

39 Essex Chambers

Procurement, Construction and Planning Law Update

December 2019

PROCUREMENT LAW -

Abandoning a tender process and time limits for bringing claims

Parishil Patel QC

Abandonment

- No express power to abandon a tender process either in Directive or the Regulations
- But, a duty to give reasons if decision is taken to abandon the tender process
- So, implicit power to abandon the tender process

Picture from: <http://joksankolikot.net/setelli/englant/2006-20-puntaa-taka.jpg>

Power to abandon

- General principles
 - A broad discretion in assessing the factors to be taken into account in making a decision
 - Power not limited to exceptional cases or necessarily based on serious grounds
 - No implied obligation to carry the tender process to a conclusion
 - Decision is subject to the fundamental rules of Community law and principles in EU Treaty

Picture from: <http://www.theguardian.com/uk-news/the-northerner/2015/may/14/george-osborne-northern-powerhouse-devolution-manchester#img-1>

Power to abandon (2)

- So, the contracting authority has to act transparently, affording equal treatment, without discrimination and free from manifest error
- Otherwise, decision will be unlawful
- If unlawful, court has power to set it aside
- If lawful, the contract (which was the subject of tender process) is not awarded

Question:

- But, does a claim for damages (loss of profits arising from that contract) said to arise from breaches of the Regulations in the conduct of the tender process survive a lawful decision to abandon the tender process?

Amey Highways Limited

- *Amey Highways Limited v. West Sussex CC* [2019] EWHC 1291 (TCC)
 - Contract for maintenance/repair of the public highways
 - 7 years, extendable to 10
 - Value of contract considerable c.£450m
 - Claim for profit under the contract c. £28m
 - Claim for wasted costs, c£1m

Amey Highways Ltd (2)

- In the tender process:
 - Amey's tender evaluated with final score 85.48
 - Only 0.03 behind the winning bid
- Amey issued proceedings:
 - Council evaluated its bid wrongly and in breach of the Regulations;
 - Had it not done so, it (not the winning bidder) would have been awarded the contract

Amey – first action

- In the proceedings:
 - Council tried to strike out Amey’s claim as being out-of-time
 - Stuart-Smith J dismissed that application, [2018] PTSR 1976

- Strike out application failed, so ...

Amey – abandonment notice

- Council made decision to abandon the tender process without awarding the contract
 - “The procurement has been subject to legal challenge which raises a number of issues and risks. The Council is aware that litigation of this sort is expensive, protracted and inherently uncertain in terms of outcome. The Council has carefully considered the overall position. With regret it has come to the view that, in the circumstances, the termination of the procurement is the most appropriate action.”

Amey – second action

- Amey issued second action challenging the lawfulness of the decision to abandon the tender process: it was manifestly erroneous, and in breach of the obligations of transparency and equal treatment
- Council denied that the decision was unlawful.
- It asserted that Amey's damages claim in the first action arising from breaches of the Regulations in relation to the evaluation of its tender was extinguished by the decision to

Amey – consolidation

- The two actions were consolidated
- Preliminary trial listed to determine:
 - The lawfulness of the decision to abandon the tender process
 - Whether the Council was right that Amey's claim for damages was extinguished by the taking of a lawful termination of the tender process (on the assumption that Amey would succeed in the First Action)

Amey – preliminary trial

- 7 issues:
 - Issues 1-4: Was the abandonment decision lawful
 - Issue 5: Did the breach cause Amey loss - in particular, would the Council have decided to abandon the procurement on a lawful basis in any event
 - Issue 7: what was the effect of the abandonment decision on the First Claim (was it extinguished?)

Findings of fact

- Stuart-Smith J made a number of important findings:
 - The Council hoped and intended that the abandonment decision would have the effect of terminating Amey's claim in the First Action – but did not believe that it was bound to have that effect
 - The driver for the decision to abandon was Amey's legal challenge and the strike out judgment – there was no other rationale

Findings – issue 5

- On issue 5:
 - No evidence to cast doubt on the proposition that Amey would have been awarded the contract if it had scored higher than Ringway
 - No argument by the Council in the First Action that Ringway's score was too low
 - No evidence to support a finding that the Council would have abandoned the procurement on a lawful basis in any event

Conclusion – issue 5

- Judge concluded:
 - Council would not have abandoned lawfully in any event
 - Amey would have been awarded the contract on or about 1 July 2018
 - Amey (assuming it was right in the First action) would have suffered loss and damage
 - All constituent elements of an accrued cause of action would have been in place on and from 1 July 2018 because Amey lost what is taken to be a profitable claim on and from that date

