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Water Law, Sewage and Biodiversity Net Gain: Legal Developments and Practical Insights

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United Utilities Water Ltd v Manchester Ship Canal Co Limited (2024) UKSC 22[1]

Introduction

Watercourse pollution is a major current concern and regularly in the news. There appear to be a large number of campaigns being run aimed at utility companies, concerned at the apparent readiness, and ability, of companies to discharge untreated effluent into water courses from Windemere to the South Downs without effective recourse. Swimming, whether in the sea near a river mouth (or discharge pipe) or inland (what is now termed "wild swimming") appears to be increasingly fraught.

In those circumstances, and at first sight, a dispute between two large companies about whether one (Manchester Ship Canal) can extract money from the other (United Utilities Water) when the latter, in the absence of negligence or deliberate misconduct, discharges polluted water into the canal when its systems are overloaded and which turns on a somewhat dusty consideration of statutory construction would appear to be rather arid stuff and not of particular interest to a wider audience, whether concerned with wild swimming or not.

Indeed, the headnote in the Weekly Law Reports is not an attention grabbing headline:-

Water _ Sewerage _ Discharge _ Untreated effluent discharged into canal from sewerage undertaker's outfalls following heavy rainfall Whether canal owner having private right of action against sewerage undertaker _ Whether such action inconsistent with statutory scheme for enforcement of sewerage undertakers_ duties_Water Industry Act 1991 (c 56), ss 117(5), 186(3)

The purpose of this paper is, however, to look beyond this headline and analyse what may turn out to be a most important Supreme Court decision which may provide a private right of action to landowners whose watercourses are affected by sewage discharge, thus forcing the utility companies to take action to prevent it or suffer significant damages claims.

In summary, the Supreme Court:

(a) Provide a helpful summary of the law of nuisance, in particular clarifying whether negligence or misconduct is necessary before it is actionable (which it is not),
(b) Provide a clear basis of the right to damages and injunction in respect of polluted watercourses.
(c) Distinguish the case of Marcic, which might have been thought to have given the utilities the equivalent of a get out of jail free card if the discharges resulted from inadequate infrastructure.

The case

First, it is important to understand what the case was about. A helpful summary is provided at paragraph 1 of the Court's judgment.

This appeal raises the question whether the owners of watercourses (an expression we shall use to describe all channels through which water flows, whether natural or artificial) or bodies of water can bring actions in nuisance or trespass in the event that the water is polluted by discharges of foul water from the infrastructure of statutory sewerage undertakers, in the absence of negligence or deliberate misconduct.

Two points to note. First, the sheer breadth of the issue under consideration. It covers all watercourses, which means all channels through which water flows whether natural or artificial. Secondly, it is dealing with circumstances where there is no negligence or deliberate misconduct. I.e. a person seeking to take advantage of the outcome of the case does not have to surmount that hurdle.

Second, it is important to understand the state of the law as determined by the Court of Appeal (whose judgment was under appeal). Again, this is summarised by the Court at paragraph 4.
The implication of the judgments in the courts below is that, absent

1. James Findlay KC.

an allegation of negligence or deliberate wrongdoing, no owner of any watercourse or body of water can bring any claim based on nuisance or trespass against any sewerage undertaker in respect of polluting discharges into the water, however frequent and voluminous the discharges may be, and however damaging they may be to the owner's commercial or other interests or to the owners ability to use or enjoy its property.

Again, two points to note. First, no action could be brought in the absence of negligence or worse if there was a polluting discharge. Second, that was so notwithstanding the frequency or volume of such discharges and the impact such discharges may have.

The appeal was therefore of much wider importance than a dispute between two commercial entities. As a matter of background, it was only the latest round in such dispute. Earlier, in 2014, the Supreme Court ruled that United Utilities had the right to discharge treated water and rain water into the canal, without payment to the canal owner. This round of the dispute concerned polluting water.

As the law stood after the Court of Appeal, the utility companies would apparently have a green light to carry on as they had been in terms of discharge without fear of suit at the hands of those affected – only having to be concerned as to what action OFWAT took.

The tort of private nuisance

The first step the Court took was to set out general principles of the law of nuisance. This article will not attempt a full analysis but will highlight the most important points made.

(a) First, the Court reaffirmed that deliberate act or negligence is not an essential ingredient but some degree of personal responsibility is required, and that the ground of responsibility is the possession and control of the land from which the nuisance proceeds.

As noted, above, this lowers the hurdle of anyone wishing to take action against pollution.

(b) Second, it distinguished between the concepts of a continuing nuisance, i.e. one which occurs repeatedly, and continuing a nuisance, which concerns when a party becomes liable for a nuisance they had not created but because they failed to take reasonable steps to prevent it.

(c) Third, it distinguished between circumstances where a party caused a nuisance and where it had adopted or continued a nuisance. As to the latter, the cause of action for continuance of a private nuisance depends on the claimants establishing not only that the nuisance has occurred, but also that the defendants knew of its possible cause, actually or constructively, and failed to take reasonable means to bring it to an end.

This distinction may add to the burden of a party seeking to bring a claim, but in reality the additional hurdle is not likely to be onerous. Alerting a utility company to a problem is likely to suffice, together with reasonable time to allow that company to deal with it.

(d) Fourth, whilst negligence (or worse) is not necessary, what is important is that the existence of a duty must be based upon knowledge of the hazard, ability to foresee the consequences of not checking or removing it, and the ability to abate it.

(e) Fifth, and of some importance, it is not a defence to a claim for private nuisance that the activity carried on by the defendant is of public benefit, although this may be relevant in determining the appropriate remedy – i.e. injunction or damages.

