cornerstone barristers

Annual Planning Day, Cornerstone Barristers | November 2024

Case Law Update

by Ben Du Feu and Alex Williams

Introduction

1. The Supreme Court gave judgment in the groundbreaking *R (Finch) v Surrey CC* [2024] UKSC 20 on 20 June 2024. The case involved, at least, five members of chambers. There is a whole session dedicated to *Finch* and its ramifications. For that reason, it is not covered in this paper.

2. The Court of Appeal has been somewhat busier with planning cases. Interestingly, from our research most (if not all) of the appeals were dismissed. What follows is a brief round-up intended to signpost any cases which may be of further interest to you:

- *John Bruce v Wychavon District Council* [2023] EWCA Civ 1389 – considers the approach to setting aside a judgment of the court and sentencing for breach of an injunction.

- *R (oao Fiske) v Test Valley Borough Council v Woodington Solar Limited* [2023] EWCA Civ 1495 – it was held that a local planning authority determining an application for planning permission, which was incompatible with an earlier grant of planning permission for the same site, was not bound in law to take account of that incompatibility as an obviously material consideration in deciding the later application. Robin Green and Rob Williams acted for the successful LPA.

- *R (oao Together Against Sizewell C Ltd) v Secretary of State for Energy Security and Net Zero* [2023] EWCA Civ 1517 – was a challenge to the grant of a development consent order for a nuclear power station. The claim concerned the meaning of a "project" for the purposes of the Conservation of Habitats and Species Regulations 2017. The Secretary of State had been entitled to treat the construction of the power station and the permanent supply of potable water for the power station as separate projects.

- *R (oao Substation Action Save East Suffolk Ltd) v Secretary of State for Energy Security and Net Zero, East Anglia One North Ltd, East Anglia Two Ltd* [2024] EWCA Civ 12 – looks at the approach to considering surface water flooding in the context of development consent for two offshore windfarms and associated onshore substations. It was held that NPS EN-1 requires flood risk from all sources, including surface water flooding, to be taken into account at all stages in the planning process to avoid inappropriate development in areas of highest risk and to direct development away from areas at highest risk. However, there are no provisions of EN-1 which require that, where there is a risk of flooding from surface water, an applicant for development consent must demonstrate that there is no site reasonably available with a lower risk of surface water flooding. The decision-maker will have to be satisfied that a sequential approach has been applied at site level to minimise risk by directing the most vulnerable uses to areas of lowest flood risk. How that is to be achieved, and whether the decision-maker can be satisfied that that has been done, involves issues of planning judgment in the application of the policy in EN-1. A similar analysis applies to the PPG and NPPF. There had been no error to the considerations of those issues on the facts of the case.

- *R (oao Boswell) v Secretary of State for Transport* [2024] J.P.L. 1047 – concerned development consent orders for three road improvement schemes near Norwich. The case concerned consideration of the cumulative impact of carbon emissions from the three schemes. The decision-maker had adopted a lawful approach to cumulative effects and the wider cumulative assessment advocated for by the Appellant was not required.

- *Adam (aka Merrill) v Cheshire East Council* [2024] EWCA Civ 536 – is another planning injunction judgment. This time dealing with the thorny issues of whether the landowner was "a person" for the purposes of the Town and Country Planning Act 1990. The court determined that he was. His argument that the land was "God's land", and not his, and therefore not subject to the injunction was also rejected. Joe Cannon (now KC) acted for the Council.

- *R (oao Suffolk Energy Action Solutions SPV Ltd) v Secretary of State for Energy Security and Net Zero* [2024] PTSR 846 concerned development consent for the construction of two offshore windfarms off the Suffolk coast. The court held that the use of a non-objection clause where a party had obtained an interest in land, or an interest in land conditional on the grant of planning permission, was lawful. They do not, generally, undermine the integrity of the planning process, the inquisitorial nature of which means that non-objection and confidentiality clauses ought not to prevent the decision-maker from becoming aware of all the relevant planning and environmental considerations. Whether that is so in an individual case will always depend on the particular facts.