Issue 7

- Issue 7:
 - The judge summarised the issue as whether a lawful abandonment has the effect of depriving a tenderer of an accrued cause of action where, before the procurement is abandoned, a breach can be proved to have caused the tenderer loss and damage

Issue 7 - conclusion

- The judge accepted that a lawful abandonment:
 - Would prevent further causes of action from accruing in the future
 - Would terminate the procurement
- But there was no basis in the Regulations, case law or principle of treatment for abandonment to have the effect of cancelling an existing accrued cause of action

Issue 7 - analysis

- The acknowledged broad discretion has considerable value even without the cancellation of accrued causes of action
- The inherent nature of an accrued cause of action means that the power to cancel it by termination of the procurement requires either clear statutory sanction, cogent policy justification or binding prior authority – all lacking

Issues 1-4 (lawfulness)

- Issues 1-4 (lawfulness)
 - The judge rejected Amey's primary case that the premise for the Council's decision was that it would extinguish the claim – in fact was a misplaced hope and belief that it would do so
 - In any event the decision was not irrational
 - It was a rational attempt to preserve public funds

Issues 1-4 (2)

- There was no breach of the principle of equal treatment because all bidders took the risk of a rational decision to abandon
- Council could have explained its reasons more fully or in different terms, but there was no breach of the principle of transparency

Consequences of Amey decision

- What are an authority's options *now*?
- Termination still “*of considerable value*” and of use in a “*wide range of circumstances*”
 - If continuing would mean awarding a contract which was not MEAT
 - If proceeding to award would not be expedient from the point of view of the public interest
 - If it becomes apparent that continuing will mean that the authority will act in breach of public or private law duties

Option if facing risky claim

- If the problem is a risky claim
 - Settle
 - Proceed with the litigation
 - Reverse the decision
 - Re-mark the tenders
 - Argue that the winning bidder should have scored higher

Time

- Regulation 92 of the 2015 Regulations governs the time period within which proceedings may be started where they do not seek a declaration of ineffectiveness.
- Regulation 92(2) provides that:
 - “... such proceedings must be started within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen”

Time (2)

- The date on which the economic operator first knew that the grounds had arisen is counted within the 30 days (see Fraser J in *SRCL Limited v. NHS Commissioning Board* [2019] PTSR 383 at [144]). Proceedings are started when the Claim Form is issued (regulation 92(6) of the 2015 Regulations)

Time (3)

- Regulation 92(4) provides that:
 - “... the court may extend the time limits imposed by this regulation (but not any of the limits imposed by regulation 93) where the court considers that there is a good reason to do so”
- The court’s power under regulation 92(4) is subject to a limitation that it cannot be exercised beyond a period of 3 months “after the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen” (regulation 92(5)).

Time (4)

- Two matters which need to be established:
 - first, when grounds for starting proceedings had arisen, and
 - second, the economic operator's knowledge (actual or constructive) of the grounds.
- The 30 day period only starts when the economic operator has actual or constructive knowledge of the grounds.

Grounds

- Grounds for bringing proceedings:
 - referred to breaches of the Regulations rather than breaches plus potential loss
 - was “effectively synonymous with ‘infringement in the broad sense’”.
- (Mann J in *Sita UK Limited v. Greater Manchester Waste Disposal Authority* [2010] 2 CMLR 48), at [46], and [127]

Knowledge

- Knowledge of the grounds which is important, i.e. the facts which apparently clearly indicate, although they need not absolutely prove, an "infringement"
- (Elias LJ in *Sita UK* supra (2011) EWCA Civ. 156 at [26] approving of the formulation stated by Mann J in *Sita UK* supra. at [130]).

Extension of time

- Fraser J in *SRCL Limited* supra. set out general principles which apply, see [154]:
 - There must be a good reason for extending time.
 - One of the matters that the court will consider is whether there was a good reason for the claimant not issuing within the time required, such as an illness or something out of the claimant's control which prevented the claimant from doing so.

Extension of time (2)

- It would be unwise to list or seek to limit in advance what factors should be considered to have relative weight to one another in that exercise.
- The court will take a broad approach in all the circumstances of the particular case.
- The categories are not closed or exhaustively listed in the cases. Lack of prejudice to the defendant is not a determinative factor.

Questions

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Construction Law Update

Hannah McCarthy

2 December 2019

Is there a contract?