Nor, as we will see below, is lack of ability to invest in infrastructure to cope with increased volumes, though that will be relevant to remedy.

(f) Sixth, and as important, statutory controls over pollution have never been treated as a reason for cutting down the rights arising under the law of private nuisance.

The existence of, particularly post-privatisation, a convoluted statutory scheme dealing with pollution will not prevent a private law action save in the clearest of cases. Indeed, the Court also set out in some detail the general principles concerned with the interaction between tortious liability and statutory powers.

(g) Statutory authority only provides a defence to an action if the nuisance arising from that activity is inevitable however it is carried out. Inevitability is a very high test. The test of inevitability is only relevant to deciding whether a nuisance has been authorised by the relevant statute. Where it is clear for other reasons that the nuisance is unauthorised, it is unnecessary to inquire into whether it is inevitable

Law in relation to pollution of watercourses by sewage

The Court first set out some principles pertaining to the position prior to privatisation. It set out 15 such principles but we have highlighted only 8 for the purposes of this article:-

1. At common law the pollution of a watercourse is an actionable nuisance, and may also constitute a trespass.

2. Considerations of public welfare do not justify the denial of relief to the private person whose rights have been affected.

3. Parliament has consistently provided specific protection

against the pollution of watercourses by sewage, over and above the protection accorded generally to interests in land.

4. Parliament has consistently required, before a watercourse is injuriously affected by the construction or operation of sewerage works, that the sewerage authority obtain the consent of persons who would at common law be entitled to prevent such injurious affection or to claim damages, failing which such injurious affection is unauthorised.

5. Parliament has consistently made it clear that it is not authorising the pollution of watercourses by sewage.

6. Parliament has consistently provided for the payment of compensation to those injuriously affected by the exercise of the powers conferred on sewerage authorities. The fact that statutory compensation is restricted to those affected by operations carried out intra vires reflects the fact that tortious conduct which is not authorised by the legislation is actionable at common law.

7. Where compensation is not available, there is a presumption that a nuisance or other infringement of private rights is unauthorised, although the presumption will be rebutted where the language of the statute is sufficiently clear to authorise the nuisance notwithstanding the absence of compensation.

8. A claim cannot be brought against a sewerage authority at common law where it is an essential ingredient of the cause of action that the authority has failed to drain its district effectually. It is under no common law duty to do so: such an obligation can only be imposed by statute.

The Court then considered, at some length, the position post-privatisation. In summary, it remained *unchanged*.

The important result is that it is quite possible to take action against sewage pollution without having to establish negligence or deliberate misconduct, where that claim arises from discharges for existing systems.

Marcic v Thames Water Utilities Ltd

The Court then considered the Marcic case.

Mr Marcic's property had been repeatedly flooded with surface water when heavy rain caused a surface water sewer to become overloaded. Surface water also entered a foul water sewer so that it also became overloaded, causing sewage to back up into Mr Marcic's property through the drain connecting his house to the public sewer. The sewers had become inadequate to accommodate an increased volume of sewage and surface water as additional houses were built, with a statutory right to connect to the sewers.

Mr Marcic brought an action for a prohibitory injunction restraining Thames Water from permitting the use of its sewerage system in such a way as to cause flooding to his property, a mandatory injunction requiring improvements to be made to the system, and damages in respect of the harm to his property. He based his claim on the tort of private nuisance and on a violation of his rights under the European Convention on Human Rights. Thames Water maintained that the only remedy was a complaint to the director, who had the power to take enforcement action under section 18 of the 1991 Act.

The Court of Appeal had upheld Mr Marcic's claim, but the Supreme Court overruled its decision and rejected his claim, which by then was a claim in damages only as remedial works had been undertaken. However, the point of principle remained. In the present case the Court distinguished the outcome in that case as it was an essential part of Mr Marcic's claim that that Thames Water had failed to perform an obligation to construct a new sewer. The duty to construct a new sewer was imposed by section 94(1) of the 1991 Act, and would not otherwise exist. Unlike that case, Manchester Ship Canal's case did not depend upon an allegation that a new sewer should have been constructed, just that polluting discharges from existing sewers should not take place. Whether or not a new sewer was needed is a matter concerned with the statutory framework and no private law cause of action exists for failure to provide one.

Contrast the situation in the current case. As a matter of principle if a cause of action in nuisance is based on the pollution of a river by noxious effluent discharged from a sewage treatment work then the underlying cause of the polluting discharge was the inadequate capacity of the sewerage works, and the defendants' failure to improve the works did not form any part of the plaintiff's cause of action, which was based on the existence of a nuisance caused by the defendants' operation of their works. The court was therefore not required to reach any decision as to whether the defendants should have enlarged the capacity of their sewerage works.

The Court demonstrated that point by contrasting two circumstances. The first is the involuntary escape of sewage from an outlet which was not planned or designed to emit sewage, resulting from the inadequate capacity of the sewerage system as a consequence of the increased usage of that system, where the complaint is that the sewerage authority has failed to drain its district effectually by failing to construct new sewerage infrastructure. No private law claim can be made. The second circumstance is the discharge of sewage from outlets or channels which were built for the purpose of carrying it away. In circumstances of the second kind, the sewerage system is operating as it was designed to operate, and the operator of the sewerage system is therefore responsible for the resultant nuisance. A private law claim can follow.

Following the Supreme Court's judgment Marcic is to be interpreted narrowly, in contrast to the approach of the courts below. They had interpreted Marcic as excluding claims whenever the underlying cause of the nuisance was the inadequacy of sewerage infrastructure. However, that is a misreading of the claim. It was an essential ingredient of the claim that the defendants were in breach of a statutory obligation to construct a new sewer, for which the statutory scheme provided an exclusive remedy. The difficulty was not that a contravention of the statutory duty was an underlying cause of the nuisance, but that it was an essential ingredient of the cause of action for which there was no independent basis at common law.