- *SSLUHC v Caldwell* [2024] EWCA Civ 467 – considers the *Murfitt* principle, which had been misunderstood and misapplied by the Inspector. The principle operates within the bounds of the statutory scheme which sets different time limits for enforcement against operational development and unauthorised material changes of use. The principles recognises that the statutory power to require restoration of the land to its previous condition can, in some circumstances, include the removal of operational development that could not be enforced against on its own because of the four-year time limit in section 171B . However, the principle does not extend to works that are more than merely ancillary or secondary and are instead fundamental to or causative of the change of use itself. It does not support the removal of a building or other operational development that is a separate development in its own right. Whether the principle is engaged is a matter of fact and degree for the evaluative judgment of the decision-maker.

- *Wathen-Fayed v SSLUHC* [2024] EWCA Civ 507 – as with Substation Action this considered surface water flood risk and took the same approach. The other issue was whether the proposed development (a crematorium), because of its location in relation to neighbouring dwellings, would contravene the requirements of the Cremation Act 1902.

- *CG Fry & Son Ltd v Secretary of State for Levelling Up, Housing and Communities* [2024] 2 P&CR 12 – the phosphates case - on a proper interpretation of reg 63 and 70 of the Conservation of Habitats and Species Regulations 2017, an appropriate assessment would be required at the discharge of conditions stage, when the appropriate assessment provisions were engaged and no such assessment had been undertaken. Such an assessment was required before the development was authorised to proceed by the implementing decision and should cover the whole development, not just the conditions being discharged.

- *Jaffe v Tingdene Marinas Ltd* [2024] EWCA Civ 751- involved the exercise of interpreting a planning permission. The judgment reminds us that the interpretation of a planning permission involves considering the natural and ordinary meaning of the words used in the document, viewed in their particular legal and factual context and in the light of common sense. The grant of a planning permission identifies what is permitted, so far as the use of land is concerned. The scope of the permitted use of the land is defined by the grant. The use specified in the grant may be of a general nature, e.g. "agricultural" or "retail", or it may be limited to a particular function, e.g. "a restaurant". Any conditions attached to the grant of permission will specify what is not permitted, but they will qualify or limit the permitted use, whose scope is delineated by the grant itself. The particular facts of the case concerned a permission granted for the stationing of houseboats on land covered by water.

3. It would be too ambitious to attempt a similar exercise in respect of the cases heard in the High Court. A Westlaw search lists over 100 planning cases in which judgment has been given in the last year. We therefore have identified 4 of those cases to address in more detail, all of which involved Cornerstone members.

R (Tesco Stores) v Reigate and Banstead BC [2024] EWHC 2327 (Admin)

4. The case concerns the grant of planning permission, against the advice of officers, by members of a planning committee for a new supermarket. The proposed operator was Lidl. Tesco, in the latest instalment of the long standing tradition of supermarkets seeking to challenge consent for rival stores, brought a judicial review because of their concerns as to the impacts of the development on a locally listed pub and a Grade II listed war memorial.

5. The pub was to be demolished to make way for the supermarket which would be across the road from and in the setting of the war memorial. Tesco brought a judicial review on the grounds that the Council had failed to comply with its statutory duty under section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990 ("P(LBCA)A 1990") in that it failed to give great weight to the preservation of the setting of a Grade II listed building. It was also alleged that the committee failed to give adequate reasons for finding that the identified harms arising from the development were outweighed by the benefits of the proposal.

6. The committee had received legally impeccable advice from their officers both in the committee report and orally at the committee hearing as to the treatment of heritage assets. The report recommended refusal on the basis that the harms outweighed the public benefits of the scheme but recognised that this was ultimately a balancing judgment for the committee. The committee disagreed and gave their reasons briefly:

"The development hereby permitted has been assessed against the relevant development plan policies as set out in the committee report and material considerations, including third party representations. It is considered that the public (social and

economic) benefits provided by the development would outweigh the less than substantial harm to the designated heritage asset, total loss of the non-designated heritage asset, the scheme's failure to promote and reinforce local distinctiveness and respect the character of the surrounding area and the potential impact on the town centre. It is therefore concluded that the development is in accordance with the relevant policies of the development plan and there are no material considerations that justify refusal in the public interest."