"No contract, no work."

Farrar v Rylatt [2019] EWCA Civ 1864

- Appeal from English TCC (Leeds DR)
- Contractor seeking share of profit
- Two sites: Hazelgrove and The Barns
- Hazelgrove: oral agreement
- The Barns: unsigned Head of Terms
- TCC: rejected both claims
- Appeal, seeking declarations of oral contract and binding nature of HofT

Farrar v Rylatt [2019] EWCA Civ 1864

- Oral agreement: no evidence for this
 - Dates? Content?
- Unsigned HoT (“Subject to Contract”)
 - Contract to be exchanged within 4 weeks
 - Clauses 5-7: sharing of proceeds (50:50)
 - No subsequent contract (despite requests)
 - Respondent relied on “subject to contract”
- Coulson LJ: “*hopeless claim*”

Farrar v Rylatt [2019] EWCA Civ 1864

- Practice Points:
 - Avoid oral agreements
 - “Subject to Contract” means:
 - subject to (a future!) contract
 - Sign documents
 - Make everyone else sign documents

The Architect's Brief

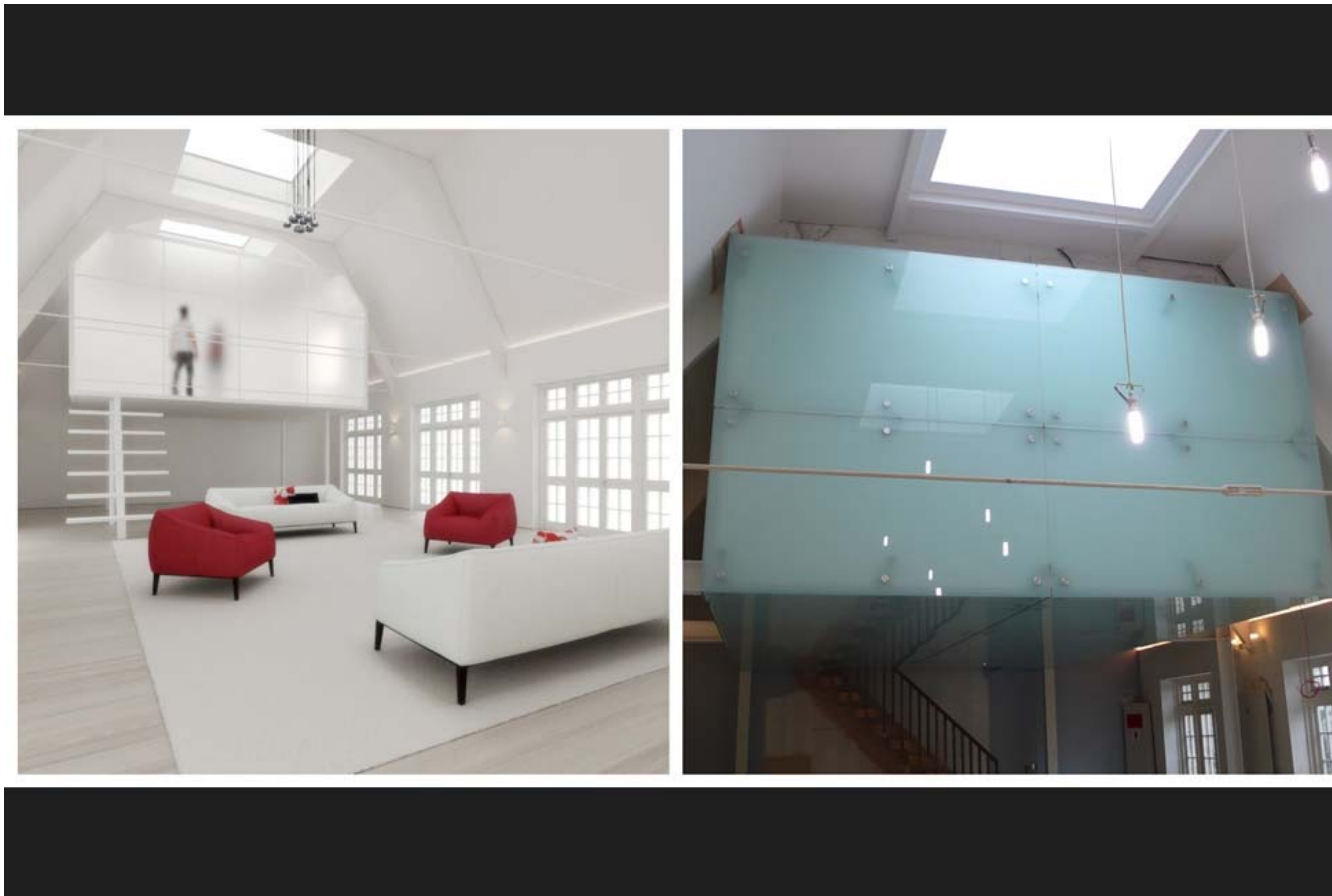


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Freeborn v Marcal [2019] EWHC 454

