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Introduction

Celina Colquhoun
Call 1990

Christopher Moss
Call: 2021

Welcome to the Summer 2023 edition of the 39 Essex Planning Environment and Property newsletter. We have an interesting and varied array of articles in this edition ranging from **Stephen Tromans KC** looking into corporate accountability and derivative actions following *ClientEarth v Shell Plc,*[1] to first-time contributors **Kerry Bretherton KC** and **Rebecca Cattermole**, who we were delighted to welcome to chambers in April this year, setting out current issues at the intersection of planning, environment and property law. **Stephanie David** has provided a taster of what you can hear on a new podcast *"Climate Law Matters"* which is presented by her and **Stephen Tromans KC**. On top of this we have a run through of the following recent decisions:

- **John Pugh Smith** takes a look at the decision of *Redrow Homes Ltd,*[2] and also opines on a fresh approach to handling planning applications and appeals following the Court of Appeal's judgment in *Smith v Secretary of State for Levelling Up, Housing and Communities, and Hackney LBC.*[3]
- **Victoria Hutton** considers the case of *Atwill,*[4] in which **Celina Colquhoun** acted for the successful claimant, and in particular the question of how to consider whether 'development' that is the subject of a permission commences under section 56 of the Town and Country Planning Act 1990 in particular in light of what happens subsequently.
- **Daniel Kozelko** covers *Devine v Secretary of State for Levelling up Housing and Communities*[5] and how to assess substantial completion for the purposes of enforcement time limits.
- **Eleanor Leydon** provides an insight into the case of *R (Friends of the West Oxfordshire Cotswolds) v West Oxfordshire DC*[6] concerning a successful challenge to the grant of planning permission for development near ancient woodland.
- **Celina Colquhoun** picks up on **Victoria Hutton's** success in *R (Samuel Smiths) v Redcar and Cleveland BC*[7] looking at powers available to local authorities under section 78 of the Buildings Act 1984 to take emergency steps to make safe buildings that were in a dangerous state, and whether such steps require planning permission.
- Lastly, **James Burton** writes on the Supreme Court's decision in *Jalla v Shell*[8] on whether unremediated oil spillage to land from a single event was (and as a matter of principle could be) a continuing nuisance, through a cause of action accruing day to day.

We do hope you enjoy this jam-packed edition of the PEP newsletter and manage to find time over the next couple of months to enjoy the Summer.

1 [2023] EWHC (Ch) 1137
2 *Redrow Homes Ltd v Secretary of State for Levelling Up, Housing and Communities & New Forest District Council* [2023] EWHC 879 (Admin)
3 [2023] EWCA Civ 514
4 *R(Barbara Atwill) v New Forest National Park Authority* [2023] EWHC 625 (Admin)
5 [2023] EWCA Civ 601
6 [2023] EWHC 901 (Admin)
7 [2023] EWHC 878 (Admin)
8 [2023] UKSC 16

Corporate Accountability

Stephen Tromans KC
Call 1999 | Silk 2009

For some years now, the view has developed that a potentially fruitful way to bring about change in corporate behaviour on social and environmental matters is to acquire shares in the company. Of course, very major shareholders such as pension funds, sovereign wealth funds and institutions such as the Church may well be able to bring significant influence to bear: though of course the reason they hold the shares as an investment, not as a means of possible influence. ClientEarth, the non-profit environmental law NGO, holds 27 shares in Shell plc – one may safely assume not as an investment. Rather, ClientEarth sought to use its status as a minority shareholder to bring a derivative action on behalf of the company against Shell's directors under s.261 of the Companies Act 2006. The basis for the proposed claim was alleged defects in the acts and omissions of the directors in respect of two matters:

1) Shell's Energy Transition Strategy published in 2021-22.
2) The response to the order made by the Hague District Court in May 2021 in *Milieudefensie v Royal Dutch Shell.*

Derivative actions require permission of the court to proceed. In ClientEarth v Shell plc [2023] EWHC (Ch) 1137 Trower J refused permission on the basis that ClientEarth had not met the threshold under s.261 of establishing a prima facie case for permission. This requirement reflects the unusual nature of derivative actions and is designed to weed out applications which are unmeritorious. It is a higher standard than a "seriously arguable" case.

Directors' duties

The thorough judgment provides some important guidance on claims such as that of ClientEarth.

The court began by identifying the relevant duties on the directors of Shell at the relevant time. These were the duty to promote the success of the company under s.172 of the Companies Act, and the duty to exercise reasonable skill care and diligence under s.174. ClientEarth had sought to formulate a number of climate-specific duties which it said the directors were subject to: these included for example according "appropriate weight" to climate risks, and implementing reasonable measures to mitigate risks to Shell's profitability in the transition to global temperature objectives under the Paris Agreement on Climate Change. Unsurprisingly, the court declined to endorse such duties, given the established law that it is for the directors, acting in good faith, to determine themselves how to promote the best interests of the company, for its members as a whole. The imposition of highly specific duties, orientated in one direction, would not be consistent with that general principle. As in judicial review, the court's role is not to second guess decisions or exercise some general supervisory jurisdiction – the question is whether the directors acted within the range of decisions reasonably open to them.

With regard to the Dutch case, the court did not accept that there was any general duty on the directors of a company to ensure they comply with orders of a foreign court. Again, this was part of the general duty to act in the best interests of the company. Shell plc was incorporated in England and the director's duties were governed by English law, not Dutch law. Further, the Hague Court itself had declined to rule on how the directors should ensure that Shell met its obligations, this being a matter for the directors.

There are some further relevant points arising from the judgment.

Views of other shareholders

It was material that the ETS had the support of a large majority of Shell's shareholders at AGMs held in 2021 and 2022. Client Earth had submitted template letters of support for its case from

members holding only 0.17% of Shell's shares. These were factors militating against the grant of relief in the court's view.

Evidence

The court commented unfavorably on the evidence put forward by ClientEarth, which was essentially a witness statement by a senior ClientEarth lawyer, expressing opinions as to how the directors should have acted in response to the alleged risks faced by the company (Shell did not dispute that climate change and energy transition presented such risks). The evidence could not be regarded as expert evidence, there was no objective universally accepted methodology which it was claimed should have been followed, and perhaps most importantly the evidence simply did not grapple with the reasonable range of options open to directors.

Ulterior motive

Shell argued that there was reason to believe that the application was brought essentially to advance ClientEarth's own policy agenda rather than the interests of the company, and as such was not brought in good faith. This clearly had some traction with the judge, who regarded the claim as having the ulterior motive of advancing ClientEarth's own agenda and seeking to impose a single-minded focus of its own views as to how to address climate risks: this pointed towards such an ulterior motive.

Relief

The court regarded the relief sought by ClientEarth – a mandatory injunction and declaratory relief – as problematic. An injunction would draw the court into the arena of supervision and control of directors' decisions, and it was hard to see what purpose declaratory relief would serve. The court expressly concluded that the proper forum for ClientEarth's arguments was a vote on a resolution in a general meeting – a course which it was open to ClientEarth to seek to procure.

Comment

The decision will no doubt have been a disappointment to climate activist groups but can hardly have been a surprise to anyone with a rudimentary knowledge of company law. While the case may go further, it seems very unlikely that a different result will be reached, at least without overturning some basic well-established principles based on statute. This does not of course mean that environmental and climate change considerations and risks can be ignored by directors. Section 172(1) of the Companies Act 2006 requires directors to act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole and in so doing to have regard (amongst other matters) to –

a) the likely consequences of any decision in the long term,

b) the interests of the company's employees,

c) the need to foster the company's business relationships with suppliers, customers and others,

d) the impact of the company's operations on the community and the environment,

e) the desirability of the company maintaining a reputation for high standards of business conduct, and

f) the need to act fairly as between members of the company.

A number of these factors, such as long-term consequences, impact on environment and communities, business relationships with suppliers and customers, and reputation, may well be engaged by climate change issues, and a simple failure to have regard to them at all could not doubt provide the basis for a legitimate derivative action. The facts, however, would probably need to be quite stark to persuade the court. As ever, the problem will be that directors will be faced with a host of countervailing considerations as to what represents the best interests of the company, and in reality, unfortunately, short term profit may well trump long term environmental improvement entailing short term pain.

There would seem to be more fruitful ways of seeking to bring companies round to environmentally responsible action than derivative actions by pressure groups holding a tiny minority of shares. Public opinion is one – as can be seen having at least some effect on water companies at present. More stringent rules on environmental and social governance are another. And companies do need to bear in mind that climate litigation in terms of group actions is definitely increasing. The FT reported on 5 June that claims such as the $36bn class action being brought against mining group BHP in respect of the collapse of the Fundão are increasingly being funded by large international litigation funders, with increasingly specialist and sophisticated law firms hunting out such claims. Others in the pipeline are the claim in Germany against RWE by Peruvian farmer Saúl Luciano Lliuya alleging that his home on the floodpath of Palcacocha Lake, is "acutely threatened" by the potential collapse of two glaciers into the lake that would cause significant flooding as a consequence of global warming; and the claim in Switzerland by residents of an Indonesian island threatened by rising sea levels against the cement producer Holcim. It can only be matter of time before some company, in some jurisdiction, takes a very big hit. It is a fair question for shareholders to ask directors how such risks are being managed. Large institutional investors, according to a 2019 article in the Harvard Business Review have in recent years grown too large to diversify away from systemic risks, forcing them to consider the environmental and social impact of their portfolios and are likely to be concerned about such risks.