7. The judgment does not break new ground, but it does provide a helpful summary of the law in three regards. First, in relation to the consideration of the impacts of development on heritage assets by decision-makers. Secondly, in relation to the standard of reasons, particularly where a planning committee disagrees with the recommendation in an officer's report. Thirdly, in respect of the use of transcripts of committee debates in judicial review.

8. On heritage, paragraphs [48] – [52] of the judgment highlight the following key principles:

i. The duty under section 66(1) P(LBCA)A 1990 is an overarching statutory duty which requires a decision-maker not simply to give careful consideration to the desirability of preserving the setting of a listed building for the purposes of deciding whether there is some harm, but a finding of harm to a listed building is a consideration to which the decision-maker must give "considerable importance and weight" when carrying out the balancing exercise.

ii. It is not open to a decision-maker merely to give the harm such weight it thinks fit, in the exercise of his planning judgment or to treat less than substantial harm to the setting of a listed building as a less than substantial objection to the grant of planning permission.

iii. The discharge of the statutory duty has been identified as "a demanding duty for a decision-maker, whose rigour has been repeatedly emphasised in the case law", but the relevant standard to apply in assessing the adequacy of reasons remains the usual standard.

iv. The requirement to give "considerable importance and weight" to any harm to the setting of a listed building does not mean that the weight to be given to the desirability of preserving its setting is the same in every such case.

v. The advice contained in the NPPF is set out in a fasciculus of paragraphs which lay down an approach which corresponds with the duty in section 66(1) of the TC(LBCA)A 1990. Generally, a decision-maker who works through those paragraphs in accordance with their terms will have complied with the section 66(1) duty.

vi. The reference in paragraph 202 of the NPPF to weighing harm against the public benefits of the proposal must nonetheless give effect to the presumption against granting permission for development which harms the setting of a listed building. The balance is "tilted" in favour of the preservation of setting; but how much weight to give to the harm to the setting of a listed building and to that tilt is a matter for the decision-maker.

9. On reasons, [56] - [63] explain:

i. There is no general common law duty to give reasons where a planning committee grants planning permission. However, a common law duty may be imposed where, in all the circumstances, fairness requires it.

ii. Whilst a decision letter of the Secretary of State or his Inspector on an appeal is designed as a stand-alone document setting out all the relevant background material and policies, before reaching a reasoned conclusion, in a decision of a local planning authority this task will normally be performed in the planning officers' report. If their recommendation is accepted by the members, no further reasons may be needed. Even if it is not accepted, it may normally be enough for the committee's statement of reasons to be limited to the points of difference.

iii. Members are entitled to depart from their officers' recommendation for good reasons, but their reasons for doing so need to be capable of articulation, and open to public scrutiny.

iv. Reasons need to be intelligible and adequate, and, in particular, they must enable the reader to understand what conclusions were reached on the principal important controversial issues.

v. A reasons challenge will only succeed if the reasoning gives rise to a substantial doubt as to whether their decision was wrong in law.

vi. The question for the court is whether the decision-maker's reasons leave genuine, rather than merely forensic, doubt over what was decided and why. The requirement is for an adequate explanation of the ultimate decision.

vii. Local planning authorities are able to give relatively short reasons for refusals of planning permission without any suggestion that they are inadequate, there is no reason why the duty to give reasons for the grant of permission should become any more onerous and such reasons can be briefly stated.

viii. There is no duty to give "reasons for reasons".

10. Finally, on reference to debate between members of a planning committee – see [64] – [70]. There is a general reluctance by the courts to delve too deeply into such material. It is important

not to fixate upon the observations of a single contributor to the discussion but to look at the general tenor of the debate and bear in mind that it is a collective decision that is being considered.

