provision in the 1967 Act which, in these circumstances, either compels or empowers the Forestry Commission to amend or withdraw a notice it has issued under section 24 to enforce compliance with conditions on a felling licence. As was stated in Mr Murdoch's letter of 1 April 2021, "the Forestry Commission does not have the statutory power to amend or revoke an Enforcement Notice once it has been served". Mr Elvin argued, however, that there is nevertheless an implied power to do so, a "discretionary power", which extends to the circumstances that have come about here. This argument**,** like the previous one, depends on the concept that the regime for felling licences has been deliberately "subordinated" by Parliament to the planning system. Sections 9(4)(d) and 15 of the 1967 Act, Mr Elvin submitted, both give priority to the planning system over the regime for felling licences, as Parliament intended. The decision to serve a notice under section 24 and the decision to prosecute for non-compliance with such a notice are both discretionary. This implies that there is also a discretion to withdraw such a notice.

76. Mr Elvin submitted that a principle applicable to abatement notices issued under the Environmental Protection Act 1990, recognised by Mr Justice Richards, as he then was, in *R. v Bristol City Council, ex parte Everett* [1999] 1 W.L.R. 92, and not doubted when the case came to this court ([1999] 1 W.L.R. 1170, at pp.1179 to 1180), also applied to notices issued under section 24 of the 1967 Act. It was held in that case that there was an implied power for a local authority to withdraw an abatement notice even though the Environmental Protection Act 1990 included no express power to do so. Mr Elvin relied especially on this passage in the judgment of Richards J. (at pp. 105 and 106):

> "The current procedure runs together the two stages, in that the notice served by the authority is final and binding in its own right, subject to a successful appeal. It was submitted that it would be inconsistent with the appeals structure under the Act of 1990 to permit an authority to change its mind about the existence of a statutory nuisance and to withdraw a notice once served.
>
> For the council, [counsel] submitted that there must be an implied power of withdrawal. A local authority is both the enforcing and prosecuting authority under Part III of the Act of 1990. Service of an abatement notice is a step in a procedure which may lead to criminal liability. It must be the position … that

> the authority has a *discretion* whether to prosecute for breach of an abatement notice. The principles of finality and certainty require that, if the authority decides not to prosecute, it may also formally withdraw the abatement notice itself. Moreover the whole thrust of the relevant provisions is to place upon a local authority a continuing duty of review. … The duty under section 80(1) is to serve a notice where the authority "is satisfied" that a statutory nuisance exists or is likely to occur or recur. It would be very surprising if the authority, having served a notice on the basis that it was satisfied on the evidence available at a particular point in time, were thereafter unable to withdraw the notice even if, because of changes of expert opinion or other changes of circumstances, it ceased to be satisfied that a statutory nuisance existed or was likely to occur or recur. …
>
> I accept [counsel's] submissions on this issue. In the absence of an implied power to withdraw an abatement notice, the enforcement provisions would in my view be unduly rigid. It seems senseless that an authority should be unable to withdraw an abatement notice which, for whatever reason, it no longer considers to be appropriate. It is particularly unsatisfactory that the recipient of the notice should remain subject to it and, by reason of a failure to comply with its requirements, should remain in breach of the criminal law in circumstances where the local authority does not consider the notice to be appropriate and has no intention of bringing a prosecution for breach of it. A power of withdrawal is therefore consistent with, and serves to promote rather than to undermine, the legislative scheme. I see no difficulty in implying such a power."

77. Here too, Mr Elvin argued, an implied power of withdrawal would be consistent with, and would serve to promote, the relevant statutory scheme. An implied power to withdraw in a case outside the two statutory grounds of appeal in section 25, when it would be unjust or unfair to persist with enforcement, would not cut across the right of appeal. Nor would it be inconsistent with other provisions, such as sections 17B and 20(2), under which withdrawal is the required consequence of a successful review or appeal. In cases where compliance with conditions on a felling licence had become unnecessary or inappropriate it would have the benefit of removing the landowner's exposure to the risk of prosecution.

78. In this case, Mr Elvin submitted, the decision of the Forestry Commission not to withdraw the section 24 notice was "irrational" or "perverse". It would prevent for a period of ten years the development of the site in accordance with a lawful grant of planning permission requiring the removal of trees, after which, if the planning permission were renewed, Arnold White Estates would be free to fell the trees growing on the site under the exemption in section 9(4)(d). There could be no justification for the Forestry Commission insisting on the enforcement of the restocking conditions on the felling licence in these circumstances.