Current issues at the intersection of planning, environment and property

Kerry Bretherton KC
Call 1992 | Silk 2016

Rebecca Cattermole
Call 1999

Introduction

Property disputes arise at various stages during planning and development. To meet increasing demand the property element of the Planning, Environment and Property Group at 39 Essex Chambers has recently been strengthened by the addition of the authors of this article to add to the existing impressive group of property practitioners. While we undertake all real estate work and related commercial transactions, we wanted to introduce ourselves by reviewing a few key elements of current topics we regularly deal with in our property work. In due course, we propose to post more detailed articles on our website expanding some of these topics.

Options and Overage

Among the most common development matters we deal with are the enforceability of option agreements and whether overage is payable. These key tools used by developers are fraught with disputes about construction which can involve substantial losses to the unsuccessful party.

While most of our work concerns the conventional disputes about construction of the particular contract there may be a new argument rearing its head creating a potential hurdle for developers.

In *Arthistory Ltd v Campbell* [2022] EWHC 848 (Ch) the court considered an option granting a property

company an option to acquire an elderly couple's property. The court set aside the option on the basis that the arrangements taken as a whole were unfair. The facility agreement provided for initial interest at a rate of 28% and an exit fee of 3% when it had always been intended that they would be waived as per a promised side letter. As there were no sound commercial reasons for the option nor was it a legitimate attempt by the property company to protect its position, the agreement was set aside pursuant to section 140B of the Consumer Credit Act 1974.

The case, however, is likely to turn on the facts and most option agreements do not involve residential homes but rather more substantial parcels of land to be developed. It seems unlikely that the issues raised in *Arthistory* will arise often, and it will remain far more usual for arguments to focus around whether the trigger event has been met.

Two recent cases involving experts and overage agreements are worth noting. In *Bastholm v Peveril Securities* (Dalton Park Retail) Ltd [2023] EWHC 438 (Ch) an application to RICS for the appointment of an expert was held to be not validly made because the deed required such application to be made jointly by individuals described as "the seller". One of these people was a discharged bankrupt. As his estate remained vested in his trustee in bankruptcy who was not a party to the application, it had not been made by all of those collectively described as "the seller".

In *Maypole Dock Ltd v Catalyst Housing Ltd* [2021] EWHC 1742 (TCC) [2021] 5 WLUK 164 [2021] B.L.R. 534 the defendant housing provider had purchased land and buildings from the claimant. Under an overage agreement, the defendant was required to optimise the open market value of land and to pay additional consideration once planning permission had been obtained for residential development. The overage agreement included an expert determination provision in the event of a dispute concerning the calculation of additional consideration other than open market value. Planning permission was granted, and the residential development constructed. The claimant alleged that the defendant had acted in breach of the overage agreement and sought damages. The defendant served notice of expert determination and alleged that it owed nothing further. The claimant maintained the court had jurisdiction. An interim injunction was granted restraining the defendant from pursuing an expert determination in relation to an overage agreement because it was held that there was a serious issue to be tried as to whether the expert or the court had jurisdiction to determine the matter.

The cases reinforce the importance of clearly drafted contracts providing for expert determination, that the technical requirements to trigger this process are met and time limits followed.

Rights to Light

A common issue whether an injunction restraining the nuisance will be awarded or whether damages are an adequate remedy for interference with rights to light. In appropriate cases, negotiated damages will be awarded in lieu of an injunction in accordance with the principles in *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20; [2019] A.C. 649.

A recent example of the application of the principles is *Beaumont Business Centres Ltd v Florala Properties Ltd* [2020] EWHC 550 (Ch) in which a building owner sought an injunction or damages in lieu of an injunction for interference with its rights of light by the defendant who had constructed a hotel and leased it.

Noting that the burden was on the defendant to show why an injunction should not be granted, the court considered that the defendant had proceeded with the development cognisant of the risk it had taken and had behaved in an unneighbourly fashion. The injury the claimant would suffer was neither small nor easily quantifiable and it was not oppressive to order a cut back.

Importantly, the failure by the claimant to apply for

an interim injunction was not a significant factor although if it wanted an injunction, it would have to join the company to whom the hotel had been let which could be heard on whether an injunction should be granted. The claimant was entitled to negotiating damages in lieu of an injunction (the hotel was valued as being in excess of £1 million more than if it had been constructed so as not to interfere with the claimant's rights to light).

The case serves to emphasise the value of obtaining early specialist expert advice. As a developer it is critical to ensure that rights to light are considered at an early stage of a project: issues regarding a right to light could mean that a scheme is financially not viable or may be subject to costly delays or reputational damage. Equally, the person potentially affected by a development is wise to seek early advice given the risks in obtaining final injunctive relief.

Restrictive Covenants

There are two features of the law of freehold covenants which mean that covenants will not bind successors in title: (a) positive covenants do not run with the land; and (b) restrictive covenants require the benefitting party to have an interest in neighbouring land that will benefit from the covenant. That is the general law.

There are statutory exceptions. Thus, for example, section 8 of the National Trust Act 1937 enables a restrictive (but not positive) covenant to be enforced by the National Trust as if it were possessed of, entitled to, or interested in, adjacent land and entered into for the benefit of that land. In the planning context, section 106 of the Town and County Planning Act 1990 enables both positive and negative obligations to bind successors in title without the need for neighbouring land to be benefitted.

More recently, as part of the Government's 25-year plan to improve the environment, a new statutory scheme of conservation covenants was introduced under the Environment Act 2021. This came into force on 30 September 2022. A conservation covenant is a private agreement between a landowner (being a freehold owner or tenant of a fixed term of 7 years or more) and a responsible body to do or not do something on their land for a conservation purpose and is intended by the parties to be for the public good.

Importantly, from a property perspective, it provides a further statutory exception to address the difficulties of the general law regarding freehold covenants. By section 122(1) the obligation binds the landowner under the covenant, and any person who becomes a successor of the landowner under the covenant. The provisions defining successor in section 122 are somewhat convoluted. The successor means a person who holds the qualifying estate or an estate in land derived from the qualifying estate after the creation of the covenant. In simple terms, it will bind any successors of the original covenantor, that is, anyone who acquires the original covenantor's estate in *any* of the land to which the obligation under the conservation covenant relates. The holder of an estate in land derived from the qualifying estate after the creation of the covenant will also be a successor. Thus, for example, where a periodic tenancy of the whole or part of the land, is granted after the covenant was entered into, that tenant is a successor and will be bound by the covenant.

There are exceptions relating to a successor who holds an estate in land derived from the qualifying estate (one important exception being that that a successor tenant will not be bound by a positive obligation). The DEFRA guidance (Getting and using a conservation covenant agreement, published 18 November 2022, is that the positive obligations, and any related ancillary obligations will, however, continue to be binding on the landlord. Responsible bodies must register conservation covenants as a local land charge and only from that point forward will they bind successors in title (in contrast to section 106 obligations).

Agriculture

Conservation covenants will play an important role in landscape recovery schemes and indeed other environmental land management schemes. The Rock Review on tenant farming in England examined, inter alia, the impact of such schemes on the tenanted sector, and DEFRA's response in May 2023 agreed that tenant farmers should be able to access financial incentive schemes. Some of the problems encountered in the context of agricultural tenancies relate to length of the letting, restrictions on user of land for agricultural purposes, reservations to the landlord of carbon and biodiversity credits, and prohibition on entering private schemes (e.g., planting trees unless ancillary to farming activities).

The Agriculture Act 2020, representing the most significant reform of agricultural policy since 1947, paves the way to facilitate tenant access to financial schemes post Brexit. A new power to challenge (and refer to arbitration) a landlord's refusal to consent or vary terms of tenancy which would enable a tenant to have access to government financial assistance was introduced by the section 19A of the Agricultural Holdings Act 1986. The scheme is set out in Part 2 of Agricultural Holdings (Requests for Landlords Consent or Variation of terms and the Suitability Test) (England) Regulations 2021 SI 2021/619. There, is however, no equivalent provision for farm business tenancies under the Agricultural Tenancies Act 1995 albeit DEFRA have indicated that is under review. Certainly, the golden thread running through access is increased collaboration between landlord and tenant in the agricultural context.

Overlooking

And we end by returning to case law and the long-awaited decision in *Fearn v Board of Trustees of the Tate Gallery* [2023] UKSC 4; 2023] 2 W.L.R. 339 in the Supreme Court. The widely reported case concerned the viewing gallery of the Tate Modern which overlooks glass walled flats. There were 1000s of visitors each week, many of whom peered into, and took photographs of, the interior of the flats. The judgment usefully summarises the principles of common law nuisance. Unlike a covenant prohibiting nuisance or annoyance is not constrained by the definition of common law nuisance (*Shephard v Turner* [2006] EWCA Civ 8; [2006] 2 P. & C.R. 28; [2006] 2 E.G.L.R. 73 at [55] Carnwath LJ, citing *Tod-Heatly (1888)* 40 Ch. D. 80, said that the common law of nuisance is of no direct relevance, since the wording of such covenant is deliberately designed to give greater protection than the common law).

The Court of Appeal in *Fearn* had raised a suggestion that planning laws and regulations would be a better medium for controlling "inappropriate overlooking" than the common law of nuisance. Lord Leggatt JSC giving the lead judgment with whom the majority agreed, held that whereas both may sometimes be relevant, planning laws and the common law of nuisance have different functions. There are quite distinct objectives; unlike the common law of nuisance, the planning system does not have as its object preventing or compensating violations of private rights in the use of land. Its purpose is to control the development of land in the public interest. The objectives which a planning authority may take into account in formulating policy and in deciding whether to grant permission for building on land or for a material change of use are open-ended and include a broad range of environmental, social and economic considerations.