11. When these principles were applied to the facts of the case, the decision had been lawfully reached. Adequate and intelligible (though brief) reasons had been given. Members had simply disagreed with officers as to the balance between harms and benefits arising in the case.

Mead Realisations Ltd v SSLUHC [2024] EWHC 279 (Admin)

12. In *Mead Realisations* Holgate J (as he then was) considered issues of interpretation and application of the sequential test in national policy on flood risk. The case concerned two claims challenging Inspectors' decisions to refuse planning permission on appeal for large housing schemes (75 and 310 dwellings). Whilst the case is essential reading for anyone dealing with the sequential test in national policy on flood risk, the point which it covers that is of even wider significance is the relationship between the NPPF and the PPG.

13. At §55, Holgate J examines the legal status of national planning policy. He reminds us that national policy is a key element of securing coherent and consistent decision-making but that national policy sits as a material consideration under s.36(6) of the Planning and Compulsory Purchase Act 2004 to the statutory development plan. The weight to be given to conflict or compliance with the NPPF is a matter of judgment for the decision-maker. At §62, it was made clear that the PPG has the same legal status as the NPPF. Neither have the force of statute and the power to make both is derived from the same source.

14. At §70, it was noted that as a matter of policy, the PPG is intended to support the NPPF. Ordinarily, therefore, it is to be expected that the interpretation and application of the PPG will be compatible with the NPPF. However, as a matter of law, it was held that the PPG could amend or be inconsistent with the NPPF.

15. At §72-92 the judgment provides a useful summary of the principles which apply when seeking to interpret and, separately, apply planning policy. Starting with the distinction between the two: interpretation of policy is an objective question of law for the court, whereas application of policy is a matter for the decision-maker, subject to review on *Wednesbury* grounds by the court. An issue of interpretation is logically prior to a question of application – one must interpret the policy correctly in order to apply it.

16. As to the approach the courts take to issues of interpretation (where they arise) Holgate J reminds us that the language used is often less precise than a contract or statute, the court should not have to engage in a painstaking construction of the relevant text. It will seek to draw from the words used the true, practical meaning and effect of the policy in its context. Bearing in mind that the purpose of planning policy is to achieve reasonably predictable decision-making, consistent with the aims of the policy-maker, it will look for an interpretation that is straightforward, without undue or elaborate exposition. A court may be entitled to say that a policy means what it says and it is the job of the decision-maker to apply it with good sense and realism.

17. At §93-116, Holgate J then turned to consider the interpretation of the sequential test in the NPPF and the PPG. At §96 he noted that where flood risk is in issue, para 162 of the NPPF sets out the sequential preference as follows: "… reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding." And at §97 explained: "This is a broad, open-textured policy. There is no additional language indicating how the issue of "appropriateness" should be approached or assessed. There is nothing to suggest that the object is restricted to meeting the requirements of the developer or applicant for planning permission, or of his particular proposal on the application site he has selected. On the face of it, the question of appropriateness is left open as a matter of judgment for the decision-maker."

18. Holgate J was satisfied that, depending on the circumstances, a specific need for the type of development proposed may be relevant to deciding the appropriate area of search and whether other sites in lower flood risk zones have characteristics making them appropriate alternatives. However, a general need for a type of land use is not relevant when deciding whether other sites are sequentially preferable and reasonably available alternatives.

19. At §106, the same was said to apply in relation to the issue of "reasonably available": "Paragraph 162 of the NPPF also stipulates that an alternative site be "reasonably available" for the proposed development. That raises issues of judgment for the decision-maker as regards ownership, or the ability to become an owner, so that the site may be developed. "Reasonably available" also has a temporal dimension. The start date and duration of the proposed development may be relevant considerations. But para. 162 of the NPPF does not require that the availability of an alternative site should always align closely with the trajectory for the developer's proposal. Here again, flexibility on all sides is a relevant consideration, together with any material aspects of need and/or market demand."

