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PLANNING CASE LAW REVIEW

Tom Cosgrove QC and Robin Green

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Topics to cover

- Interpretation of Policy
- Decision making and the tilted balance
- Green Belt
- Heritage

Interpretation of Policy

Policy Interpretation

Two aspects:

(i) Approach to interpretation of a development plan as a whole in a decision making context.

(i) Approach to construing and applying planning policies – national and local.

Corbett v Cornwall Council [2020] EWCA Civ 508
9th April 2020

Corbett v Cornwall Council [2020] EWCA Civ 508

Facts:

- LPA permitted proposed extension of caravan park
- Conflict with Dev Plan policies 14 of the RLP and 23 of the CLP
- But - compliance with other Dev Plan policy relating to tourism

Corbett v Cornwall Council [2020] EWCA Civ 508

CA Held (Lindblom LJ):

- The s.38(6) duty could only be properly discharged if the decision maker established whether the proposal accorded with the development plan ‘as a whole’.
- If (as was usual) policies pulled in different directions a judgment had to be exercised to determine if a proposal accorded with the plan as a whole bearing in mind the relative importance of policies in play and the extent of breach or compliance.
- On the facts of the case the LPA had interpreted policies correctly and struck an appropriate balance/judgment.

Corbett v Cornwall Council [2020] EWCA Civ 508

Implications?

- An argument likely to be pursued by applicants.
- It does <u>not</u> mean that a conflict with a single policy can never be capable of constituting conflict with the dev plan as a whole.
- It emphasises the importance of careful planning judgments in the context of public law challenges.
- It - perhaps – gives new life to a long standing principle.

Policy construction v application

Concepts in recent case law

Construction/Interpretation of policy

- The decision maker must identify and understand the relevant policies
- The construction of policy is a matter of law

Application of policy

- Once properly understood, the application of policy is a matter of planning judgment
- The reasonable exercise of planning judgment will not be disturbed by a court

Gladman Developments Ltd. v Canterbury City Council [2019] EWCA Civ 669

Lindblom LJ in *Canterbury* at para 22 – 5 points to highlight on construction of policy:

- The interpretation of development plan policy (*or national policy*) is ultimately a matter of law for the court.
- The court does not approach that task with the same linguistic rigour as it applies to the construction of a statute or contract.
- It must seek to discern from the language used in formulating the plan the sensible meaning of the policies in question, in their full context, and thus their true effect.

Gladman Developments Ltd. v Canterbury City Council [2019] EWCA Civ 669

- The context includes the objectives to which the policies are directed, other relevant policies in the plan, and the relevant supporting text.
- The court will always keep in mind that the creation of development plan policy by a local planning authority is not an end in itself, but a means to the end of coherent and reasonably predictable decision-making, in the public interest.

What does all this mean?

- Because of the breadth of such principles there is ample/inevitable (?) scope for differing interpretations even amongst seasoned professionals
- Likely to lead to extensive litigation?
- The *Cornwall* case reminded us that the interpretation of planning policy depends on a sensible reading of language in context. But…. The distinctions can be fine ones..

What does all this mean?

- The concept of ‘context’ as a key aspect of interpretation is a fluid one.
- Compare the *Canterbury* case with *Chichester DC v Secretary of State for Housing, Communities and Local Government* [2019] EWCA Civ 1640
- In *Canterbury* the ‘true’ interpretation of policy – as a ‘matter of necessary inference’ left no scope for proposals lacking explicit policy support.

What does all this mean?

❖ But in *Chichester* the correct interpretation resulted in the policies there requiring no such inference because they were '*explicit*'. In this legal planning world you can:

(i) conflict with relevant policy and not conflict with the development plan as a whole (*Cornwall*)..but also…

(i) Not offend against any particular term of a policy in a plan but nevertheless be in conflict with the 'strategy' in it (*Canterbury & Chichester*).

What does all this mean?

Lindblom LJ in *Chichester* referring to *Canterbury* and *Crane* at paragraph 47:

"*What those two cases show is **that there will sometimes be circumstances in which a proposal for housing development, though it neither complies with nor offends the terms of any particular policy of the development plan, is nevertheless in conflict with the plan** because it is manifestly incompatible with the relevant strategy in it. This may be a matter of "natural and necessary inference" from the relevant policies of the plan, read sensibly and as a whole. The effect of those policies may be – I stress "may be" – that a proposal they do not explicitly support is also, inevitably, contrary to them. **Whether this is so will always depend on the particular context, and, critically, the wording of the relevant policies, their objectives, and their supporting text***"

What does all this mean?