Indeed, the Supreme Court had previously made it clear in *Lawrence v Fen Tigers Ltd* [2014] UKSC 13; [2014] AC 822, that planning laws are not a substitute or alternative for the protection provided by the common law of nuisance. As Neuberger JSC said, when granting planning permission for a change of use, a planning authority would be entitled to assume that a neighbour whose private rights might be infringed by that use could enforce those rights in a nuisance action; it could not be expected to take on itself the role of deciding a neighbour's common law rights.

There are future points in common law nuisance

which remain undecided. Coming to a nuisance is no defence (see *Lawrence v Fen Tigers*) but obiter comments suggest a possibility that a use of a defendant's land which pre- dates a change in use of claimant's land may support a defence by contributing to the character of locality.

Conclusion
It is a busy time for property practitioners, and we have some very exciting projects.

Kerry has just published the 2nd edition of the book of which she is co-author *The Electronic Communications Code: A Practical Guide;* she is currently advising on complex issues relating to the Building Safety Act 2022; is acting in an appeal involving arguments about penalty clauses and notices to complete (recently remitted from the Court of the Appeal for trial); recently succeeded in an appeal concerning a long dispute between farmers about various agricultural and commercial holdings and has a good track record of success in rights of way appeals and boundary disputes.

Rebecca is working on various environmental land management schemes in the context of property rights and in particular agricultural tenancies. And she continues to advise on recovery of possession of tenanted agricultural land and other property issues concerning the purchase of agricultural land intended for large scale development.

We are both very excited to have joined this thriving Group within 39 Essex Chambers and look forward to working with such talented colleagues. As part of our way of getting to know the 39 Essex Chambers' clients we are happy to accept instructions pursuant to Chambers 15 minute Pilot Scheme.

Launch of podcast: "Climate Law Matters"

Stephen Tromans KC
Call 1999 | Silk 2009

Stephanie David
Call 2016

Stephen Tromans KC and Steph David have recently launched a podcast, called "Climate Law Matters", with the aim of identifying the key legal developments and barriers in addressing the most pressing challenge of our generation, climate change. The podcast covers a range of sectors including energy, water, financial services and transport, to name but a few; and involves interviews with experts across law, science and policy.

Episodes 1-4 are available on Spotify and Apple Podcasts, as well as on Chambers' website. In these episodes, Stephen and Steph discuss the Net Zero Growth Plan and Carbon Budget Delivery Plan, public interest environmental judicial reviews and the role of the Paris Agreement in these challenges, as well as the role of environmental principles in climate change litigation.

Episode 5 will be published soon and involves an interview with a Professor of Economic Policy specialising in energy and climate.

Half time realities

John Pugh Smith
Call: 1977

Introduction

In my January article entitled "New Year Hopes & Fears"[9] I reviewed the decision of Mr Justice Kerr in *Smith v Secretary of State for Levelling Up, Housing & Communities and Hackney LBC* [2022] EWHC 3209 (Admin) which had led to a successful challenge of PINS's cost savings initiative of using "Appeal Planning Officers" or "APOs" to address delays and free-up inspectors' time, one of the Rosewell recommendations.[10] I also considered their Stakeholder Survey and PINS' latest performance statistics and suggested that the challenges and solutions being faced by the appeal process could benefit from the greater deployment of Alternative Dispute (ADR) particularly the use of mediation and other related techniques to facilitate dialogue can achieve positive outcomes in even the most protracted and ill-tempered disputes.

It is now late June. The Court of Appeal has swiftly, and, unsurprisingly, heard and upheld the Secretary of State's appeal *[2023] EWCA Civ 514.* PINS has now published its latest performance targets but it continues to struggle in meeting the new Ministerial targets.[11] The number of planning applications and appeals, particularly for new residential developments, is down due to the current state of the economy and the housing market.[12] What changes? Is it not time for the more holistic approach now being progressed in the Civil Courts for litigation genuinely to be a course of last resort so that greater efforts are put into trying to resolve matters by (assisted) negotiation?

The *Smith* Case

This litigation arose out of an advertisement appeal determined by the written representations appeal. The principal legal issue, upon which the statutory challenge had succeeded before Mr Justice Kerr, was his finding that the appointed Inspector, in breach of the requirements of procedural fairness and natural justice, had failed to determine the appeal independently of the APO and had unlawfully sub-delegated his functions to an inexperienced junior officer, whose recommendation and reasoning he accepted without alteration. Whilst the relevant legislation did not require a site visit to be carried out, the appeal acceptance letter had stated that a site visit would be carried out by an inspector or their representative. In the event, the APO had conducted the site visit on behalf of the (appointed) Inspector, following which she had recommended that the appeal be refused on the sole ground of visual amenity. The Judge was concerned that, in effect, the Inspector had 'topped and tailed' the APO's decision without adding further reasoning before signing and issuing the decision in his own name, appending the decision of the APO. Subsequently, permission to appeal had been granted on one ground, that the Judge was wrong to conclude that the process was unfair as the appeal planning officer had only provided recommendations for the Inspector. The Inspector had personally considered all documentation and the decision to dismiss the appeal was his own.

Giving the sole judgment of the Court, Lord Justice Lewis said that the starting point was that the decision on whether or not to allow the appeal had been taken by the inspector. He was the person appointed to take the decision and he did, in fact, take the decision to dismiss the appeal. In doing so, he had read the documentation, considered the photographic evidence and also read the reasoned

9 https://www.39essex.com/sites/default/files/2023-01/PEPNewsletter_17Jan2023.pdf

10 https://www.gov.uk/government/publications/independent-review-of-planning-appeal-inquiries-report (published 12 February 2019)

11 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1159854/Ministerial_Measures_Experimental_Stats_Release_May_23.pdf

12 https://www.planningresource.co.uk/article/1827376/record-low-applications-threaten-housing-targets-put-pressure-planning-departments?bulletin=planning-daily&utm_medium=EMAIL&utm_campaign=eNews%20Bulletin&utm_source=20230623&utm_content=Planning%20Resource%20Daily%20(263)::www_planningresource_co_u_16&email_hash=

recommendation of the APO which described the site and gave her reasons for considering that the proposed advertisement would have an adverse effect on visual amenity. There was no question here of unlawful delegation, that is, there is no question here of the decision being taken by a person other than the appointed decision-maker.

The next question was whether the process adopted by the decision-maker was fair. It is for the decision-maker to decide on the procedure to be followed provided that the procedure is fair and that it provides the decision-maker with the material necessary to make a decision: see *R (Reckless) v Kent Policy Authority* [2010] EWCA Civ 1277 at paragraph 29 (per Carnwath LJ). In the present case, as accepted by the Judge, there was nothing unfair in the APO carrying out a site visit and reporting on the facts, the evidence and the contentions of the parties. Similarly, there was nothing objectionable in principle in the APO making a recommendation as to whether or not the appeal should be allowed and providing reasons for that recommendation. Lord Justice Lewis remarks: "The decision remains that of the inspector. It is for the inspector to determine whether he agrees with the recommendation and the reasons. If the inspector does not agree, or if he considers that the reasoning is not adequate, he will not accept that recommendation or will not rely on that reasoning. There is no reason why, as a matter of procedural fairness, an appeal planning officer cannot provide reasoned recommendations as part of the decision-making process. That is consistent with the case-law in this area as appears from the decision in *Reckless* and the case law summarised at pages 255 to 258 of Wade & Forsyth *Administrative Law* (12th ed.)."[13]

He then states that he does not accept that the reasons identified by the Judge justify a different conclusion. First, there is no evidential basis for the Judge's conclusion that the appeal planning officer "was seriously unqualified to exercise the evaluative professional planning judgment on visual amenity". The APO had an undergraduate degree in a relevant subject and had received training on the categories of appeals with which she was dealing. Furthermore, it was not a matter for a court, exercising supervisory functions by way of judicial or statutory review to determine the appropriate level of qualifications for APOs. Secondly, and more significantly, the ultimate decision on whether to allow or dismiss the appeal was the inspector's. If he considered that the APO's reasoned recommendation was inadequate (for whatever reason), he would not have relied upon it. It is difficult, therefore, to see on what basis considerations of qualification or training justify a conclusion that the process was unfair.

The Court also did not accept the Judge's general conclusions that it would "be better practice, to ensure fairness" for the APO to address the facts and avoid planning judgments. In this case, the APO had provided reasoned recommendations. She had not taken the decision. The inspector did. There is nothing inherently objectionable as a matter of principle in making a reasoned recommendation based on a view of the planning merits of the appeal. That does not give rise to procedural unfairness. Nor does it assist to refer to the APO providing "a powerful steer" or to suggest that the appeal planning officer was determining the key issue of visual amenity, "albeit on a provisional basis and subject to the inspector's decision whether to agree or disagree with her judgment".

Finally, in the context of this case, the principles of procedural fairness did not require the reasoned recommendation of the APO to be provided to the parties for comment prior to the inspector taking his decision. This was an appeal using the written representations procedure. The APO was part of the internal machinery within PINS for enabling the inspector to deal with that appeal. She was not a witness or a party giving evidence or making representations. Rather, she was part of the process by which the inspector considered the appeal. In those circumstances, there was no procedural unfairness in her reasoned

13 @ para. 19

recommendation not being disclosed to the parties for comment.