As a result, Marcic does not prevent claims where it is not an essential ingredient that a new sewer be constructed.

Conclusion

A number of matters are helpfully clarified.

First, the owner of a watercourse, or a riparian owner, has a right of property in the watercourse, including a right to preserve the quality of the water. That right is protected by the common law of tort.

Second, there is no doubt that the discharge of polluting effluent from sewers, sewage treatment works and associated works into a privately owned watercourse is an actionable nuisance at common law, if the pollution is such as to interfere with the use or enjoyment of the relevant property.

Third, the 1991 Act does not authorise sewerage undertakers to cause a nuisance or to trespass by discharging untreated effluent into watercourses.

Fourth, the conclusion that the 1991 Act does not authorise sewerage undertakers to cause a nuisance or to trespass by discharging untreated effluent into watercourses also follows from the application of the inevitability test laid down. In the present case, it was accepted that the discharge of polluting effluent could be avoided by means of investment in improved infrastructure and better treatment processes.

Fifth, a statutory scheme under which an interference with a right of property is not authorised, and under which compensation is not provided, but under which the private law remedy is nevertheless ousted, would be anomalous.

The importance of these conclusions is that the current state of infrastructure, difficulties of funding capital investment, are simply not relevant to the principle of a claim. Utility companies cannot escape liability by playing such cards, relying on the principle that courts will not tend to get involved with the difficult balance of such matters, leaving that to OFWAT.

However, against that background, the Court made it clear that the scheme of the 1991 Act, including this enforcement mechanism, might be disrupted if the court were to grant injunctions which required the sewerage undertaker to spend large sums to create new infrastructure as a remedy for interferences with private property rights. But it does not follow from a court's conclusion that it should not grant such an injunction that a remedy in damages is also excluded. Such discussion does not rule out injunctions as a remedy, but careful consideration should be given as to the terms of any injunction sought.

The Biodiversity Net Gain Legal and Policy Regime in England[2]

Introduction

Is it possible to achieve the laudable aim of improving biodiversity by means as rigid, specific, and severe as the law? One answer is clear enough: previous efforts have not worked to stem the crisis of biodiversity loss even where BNG policies have existed for decades. David Attenborough noted in his forward to the Dasgupta Review:
"We are facing a global crisis. We are totally dependent upon the natural world. It supplies us with every oxygen-laden breath we take and every mouthful of food we eat. But we are currently damaging it so profoundly that many of its natural systems are now on the verge of breakdown…Today, we ourselves, together with the livestock we rear for food, constitute 96% of the mass of all mammals on the planet. Only 4% is everything else – from elephants to badgers, from moose to monkeys."

The European Union's Explanatory Memorandum proposing a regulation on nature restoration (2022/0195) concluded "[d]espite EU and international efforts, biodiversity loss and the degradation of ecosystems continue at an alarming rate.[3] The outlook for biodiversity and ecosystems is bleak and shows that the current approach is not working."[4]

Closer to home for legal practitioners, Holgate J. (as he then was) noted in *Vistry Homes Limited v Secretary of State for Levelling Up, Housing and Communities, St Albans City and District Council, Colney Heath Parish Council* [2024] EWHC 2088 (Admin):

"139. Global decline in biodiversity is described in the literature as a matter of great concern. It was discussed at the UN COP 26 meeting in November 2021. The nations involved adopted the

2. The following consists of edited extracts from the forthcoming book by Nina Pindham, published by Law Brief Publishing.
3. Page 1, first sentence.
4. Page 2, final paragraph.

Glasgow Climate Pact. Paragraph 38 emphasises the importance of protecting, conserving and restoring nature and ecosystems including the protection of biodiversity.

140. A report by the House of Commons Environment Audit Committee in June 2021 ('Biodiversity in the UK: Bloom or bust?' HC 136) referred to the UK as being one of the most nature-depleted countries in the world."

And so, all eyes are on England's world-leading approach: at the time of writing, it will be the explicit focus of sessions held at the UN Convention on Biological Diversity's 16th annual Conference of the Parties, held between 21 October to 1 November 2024 in Cali, Colombia.

General overview

The genesis of the BNG regime is the Environment Act 2021. It comprises the framework for a series of enabling and amending provisions, concerning both primary and secondary legislation, supplemented through policy and guidance issued from two separate government departments, spread across numerous websites. The BNG regime is, in short, incredibly complex. The aim, however, is simple: to achieve a measurable post-development improvement in biodiversity.

How does the BNG regime work to achieve this goal? First, s.98 and Schedule 14 to the Environment Act 2021 inserted s.90A and Schedule 7A into the Town and Country Planning Act 1990. Together these impose (from 12 February 2024) a mandatory condition on all grants of planning permission requiring the provision of at least 10% BNG for at least 30 years (for the condition see paragraph 13 of Schedule 7A, "the biodiversity gain condition"). The biodiversity gain condition applies to all non-exempt planning permissions granted under Part 3 of the Town and Country Planning Act 1990, save for permissions granted under s.73A (which is exempted under reg.2(2) of the Environment Act 2021 (Commencement No.8 and Transitional Provisions) Regulations 2024).

The BNG regime does not apply to any planning permission granted after 12 February 2024 when the application was made before 12 February 2023 (reg.s 2 and 3 of the Environment Act 2021 (Commencement No.8 and Transitional Provisions) Regulations 2024). This does not mean the BNG regime must be treated as irrelevant in such decisions: the Court of Appeal has accepted that future legislative provisions may be relevant to a decision maker (*R (Cala Homes (South) Limited) v Secretary of State for Communities and Local Government* [2011] EWCA Civ 639 where the point was not ultimately disputed ([20] and [33]).