- English TCC
- Claimant: residential homeowners
- Pool house conversion into a “glass box on legs” cinema room
- Architect redesigned original plans without informing claimants
- Glass box as built significantly different from original design

Freeborn v Marcal [2019] EWHC 454



Freeborn v Marcal [2019] EWHC 454

- Architect alleged 800 series drawings emailed and posted to Claimants
- Notebooks:
 - *“tumble dryer of misinformation”*
 - *“confused, confusing and chaotic”*
- No written contract, no written brief, no minutes, no reports, no valuations
- Judgment for Claimants: £500,000+

Freeborn v Marcal [2019] EWHC 454

- Practice points:
 - Architect's duty of care to provide a written brief
 - Wider applicability:
 - Written contracts!
 - Keep notes!

What does “delivery” mean?



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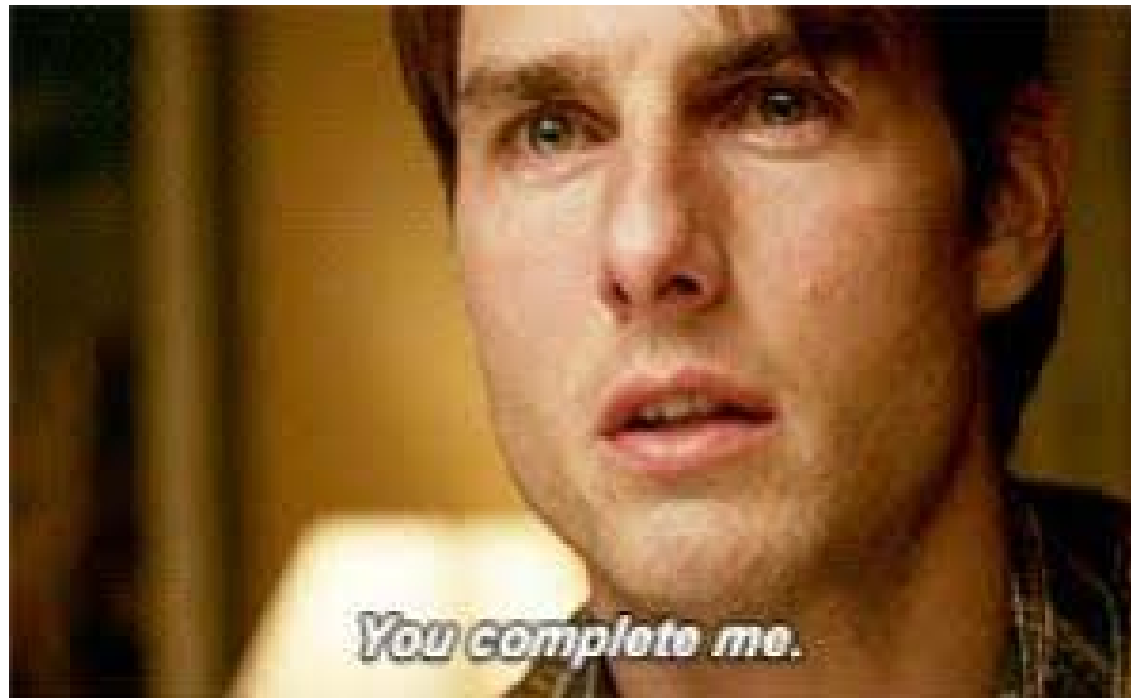
Universal Sealants (UK) Ltd v Sanders Plant and Waste Management Ltd [2019] EWHC 2360

- English TCC
- Contract for supply of concrete in road construction
- Application to enforce adjudicator's decision
- Was the contract excluded by section 105 (2)(d) of HGCRA 1996 (provision 4(2) of CC(NI)O 1997): “(2) *manufacture or delivery to site of-*
(i) building or engineering components or equipment
(ii) materials, plant or machinery...
except under a contract which also provides for their installation”

Universal Sealants (UK) Ltd v Sanders Plant and Waste Management Ltd [2019] EWHC 2360

- Claimant: main contractor
- Sub-contract order to defendant for “delivery” of M50 grade concrete
- Delivered and poured ST5 concrete on site
- Jefford J:
 - Installation means works done after delivery
 - But concrete is unusual: delivery and pour are the same
- But for this, claim would have failed

Are we (practically) completed?