20. In this context it was found that the PPG did not conflict with the NPPF. It performs the legitimate role of elucidating the open-textured policy in the NPPF. The PPG describes "reasonably available sites" as sites "in a suitable location for the type of development with a reasonable prospect that the site is available to be developed at the point in time envisaged for the development." The PPG provides for issues as to suitability

of location, development type, and temporal availability to be assessed by the decision maker as a matter of judgment. It was held that the PPG is a proper aid to clarifying and understanding the meaning of the NPPF.

Marks and Spencer Plc v SSLUHC [2024] EWHC 452 (Admin)

21. This case involved the much-publicised call-in decision by the Secretary of State in relation to the application to demolish and re-develop the flagship M&S store on Oxford Street. The local planning authority and Inspector both supported the scheme but the Secretary of State refused it for various reasons including carbon impacts.

22. Lieven J allowed the claim on 5 of the 6 grounds and quashed the decision.

23. Perhaps the most significant ground, at least in policy terms, was Ground 1. The claimant criticised the Secretary of State's treatment of NPPF §152 (now 157), which "encourage[s] the reuse of existing resources, including the conversion of existing buildings", for the purpose of supporting the transition to a low-carbon future. The Secretary of State interpreted this requirement as a "strong presumption in favour of repurposing buildings", and to require a "compelling justification" for demolishing and rebuilding rather than re-using.

24. Lieven J held (at §§54-56) that this was a "plain" misinterpretation of the NPPF that was "simply not open to him". Encouragement to re-use existing buildings was not the same as a strong presumption to that effect. This mis-reading of the NPPF then infected other aspects of the decision, causing the Secretary of State to impose a heightened policy hurdle for the developer to overcome.

25. Ground 5 also involved the interpretation of policy, namely the London Plan's Policy SI2, which imposed a "zero-carbon target" failing which offsetting obligations would apply. The Secretary of State took this carbon off-setting target to apply not just to operational carbon (i.e. relating to a development's life-cycle) but to the embodied carbon released during construction. In that respect he was found to have become "thoroughly confused" (§116).

26. The other grounds were more specific to the facts of the case:

a. On Ground 2, Lieven J found (at §§60-72) that the Secretary of State had acted unlawfully in rejecting the Inspector's conclusion that there was no viable and deliverable alternative to the proposed scheme. He was free to disagree with that conclusion but only after properly understanding it and properly explaining his reasons for departing.

b. Grounds 3 and 4 concerned the Secretary of State's treatment of the argument that refusing the development would involve harm through lost opportunity, in particular to Oxford Street and the wider West End. Ground 3 succeeded because the Secretary of State acted unlawfully when giving significant weight to the public benefits of the proposal but only limited weight to the harm that would ensue if it were refused (§§85-86). Ground 4 succeeded because inadequate reasons were given for rejecting the Inspector's conclusion that there would be harm to the wider West End if M&S left the site and another department store failed to take its place (§92).

c. Ground 6 was the only ground that failed. Lieven J rejected the argument (at §132) that the Secretary of State had failed to give sufficient reasons for his heritage decision, in particular as it related to the potential of the existing buildings on the site to contribute to the Grade II* listed Selfridges building.

Friends of the Earth v SSLUHC [2024] EWHC 2349 (Admin)

27. This is a significant judgment for its exploration of the Supreme Court's recent decision in *Finch*, mentioned above. It concerned the Secretary of State's decision of December 2022, following a call-in, to grant planning permission for a new underground coal mine in Whitehaven, Cumbria. The Secretary of State's decision predated the Supreme Court's decision in Finch, on the required scope of environmental impact assessment in the context of fossil-fuel developments and downstream emissions. The decision is notable for various reasons including that the judge, Holgate J, was the same judge who sat at first instance in *Finch*.

28. The question was whether the Secretary of States's decision in the Whitehaven case could stand in the light of the Supreme Court's decision. The Secretary of State conceded that it could not. However, the developer (West Cumbria Mining) defended the case, which was brought by way of conjoined s.288 challenges by two interested parties to the inquiry (Friends of the Earth, and South Lakeland Action on Climate Change).