And don’t forget that amidst all this..

The Courts have been recently very forthright – with a sense of almost despair – in telling litigants that they are failing to distinguish between concepts of construction and application and urging parties to avoid ‘*excessive legalism*’

So…

A recent example of policy interpretation

The Queen on the Application of Wiltshire Council v Secretary of State for Housing, Communities and Local Government v Mr W Howse [2020] EWHC 954 (Admin) - 23 April 2020

- Concerned the interpretation of paragraph 79 (d) NPPF (isolated homes in the countryside) and the meaning of 'subdivision of a residential dwelling'

- Did the subdivision have to relate to one physical dwelling? Inspector said no.

- Court said yes! See paragraph 26 of Lieven J where she highlights difference between interpretation and application.

DECISION-MAKING AND THE TILTED BALANCE

Decision-making and the tilted balance

Topics

- Recap
- Triggering the tilted balance
- Application of the tilted balance

Recap

Paragraph 11 of the National Planning Policy Framework (February 2019) states that development plans and decisions should apply a presumption in favour of sustainable development.

Where proposed development accords with an up-to-date development plan, that means granting permission without delay (11(c)).

Recap

Where development proposals do not accord with a development plan, the starting point is that permission should be refused unless material considerations indicate otherwise.

Para 11(d) of the NPPF introduces an important material consideration.

Paragraph 11(d) of the NPPF – the tilted balance

"For decision-making, the presumption means that where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date[7], granting permission unless:

i. the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed[6]; or

ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole."

Triggering the tilted balance

- Where there are no relevant development plan policies.
- Where the policies which are most important for determining the application are out-of-date.

Three recent cases have clarified the way these triggers operate.

Paul Newman New Homes Ltd v SSHCLG [2019] EWHC 2367 (Admin)

First trigger in para 11(d): "where there are no relevant development plan policies".

In *Paul Newman* an Inspector refused planning permission for residential development in the countryside because of its adverse effect on the character and appearance of the area, contrary to a single policy in the 2004 development plan. As there was a 5-year housing land supply, the Inspector considered that the tilted balance was not applicable. This was challenged in the High Court.

Paul Newman New Homes Ltd v SSHCLG [2019] EWHC 2367 (Admin)

Sir Duncan Ouseley dismissed the challenge.

- The phrase “where there are no relevant development plan policies” is quite clear.
- Where one or more relevant development plan policies exist, the first trigger for the application of the tilted balance cannot be applied.
- One relevant policy (even if out of date) is enough.
- “Relevant” means relevant to determining the application; ie having some real role in determining the application. A fanciful connection is not enough, but the policy does not need to be an “important” policy.

Paul Newman New Homes Ltd v SSHCLG [2019] EWHC 2367 (Admin)

Going to the CA on 1/2 July 2020

Wavendon Properties Limited v SSHCLG [2019] EWHC 1524 (Admin)

Second trigger in para 11(d): "Where the policies which are most important for determining the application are out-of-date"

In *Wavendon* major housing development in the countryside was refused on appeal as being in conflict with the development plan. Two countryside protection policies were considered by the Inspector to be out of date, but the tilted balance was not applied. This was challenged in the High Court. Dove J found no error by the Secretary of State.

Wavendon Properties Limited v SSHCLG [2019] EWHC 1524 (Admin)

The correct approach to assessing whether the most important policies are out of date:

(i) decide which policies are the most important for the determination;

(ii) assess whether each is out of date applying NPPF and *Bloor Homes*;

(iii) form an overall judgement as to whether policies as a whole are out of date.

Peel Investments (North) Ltd v SSHCLG [2019] EWHC 2143 (Admin)

“Out-of-date”

In *Peel* a housing scheme was refused in 2018 because of the breach of environmental and recreational policies in City of Salford UDP 2004-16. Appellant had argued that the UDP and its policies were out of date: time expired; housing requirement based on RPG13 (2003); different policy context; LPA accepted greenfield releases needed. Rejected by Inspector and Secretary of State. Challenge dismissed by Dove J.