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Mears Ltd v Costplan Services (South East) Ltd & Ors [2019] EWCA Civ 502

- English Court of Appeal
- Two student accommodation blocks
 - Mears: property management company and leaseholder (AFL)
 - Costplan (R1): employer's agent
 - Plymouth (Notte Street) Ltd (PNSL)(R2): employer and landlord (AFL)
 - J.R. Pickstock Ltd (R3): D&B contractor
- Pickstock reduce size of rooms by +3%
- Mears argue material breach of contract such that:
 - Costplan cannot certify PC
 - Mears determine its contract with PNSL
- TCC: declined to make these declarations

Mears Ltd v Costplan Services (South East) Ltd & Ors [2019] EWCA Civ 502

- Questions for Court of Appeal:
 - Was reducing the rooms by more than 3% a material breach of contract?
 - Declarations on PC:
 - No PC where known material or substantial defects
 - No PC where material and substantial breaches of AFL
 - No PC where material and substantial breaches of AFL and/or material and substantial defects in the Works

Mears Ltd v Costplan Services (South East) Ltd & Ors [2019] EWCA Civ 502

- Coulson LJ
 - Analysis of PC in caselaw
 - “Substantial completion” – 19th century concept
 - Practical completion (paragraph 74):
 - No hard and fast rules
 - Latent defects cannot prevent PC
 - Patent defects: no difference between outstanding item of work and item of defective works
 - PC: where works completed “free” from patent defects, other than those to be ignored as “trifling”
 - Fact and degree: mere fact that habitable might not mean PC
 - But mere fact that irremediable does not mean not PC

Is there a collateral warranty?



British Overseas Bank Nominees Ltd v Stewart Milne Group Ltd [2019] CSIH 47

- Scottish Court of Session, Inner House
- Car park: defective build resulting in flooding
- Original design and build contract: 2008
- Collateral warranty in favour of purchasers: 2013
- Collateral warranty raised: 2018
- Out of time?

British Overseas Bank Nominees Ltd v Stewart Milne Group Ltd [2019] CSIH 47

- Equivalent rights of defence (ERD) clause trumped by statutory prescription (limitation)?
- Outer House: Purchaser could rely on statutory prescription (limitation)
- Conflict with English TCC: Swansea Stadium Management Company Ltd v City & County of Swansea and another [2018] EWHC 2192 (TCC)
- Inner House: Purchaser was time-barred
 - “Standing in the shoes” of employer in every sense
 - Parties could have agreed a different time bar

Was there ever a contract?



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Moorgate Capital (Corporate Finance) Ltd v HIG European Capital Partners LLP [2019] EWHC 1421(Comm)

- English Commercial Court
- Company acquisition
- Claimant: corporate finance advisor
- Defendant: purchaser
- Claimant offered £80,000 after acquisition - seeking fees of £1,000,000 for services offered:
 - Oral agreement; or
 - *Quantum meruit*
- Was there a contract? If not, was the Claimant entitled to be paid?

Moorgate Capital (Corporate Finance) Ltd v HIG European Capital Partners LLP [2019] EWHC 1421(Comm)

- Expert evidence on custom and practice of corporate finance services
- No entitlement to payment:
 - Defendant denied oral agreement
 - No written evidence of agreement
 - Delay of six years
- No general right to payment for requested services
 - Defendant should pay where has received “incontrovertible benefit” or requested services or behaved “unconscionably” in declining to pay
 - No obligation to pay where claimant gambled on “concluded contract”

Has the dispute crystallised?



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Dickie & Moore Ltd v Trustees of the Lauren McLeish Discretionary Trust [2019] COSH 87

- Opinion of Scottish Court of Session, Outer House
- Adjudication enforcement:
 - Dispute contained in Notice of Adjudication was “*very*” different from any dispute crystallised prior to notice
 - Final Account
 - Further EOT and loss and damages sought
- A “very material part” of the dispute in notice had not crystallised before Notice was served
- Adjudicator had no jurisdiction

Dickie & Moore Ltd v Trustees of the Lauren McLeish Discretionary Trust (No.2) [2019] COSH 87

- Scottish Court of Session, Outer House
- Claimant seeking enforcement of the outstanding part of decision
- Considering *Cantillon** and severance
- No “blanket ban” on severance in single issue disputes
- Is there a “core nucleus” of the decision to enforce? (not EOT and loss claims)
- On these facts: yes

**Cantillon Ltd v Urvasco Ltd* [2008] EWHC 282(TCC)

No money, no fight?