However, decision makers should be cautious in their language, as no fewer than three cases have already alleged an unlawful retrospective application of the BNG regime, two successfully. In *NRS Saredon Aggregates Limited v Secretary of State for Levelling Up, Housing and Communities* [2023] EWHC 2795 (Admin) Eyre J. held the decision-maker was not entitled to reduce the weight that would otherwise be given to the first 10% of the BNG to be provided by applying the not-yet-in-force legislative requirement ([55] to [56]). In *R (Weston Homes plc) v Secretary of State for Levelling Up, Housing and Communities* [2024] EWHC 2089 Admin the reasoning for the weight given to BNG improvements, in the context of the new legislation, was deemed unlawfully inadequate. An argument on retrospective application was also made in *Vistry Homes* but did not succeed.

From 2025 the BNG regime will also apply to nationally significant infrastructure projects, ("NSIPs") through amendments to the Planning Act 2008 (via what will be Schedule 2A to that Act and consequential amendments). The Government has confirmed its commitment to making BNG mandatory for NSIPs from November 2025.

It is important to point out the BNG regime should be distinguished from the provision of other biodiversity gains. The statutory metric, for example, is not intended to represent a comprehensive model of all aspects of biodiversity. By using habitat as a proxy, species presence and/or abundance are not accounted for in the metric. Protected sites are dealt with separately from the BNG regime. These and other measures of biodiversity value are nonetheless crucial in ecological terms, and therefore remain important for developers and decision makers to propose and consider outside of the BNG regime.

The biodiversity gain objective

In addition to express statutory exemptions, there are transitional arrangements which disapply the biodiversity condition from certain planning permissions, as well as special modifications for other planning permissions (such as s.73 or phased permissions) or where irreplaceable habitat is present on the development site. These will be explored in more detail during the oral presentation of this article.

For all non-exempt planning permissions, Schedule 7A, paragraph 1(1) of the Town and Country Planning Act 1990 confirms the legislation provides for "grants of planning permission in England to be subject to a condition [this is the biodiversity gain condition] to secure that the biodiversity gain objective is met." So how does one meet the biodiversity gain objective?

Schedule 7A, paragraph 2(1) provides that the biodiversity gain objective is met if "the biodiversity value attributable to the development" exceeds the pre-development biodiversity value of the onsite habitat by at least "the relevant percentage". The relevant percentage is at least 10% (Schedule 7A, paragraph 2(3)). This percentage can be changed, but only by way of law (as

secondary legislation in the form of regulations: paragraph 2(4)), and only after a draft of the instrument containing the regulations has been laid before, and approved by a resolution of, each House of Parliament (s.333(3AA) of the Town and Country Planning Act 1990).

There are three ways to achieve BNG in order to satisfy the gain objective. Onsite "units" (a quantified biodiversity value uplift within the red line boundary of the development site, Schedule 7A paragraph 12 refers to the development site as "land to which the planning permission relates"); offsite units (biodiversity gains created on land outside the development site, or the purchase of pre-made offsite biodiversity units); and finally statutory biodiversity credits (buying credits from Natural England as a measure of last resort if onsite or offsite options are not feasible).

In each case, the statutory metric (an online Excel-based tool published by the Secretary of State for the Environment, Food and Rural Affairs) is used "for measuring, for the purposes of [Schedule 7A], the biodiversity value or relative biodiversity value of habitat or habitat enhancement" (Schedule 7A, paragraph 4(1); see also Schedule 7A, paragraph 3). Because of the critical importance of the metric it must be laid before Parliament (Schedule 7A, paragraph 4(6)), and is subject to procedural conditions in the event of any update (mandatory consultation and transitional arrangements: paragraphs 4(4) and 4(5)).

The statutory metric uses habitat as a proxy measurement for biodiversity value, resulting in numeric biodiversity units in one of three non-interchangeable types of habitat comprising either area habitat, watercourse, or hedgerow units. 10% BNG must be achieved for every one of the three impacted types of habitat; in other words, gains in one type of habitat cannot offset the provision of less than 10% gain in another form of habitat type.

As to the baseline date from which the gain is to be measured, Schedule 7A provides for six options depending on the circumstances. This too will be explored in the oral presentation of this article.

Biodiversity gain hierarchy

The biodiversity gain hierarchy is as central to the BNG regime as the biodiversity gain condition and objective: the condition achieves the objective through application of the hierarchy. Article 37A of the Town and Country Planning (Development Management Procedure) (England) Order 2015 sets out the definition of the hierarchy:

"37A. Meaning of biodiversity gain hierarchy
In this Part, 'biodiversity gain hierarchy' means the following actions in the following order of priority-

(a) in relation to onsite habitat with a habitat distinctiveness score, applied in the statutory metric, equal to or higher than four-
(i) avoiding adverse effects of the development, or
(ii) insofar as those adverse effects cannot be avoided, mitigating those effects;

(b) in relation to any onsite habitat which is adversely affected by the development, compensating for that adverse effect by-
(i) habitat enhancement [defined in paragraph 12(2) of Schedule 7A to the Town and Country Planning Act 1990] of onsite habitat;
(ii) insofar as there cannot be that enhancement, creation of onsite habitat;
(iii) insofar as there cannot be that creation, the availability of registered offsite biodiversity gain for allocation to the development;
(iv) insofar as registered offsite biodiversity gain cannot be allocated to the development, the purchase of biodiversity credits."