79. That argument was powerfully presented by Mr Elvin. But I am not persuaded by it. If we had to resolve the point in this case, I would hold that the Forestry Commission's refusal to withdraw the section 24 notice was legally sound. I would not accept that, under the 1967 Act, there is an implied general power to withdraw such a notice such as was suggested by Mr Elvin. Nor would I accept that, if the Forestry Commission

did have such a power, its failure or refusal to withdraw the section 24 notice it had issued in this case was irrational or otherwise unlawful.

80. I would not want to rule out a residual discretion for the Forestry Commission to amend or withdraw a section 24 notice in limited circumstances. Without trying to define the scope of such a discretion, I think it might exist, for example, in a case where it became clear that the notice had been mistakenly issued because of some factual error or misunderstanding, or where some inaccuracy or ambiguity had occurred in its wording. The exercise of the power to amend or withdraw in such a case would of course need to be considered in the particular circumstances as they arose.

81. But is there any wider implied discretion than that? In my view, having regard to the composition and content of the statutory scheme, the court should hesitate to conclude that there is. And in any event, I think there is a strong argument against the proposition that there exists an implied power of withdrawal of the kind on which Mr Elvin sought to rely, which seemed to come very close in its character to a duty.

82. Section 24 must be viewed in its own statutory context. It belongs to a tightly composed group of provisions in Part II of the 1967 Act which embody the statutory control of felling, including provisions specifically for felling licences required under section 9. Together, those provisions function coherently. Section 24(1)(a) and (2) are directed to the enforcement of conditions imposed on a felling licence in accordance with the provisions in section 10(2) and section 12(1). Section 12(1) requires prior "consultation with the applicant for the licence", and provides for the imposition of conditions considered by the Forestry Commission to be "expedient" for "the restocking or stocking with trees of the land on which the felling is to take place". Section 16 provides for a review by the Minister of the conditions imposed. Section 24 is the enforcement counterpart to those provisions. The 1967 Act also expressly provides a procedure by which a notice issued under section 24 can be challenged, and, if need be, cancelled. It affords a right of appeal to the Minister under section 25, on specific grounds, and it requires the Minister either to confirm or to cancel the notice after considering the report made to him. Section 24 itself, in subsection (4), leaves with the Forestry Commission the power to initiate a prosecution for failure to comply with the notice, and sets a limitation of two years on criminal proceedings being instituted. In these precisely formulated provisions within the comprehensive statutory arrangements for felling, no express power to withdraw a notice issued under section 24 has been conferred on the Forestry Commission. But where Parliament has seen the need to provide expressly for a power to withdraw, it has done so. Section 17B(2) of the 1967 Act gives the Minister power to direct the Forestry Commission to withdraw a restocking notice. Section 20(2) gives him the power to withdraw felling directions.

83. The statutory procedure for enforcement under section 24 of the 1967 Act is not open-ended. It reaches finality either in an appeal under section 25, or in the Forestry Commission entering on the land to take the steps required by the notice under section 24(3) or criminal proceedings being instituted under section 24(4). In every case it is for the Forestry Commission to consider, as a matter of its own discretion, how it should best proceed. It will do this having regard to the interests of good forestry. In the first place, it will consider whether it is expedient and necessary, under section 24(2), to launch an enforcement process at all. Having begun that process, it is not

obliged to continue with it to the point of initiating a prosecution for non-compliance. If there is an appeal against the section 24 notice under section 25, it will consider whether it should contest that appeal, and on what basis. And ultimately, if there has not been a successful appeal, it will consider, within the statutory time limit of two years after the date of the offence in question, whether or not to press enforcement to a prosecution.

84. In some cases, no doubt, prosecution will turn out to be unnecessary because, in the Forestry Commission's view, the interests of good forestry do not compel that step – if, for example, the requirements of the section 24 notice have by then been substantially met on the site itself or made good by the planting of trees on other land nearby, or are likely in due course to be met by compliance with the requirements of planning conditions or an obligation entered into by the landowner under section 106 of the 1990 Act. At any stage in the statutory process, the Forestry Commission may choose not to commit further resources to enforcement if it would not be expedient to do so. It may, however, take the view, as it evidently did in this case, that it would be sensible to await the expiry of the specified time for compliance with the section 24 notice before considering whether to refrain from the final stage in the enforcement process, or to persist by instigating criminal proceedings. Normally at least, unless in the meantime the conditions on the felling licence have been compiled with or an appeal against the notice has been pursued under section 25, one might expect it to await the date for compliance before taking account of any change of circumstances on the ground or in the planning history of the site, including any planning permission or reserved matters approval granted since the enforcement process was started.