Peel Investments (North) Ltd v SSHCLG [2019] EWHC 2143 (Admin)

- Held: Out of date a matter of fact and judgment.
- Expiration of plan period ≠ out of date.
- Decision-maker entitled to conclude policies continued to deliver their objectives, and the reasons for the policies remained relevant and consistent with the NPPF.
- Development plan continued to deliver an appropriate quantum of housing (5-year HLS).
- Inspector and SoS right to focus on consistency with the Framework and results on the ground.

Peel Investments (North) Ltd v SSHCLG [2019] EWHC 2143 (Admin)

Going to CA on 30 June/1 July 2020

Applying the tilted balance

The tilted balance calls for the grant of planning permission unless:

(i) the operation of certain protection policies provides a clear reason not to, or

(ii) “any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole”.

Two cases have considered these provisos.

Monkhill Ltd v SSHCLG [2019] EWHC 1993 (Admin)

Monkhill Ltd v SSHCLG [2019] EWHC 1993 (Admin)

- Para 172 NPPF: “Great weight should be given to conserving and enhancing landscape and scenic beauty in … Areas of Outstanding Natural Beauty, which have the highest status of protection in relation to these issues. … The scale and extent of development within these designated areas should be limited …”

- Inspector held that a housing scheme in Surrey Hills AONB would harm the AONB. Although no 5-year HLS, para 172 provided a clear reason for refusing permission, disapplying para 11(d) presumption.

Monkhill Ltd v SSHCLG [2019] EWHC 1993 (Admin) contd

- Challenged in the High Court on grounds that language of para 172 did not provide a clear reason for refusal; it merely indicated degree of weight to be given to one factor.
- Rejected by Holgate J. Argument too legalistic. Implicit in para 172 that a balancing exercise to be carried out, the result of which may sustain a clear reason for refusal.

Going to CA in November 2020

Gladman Developments Limited v SSHCLG and Corby BC [2020] 518 (Admin)

In assessing whether “any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole”, should one take account of development plan policies?

This question was answered by Holgate J in *Gladman Developments Limited v SSHCLG and Corby BC*

Gladman Developments Limited v SSHCLG and Corby BC [2020] 518 (Admin)

Gladman involved challenges to two appeal decisions refusing to grant planning permission for residential development in the countryside. In both cases the tilted balance was engaged because the most important policies for determining the appeals were deemed out of date as a result of deficiencies in the 5-year housing land supply. In both cases the claimants argued in the High Court that the Inspector had wrongly taken account of breaches of development plan policy in striking the tilted balance.

Gladman Developments Limited v SSHCLG and Corby BC [2020] 518 (Admin)

Holgate J was having none of it.

- The courts have made it plain in relation to the 2012 NPPF that the weight to be attached to development policies, whether telling in favour of or against a proposal, was a matter to be assessed in the balance.
- Adopting the straightforward approach to interpretation laid down by the case law, paragraph 11(d)(ii) of the 2019 NPPF does not require any relevant development plan policies to be excluded from the tilted balance.
- Neither NPPF 2019 nor planning policy in general should be subjected to "excessive legalism" in legal challenges brought by any party disappointed by the outcome of a planning application or planning appeal.

GREEN BELT

Cover 2 aspects of Green Belt case law

(i) Approach to the GB ‘exceptional circumstances’ test in a policy making/local plan context.

(i) Recent SC case from February 2020 addressing issue of openness.

Compton Parish Council v Guildford BC [2019] EWHC 3242 (Admin) - 4th December 2019

- Case concerned a challenge to a local plan

- Held (re GB) that the plan was not unlawful where there were exceptional circumstances that justified the release of land.