It is important to note the hierarchy, like much of the BNG regime, does not apply to irreplaceable habitats. Where it does apply, developers are obliged to explain, and planning authorities are obliged to consider, how the biodiversity gain hierarchy has been applied when determining whether to approve the biodiversity gain plan. If it has not been applied that must be explained. If no reason is given, the absence of an explanation must be taken into account by the planning authority. Because the application of the biodiversity gain hierarchy is a mandatory material consideration, decision makers should give reasons if they do not approve the biodiversity gain because of a failure in relation to the biodiversity gain hierarchy. These reasons should meet the legal standard.[5] enabling the developer to know what they did wrong and why the plan was rejected as a consequence of that failure.

The biodiversity gain hierarchy is separate from, but relevant to, the mitigation hierarchy set out in paragraph 186(a) of the National Planning Policy Framework.[6] Thus, there is a separate requirement for decision makers to refuse a planning application if significant harm to biodiversity resulting from the development cannot be avoided (through locating on an alternative site with less harmful impacts), adequately mitigated, or, as a last resort, compensated for. Clearly, avoiding, mitigating and if necessary compensating for harms to biodiversity through the BNG regime can be relevant to application of the paragraph 186(a) policy but other biodiversity impacts may also be relevant.

Taking account of BNG during determination

Because development cannot commence until the biodiversity gain plan has been approved, prudent decision makers and developers should consider at least in general terms whether, and if so, how the biodiversity gain objective will be met during the entire planning process from pre-application to determination. The implications of certain onsite habitats for developability and

5. Reasons for the decision must be intelligible and adequate, enabling one to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues'. A decision maker's reasoning must not give rise to a substantial doubt as to whether they went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration (per Lord Brown in *South Bucks District Council and another v Porter (No. 2)* [2004] 1 WLR 1953, at page 1964B-G).
6. Which provides: "When determining planning applications, local planning authorities should apply the following principles: a) if significant harm to biodiversity resulting from a development cannot be avoided (through locating on an alternative site with less harmful impacts), adequately mitigated, or, as a last resort, compensated for, then planning permission should be refused".

viability means developers really should be considering BNG at the site-selection stage.

Developers will also want planning authorities to take account of the benefit of the provision of BNG (see the decision of Holgate J. in *Vistry Homes Limited v Secretary of State for Levelling Up, Housing and Communities, St Albans City and District Council, Colney Heath Parish Council* [2024] EWHC 2088 (Admin), set out in more detail below), as well as the additional positive benefits of delivering onsite BNG such as landscaping, amenity, health, and climate change mitigation and adaptation improvements, when determining the planning application.

For planning authorities, matters related to the BNG regime that could appropriately be considered prior to determination of the planning application may include (this is not an exhaustive list):

- The appropriate balance expected between onsite gains, offsite gains and the use of statutory biodiversity credits for the development, taking account of the biodiversity gain hierarchy;
- Whether the type and location of any significant onsite habitat enhancements proposed for onsite gains are appropriate, taking into account other policies to support biodiversity (including local nature recovery strategies) and other wider objectives (for example policies for design, open space and recreation, and retention of trees); and
- Any planning conditions which need to be imposed to secure any significant onsite habitat enhancements, including any conditions requiring the maintenance of the enhancement for at least 30 years after the completion of the development.

Prior to the determination of the planning application, decision makers and applicants should also discuss any s.106 planning obligations, the terms of any habitat management and monitoring plan, and any additional conditions that may be required. Ensuring these matters are dealt with early in the process avoids costs and delay subsequently if the arrangements are unworkable and need to be amended.

Where landscaping and layout are reserved matters, the implications for existing onsite habitats and the contribution to onsite gains will not be known with the requisite certainty at the time of the determination. Where it does not fall within the definition of phased development, to which a special procedure applies, planning authorities in such cases will need to secure means by which they can conclude that, notwithstanding the lack of detail, the biodiversity gain objective will be met through subsequent approvals.

Consideration of BNG as a benefit of planning permission

The vexed question of whether policy-based requirements (or in this case, legal requirements) are capable of constituting a benefit of the development in the planning balance was addressed by Holgate J., considering BNG, in *Vistry Homes*. In a detailed set of paragraphs, he said:

"152. Where a development is required to provide a measure in order to overcome or mitigate, or compensate for, a harm caused by that project, ordinarily that measure could not rationally be described as a benefit. So, for example, where a development would result in a loss of biodiversity, the provision of additional biodiversity on the same site or on other land nearby in order to completely offset that loss, so that in overall terms there is no net reduction in biodiversity attributable to the development, is not a benefit. It is simply the development 'consuming its own smoke.'

153. But as the name and definition of BNG indicates, that term refers to an improvement in biodiversity. That goes beyond offsetting the adverse impacts of a development scheme. It increases biodiversity in order to help redress a general national problem, which is not caused by the development proposed. On any view, that would be a benefit of the proposed scheme. It is difficult to see how rationally anyone could say otherwise. However, the scale of that benefit and the weight to be attached to it are separate considerations.

154. I do not see why the identification of what is, and what is not, a benefit should be altered, because what would otherwise be recognised as an improvement or benefit is the subject of a requirement imposed by planning policy or by legislation. Whether a measure should be treated as a benefit, depends upon *inter alia* its nature and purpose, including whether it would help to meet a need which is, or is not, related to the development proposed…

155. It is difficult to see how logically a decision-maker could give no weight at all to, for example, the provision of 10% BNG because that equated to the 10% requirement in *Schedule 7A* . The fact that such a requirement is imposed by legislation is simply a mechanism for ensuring that a wide range of developments contribute to the collective effort of improving biodiversity in England. It does not alter the nature or purpose of the improvement in biodiversity which is provided, or the underlying justification for the requirement to reverse a national decline in biodiversity over many years.