PINS Latest Performance Statistics

The introduction to the *Ministerial Measures: Experimental Statistics 1st June 2023*[14] explains that this report provides information on how PINS has performed against new measures by which Ministers agreed to assess the organisation's casework performance for appeals. These measures are:

A) Appeals valid on first submission.

B) How long appeals take – there is also an ambition for more consistent, timely decisions.

C) Customer satisfaction.

D) Number of cases quality assured.

For measure (A) the report covers the twelve months January to December 2022. Information on how long appeal decisions take from valid receipt to decision (measure B) covers the 12 months from May 2022 to April 2023. No information is available on measure (C). Measure (D) covers the three months January to March 2023. It also notes that this is the fourth time such information has been produced, and work is still in development. Following a review, this series continues with the status of "Experimental", with updates provided every three months. The next publication is stated to be in August 2023.

In respect of measure (A), for appeals received during October to December 2022, 64.4% were valid first time. This is against an ambition of the proportion rising annually and ambition to reach 100%, rising to at least 85% in 2023/24.

Turning to the more critical measure (B), the report reminds that the ambition is that PINS should work towards a target for appeals decided entirely using written evidence of 16-20 weeks, and a target of 24-26 weeks for appeals decided including at least some evidence through hearing or inquiry. However, the statistics reveal that, over the year ending April 2023, just 27.4 per cent of written representation appeals were decided within 20 weeks, with the largest proportion of such appeals decided within 52 weeks. For appeals partly or wholly involving hearings or inquiries, just 10.3 per cent were dealt with within 20 weeks and 10.7 per cent were dealt with within 26 weeks. Worryingly, some 53.2 per cent took more than 52 weeks. However, the report explains that these are "experimental statistics, with further work required to ensure robust, consistent quality assurance around them".

The Ministerial targets also require information on how long appeal decisions take from valid receipt to decision with information provided on various percentiles. It sets an ambition that the decision time for the 50th percentile of all cases should fall and that the decision time for the 90th percentile of all cases should fall faster than the 50th percentile. However, the report reveals that, over the period October 2021-April 2023, both measures were rising rather than falling, and that the gap between them is not reducing. In the October-December 2021 quarter, the decision time for the 50th percentile of cases was 26 weeks, which rose to 29 weeks in the January-March 2023 period. Meanwhile, the decision time for the 90th percentile of cases also rose from 49 weeks in the first period to 62 weeks in the final one. The gap between them also rose, rather than fell, from 23 weeks to 33 weeks over the same timescale.

As already mentioned, in respect of measure (c), no data is provided on the customer satisfaction target. However, the report advises that PINS is working with the Institute for Customer Service to conduct a "satisfaction survey". It adds: "The data capture phase was carried out in April and early May 2023. The results will be reported when available." Finally, for measure (D), although there is no specific statistical Ministerial target on quality assurance, the report states that, over the three months January to March 2023, 1,099 appeal cases were quality assured,

14 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1159854/Ministerial_Measures_Experimental_Stats_Release_May_23.pdf

constituting "between a fifth and a quarter" of all appeal decisions issued over the period. Again, unfortunately, there has been a drop; for according to the previous update, covering the October to December 2022 quarter, 1,257 appeal cases had been quality assured over that period.

That fresh approach

In the context of this article the Court of Appeal's *Smith* judgment is helpful in the following wider respects. It confirms:

1) As the process to be followed is within the decision maker's discretion, it is for him or her to decide on the process, provided it is fair.[15]

2) The factual context includes the nature of the decision to be taken; the considerations relevant to the decision; and the characteristics and role played by, respectively, the decision maker and the person giving assistance to the decision maker.[16]

Accordingly, with this judicial endorsement of the APO system, PINS (and DLUHC) can surely embrace further innovative solutions towards helping reduce the backlog of appeals and speed up the process are legally permissible. I suggest, again, that these could swiftly include not only the greater use of technical assessors (e.g., on heritage, design and viability disputes) but also independent mediators (facilitators) to help resolve or limit discrete issues within the appeal and call-in processes, for example, housing land availability, viability and section 106 contributions, mitigation measures.

So, given the current and likely state of affairs surely now is the time, finally, for such fresh thinking and approaches to be more actively progressed though, not yet, the use of artificial intelligence, please.[17]

John Pugh Smith *is a recognised specialist in the field of planning law with related disciplines acting for both the private and public sectors. He is also an experienced mediator, arbitrator and dispute 'neutral'. He is on the panel of the RICS President's appointments for non-rent review references, a committee member of the Bar Council's Alternative Dispute Resolution Panel, an advisor to the All Party Parliamentary Group on ADR, one of the Design Council's Experts and a member of its Highways England Design Review Panel. He has been and remains extensively involved in various initiatives to use ADR to resolve a range of public sector issues. including the DLUHC/PINS Enforcement Mediation Pathfinder Initiative.*

Section 106s and all that

John Pugh Smith
Call: 1977

Introduction

While the case law on s.106 issues should now be settled the decision of Mrs Justice Lieven in *Redrow Homes Ltd v Secretary of State for Levelling Up, Housing and Communities & New Forest District Council* [2023] EWHC 879 (Admin) raises some issues worthy of note, again, on s.73 variations.

This was a highly fact specific case and the judgement necessarily deals with the language of the Inspector's Decision Letter and the specific unilateral undertakings offered by the Claimant at appeal stage. Nevertheless, its s.73 context, and, the Judge's consideration of the case of *Norfolk Homes Ltd v North Norfolk District Council* [2020] EWHC 2265(Admin), about which I wrote two articles at the time, due to my particular geographical as well as professional interest in the differing approaches taken by the two involved judges at the time,[18] raises its significance for inclusion within practitioner libraries.

15 @ Para. 18

16 @ Para. 19-20

17 https://thetimeblawg.com/2023/06/24/chatgpt-lawyers-sanctioned/

18 https://www.localgovernmentlawyer.co.uk/litigation-and-enforcement/311-litigation-features/43562-section-106s-and-the-technical-traps-submission; https://www.localgovernmentlawyer.co.uk/planning/318-planning-features/44776-section-106s-and-the-technical-traps-submission-the-final-chapter

The *Redrow* case

Redrow had originally granted planning permission in 2012 for a mixed-use development at Lymington Shores that comprised "168 dwellings, a restaurant, retail/commercial space, boat club, art gallery, jetty with pontoon, access alterations, pedestrian bridge over railway [necessary emphasis added], riverside walkway, car parking, landscape and drainage. The s.106 agreement which accompanied the 2012 permission included a restriction which required the *"construction and substantial completion"* of the pedestrian bridge over railway ("the Footbridge") prior to occupation of the 75th open market dwelling. This restriction was later varied by a deed of variation in 2017, to occupation of the 125th open market dwelling. The restriction, as varied, required that the final 17 open market units forming part of the development could not be occupied until the Footbridge had been delivered. Having virtually completed the development Redrow applied for a s.73 variation to remove Condition 19 from the 2012 permission. The Council accepted that it was appropriate for Condition 19 to be removed. However, it refused the application, not because it thought that Condition 19 should not be removed, but because it did not want to risk undermining the s.106 obligation that required the construction of the Footbridge. The Council's reason for refusal was that if it were to grant the s.73 variation it would mean that a new planning permission would be granted for the development, without the necessary new s.106 agreement being entered into to secure the delivery of the Footbridge, amongst other obligations.

Redrow appealed against this refusal making a number of written representations both before and after the hearing. Their statement of case confirmed that they were prepared to enter into a new s.106 agreement but that they did not consider it necessary to require the last 17 open market dwellings to remain vacant until such time as the Footbridge was delivered. They did not suggest that the s.106 delete reference to it but rather stated that it should provide for a period of 2 years for the Footbridge to be delivered, failing which they would have to offer the Council the sum of at least £1 million which could be used to deliver the Footbridge. Upon being granted further time by the Inspector at the hearing to submit any s.106 agreement or unilateral undertakings, Redrow submitted two unilateral undertakings on an alternative basis:

1) To remove the requirement for 17 open market dwellings to be left unoccupied unless or until the bridge is delivered and replace this with a positive requirement to deliver the bridge within 2 years but with no restriction on the unoccupied homes (in the absence of any evidence of any planning harm)
2) To remove the requirement for 17 open market dwellings to be left unoccupied unless or until the Footbridge is delivered and replace it with 5 open market dwellings.

The Council submitted that the Inspector should disregard the two undertakings on the basis that there are only two recognised methods for varying a s.106 agreement:

1) By agreement between the LPA and the person against whom the obligation is enforceable.
2) By an application under s.106B TCPA 1990.

The Council argued that the Claimant was trying to instead vary a s.106 obligation through a third method (i.e., via a s.73 application). The Inspector dismissed the appeal and the reasoning provided by the Inspector was challenged by the Claimant on two grounds, both of which were dismissed by the Judge.

Ground (1) had been argued on the basis that the Inspector had erred in law as she had misdirected herself in concluding that she had no power to allow the appeal and impose a fresh s.106 obligation. This argument was put forward by the Claimant on the basis that the Inspector used the following phrase at paragraph 17 of the Decision Letter: "Notwithstanding my finding in relation to the removal of condition 19, were I to allow the appeal, the submission of UUs [unilateral undertakings] seeking to modify the

terms of the planning obligation agreed under the original planning permission fall outside the scope of an application made under Section 73 of the Act". This phrase, Redrow argued, indicated that the Inspector had restricted herself from taking into account the undertakings offered and concluded that she could not allow the appeal on that basis. The Court rejected this ground, holding that although the Inspector's use of the abovementioned phrase was "infelicitous", reading the Decision Letter as a whole, it was apparent that the Inspector knew and understood that she had the power to allow the appeal upon a satisfactory s.106 agreement being achieved. This was evident since the Inspector, in earlier paragraphs of the Decision Letter, had discussed why the undertakings offered were not satisfactory in the circumstances of the case. The Court held that if, as the Claimant submitted, the Inspector had erred in law and concluded that she did not have the power to allow the appeal, then there would have been no need for the earlier paragraphs.