85. This understanding of the procedure in section 24, I think, reflects both an appropriate degree of autonomy for the Forestry Commission in exercising its enforcement functions, and also the realistic and pragmatic approach one would expect it to adopt. It seems to me to accord with good sense. And it does not require the court to imply into the statutory scheme a general power of withdrawal which the legislature has not thought it necessary to provide.

86. It may fairly be said, in my view, that if Parliament had intended there to be a general power for the Forestry Commission to withdraw a section 24 notice, it would have made express provision for such a power. And in the absence of any express provision to that effect, the court should not imply one. Creating a general power of that kind for this statutory scheme would, I think, be a matter for the legislature, not the court. I am not attracted by the suggestion that Parliament has simply overlooked the need for a power of withdrawal because the 1967 Act came on to the statute book before the modern planning system had fully evolved, and provision was made for outline planning permission. Although the 1967 Act has been subject to some amendment since its coming into force, albeit not radical amendment, Parliament has not seen any need to introduce a power to withdraw a section 24 notice in a case such as this, or at all. By contrast, in the statutory scheme for planning it has done that. Section 173A of the Town and Country Planning Act 1990 gives local planning authorities the power to "withdraw" enforcement notices issued by them (subsection (1)(a)) and to "waive or relax any requirements of such a notice" (subsection (1)(b)), and section 187A(6) gives them the power to "withdraw" a "breach of condition notice". No comparable provision has been inserted into the 1967 Act.

87. In my view there is not a parallel here with the considerations that in *ex parte Everett* were found to indicate the existence of a general power to withdraw an abatement notice issued under section 80 of the Environmental Protection Act 1990. In that statutory context I do not doubt Richards J.'s view that it would make good sense for an authority to be able to withdraw a notice which it no longer considered to be appropriate. As he said, "the whole thrust of the relevant provisions" for abatement notices was "to place upon a local authority a continuing duty of review". Here, however, to hold that the Forestry Commission has a general discretionary power to withdraw a section 24 notice upon request by the landowner, or on its own initiative, would effectively impose upon it a duty of continuous review which it does not currently have. Once it has issued a notice under section 24 it has no duty to keep that notice under review. It is entitled to expect that the requirements of the notice and the underlying requirements of the conditions on the felling licence will be complied with, or an appeal pursued under section 25.

88. Richards J. also saw a basis for implying a power of withdrawal into the relevant provisions of the Environmental Protection Act 1990 in the fact that a person might remain exposed to criminal proceedings for breach of an abatement notice when the local authority had formed the view that the notice was no longer appropriate and did not intend to prosecute for breach. In the legislation for felling licences, however, as Mr Simons pointed out, section 24(4) of the 1967 Act provides that criminal proceedings for a failure to comply with a section 24 notice cannot be instituted more than two years after the date of the alleged offence. If the Forestry Commission decides not to initiate a prosecution within that period, the landowner's potential liability to a fine upon conviction will come to an end.

89. To conclude, if we had to determine the question in disposing of the appeal, I would hold that the Forestry Commission's "decision" – if that is what it was – in the correspondence between the parties in the first four months of 2021, was not taken on a mistaken understanding of its statutory powers, and that it did not act irrationally or otherwise unlawfully in conducting itself as it did. The section 24 notice did not lack a lawful basis when it was issued, nor had it lost that lawful basis when the Forestry Commission's refusal to withdraw it eventually came under attack. I would not conclude that there is an implied general power for the Forestry Commission to withdraw a section 24 notice of the kind for which Arnold White Estates contends. But if there were such a power, I would not accept that the Forestry Commission erred in law in refusing to withdraw the notice it had issued here. In my view it had legitimate and reasonable grounds for maintaining the notice, at least to the extent, as was made plain in Mr Murdoch's letter of 1 April 2021, that it would "reserve taking a decision on whether to escalate" its enforcement of the restocking conditions "until after the compliance date stated within the [section 24 notice] … and a subsequent inspection".

Conclusion

90. For the reasons I have given, I would dismiss the appeal.

Lord Justice Holroyde:

91. I agree.

Lord Justice Coulson:

92. I also agree.