156. It also follows that where a development would provide BNG of 20%, a decision-maker is not entitled to say that only that part of the BNG which exceeds 10% can qualify as a benefit in deciding whether to grant planning permission.

157. I turn to consider questions of weight. If a decision-maker were to reduce the weight which he *would otherwise* give to a 40% provision of affordable housing because the development will provide the level of housing required by the development

plan, that would also be objectionable, certainly in the absence of any logical explanation. The decision-maker should be assessing how the developer's contribution of affordable housing stands in relation to *inter alia* the justification in the development plan for the level of affordable housing required by the policy. Key considerations could include the level and nature of the need for affordable housing in the district and any shortfall in delivery.

158. Similarly in relation to BNG, a decision-maker should consider the nature and purposes of the requirement and of the contribution being made. *Schedule 7A of TCPA 1990* imposes a blanket requirement for the provision of 10% BNG for a broad range of development to alleviate a national problem. This benefit is of a generalised nature. It may be contrasted with the benefit of providing affordable housing which is related to (a) the highly specific needs identified by an LPA for its area and (b) ensuring that the release of housing land meets the need for affordable housing as well as general housing. Such considerations may affect the weight to be given to benefits. This is a matter for the decision-maker…

161. Having said all this, I do accept Mr Williams' submission that the statutory requirement for BNG of 10% can properly be used as a simple *benchmark* for comparing the BNG to be provided for a proposed development…

163. Where the application for permission was made before 14 February 2024 [sic: this is 12 February] the statutory 10% requirement should not be treated as having been applicable, nor should that be the effect of the decision-maker's reasoning. However, it was common ground between the parties that the 10% BNG provision in Schedule7A to the TCPA 1990 may be used in such cases, but only as a benchmark, in assessing the weight to be given to a BNG contribution. It must not be used to reduce the weight that the decision-maker would otherwise have given to the provision of BNG in a particular case."

Information to include on decision notice

Responsibilities under the BNG regime endure for 30 years. This means issues are likely to arise when the people who discussed and agreed the terms of a planning permission are long gone. This means the language used to set out actions and responsibilities should be crystal clear and capable of objective interpretation. Here, the general principles courts will apply to the interpretation of planning permissions should be borne in mind by planning decision makers.

First, the court's starting point is not deference to the decision maker's judgment: *UBB Waste Essex Ltd v Essex County Council* [2019] EWHC 1924 (Admin), per Lieven J. at [25]. This is because the proper interpretation of a planning permission is a matter of law for the court: *Barnett v Secretary of State for Communities and Local Government* [2009] EWCA Civ 476, per Keene L.J. at [28]. The court will ask itself, objectively, what a reasonable reader would understand the words of the planning permission to mean having regard to their natural and ordinary meaning, the planning purpose, and common sense, and the planning permission when read as a whole: *Trump International Golf Club Scotland Ltd v The Scottish Ministers* [2015] UKSC 74 per Lord Hodge at [34]; *London Borough of Lambeth v Secretary of State for Housing, Communities and Local Government* [2019] UKSC 33, per Lord Carnwath at [16]-[19]; and UBB, per Lieven J at [55].

The interpretive exercise will not normally include material outside the planning permission itself. The correct approach when determining whether regard should be had to any material beyond the planning permission was set out by Keene J. (as he then was) in *R v Ashford Borough Council ex parte Shepway District Council* [1999] PLCR 12 at page 19C to 20D, and has been applied ever since. The case law on this point was summarised by Steyn J. in *R (Gallagher Ventures Limited v Secretary of State for Housing Communities and Local Government, Torbay Council* [2021] EWHC 3007 (Admin) (at [5]):

"i) The general rule is that in construing a planning permission which is clear, unambiguous and valid on its face, regard may only be had to the planning permission itself (including the conditions, if any, on it and the express reasons for those conditions): *Ashford*, per Keene J. at p.19C-D; *R (Menston Action Group) v City of Bradford Metropolitan District Council [*2016] EWCA Civ 796, per Lindblom L.J. at [11].

ii) The planning permission may incorporate by reference the application. It will only do so if some words sufficient to inform a reasonable reader that the application forms part of the permission appear in the operative part of the permission, showing that the words govern the description of the development permitted. Any document that is properly to be regarded as incorporated by reference is intrinsic to the planning permission and the court should have regard to it when determining the meaning of the planning permission. See *Ashford*, per Keene J. at p.19D-G.

iii) If there is an ambiguity in the wording of the permission, it is permissible to look at extrinsic material to resolve that ambiguity. Extrinsic evidence may be documentary (e.g. the relevant planning officer's report), but it is not confined to documentary evidence: *Wood v Secretary of State for Communities and Local Government* [2015] EWHC 2368 (Admin), per Lindblom J. at [43]."

A relatively cautious approach will be taken to extraneous material, especially if it is not material in the public domain. This is because the courts are interpreting a public document, subject to public consultation, on which the public may well have had a vocal say, and which might be relied on by third parties who never had an opportunity to participate in the determination process *(Trump*

International, per Lord Carnwath at [65]-[66]; Lambeth v SSHCLG, per Lord Carnwath at [18]; and *UBB*, per Lieven J. at [56]-[57].

The courts are to assume this hypothetical reasonable reader will have some knowledge of planning law, and understand the role of the planning permission, conditions and any incorporated documents: *UBB*, per Lieven J. at [52] to [53].