On Ground 2 Redrow had argued that, notwithstanding Ground (1), and the quality of the Inspector's reasons the Judge found that they were sufficiently clear as to the basis on which she was dismissing the appeal.

The judgment then records the following:

> 49. *Finally, an important issue arose during the course of the hearing about the degree to which the principles set out by Holgate J in* **Norfolk Homes** *apply to the situation that arose in the current case. The Claimant placed great reliance, both in its written representations and before this court, on* **Norfolk Homes**, *and in particular the principle that the s.106 agreement ceased to have effect if it was not expressly tied into the subsequent s.73 grant, see [127] of that case.*
>
> 50. *However, there is at least one important distinction between the current case and* **Norfolk Homes.** *In that case the original planning permission had not been implemented and the obligations in the s.106 had therefore not yet arisen. However, the present case is completely different. Not merely had the 2012 permission been implemented, it had in all material respects been completed. The obligation to construct the footbridge had already arisen under clause 4.4, albeit it did not bite until the occupation of originally the 75th and then the 125th dwelling.*
>
> 51. *It cannot be the case that the effect of the s.73 fresh permission wipes out obligations which have already arisen. It is in my view open to debate the degree to which a s.73 consent would remove an obligation which had arisen but had not yet become enforceable. Powergen makes clear that a developer can elect whether to implement the s.73 consent or the original consent. However, where the original consent has been implemented (here virtually completed), I cannot see how the developer can rely upon s.73 to change the effect of the extant s.106. That is a matter for another case, but I note that it is a material distinction between the two cases, and one that the Claimant did not acknowledge in their representations. It was the distinction between a case where the original permission had been implemented and one where it had not, which the LPA was raising in its post-hearing representations. Therefore, I do not think the position is as clear cut as Mr Garvey and his clients had suggested. However, so far as the Inspector's decision is concerned, she was deciding the matter on the merits of the undertakings that had been offered and therefore this legal complication was not in issue.*

Concluding Remarks

Reflecting on the foregoing, lead to the following reminders:

1) That developers should not over-promise in s.106 agreements when seeking to get permissions over the line, thinking they may be able to wriggle out of obligations later on.
2) That where developers find themselves about being pressured to accept obligations they are

not convinced can be complied with they need to remember that no easy or available solution legally exists, without the LPA's co-operation, which will be permitted by the Courts, before they sign up to that planning obligation.[19]

Nonetheless, with such a slow and unresponsive planning appeal system, it is unsurprising that these types of situation continue to occur, and, all too often.

R(oao Barbara Atwill) v New Forest National Park Authority [2023] EWHC 625 (Admin)

Victoria Hutton
Call: 2011

In this case the Claimant judicially reviewed the Park Authority's grant of a planning permission to the Interested Party under s73 Town and Country Planning Act 1990 ('TCPA 1990') for the variation of the approved plans condition attached to a planning permission which had been granted in 2018 ('the 2018 Permission'). The 2018 Permission was for the demolition of an existing dwellinghouse and the construction of a new dwelling and associated works.

The factual background was convoluted but the key point was that having been granted the 2018 Permission the Interested Party demolished the existing dwellinghouse (as was provided for by the 2018 Permission) but then went on to build a dwellinghouse which was materially different from that which the 2018 Permission authorised. The key issue in the case was whether the 2018 Permission had been implemented and therefore whether the Park Authority had the power to grant a s73 application to regularise the breach of planning control; or, alternatively, whether the material differences in what had been built as against what had been permitted meant that the 2018 Permission had not been implemented. The Council held that the act of demolition of the original dwelling had lawfully implemented the 2018 Permission. The Claimant argued that the Park Authority's approach was unlawful and it was necessary to consider the entirety of the development which had occurred.

The Claim proceeded on seven grounds, six of which were successful. However, it is ground 1 which is likely to be the most significant and is therefore the ground which this article focusses upon.

Section 56 of the TCPA 1990 states (as material):

56. – Time when development begun

1) Subject to the following provisions of this section, for the purposes of this Act development of land shall be taken to be initiated –
   a) if the development consists of the carrying out of operations, at the time when those operations are begun.

…

2) For the purposes of the provisions of this Part mentioned in subsection (3) development shall be taken to be begun on the earliest date on which any material operation comprised in the development begins to be carried out.

…

4) In subsection (2), "material operation" means –
   a) any work of construction in the course of the erection of a building;
   b) any work of demolition of a building;

…".

A number of cases have considered s56 TCPA 1990 and, in particular, the issue of whether it is permissible to consider the entirety of works which have occurred and not simply discrete 'implementation works' which occur prior to the date of a permission's expiry.

19 See e.g., *R (Millgate Developments Ltd) v Wokingham District Council* [2011] EWCA Civ 1062

In *Commercial Land v Secretary of State for Transport, Local Government and the Regions* [2002] EWHC 1264 (Admin) Ouseley J held that:

> "… the question of whether the operations done were comprised within the development involves looking at what has been done as a whole and reaching a judgment as a matter of fact and agree upon the whole. It does not entail any artificial process of ignoring part of what has been done …". (at [35])

In that case Ouseley J acknowledged that mere differences between approved plans and that which has been permitted may not prevent operations being comprised in the development for the purposes of s56 TCPA:

> "No doubt there will be cases where the difference between the plans approved and the development carried out, is so large that of itself that prevents the operations relied on being operations comprised in the development and of itself would permit an Inspector rationally so to conclude without more ado. However, the question of whether a material operation is or is not "comprised in the development" cannot necessarily be answered by asking simply if there is a difference between the approved plans and the actual operations relied on."

Ultimately, *Commercial Land,* together with other cases which have followed it (including *Green v Secretary of State for Communities and Local Government* [2013] EWHC 3980 (Admin) and *Silver v Secretary of State for Communities and Local Government* [2014] EWHC 2729 (Admin)) establish that whether or not operations are comprised in a particular development and therefore whether that particular development has been implemented is a matter of planning judgment for the decision maker. Further, that judgment should consider the entirety of the works carried out rather than simply focusing on the initial operations and ignoring what comes next.

In *Atwill* Lane J followed the Commercial Land line of case law and found that the same principle applies to the consideration of s73 Applications where it is necessary to establish whether the underlying permission has been validly begun. Lane J found that the Council's reliance upon the demolition works alone as implementing the 2018 Permission was unlawful (at [42]). The Judge confirmed (at [45]) that the 2018 Permission had not been implemented.

The decision of Lane J to follow the principles of *Commercial Land* and other cases in the context of a s73 application is not surprising. It is a useful reminder that a person may conduct works (for example demolition) within the time limit for a permission's expiry. At that stage, if the works were consistent with the approved plans, then there would be little question that the permission had been implemented. The person could go on to build out the works under the permission and there would be no issue with regards to implementation and s56 TCPA 1990. However, if the person goes on to build out a development which is substantially different from the approved plans, then the permission will not have been implemented as the originating works will not have been comprised in the development for the purposes of s56 TCPA 1990.

The Claimant was represented by Celina Colquhoun, Instructed by Emily Williams of Addleshaw Goddard.

Devine v Secretary of State for Levelling up Housing and Communities [2023] EWCA Civ 601

Daniel Kozelko
Call 2018

In *Devine* the Court of Appeal was faced with a short issue: how to assess substantial completion for the purposes of enforcement time limits. On the facts Mr Devine had undertaken extensive works on a 19th Century barn. In the four years

prior to the issue of an enforcement notice he had undertaken works he alleged were repairs (including repair of the roof, replacement of lintels, levelling of the floor, and moving of openings). Unchallenged findings of the Inspector were that, assessed as a dwellinghouse, the building was a new structure rather than a repaired existing structure. However, Mr Devine alleged that the Inspector and High Court (Fordham J) had erred in two respects:

1) They had incorrectly taken into account Mr Devine's intention to use the building as a dwellinghouse in concluding the purpose of the building was a dwellinghouse; and,
2) They had incorrectly started from the assumption that the building was a dwellinghouse in assessing substantial completion. The enforcement notice had only enforced against a new building rather than a dwellinghouse.

Mr Devine said that these flaws were fatal to the Inspector's decision; it was only because substantial completion had been measured against a dwellinghouse that the building was found to be incomplete. Had it instead been measured against an agricultural barn, the building would have been determined to be substantially complete and thus the four years to have run.

In considering these arguments the Court of Appeal (Sir Keith Lindblom) began by referring to the House of Lords' decision in *Sage v Secretary of State for the Environment, Transport and the Regions* [2003] 1 WLR 983. At para 14 Lord Hobhouse held:

> *"14. The inspector rightly did not investigate the intentions of Mr Sage at various stages in the history nor the uses he had made of the structure from time to time. The character and purpose of a structure falls to be assessed by examining its physical and design features. The relevance of the assessment is to determine whether or not the building operation is one requiring planning permission. The actual use made of the building does not alter the answer to be given."*

The Court of Appeal then rejected the grounds of challenge. In respect of the first, it interpreted Sage as deciding that purpose is an objective matter to be ascertained from the physical characteristics of a building. The intention of the developer, subjective as it is, cannot generally unseat that objective fact where there is disagreement. However, this does not make the intention of the developer an irrelevant consideration. Usually, the purpose of the development and the intention of the developer will be consistent. Such consistency is plainly relevant and may be considered in ascertaining the purpose of the building.