"That leaves plan 'B' - absconding with the remaining funds."

Bresco Electrical Services (in liq.) v Michael J Lonsdale (Electrical) Ltd [2019] EWCA Civ 27

- English Court of Appeal
- Appellant: electrical contractor (in liquidation)
- Could company refer matter to adjudication whilst in liquidation?
- TCC: no, granting an injunction
 - Liquidation meant that claims/cross claims incapable of separate enforcement (“utility argument”)
- Bresco: seeking to set aside injunction
- Conjoined appeal: Cannon v Primus
 - Company in a CVA
 - **

Bresco Electrical Services (in liq.) v Michael J Lonsdale (Electrical) Ltd [2019] EWCA Civ 27

- Appeal upheld:
 - Utility argument: adjudication and insolvency are incompatible
 - Adjudication: promoting cashflow
 - Insolvency: abstract accounting exercise
 - No enforcement possible (refusal of summary judgment/stay)
 - In addition:
 - responding party in position of incurring costs to defend or overturn adjudication
 - Court resources
 - Solution: injunction
 - Only in exceptional circumstances could liquidated company succeed in adjudication and enforcement

Meadowside Building Developments Ltd v 12-18 Hill Street Management Company Ltd [2019] EWHC 2651 (TCC)

- Following Bresco
- Claimant contractor: voluntary wind-up
- Exception to rule that enforcing adjudication against company in liquidation?
- TCC: no
- Exception likely where:
 - Adjudication determines final net position
 - Satisfactory security is provided (including undertaking to ring fence sum)

Industry developments



Post-Grenfell: Phase 1 Report

- Grenfell Phase 1 Report: 30 October 2019
- Construction of the Building Regulations is a matter of law
- Concrete walls of the tower complied with BR
- Compelling evidence that cladding did not comply
- Phase 2: hearings on 27 January 2020

Post Grenfell: Legislation

- Consultations for implementation of Hackitt Review in England & Wales
- Approved Document B (Building Regulations 2010, England and Wales)
- Outlook: don't wait for legislation

Brexit

- 31 January 2020
- Construction Projects Regulation Regime
 - UK Standard to replace CE Standard
 - <https://www.gov.uk/guidance/construction-products-regulation-if-there-is-no-brexit-deal>

New standard forms

- New suite of RIBA Professional Services Contract issued in November 2018
- RICS Standard Form of Consultant Appointment 2019
- NEC 4 (June 2017)
- FIDIC: Conditions of Contract for Underground Works (Emerald Book) issued May 2019

Any questions?

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Planning Law update

Belfast

Richard Harwood QC
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Material considerations

- *R(Wright) v Forest of Dean Council* [2019] UKSC 53
- Planning permission sought for wind turbine to be run by community benefit society with 4% of turnover donated to local community fund (Society & fund secured by condition)
- Permission quashed as donation immaterial (Dove J; CA (Hickinbottom LJ); SC (Lord Sales))

Forest of Dean

- *Newbury v SoS* criteria for materiality and conditions applied:
- For a planning purpose and not for any ulterior one, and ... fairly and reasonably relate to the development permitted. not be so unreasonable that no reasonable planning authority could have imposed them
- *Westminster* 'relates to the character of the use of land'

Forest of Dean

- Lord Sales – limits are for the protection of landowners and the public interest
- Here for ‘ulterior purpose of providing general benefits to the community’
- Did not ‘fairly and reasonably relate to the development for which permission was sought’
- Materiality does not change with planning policy
- Policy may affect rationality (*Royco*) and consequences (*Mitchell*)

Forest of Dean

- Supreme Court supported other cases on relevant land use effects:
- *Copeland* (health effects of fast food takeaway)
- *Welcome Break* (local training, produce in MSA)
- *Verdin* (local procurement)

Q: is public body profit relevant?