That is the underlying jurisprudence on the interpretation of a planning permission. As to the actual text to include, article 35 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 now provides BNG-specific information to include on decision notices for planning authorities. Local planning authorities have also been provided with model paragraphs for biodiversity gain information, which they are encouraged to use.[7]

Applying other planning conditions in relation to BNG

Sections 70(1) and 72 of the Town and Country Planning Act 1990 gives planning authorities very broad powers to impose such planning conditions as they see fit. It follows that they may include additional conditions relating to the delivery of BNG. The PPG gives examples, such as a planning condition used to secure significant onsite habitat enhancements which are required to be secured and maintained for at least 30 years under paragraph 9 of Schedule 7A, as well as monitoring and reporting arrangements.[8]

The key consideration when imposing conditions in relation to BNG (other than the need for objective clarity and precision in light of the 30-year-long positive obligation) is that they should not be used to secure funding for delivering or monitoring biodiversity net gain (due to difficulty in enforcement of the condition's terms). Funding should be secured through s.106 planning obligations (where justified).[9]

Significant and non-significant onsite habitat enhancements

Schedule 7A, paragraph 9(3) of the Town and Country Planning Act 1990 requires that where an applicant relies upon a "significant" increase in onsite habitat biodiversity value, that habitat enhancement must be subject to either a planning condition, s.106 agreement, or conservation covenant in each case requiring the retained, enhanced and/or created habitat to be maintained for at least 30 years after the development is completed. If a planning condition is used this is separate to the biodiversity gain condition (i.e. that which requires the developer to achieve at least 10% BNG).

The PPG does not provide much assistance in terms of defining what a significant gain comprises: "[s]ignificant enhancements are areas of habitat enhancement which contribute significantly to the proposed development's BNG, relative to the biodiversity value before development".[10] Examples (in a non-exhaustive list) are provided:

- habitats of medium or higher distinctiveness in the statutory metric
- habitats of low distinctiveness which create a large number of biodiversity units relative to the biodiversity value of the site before development
- habitat creation or enhancement where distinctiveness is increased relative to the distinctiveness of the habitat before development
- areas of habitat creation or enhancement which are significant in area relative to the size of the development
- enhancements to habitat condition, for example from poor or moderate to good
- creating a wildflower meadow or a nature park

The maintenance of non-significant onsite habitats need not be secured by legal agreement or condition, but there is a PAS onsite s.106 agreement template available which helpfully includes clauses to secure the requisite funds for local planning authority monitoring of all onsite habitat.

The PPG notes decision makers should always consider wider matters when assessing the suitability of proposals for onsite habitat gains, such as: highways safety, designated heritage assets, increasing or restricting access to nearby natural areas (depending on the sensitivity of nearby habitats), and the impact on aviation safety.[11]

What is the "completion" date?

The requirement that maintenance of a significant onsite habitat enhancement must be secured by either a planning condition, planning obligation or conservation covenant for at least 30 years after "the completion of the development" is a potential issue.

Clearly, the completion of any onsite works to enhance and/or create habitat (not just completion of the buildings related to the development) must be included in considerations of completion (you cannot maintain what does not yet exist). The PPG suggests that using traditional indicators of completion for residential or commercial development (such as a building regulations notice) may not be appropriate for the purposes of the BNG regime,[12] but does not provide further guidance.

Suggestions include using occupation as the defined "completion" date for the purposes of maintaining onsite BNG.[13] This is the earliest point where the purpose of the development can be said to be achieved (thus, it can be described as being completed for all intents and purposes) and it is also a point the developer has a

7. https://assets.publishing.service.gov.uk/media/663251d969098ded31fca800/BNG_Decision_Notice_Text.odt. See also PPG paragraph: 025 Reference ID: 74-025-20240214.
8. PPG paragraph: 027 Reference ID: 74-027-20240214.
9. PPG on Use of Planning Conditions, paragraph: 005 Reference ID: 21a-005-20190723.
10. DEFRA BNG guidance: https://www.gov.uk/guidance/make-on-site-biodiversity-gains-as-a-developer#significant-on-site-enhancements.
11. PPG paragraph: 021 Reference ID: 74-021-20240214.
12. PPG paragraph: 022 Reference ID: 74-022-20240214.

financial incentive to achieve.

Due to the importance of all parties having certainty on when the 30 year maintenance period starts (and ends), and because of the potential hardships caused by a poorly-thought through unilaterally imposed "completion date", planning authorities and developers should discuss the matter amongst themselves and ensure they both are clear (and any consequential document is equally clear) on the point of completion and when the 30 year maintenance period begins.

Whatever parameter is chosen for "completion of development", planning authorities and developers should check timeframes carefully as environmental constraints when establishing and maintaining habitat (planting season, suitable ground conditions, appropriate soil fertility levels, etc.) may mean habitat works are potentially years out of sync with, for example, occupation timescales.

Interactions with local plan making

The BNG regime is predominately a statutory regime. Where a provision in statute conflicts with a provision in a local plan, statute takes priority. Where the local plan goes further than the BNG regime (i.e. requiring 20% BNG), then (1) what is required under statute must be provided, and (2) the requirements of the policy should also be provided, unless material considerations indicate otherwise (by s.38(6) of the Planning and Compulsory Purchase Act 2004). This means a developer could not argue at appeal that 10% BNG need not be provided, but they can argue that material considerations mean that 20% need not be.