On the facts, the physical characteristics of the building were those of a dwellinghouse. That the Inspector had regard to Mr Devine's (consistent) intention for the building, which was for the development to be a dwelling, was permissible. Sage does not require intention to be excluded from the analysis; instead, the case is a recognition of the limited weight that can be given to an inconsistent subjective intention of a developer.

As to the second ground, this was also rejected. The Court of Appeal held that the Inspector had began by considering whether there was a new building. Indeed, it was necessary for the Inspector to do so to consider (and reject) the appeal under s.174(2)(b) TCPA 1990. Permission to challenge that determination in the High Court had not been given. It was only as part of identifying whether there was a new building that the Inspector determined what that new building was: a dwellinghouse.

This case reaffirms the point established in *Sage* that the intention of a developer will be subordinate to the physical characteristics of a building when assessing purpose. It is also an important example of where an appeal will be difficult when constrained by a narrow permission to appeal; ultimately, Mr Devine had to argue around unchallenged findings that this was a new dwellinghouse. Finally, the final paragraph of the judgment again is a testament to the dim

view that the courts take of developers seeking to retroactively justify their breach of planning control. Sir Keith held at para 47:

> *I do not find this result uncomfortable […]. The reality here, in the light of the inspector's assessment, is that instead of applying first for planning permission Mr Devine went ahead with the erection of a "new building" in place of the one he had acquired when he bought the site. He continued with his unauthorised building work for many years. No planning permission for it was granted. And as the council was entitled to do, it ultimately enforced, and its enforcement notice was lawfully upheld. That is, I accept, unfortunate for Mr Devine. But in my view, it is not an outcome that could be considered "punitive" or "disproportionate", or otherwise unjust.*

R (oao) Friends of the West Oxfordshire Cotswolds, v West Oxfordshire District Council [2023] EWHC 901 (Admin)

Eleanor Leydon
Call 2020

This remarkably successful challenge, concerning the grant of planning permission for development near ancient woodland, is a helpful explainer of ancient woodland protections in national planning policy and guidance, and relatedly of the perils of misunderstanding or mischaracterising expert advice on nature, biodiversity and habitats. It also underscores the importance of complying with the scope of the planning permission: the decision was quashed for failure to comply with the limited woodland protections required by the planning permission, which themselves fell short of national guidance.

The local planning authority granted planning permission, subject to conditions, for residential development of 25 dwellings and a 12-bed supported living facility next to an area of ancient woodland near Charlbury. The conditions included requirements for the approval of plans to protect the nearby ancient woodland and wildlife habitats.

Ancient woodland comprises just 2.5% of UK land but is its most biodiverse woodland habitat and the best at storing carbon. Its importance is 'well recognised in policy and guidance' [4]: para 180 c) NPPF states that *'development resulting in the loss or deterioration of irreplaceable habitats such as ancient woodland and ancient or veteran trees should be refused unless there are wholly exceptional reasons, and a suitable compensation strategy exists.'* Further, Standing Advice from Natural England ('NE') from 2012 recommends that adjacent proposals should have a buffer zone of *'at least 15 metres from the boundary of the woodland to avoid root damage (known as the root protection area)'*: larger impacts would likely require a larger buffer zone. The minimum 15 metre buffer zone recommendation was also reflected in the relevant Local Plan.

On the facts, the ecological assessment and biodiversity management plan submitted with the application recommended just a 5 metre buffer zone between the proposed development and woodland. The authority's ecological consultant advised that this would be acceptable if it could be fully implemented and recommended imposing a relevant condition. In its final form, Condition 8 required the pre-commencement submission of an Ecological Management Plan based on the Biodiversity Management Plan, which would detail, inter alia, *'who will be responsible for carrying out the proposed works including all monitoring work, details and the mechanisms to ensure the success of the proposed buffer zones and enhancements… Once approved all the works must be carried out as per…the Ecological Management Plan and thereafter permanently maintained.'* Composite plans, which expressly referred to the 5 metre buffer zone as agreed, were subsequently submitted and approved.

Condition 13 required the approval of a tree protection scheme which complied with BS

5837:2012: 'Trees in Relation to design, demolition and construction'. The condition specified that *'The approved measures shall be kept in place during the entire course of development. No work, including the excavation of service trenches, or the storage of any materials, or the lighting of bonfires shall be carried out within any tree protection area.'* A scheme was subsequently submitted purporting to show the local of root protection areas.

The developer applied for approval in relation to discharge of the conditions: the claimant objected and pointed out that the application demonstrated a failure to make allowance for the 5 metre woodland buffer. The developer subsequently admitted, first in relation to a single point in the plan and later in relation to three different points, that this buffer zone could not be achieved. By this point, the authority's ecology officer had left the authority and could not be re-consulted.

Interestingly, there was no direct challenge as to why the 15 metre buffer zone recommended in both NE's national guidance and the Local Plan was not adhered to: no reasons had been explored in the authority's minutes [12]. Instead, two of the three successful grounds of challenge turned on failure to adhere even to the 5 metre buffer zone. In particular, the claimant challenged the authority's approval of plans submitted in purported compliance with Conditions 8 and 13, despite the fact that the 5 metre buffer zone could not be achieved at three different points. The court discussed the principles governing the construction of planning conditions and concluded that Condition 8 *'permits no room for officers subsequently to vary the width of the buffer zone on an application to discharge. It could have been worded in that way, but it was not. What it requires was is that the works and maintenance are to be carried out as per the approved plans, which provided for a 5 meter buffer zone'* [38]. For similar reasons, the challenge to the approval of discharge of Condition 13 also succeeded: *'in my judgment, what Condition 13 requires is compliance, not substantial compliance'* [47].

The third successful ground concerned the authority's reliance on advice from NE. The ancient woodland in question did not fall within a statutory nature conservation site, and it was in relation to those statutory sites that NE stated it had no objection [10]. However, NE also said (in line with its Standing Advice) that it would expect the LPA to assess and consider other possible impacts of the proposal, including *'local or national biodiversity priority habitats and species'*, in relation to which NE does not hold locally specific information. NE recommended that the LPA seek further information. However, the case manager did not relay this part of the advice, but simply stated that NE had *'no objection'* [11]. The case manager then relied on the fact that NE had seen the original application and raised no objections as a reason why the loss of the 5 metre buffer zone was not viewed as unacceptable [29], and a reason to approve the discharge of the conditions [42]. This was a *'material and significant misunderstanding'* of the advice [43].

The court held that *'given the express importance of the buffer zone (which was only one third of what policy required) and the tree protection measures, the decisions complained of must be quashed'* [50].

Exercise of Emergency Powers under Building Act 1984 – *R (Samuel Smiths) v Redcar and Cleveland BC [R (Samuel Smiths) v Redcar and Cleveland BC* [2023] EWHC 878 (Admin)

Celina Colquhoun
Call 1990

This case relates to powers available to local authorities under section 78 of the Building Act 1984 ('the 1984 Act') to take emergency steps to make safe buildings that were in a dangerous state and whether those powers exempt the local authority from having to obtain planning permission to take such steps in circumstances

were permission would normally be required.

Tora Hutton of 39 EC successfully argued on behalf of the claimant owner of a hotel which shared a party wall with the relevant property, the Arlington Chapel and School House in Saltburn-by-the-Sea ("the Property"), that the defendant Council (which owned the Property) had acted unlawfully in demolishing the Property in reliance on s78 of the 1984 Act without having obtained planning permission to do so.

The Council had bought the Property in November 2021 and did in fact apply for planning permission to demolish the buildings which were in a poor state. The Claimant objected to the application and the Council later withdrew it.

In 2022 the Council explored further options for the buildings and instructed structural surveyors to provide advice. The conclusion in the first instance was that the state of disrepair of the Property was such that it was unviable to undertake measures to repair/rectify it but also that it was in such a poor state that it was dangerous. The options considered by the Council in light of this advice included a further planning application to demolish the buildings or using powers under s78 of the 1984 Act to effect demolition.

S. 78 empowers local authorities to take necessary steps to remove a danger where a building or structure appears to them to be dangerous. Ultimately, the Council decided to proceed under s78 of the Building Act 1984 and to demolish the buildings but without planning permission. This was despite acknowledging that to do so would amount to a criminal offence.

The Council's reasons for acting were in light of the time that it would take to process a fresh planning application and the potential consequent delay and also in light of what the Council considered was an urgent need to demolish before winter and the "to mitigate the risk of building collapse during the winter months if a snow load is applied to the roof of the building". There were said to be no alternative options available "to practically mitigate the risk prior to the winter months". Although a temporary supporting structure could be considered, its design and cost would "fall outside practical boundaries…". It was also said that the structural report warned that "any repair works, including temporary works, may impact the structural integrity of the building".

The Council notified the Claimant but then proceeded to demolish the Property.

The Claimant challenged the decision to demolish by way of judicial review.

Ground 1 was that planning permission was required for the demolition under s57 Town and Country Planning Act 1990 and that it amounted to a criminal offence under s196D of that Act. Ground 2 was that the Council had failed to apply s78 Building Act 1984 lawfully including in failing to equip itself with adequate evidence to take its decision.

Mr Justice Lane upheld ground 1 of the challenge and dismissed ground 2 on the facts. In relation to ground 1 the Judge found that s78 Building Act 1984 does not obviate the requirement for planning permission under the Town and Country Planning Act 1990 and he issued a declaration to that effect.