29. The conjoined claims distilled into 5 core issues. On 4 of those the claims succeeded so the decision was quashed.

30. The first and second issues are the most significant in terms of the length and detail of the analysis to be found in the judgment and their potential to set precedents in other similar cases.

31. The first issue was whether the environmental impact assessment fell foul of the requirements of the EIA Regulations in failing to consider the downstream impact of burning the coal once extracted from the site. Holgate J held that it did. In particular, and

echoing the Supreme Court's judgment in *Finch*, it was inevitable that the coal would be burned once extracted. It was therefore "plain" that it was a likely significant indirect effect of that project (§101); as well as an obviously material consideration that fell to be considered when determining the application, given the "scale and significance" of those emissions (§102).

32. Although the developer argued that the Whitehaven coal would simply replace coal that was already being imported and burned from mines in the USA, this did not prevent it from being a likely significant effect of the development (§103). In any event it was not inevitable, on the evidence, that the Whitehaven development would mean the US coal remaining in the ground rather than also being burned (§108).

33. The claims therefore succeeded on the first issue.

34. The second issue considered this "substitution" argument – that the Whitehaven coal would simply substitute for US coal rather than adding to global greenhouse gas emissions – in greater detail. Given that in the light of *Finch* the environmental impact analysis was deficient, the second issue was whether the Secretary of State's approach to the substitution point could overcome this legal error.

35. In the learned judge's view, the developer could only have overcome the error by placing evidence before the Secretary of State demonstrating (a) that, as a result of substitution, there would be a nil net increase in global greenhouse gas emissions (i.e. that the substitution would be perfect or near-perfect) and (b) that there would be no further demand for the US coal that remained in the ground as a result of the Whitehaven development (§124). However, the evidence did not reasonably establish those points, which neither the Inspector nor the Secretary of State appreciated (§163).

36. Their findings were also found to be internally inconsistent: (a) because on the one hand they suggested that the impact on greenhouse gas emissions would be neutral or slightly beneficial, while on the other hand they accepted that certain benefits (the benefit of saving on transport emissions by sourcing coal domestically rather than from abroad) were "unquantifiable", and that there was some scope for the Whitehaven coal to be exported beyond the UK and Europe (the target market) and to further afield, like Asia (§168); and (b) because they found that there would be only partial substitution of Whitehaven for US coal while also maintaining that the substitution would be perfect or near-perfect (§175). A summary of the various flaws can be found at §187.

37. The claims therefore succeeded on the second issue.

38. The remaining issues were considered relatively briefly. The third issue was whether the decision was flawed in its treatment of the potential disbenefit, if the development were to go ahead, that granting planning permission would harm the UK's ability to persuade other countries to reduce greenhouse gas emissions. In the light of his findings on the first and second issues, Holgate J found that it was (§208). Both the Inspector and the Secretary of State agreed that Whitehaven could serve as a net zero benchmark to which other mineral extraction developments could aspire. But this was on the basis of their flawed assessment that the development would not in fact generate a net increase in emissions. So it followed that the decision was unlawful for this reason too.

39. Issue four was whether the decision was flawed because the Secretary of State accepted the carbon offsetting arrangements contained in the developer's planning obligation. Holgate J agreed that it was, because the Secretary of State failed adequately to address the objection that the offsetting arrangements relied on offsets from outside the UK, contrary to advice from the Climate Change Committee (§217). Moreover, it was inappropriate to refuse relief on the basis that the unlawfulness could not have affected the decision. It was for the Secretary of State to consider the implications of the objection to the offsetting arrangements, not for the court to assume the decision-maker's fact-finding role (§225).

40. The fifth issue was whether the Secretary of State and Inspector acted unlawfully in differentially treating the arguments of South Lakeland (as objectors) and West Cumbria Mining (as the developer), in particular whether the decision-maker held the former to unlawfully high standards by requiring it demonstrate "certainty" on various points, for example the absence of future demand for coking coal. Holgate J rejected this particular challenge (at §§227-230). Reading the decision letter (and Inspector's report) fairly, this was not what had happened.

Ben Du Feu

Alex Williams