The PPG indicates that a local plan-based policy which required a gain of at least 10% from new developments in anticipation of the statutory regime "should no longer apply when determining applications for planning permission subject to biodiversity net gain, although it may continue to be a material consideration"; and "[d]ecision makers should not give weight to local policy which requires biodiversity gains for types of development which would now be exempt under the statutory framework".[14] Unless extant development plan policy has been revoked it remains development plan policy subject to s.38(6) of the Planning and Compulsory Purchase Act 2004, so decision makers cannot ignore such policies: they remain subject to an express statutory direction on decision making. The PPG is also a material consideration and any decision contrary to the PPG requires justification. What weight should be given to relevant policies and guidance is a matter for decision makers.

Looking ahead, future development plans, supplementary development plan documents, and local guidance should be consistent with the BNG regime. There is nothing precluding plan makers from including additional policies which complement without duplicating the BNG regime.

As to the adoption of development plan policies which go beyond the BNG regime, the PPG says:

"[p]lan-makers should not seek a higher percentage than the statutory objective of 10% biodiversity net gain, either on an area-wide basis or for specific allocations for development unless justified. To justify such policies they will need to be evidenced including as to local need for a higher percentage, local opportunities for a higher percentage and any impacts on viability for development. Consideration will also need to be given to how the policy will be implemented."[15]

So, it is permissible to adopt local development plan policy requiring greater than 10% BNG but it must be carefully considered and justified by reference to appropriate evidence in line with the PPG.

Monitoring and enforcement

Developers must ensure habitats they enhance or create in order to achieve the biodiversity gain objective are maintained for at least 30 years, whether that is onsite or offsite. A legal agreement and/or condition are mandatory to outline responsibilities for habitat enhancement and/or creation, monitoring, and reporting for all offsite and "significant" onsite habitat provision. Legal agreements can take the form of either an agreement under s.106 of the Town and Country Planning Act 1990 or conservation covenant under s.118 of the Environment Act 2021. Additional planning conditions and legal agreements may also be used to secure the necessary provision, maintenance and monitoring of non-significant onsite BNG for at least 30 years. If conditions or a s.106 agreement are used the enforcing body will be the local planning authority for that area. If a conservation covenant is used, the enforcing body will be the designated responsible body (which may also be a local planning authority).

Failure to comply with the biodiversity gain condition is a breach of planning control. Onsite provision of habitat is the first priority of the BNG regime. Local planning authorities, accordingly, have the most crucial enforcement role within the entire BNG regime.

Local planning authorities should have local enforcement plans that include their priorities for enforcement action. These should be updated to reflect the new BNG regime, and include enforcement of the initial delivery of habitats as well as enforcement of ongoing management, maintenance and monitoring requirements.

The enforcement tools granted to local planning authorities relevant to BNG are discretionary, and fears over the lack of capacity of overstretched enforcement teams within local planning authorities have accompanied the development of the BNG regime from its

13. See PAS templates.
14. PPG paragraph: 020 Reference ID: 74-020-20240214.
15. PPG paragraph: 006 Reference ID: 74-006-20240214.

very conception. This lack of capacity means enforcement action is often initiated by complaints from local residents. However, local residents may well be more likely to complain about a failure to mow "messy" BNG grassland because they want to use it for football and picnics than they are to complain about a grassland achieving moderate condition instead of good condition by year 25, for example.

A breach of condition notice is issued under s.187A of the Town and Country Planning Act 1990 as follows (noting, while it is still discretionary, there is no expediency test for the service of a breach of condition notice and no right of appeal):

"(2) The local planning authority may, if any of the conditions is not complied with, serve a notice (in this Act referred to as a *'breach of condition notice'*) on-
(a) any person who is carrying out or has carried out the development; or
(b) any person having control of the land,
requiring him to secure compliance with such of the conditions as are specified in the notice."

Because habitats may take decades to establish, by the time a breach is apparent the developer may be long gone. The person "having control of the land" must then be identified. Management companies incorporated to carry out landscaping and BNG work must be in control of the land on which the BNG units have been provided in order to be liable for any breach of condition. Then, if the person is in control of the land and responsible for the breach of condition, there is the question of whether they have the funds and expertise to secure compliance with the breach of condition notice. It is foreseeable that a failure to provide the requisite BNG is precisely because that person lacks sufficient funds and/or expertise.

Further, a breach of condition notice must *specify* the steps which the local planning authority consider ought to be taken, or the activities which the authority consider ought to cease, to secure compliance with the conditions specified in the notice. A period for compliance must also be specified (s.187A(7)). The statutory language requires detail, clarity and precision in the drafting of the notice. This is of particular importance given the risk of criminal liability if the notice is not complied with. In *R. v East Lothian Council Ex p Scottish Coal Company Ltd* [2001] 1 PLR 1 (a Scottish case, but considering the same statutory language), Lord Prosser said at [12] this statutory language "is concerned with actual, factual steps". The formulation adopted in the notice in that case, which required that the respondents complied with the stated condition by "ensuring" that its terms were met, was not lawful, because use of the word "ensuring" focused upon the result to be achieved, rather than the means of achieving it (which, according to the statutory language, had to be specified) (per Lord Prosser at [12]). Thus, compliance with these legal requirements on local planning authorities may require highly specialist ecological expertise in order to specify the requisite terms of the notice so as to secure compliance.

If the breach of condition notice is not complied with, it is a criminal offence punishable by an unlimited fine (s.187A(9) and s.187A(12)). There is a statutory defence that the recipient of the notice took all reasonable measures to secure compliance with the conditions specified in the notice (or, was no longer in control of the land) (s.187A(11)). Criminal proceedings and a hefty fine will not, however, secure BNG. Section 187A does not grant local planning authorities step in rights to remedy a breach of condition.

Where there is a s.106 agreement or conservation covenant, the legal enforcement framework is simpler and more certain, as any failure to comply with the terms of that agreement is a breach of that agreement and may be enforced in accordance with the terms of that agreement.


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