The detailed reasoning underscores the fact that the Planning Acts are designed to be a complete code. Section 57 provides that planning permission is required for development (subject to limited exceptions in that section). Decisions taken under the Building Act 1984 are not exempted from the controls of the town and country planning regime.

It will often be the case that demolition conducted by local authorities under s78 Building Act 1984 will benefit from permitted development rights and where such demolition is urgently necessary in the interests of safety or health there is no need to seek prior approval. However, in this case, the

location of the Property within a Conservation Area meant that permitted development rights were not available and so the issue arose.
The Council had sought to argue that s78 properly understood meant that acting as it did was in accordance with s78 and meant that planning permission was not required. It sought to distinguish s78 from ss77 and 79 of the 1984 Act. These provisions, respectively, give a local authority the power to apply to a magistrates' court for an order requiring the owner of a building, which is in a dangerous condition, to execute works necessary to obviate the danger or by notice, to require the owner of a building in "a ruinous or dilapidated condition" which is seriously detrimental to the amenities of the neighbourhood to execute works of repair or restoration or, if the owner so elects, to take steps for demolition. Both these sections also allow the local authority to step in and carry out the relevant works if the owners fails to. Both also state that they have effect "subject to the provisions of the Planning (Listed Buildings and Conservation Areas) Act 1990" whereas s77 does not state this. None of these provisions refer specifically to the Town and Country Planning Act 1990.

The judge rejected the Council's contention that requiring an authority to have planning permission in place before acting under s78 would negate its purpose as a provision which specifically allowed for emergency action to be taken and that it should be distinguished from ss77 and 79. Lane J also rejected the argument that ss77, 78 and 79 should be read to exclude the Planning Acts. The claim therefore succeeded.

It was agreed in the circumstances that a declaration was the appropriate remedy.
The successful claimant was represented by Tora Hutton, instructed by Matthew Baker of Pinsent Masons LLP.

Jalla v Shell and continuing nuisance in the Supreme Court: a missed opportunity?

James Burton
Call 2001

Introduction

On 10 May 2023 the Supreme Court gave judgment in *Jalla & anr v Shell International Trading and Shipping Co Ltd & anr* [2023] UKSC 16; [2023] 2 W.L.R. 1085, rejecting the claimants' appeal against the decision of the Court of Appeal [2021] EWCA Civ 63; [2021] Env. L.R. 26, the Court of Appeal itself having upheld the first-instance decision of Mr Justice Stuart-Smith, as he then was.

The appeal concerned a single issue, with vital knock-on consequences for limitation and hence the claimants' ability to pursue their claims: whether unremediated oil spillage to land from a single event was (and as a matter of principle could be) a continuing nuisance, through a cause of action accruing day to day. Rejecting the appeal, the Supreme Court found it was not.

Thus marks the end point of one element of multi-pronged litigation brought by the same claimants (Messrs Jalla and Chujor) arising out of the spillage at sea of at least 40,000 barrels of oil from the Bonga oil field c.120km off the coast of Nigeria on 20 December 2011.

Given findings of fact made in related proceedings by Mrs Justice O'Farrell on 28 February 2023 ([2023] EWHC 424 (TCC)) (that all claimants who had suffered actionable damage, had suffered it in December 2011 - January 2012, and that the applicable limitation period was five years), it may be the judgment of the Supreme Court marks the end of the litigation as a whole.

However, the case is pregnant with ghosts of arguments either not run or not determined, not least exploration of whether the "polluter pays"

principle is now a common law norm and if so its effect, and one is left wondering what might have been. Those lacunae are my focus.

References to paragraphs in the judgment of the Court are [x].

Context

Quite how the oil came to spill is not material, though it was common ground it came from a rupture in a flexible flow line between a "Floating Production Storage and Offloading facility" ("FPSO") and a Single Point Mooring buoy ("SPM") whilst oil was being transferred from the FPSO via to the SPM to a tanker, the MV Northia. The rupture occurred, and so the spill started, at around 3am on 20 December 2011.

The parties agreed that the Supreme Court should approach the appeal on the basis that the oil (a) reached the Nigerian Atlantic coastline, including the claimants' land, and (b) that it did so within weeks, rather than months, of 20 December 2011 (so in December 2011/January 2012).

The Court was also prepared to proceed on the assumed basis that such a one-off event, originating at sea, could cause an actionable nuisance to the claimants once the oil reached their land ([2]).

Limitation was a crucial issue because of the unhappy way the claimants had sought to prosecute their claims.

The claimants had issued their claim form on 13 December 2017, so just under six years after the spill occurred on 20 December 2011, in circumstances where there was at least an argument (that O'Farrell J accepted in [2023] EWHC 424 (TCC)) that Nigerian law set a five-year limitation period. But the claimants' original pleadings did not even get them over the jurisdictional hurdle to proceed in England. Thus, in April 2018, the claimants purported to amend their claim form, by adding the first respondent to the appeal, a company domiciled in England (with name shortened to "STASCO"), and ultimately the only possible "anchor" defendant, in place of a different entity. Further, in April, June and October 2019, issued a series of applications to amend their claim form and particulars of claim to plead relevant allegations against STASCO, in relation to the operation of the MV Northia.

As a result, the claimants did ultimately come to plead a case against an anchor defendant that was sufficient to found the jurisdiction of the English courts, but obviously late, and hence always subject to limitation: the defendants submitted that, as the amendments were being sought after the expiry of the limitation period, the claimants had to satisfy the requirements of CPR rr 17.4 and/or 19.5 (now 19.6) and that they could not do so ([10]).

Key elements of the judgment

The judgment of the Court, given by Lord Burrows JSC, does nothing to disturb the fundamentals of nuisance (and see [2-3] for a pithy summary and [19] on for more detailed exposition).

It cites *Lawrence v Fen Tigers Ltd ("Lawrence")* [2014] UKSC 13, [2014] AC 822, para 3 (*per* Lord Neuberger PSC) and *Fearn v Board of Trustees of the Tate Gallery ("Fearn")* [2023] UKSC 4, [2023] 2 WLR 339, paras 18 – 20 (*per* Lord Leggatt JSC), plus textbooks, for the general proposition that the tort of private nuisance is committed where the defendant's activity, or a state of affairs for which the defendant is responsible, unduly interferes with (or, as it has commonly been expressed, causes a substantial and unreasonable interference with) the use and enjoyment of the claimant's land [2]. Further, citing *Clerk & Lindsell on Torts,* para. 19-02, that the tort of private nuisance is actionable only on proof of damage and is not actionable *per* se. Which requirement is satisfied for private nuisance by establishing the undue interference with the use and enjoyment of the land (not, e.g., actual physical damage) [3].
The Court made the point that whilst no prior English law decision had decisively accepted or rejected the claimants' argument ([17]), continuing nuisance in the legal sense is a commonplace in the tort of private nuisance, through causes

such as noise (as in *Lawrence*), smoke, smells, tree roots (such as in *Delaware Mansions Ltd v Westminster City Council ("Delaware Mansions")* [2001] UKHL 55, [2002] 1 AC 321), even overlooking (as in Fearn) [26], and that *'It is precisely because, in the normal case, the tort of private nuisance is continuing that an injunction, prohibiting the continuation of activity or a state of affairs, is a standard remedy for the tort of private nuisance'* ([28]).

Equally, damages could only be claimed for damage that already occurred (save that damages for future loss could be awarded in substitution for an injunction) [29].

Thus, a case on tree roots, such as *Delaware Mansions* (on which the claimants sought to rely), provided *'a good example of a continuing nuisance but need not be viewed as the paradigm example of a continuing nuisance. In such a case, there is an ongoing state of affairs outside the claimants land, constituted by the living tree and its roots, for which the defendant is responsible and which causes, by extraction of water through its encroaching roots, continuing undue interference with the claimant's land. The cause of action for the tort of private nuisance therefore accrues afresh from day to day.'* [30].

The Court made three additional points about a continuing nuisance ([31-33]):

1) A continuing nuisance is in principle no different from any other continuing tort or civil wrong.
2) It follows logically from the concept of a continuing cause of action that, if the limitation period is one of six years from the accrual of the cause of action, damages at common law for a continuing nuisance cannot be recovered for causes of action (i.e., for past occurrences of the continuing nuisance) that accrued more than six years before the claim was commenced.
3) there are certain linguistic complications in respect of a continuing nuisance, one of which arises from the concept of the defendant "continuing" a nuisance. What is meant by this is that a defendant who has not created the nuisance will be liable for it (if damage is caused to the claimant) where, with actual or presumed knowledge of the continued state of affairs, the defendant does not take reasonable steps to end it. But the "continuing" of the nuisance in this sense is not the same as there being a continuing nuisance in the sense of there being a continuing cause of action.

The essence of the claimants' case was that there was a continuing nuisance because, on the facts that were to be assumed for the purposes of the appeal, the oil was still present on the claimants' land and had not been removed or cleaned up ([34]).