- Re ‘exceptional circumstances’ – see Sir Duncan Ouseley at paragraphs 68-72

Key points – except circs

- ‘exceptional circumstances’ is a policy concept that is – deliberately- not defined.
- A planning judgment is required – Ouseley at paragraph 68-72 in *Compton*:

“*All that is required is that the circumstances relied on, taken together, rationally fit within the scope of "exceptional circumstances" in this context. The breadth of the phrase and the array of circumstances which may come within it place the judicial emphasis very much more on the rationality of the judgment than on providing a definition or criteria or characteristics for that which the policy-maker has left in deliberately broad terms*”

Key points – except circs

- "Exceptional circumstances" is a less demanding test than the development control test for permitting inappropriate development in the Green Belt, which requires "very special circumstances."
- There a danger of the simple question of whether there are "exceptional circumstances" being judicially over-analysed. The phrase does not require at least more than one individual "exceptional circumstance". The "exceptional circumstances" can be found in the accumulation or combination of circumstances, of varying natures

Key points – exceptional circs

- Re housing and excep circs note what Ouseley said:

“*General planning needs, such as ordinary housing, are not precluded from its scope; indeed, meeting such needs is often part of the judgment that "exceptional circumstances" exist; the phrase is not limited to some unusual form of housing, nor to a particular intensity of need.*”

- Re the often referred to analysis in *Calverton* of how the issue should be approached- the Court made clear that it is not exhaustive or a checklist. The points may not all matter in any particular case, and others may be important especially the overall distribution of development, and the scope for other uses to be provided for along with sustainable infrastructure

R. (on the application of Samuel Smith Old Brewery) v North Yorkshire CC - 5 February 2020 - [2020] UKSC 3

- SC held that an LPA had correctly understood the meaning of the word ‘openness’ in the NPPF when granting planning permission for the extension of a quarry in the green belt.

- The visual impact of the proposed development was not a necessary part of the openness assessment.

Key Points – Samuel Smith case

- Central Q: Had policy for mineral extraction in the GB been misapplied?

- High Court [2017] EWHC 442 (Admin): No

- Court of Appeal [2018] EWCA Civ 489: Yes

- Supreme Court [2020] UKSC 3: No error of law

"39. *… Paragraph 90 [now 146] does not expressly refer to visual impact as a necessary part of the analysis, nor in my view is it made so by implication. As explained in my discussion of the authorities, the matters relevant to openness in any particular case are a matter of planning judgement, not law.*"

Key Points – Samuel Smith

"*41. ... such relatively limited visual impact which the development would have fell far short of being so obviously material a factor that failure to address it expressly was an error of law.*"

- What does this mean in practice?
- An example of where application (planning judgment) trumps an attempt to legally interpret/construe a part of policy?

HERITAGE

Heritage

Topics

- Onus in showing optimum viable use and enabling development
- Paras 195, 196 NPPF and residual harm
- Categories of harm
- Public benefits
- Questioning the listing of an object as a building

City & Country Bramshill Limited v SSHCLG [2019] EWHC 3437 (Admin)

City & Country Bramshill Limited v SSHCLG [2019] EWHC 3437 (Admin)

An Inspector dismissed various appeals concerning residential development affecting listed buildings and a registered park and garden (RPG). In some of the appeals the appellant had argued that the development involved the optimum viable use (OVU) of the RPG and/or enabling development. The Inspector disagreed, holding that she was "not persuaded that there is not another less harmful residential scheme that could be provided with the same benefits to the RPG", although there was no such scheme before her.

City & Country Bramshill Limited v SSHCLG [2019] EWHC 3437 (Admin)

Waksman J rejected a challenge to this decision.

- There is a difference between “ordinary” planning applications and those that affect heritage assets.
- The possibility of alternative modes of less harmful development at the site of a heritage asset is of particular importance.
- A decision maker may consider this possibility, whether or not a specific alternative scheme is before her.
- On the facts, the Inspector was not obliged to inform the appellant she was thinking along these lines because more than minor modifications to the proposal would be needed.

City & Country Bramshill Limited v SSHCLG [2019] EWHC 3437 (Admin)

Waksman J also rejected an argument that where a proposal would both harm and benefit a heritage asset, an “internal heritage balance” must be carried out and NPPF paras 195 (substantial harm) or 196 (less than substantial harm) applied only if there would be a net resulting harm. He held that working through paras 193-196 of the NPPF complied with the statutory heritage duties (*Mordue*) and was in accordance with the decision in *Safe Rottingdean v Brighton and Hove City Council* [2019] EWHC 2632 (Admin).