Pre-application consultation

Greencastle Rouskey Gortin

- Adequacy of pre-application consultation under s 27
- Notice ‘in general terms of the description’
- Press advertisements, community meeting
- Q rationality of Department acceptance (not jurisdictional q for the Court)
- Adequacy derives from consultation concepts (Sedley principles) but not a fairness test – ability to make a meaningful response

Greencastle

- Consultation on ‘a general outline of the project then in contemplation’
- The application ‘may legitimately differ in significant respects’

Council processes - *Allister*

- *Allister v Causeway Coast and Glens BC*
[2019] NIQB 79
- Procedural unfairness – late, redacted documents
- Protocol – site visits
- Policy breaches
- EIA screening – failure to consider marine buffer zones

Previous decisions - R (Davison) v Elmbridge BC

- [2019] EWHC 1409 (Admin) Challenge to decision to grant permission for new football and athletics stadium, located in the green belt
- Previous permission quashed because Council erred in its interpretation of para 89 NPPF in finding the stadium to be appropriate development despite it causing harm to the openness and purpose of GB
- C argued the Council contravened the principle of consistency in decision-making by departing from its previous finding (without giving any reasons), subsequently finding that the stadium would not have an adverse impact on GB. Council contended it was not required to consider its previous decision given that it was quashed

R (Davison) v Elmbridge BC

Summary of key principles as per Thornton J at [56]:

- Principle of consistency not limited to the formal decision but extends to the reasoning underlying the decision
- Of itself, quashed decision incapable of having any legal effect on the rights and duties of the parties. Decision-making process must start from scratch. DM not bound by previous decision
- Previously quashed decision can be a material consideration (depends on circumstances)
- DM may need to consider basis on which previous decision quashed and take into account parts of decision unaffected by the quashing
- The greater the apparent inconsistency between the decisions, the more the need for an explanation

R (Davison) v Elmbridge BC

Conclusion

- Second decision quashed for a failure by the Council to consider its previous conclusion that the proposal would have an adverse impact on GB openness

In the absence of any explanation it is simply not possible to know whether the Planning Officer and especially the Planning Committee were even aware they had changed their position, let alone whether they had grasped the intellectual nettle of the difference in view. Nor was the explanation for the apparent inconsistency so obvious that a formal statement about it was unnecessary. [67]

- Permission to appeal granted

Reasons - SAVE Britain's Heritage

- *R(SAVE Britain's Heritage) v SoS CLG* [2018] EWCA Civ 2137 [2019] 1 WLR 929
- Challenge to the refusal to “call in” Paddington Cube applications on (1) breach of legitimate expectation and (2) general common law duty
- Government policy and Parliamentary answers in 2001 that reasons would be given but practice changed in 2014
- No reasons given.
- No express duty to provide reasons under s.77(1) nor a general common law duty
- Legitimate expectation declaration nonetheless on the particular facts and circumstances
- Ministerial Written Statement 26 March 2019 – no reasons for calling in or not calling in applications

Reasons - Knox

- ***Knox v Causeway Coast and Glens BC***
[2019] NIQB 34
- Reasons required for approval of barn conversion within World Heritage Site as council protocol and conflict with policy and officer recommendation
- 29 word reasons adequate

Interpretation of permissions

- ***Trump International v Scottish Ministers*** a more pragmatic approach – consider ‘ordinary and natural’ meaning in context of the permission and common sense
- ***Donnelly*** [2018] NICA 44: whether underground mining permission for 60 or 81 ha
- ***Swindon Borough Council v SoSHCLG*** [2019] EWHC 1677 (Admin): Whether condition required roads to be highways
- ***Lambeth LBC v SoSCLG*** [2019] UKSC 33: effect of section 73 planning permission which set out the changed condition in the description of development but not in the conditions

Donnelly

- Court of Appeal followed *Trump*
- Clash between drawings showing 81 ha (60 existing open cast and 21 ha blanket bog) and application form (60 ha)
- Held: permission covered 81 ha, but authorised underground mining only in the 60 ha

Swindon

- Business estate permission with ‘carriageways’ linking to other parts of New Eastern Villages
- Condition 39:
 - ‘The proposed access roads, including turning spaces and all other areas that serve a necessary highway purpose, shall be constructed in such a manner as to ensure that each unit is served by fully functional highway, the hard surfaces of which are constructed to at least basecourse level prior to occupation and bringing into use.’