The Court addressed this by reference to *flooding*, not by reference to an oil spill per se [35]: *'it would mean that if the other ingredients of the tort of nuisance were made out, and a claimant's land were to be flooded by an isolated escape on day 1, there would be a continuing nuisance and a fresh cause of action accruing day by day so long as the land remained flooded on day 1,000'.*

On that basis, the Court noted ([36]): *'It can therefore be seen that the effect of accepting the submission would be to extend the running of the limitation period indefinitely until the land is restored. It would also impliedly mean that the tort of private nuisance would be converted into a failure by the defendant to restore the claimant's land. It might also produce difficulties for the assessment of damages, which are, in general, to be assessed once and for all.'*

The Court summarily dismissed the claimants' case, saying this at ([37]):

> *'…There was no continuing nuisance in this case because, outside the claimants' land, there was no repeated activity by the defendants or an ongoing state of affairs for which the defendants were responsible that was causing continuing undue interference with the use and enjoyment of the claimants' land. The leak was a one-off event or an isolated escape. The oil pipe was no longer leaking after six hours and it is being assumed for the purposes of this appeal that the*

oil reached the Nigerian Atlantic shoreline (and hence the claimants' land) within weeks rather than months of 20 December 2011… here the cause of action accrued and was complete once the claimants' land had been affected by the oil: there was no continuing cause of action for as long as the oil remained on the land.'

Further that ([39]), to accept the claimants' submission would be to undermine the law on limitation of actions, because it would mean that there would be a continual re-starting of the limitation period until the oil was removed or cleaned up.

The Court distinguished the subsidence case of *Darley Main Colliery Co v Mitchell ("Darley")* (1886) 11 App Cas 127, on which the claimants placed heavy reliance, where damage caused by a collapse many years (in 1882) after the defendant's tortious conduct that given rise to structural weakness and caused initial damage (in 1868), was found to give rise to a fresh cause of action, despite the lack of any further act or omission on the part of the defendant causative of the damage. The Court distinguished *Darley* on the basis that there was fresh damage many years later, whereas here it was 'no part of (the claimants') case that the oil caused separate and different damage to the claimants' land', i.e., no case that there was fresh damage from the (assumed) fact the oil remained on the land having reached it ([41]).

The Court did conclude that there was no need for a defendant to have continuing control over the thing causing the nuisance, for there to be continuing nuisance ([46]).

Missed opportunity?

Two (interlinked) points stand out:

1) The silence in the judgment regarding the "polluter pays" principle;
2) The positive statement in the judgment that the claimants did not advance a case of *different* damage from the same unremediated oil (and the implications of the claimants' failure to secure permission to appeal against Stuart-Smith J on the basis of prematurity).

The "polluter pays" principle is well known to environmental lawyers and is of very long standing. Statutory recognition of the principle in the Environment Act 2021 is not recognition of a novelty, but of a well-established concept.

On any view, the claimants faced very real difficulty in identifying any supportive prior authority, let alone authority that could not be distinguished.

Equally, the claimants' failure to secure permission to appeal the rejection of their prematurity argument, meant that they could not advance a positive case that the oil sitting unremediated on the land was causing different damage day to day.

Hence it was straightforward to distinguish *Darley*, on its face the case most promising for the claimants.

In those circumstances, one might have expected an argument, even if only in the alternative, on the basis that (i) the "polluter pays" principle is now so universally accepted that it has become a norm at common law; (ii) the norm is largely de-fanged if the polluter has the ability to accrue a limitation defence whilst pollution remains unremediated. It would be going (much) too far to suggest the argument would have succeeded and overturned centuries of orthodoxy, but from the judgment it does not appear to have been run.[20]

Had it been run, even a (likely) rejection by the Supreme Court, would have served to frame the issue should the legislature consider going further than the policy duty in the Environment Act 2021.

20 There was a hint of an argument based on the "polluter pays", but no more than a hint, in the Court of Appeal judgment, which at para.47 recorded the claimants' then-leading counsel as having advanced a submission complaining of "injustice" if oil spilled on land in year 1, causing little damage, but in year 7 caused significant damage, yet by year 7 a claim would be out of time, in which circumstances it was said "the polluter would get off". The response of the Court of Appeal was that there was no question of someone "getting off", merely of the operation of the limitation period (para.48). Moreover, that more relevant was the claimants own delay in waiting before issuing, then taking the time they did to join STASCO and plead the relevant allegations (para.49).

As to the absence of a case regarding *different* damage from the same unremediated spill, the claimants had argued that it was premature for Stuart-Smith J to decide the continuing nuisance point, and that the decision should await trial, when all of the evidence was known. Stuart-Smith J had rejected that submission and permission to appeal on that point had been refused by the Court of Appeal, which position the Court of Appeal reiterated in its substantive judgment, including by reference to case-management and the inter-linked question of jurisdiction (paras.29-30).

This, though, was highly relevant, because in the Supreme Court the claimants sought to argue, by analogy (considering the example of flooding), that *different* damage would be caused day to day by the "flood" remaining on the land.

A different damage argument was, surely, the obvious way to found a case on *Darley*. Which, given the nature of oil, which does have a capacity to cause fresh damage over time (if not, perhaps, literally day-to-day), would have been interesting to explore.

Not least in light of the basis on which the Supreme Court distinguished *Darley*. Despite the care taken by the earlier part of the judgment to emphasise that the damage requirement in the cause of action may be satisfied without physical damage, and also that the Court of Appeal had distinguished between the act or "hazard" *constituting* the nuisance, and the resultant consequence (e.g. damage) (see para.69), Supreme Court judgment [41] cuts against that and distinguishes Darley on the *basis of fresh damage* (fresh damage without a fresh "hazard" in terms of a fresh act or omission by the defendant). Whilst the Supreme Court mentioned continuing lack of support as part of *Darley*, it is hard to see why that is any different to a continuing lack of remediation.

However, the lack of PTA for the prematurity point appears to have stymied all such arguments. Given what has been a relative recent spate of nuisance judgments from the Supreme Court (*Lawrence, Fearn,* now this), one suspects it will be some time before a case returns that could allow exploration of these arguments. Adding to the nagging sense of missed opportunity.

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Stephen is recognised as a leading practitioner in environmental, energy and planning law. His clients include major utilities and industrial companies in the UK and elsewhere, banks, insurers, Government departments and agencies, local authorities, NGOs and individuals. He has been involved in some of the leading cases in matters such as environmental impact assessment, habitats, nuisance, and waste, in key projects such as proposals for new nuclear powerstations, and in high-profile incidents such as the Buncefield explosion and the Trafigura case.

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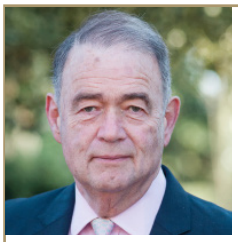

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John is a recognised specialist in the field of planning law with related environmental, local government, parliamentary and property work for both the private and public sectors. He is also an experienced mediator and arbitrator and is on the panel of the RICS President's appointments. He is a committee member of the Bar Council's Alternative Dispute Resolution Panel, an advisor to the All Party Parliamentary Group on ADR, one of the Design Council's Built Environment Experts and a member of its Highways England Design Review Panel. He has been and remains extensively involved in various initiatives to use ADR on to resolve a range of public sector issues.

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High value complex property litigation and disputes are at the heart of Kerry's practice. Her work is centred on property, property development, fire safety and the Building Safety Act 2022 and agriculture. Kerry has acted in some of the leading property cases on land registration and mortgage possession and frequently advises on high value disputes relating to options and overage, freehold covenants, restrictive covenants and easements including rights of way and rights to light. She regularly acts in boundary disputes, land registration and mortgage litigation. Her landlord and tenant work involves all aspects of commercial landlord and tenant as well as residential disputes. Co-author of The Electronic Communications Code: A Practical Guide she is an expert in the Electronic Communications Code and its impact on developers and land-owners. She is described as *"an accomplished silk with a wealth of expertise in real estate litigation"* Chambers 2022.

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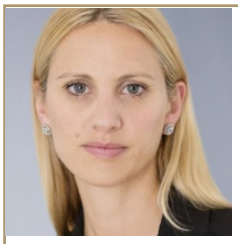

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Victoria is consistently rated as one of the top juniors at the planning bar (Planning Magazine, Chambers and Partners and Legal 500). Victoria's cases span the full range of planning work from promoting large infrastructure (for example, Sizewell C) through to advising on knotty enforcement matters. Victoria appears in all tribunals including hearings, inquiries, the High Court, Court of Appeal and Supreme Court. Victoria has developed considerable expertise in the area of environmental law. Her cases span a variety of issues including waste, habitats, biodiversity, the marine environment and contaminated land. Victoria was nominated by Chambers and Partners as planning and environment junior of the year in 2021. Her environmental knowledge and expertise has been described as 'second to none' (Legal 500 2023).

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Daniel has a mixed practice incorporating planning, environmental, and public law. His instructions have included: acting in proceedings to obtain a certificate of lawfulness of existing use or development; advising on material changes of use of land in the context of retail developments; and, work on matters involving damage to utilities and highways. Daniel has also recently returned from a secondment at the Supreme Court of the United Kingdom, where he was judicial assistant to Lord Carnwath and Lady Arden. In the course of that secondment Daniel worked on a number of cases raising planning and environmental issues, including *R (on the application of Samuel Smith Old Brewery (Tadcaster) and others) v North Yorkshire CC* [2020] UKSC 3 and *Dill v Secretary of State for Housing, Communities and Local Government and another* [2020] UKSC 20.

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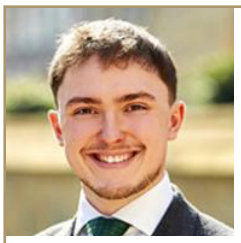

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During pupillage Christopher was involved in a variety of planning and environmental law matters and is keen to grow his practice in these areas. He is currently being led by Daniel Stedman Jones in a statutory review of a decision refusing a planning application for a major solar farm on agricultural land, contrary to an inspector's recommendation. He has also been instructed to advise and draft pleadings in relation to tree-related subsidence.

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