City & Country Bramshill Limited v SSHCLG [2019] EWHC 3437 (Admin)

Finally, the judge held that the Inspector was entitled to give significant weight to development plan heritage policies, notwithstanding the absence of an NPPF para 196 balancing exercise within them, because it was a matter of planning judgment for her and “there is some sense in saying that significant weight should be given to the local policies because, after all, they are essentially reflecting the statutory duty contained in s66 [of the P(LBCA) A 1990]”.

Going to CA in December 2020

R (James Hall and Company Limited) v City of Bradford MDC [2019] EWHC 2899 (Admin)

Development of, or within the setting of, a heritage asset may be harmful, neutral or beneficial to the significance of the asset.

Paras 195 and 196 of the NPPF refer to "substantial harm" and "less than substantial harm". In *James Hall* the question arose whether there was a further category of harm – minimal or de minimis harm. HHJ Belcher said that there was not.

R (James Hall and Company Limited) v City of Bradford MDC [2019] EWHC 2899 (Admin)

In her judgment, “There is substantial harm, less than substantial harm and no harm. There are no other grades or categories of harm … There is no intermediate bracket at the bottom end of the less than substantial category of harm for something which is limited, or even negligible, but nevertheless has a harmful impact.”

Consequently, *any* harm to the significance of a heritage asset, however small, brings into play NPPF heritage policy.

Tower Hamlets London Borough Council v SSHCLG [2019] EWHC 2219 (Admin)

Tower Hamlets London Borough Council v SSHCLG [2019] EWHC 2219 (Admin)

Para 196 of the NPPF states: “Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use”.

Can the “public benefits of the proposal” include speculative future development of a cleared site? In *Tower Hamlets* Kerr J held that they could, if not too remote.

Tower Hamlets London Borough Council v SSHCLG [2019] EWHC 2219 (Admin)

Three unlisted workers cottages within a conservation area had been unlawfully demolished. The LPA served enforcement notices requiring their facsimile replacement. On appeal, an Inspector quashed the notices and granted planning permission for the demolition because the cottages made only a small contribution to the CA and the vacant site was likely to be beneficially developed in the future, although there were no clear proposals before him.

Tower Hamlets London Borough Council v SSHCLG [2019] EWHC 2219 (Admin)

With some misgivings, Kerr J held that the public benefits in para 196 of the NPPF could include the possibility of beneficial development coming forward on a vacant site. He accepted the site owner's submission that the public benefits referred to in para 196 include any benefit that flows or is likely to flow from the proposal. If the proposal is demolition of existing buildings, the inspector cannot realistically ignore benefits likely to result from the site being vacant.

Tower Hamlets London Borough Council v SSHCLG [2019] EWHC 2219 (Admin)

From a heritage perspective, the decision is troubling. Any future proposal will be assessed against a vacant site, not against a site with buildings that make a positive contribution to the CA.

Dill v SSHCLG [2020] UKSC 20

Dill v SSHCLG [2020] UKSC 20

Following the sale and removal of two free-standing listed urns from the garden of a listed building, the LPA served a listed building enforcement notice requiring their reinstatement. Appeals were lodged against the LBEN and the refusal of LB consent. The issue arose whether the landowner could challenge the status of the urns as buildings. The Inspector, High Court and Court of Appeal held he could not – the listing was conclusive and could not be challenged. Yesterday the SC allowed the landowner's appeal.

Dill v SSHCLG [2020] UKSC 20

Lord Carnwath held that in an appeal against a LBEN it is open to the appellant to argue that the item in question is not a building.

He went on to give guidance on the extended definition in s 1(5)(b) PLBCAA 1990 (curtilage structures), holding that "a statue or other ornamental object, which is neither physically attached to the land, nor directly related to the design of the relevant listed building and its setting, cannot be treated as a curtilage structure and so part of the building within the extended definition".

Dill v SSHCLG [2020] UKSC 20

As to the meaning of “building”, Lord Carnwath approved the application of the *Skerritts* criteria:

- Size
- Permanence
- Degree of physical attachment

The method of installation – something akin to a building operation – may also be significant.

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Ask us more questions:

events@cornerstonebarristers.com

For instructions and enquiries:

elliotl@cornerstonebarristers.com

dang@cornerstonebarristers.com

samc@cornerstonebarristers.com