Swindon

- Andrews J – highway has public right to pass and repass
- Condition required access roads to be highways
- Not contended that unlawful to use a condition to do this – consideration of *Hall v Shoreham on Sea*; *Tesco Stores v SoS*

Lambeth

- Planning permission for retail unit, condition restricting to retail warehouse-type comparison
- Section 73 permission (s54 Planning Act (NI)) – for variation of condition; proposed wording set out (non-food retail) in description
- Conditions set out – but not retail restriction

Lambeth

- Supreme Court – Lord Carnwath
- Reasonable reader – assume take at face value, rather than elaborate legal analysis
- Permission is approving a variation of condition – whilst a new permission, effect of decision is clear
- Permission with non-food condition

Lambeth – other bits

- As retail unit in use, no time limit for commencement to be applied (change to condition is not development) – para 13
- Query when new condition is in force?
- Provisional view that conditions under two permissions for same use can be in force at the same time if not inconsistent – para 38

Variation of conditions

- *Finney v Welsh Ministers* [2019] EWCA Civ 1868
- Planning permission for 2 wind turbines ‘up to 100 m’
- Section 73 application (NI s 54) to change drawings to 125 m turbines
- Inspector approved on appeal, High Court upheld, but Court of Appeal quashed

Finney

- Agrees with *Arrowcroft* and *Vue Entertainment* only conditions that could have been imposed on the original consent
- Whilst ‘fundamental alteration’ used, q of scope of that
- Not permissible to increase in this case
- Right on that point

Finney – points to watch

- ‘Operative’ part of permission is not just the description but may include the application form & approved drawings
- Some conditions might contradict description – eg reduce numbers, mix

Local Development Plans

English Local Plans

- Troubles in examinations
- West Of England – justification for numbers and strategic sites
- Sevenoaks – dealings with other councils
- London – viability, realism
- Withdrawals – East Cambridgeshire (on Inspector's mods), Amber Valley

English Court challenges

- Range of High Court and Court of Appeal judgments – illustrative rather than new
- *CPRE Surrey v Waverley BC* [2019] EWCA Civ 1826
- *Dylon 2 Ltd v Bromley LBC* [2019] EWHC 2366 (Admin)
- *Compton Parish Council v Guildford BC* (judgment pending)

Heritage

Curtilage

- *Challenge Fencing Ltd v SoS Housing, Communities and Local Government* [2019] EWHC 553 (Admin)
- Review of meaning of ‘curtilage’ in context of permitted development rights for hard surfaces for industrial buildings
- Also relevant to listed buildings

What is a listed building?

***Dill v Secretary of State* [2019] PTSR 1214**

- Piers and lead urns specifically listed ‘a building which is for the time being included in a list’ (cf s 80 Planning Act NI)
- Status as buildings could not be challenged in a listed building consent or enforcement appeal (cf. s 159 Planning Act NI)
- Left open what was a building: whether property law tests relevant to what can be listed?
- And whether planning and rating cases relevant to this question (the *Skerritts* cases)?
- Error holding LBC application invalid for failing to state where the items were being moved did not render the decision on the merits of removal unlawful
- Permission to appeal granted by Supreme Court



Enforcement notice appeals

- *Taylor v Scottish Ministers (No.2)* [2019] CSIH 11
- Reminder of the need for parties to raise matters and not to rely on them being obvious for the reporter/inspector
- Generally role to determine written representation appeals on those reps and site visit

Enforcement: Prosecutions

- Abuse of process to prosecute so that the prosecuting body can receive payments under Proceeds of Crime Act 2003:
Wokingham Borough Council v Scott
[2019] EWCA Crim 205
- Need for proper recording of reasons for decision to prosecute

Renewable Heat Incentive

- *Green Belt (NI)* [2019] NICA 47
- Accreditation of biomass boilers for woodchip drying under the RHI Regulations
- Application initially rejected on the purpose of the activity
- Ofgem and the Department refused to consider further information submitted in the review

Green Belt (NI)

- Claimant failed in High Court but won 2-1 in Court of Appeal
- All held duty to take into account further information submitted, as promised in the guidance
- Majority considered Ofgem/Department had failed to do so

Litigation practice

- *Rural Integrity (Lisburn 01) Ltd v Planning Appeals Commission* [2019] NIQB 40 Aarhus cost caps of £10,000 each way in latest corporate litigation vehicle
- Totally exceptional extension of time for JR where erroneous decision notice revived (and the error concealed): *R(Thornton Hall Hotel) v Thornton Holdings* [2019] EWCA Civ 737

New books

- *Planning Enforcement* (3rd Edition)
publishing early 2020
- Bloomsbury Professional

Discount code: BPLPE3EM15

Planning Policy (with Victoria Hutton)
BPPLANPOL

Planning Permission TOPP15

End

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