INTRODUCTION

Jonathan Darby

Welcome to this week's edition of our Planning, Environment and Property newsletter. This week we include articles from Celina Colquhoun and myself (on Westferry and wider issues relating to disclosure in judicial review); John Pugh-Smith (on settlement and discontinuance); Richard Harwood QC and Stephanie David (on a recent case of theirs that offers clarification of the approach to flooding and policy compliance); and James Burton (on achieving resolution of an error on the face of a decision letter).

As ever, we hope you enjoy the read!

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FISHY FISHING...JUDICIAL REVIEW IN PLANNING AND THE POWER OF DISCLOSURE

Celina Colquhoun
Jonathan Darby

A great deal of ink has already and continues to be spilled about the decision of the Secretary of State, Robert Jenrick, to grant permission (contrary to the Inspector's recommendation) for the Westferry Print housing scheme (a scheme comprising some 1500 housing units). This decision came a day before a new CIL charging schedule was to be approved for adoption by the relevant planning and charging authority – the London Borough of Tower Hamlets – and which would have had the consequence, if made any later, of triggering a CIL charge of circa £ 40m to the developer Northern & Shell (owned by the controversial Mr Richard Desmond who is also owner of the site). In addition it came earlier than expected following receipt of the Inspector's report in late November 2019.

The focus of the media has obviously been upon the acceptance by the Secretary of State of apparent bias with the implication of objective consideration of the circumstances (ie a case where the decision maker "can see now that might have looked a bit bad…") but it is the rather unblinking acceptance, apparent from the pre-action correspondence and referred to the Consent Order,[1] that the decision to approve seems to have been made in full knowledge that the timing of a positive decision would allow the developer to avoid this tax and was for the purpose of permitting that to occur albeit it was stated to be in order *"to avoid delay"*, that is so astonishing.

As part of its case, LBTH made a very early request at the pre-action stage making it clear that they would be seeking and were entitled to disclosure of correspondence and advice received by the SofS in respect of the Westferry scheme in line with the duty of candour. Instead of complying, the SofS gave his explanation and deemed the request for disclosure a 'fishing exercise' by the SofS, with the implication that there was nothing to be found. Given the acknowledgement above however the SofS had, it seems, rather placed the Claimant next to a large pond full of trout and handed him a fishing rod!

The consequence of consenting to judgment means of course that there was no further disclosure.

This article does not look at the nature of bias or apparent bias as a matter of law but upon the power of what might be referred to as 'informed fishing exercises' and how important and effective a tool they can be as part of upholding transparency and the rule of law.

The starting point in respect of disclosure in planning challenges is a recognition that, unlike in civil litigation, there is no duty of standard disclosure: see Part 54A, Practice Direction, Para 54.16 *"Disclosure is not required unless the court orders otherwise"*; and Practice Direction 8C.

As such, in large part, claimants must rely upon a defendant's 'duty of candour' in seeking information about a prospective claim. The application of that duty was explained by Lord Donaldson MR in *R v Lancashire County Council, ex p Huddleston* [1986] 2 All ER 941 as follows:

> *"This development has created a new relationship between the courts and those who derive their authority from public law, one of partnership based on a common aim, namely the maintenance of the highest standards of public administration… The analogy is not exact, but just as the judges of the inferior courts when challenged on the exercise of their jurisdiction traditionally explain fully what they have done and why they have done it, but are not partisan*

1 As published: http://www.cllrandrewwood.com/news/westferry-printworks-judicial-review-documents#

> *in their own defence, so should be the public authorities. It is not discreditable to get it wrong. What is discreditable is a reluctance to explain fully what has occurred and why… Certainly it is for the applicant to satisfy the court of his entitlement to judicial review and it is for the respondent to resist his application, if it considers it to be unjustified. But it is a process which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the authority's hands."*

Although Lord Donaldson MR then described the judicial review process as *"one of partnership based on a common aim, namely the maintenance of the highest standards of public administrations"*, the increasingly adversarial nature of such challenges is as palpable as it is, perhaps, inescapable. Given that nature, in circumstances like Westferry and the other examples outlined below, potential claimants will often find little comfort in the principle that the duty of candour applies from the outset to all information relevant to the issues in the case, not just documents. This is because if a defendant does not engage properly with the application of the duty, then there is little by way of a procedural safety net and it is therefore in effect up to a claimant actively to prosecute its claim and to demand disclosure.

Further, and in any event, the scope of the duty of candour is not set out in any rule or practice direction and, because the duty is based upon case law, there are a number of different formulations that have developed subsequent to Huddleston. On the one hand, there are those in which the focus has been upon the relevant facts and reasoning, rather than necessarily disclosure of documents, including in *Tweed v Parades Commission for Northern Ireland* [2007] 1 AC 650, in which Lord Carswell noted that the *"obligation resting on an authority"* was *"to make candid disclosure to the court of its decision making process laying before it the relevant facts and reasoning being the decision challenged"*. On the other hand, there are formulations that suggest of a need for – at least partial – disclosure of the underlying documents themselves, including *Graham v Police Service Commission* [2011] UKPC 46, at para 18, where the duty was said to encompass *"materials which are reasonably required for the court to arrive at an accurate decision"*.

When taken together, the general approach of courts has been to encourage (rather than require) disclosure of relevant documents as a matter of good practice: see, for example, *R (Sustainable Development Capital LLP) v Secretary of State for BEIS* [2017] EWHC 771 (Admin) per Lewis J:

> *"The specific provisions of Practice Direction 54A contemplate that disclosure will only be required if the court so orders. A defendant public body may voluntarily provide copies of documents and is encouraged to do so (and it may be a method of discharging its duty of candour to ensure that a court is informed of the relevant facts underlying and the reasons for a decision). Until an order is made, however, a defendant is not required to disclose documents. In those circumstances, a reference to a document in a witness statement filed in the course of proceedings for judicial review would not amount to disclosure. Consequently, I ruled at the hearing that the Claimant had no right to inspect the document pursuant to CPR 31.3 …"*

Of course, a court may exceptionally order disclosure pursuant to (what is likely to be a highly speculative) specific disclosure application. However, timing can then be a particular issue in formulating a claim and surmounting the permission hurdle, not least because such applications tend to be best deployed after the filing and service of detailed grounds of resistance and evidence; otherwise, the criticism will be that the application was premature. Yet, that does not assist a claimant whose claim depends upon the contents (or existence) of certain documents, such as a recent client of the co-author Jon Darby who sought to challenge a local planning authority in respect of the publication and notification requirements under the DMPO.

In that instance, in essence, the client claimed not to have received a consultation letter from the LPA in respect of a planning application despite having been engaged fully with the determination of a previous planning application relating to the same adjacent site. The upshot was that the client had been unable to make representations, despite the potential impact of the proposals upon its adjoining business premises. Nor had the client seen a site notice (which the authority claimed to have erected, but in relation to which it had seemingly either made no record or retained no evidence because, quite remarkably, the relevant officer's mobile phone had apparently been broken!). In response to the challenge to the LPA's decision to grant, the summary grounds of defence were accompanied by disclosure of a computer print-out that suggested the consultation letters had been generated to a list of recipients (including the client) and 'sent' to the authority's print room. On its face, one could argue that the print out was strong evidence of the letters having actually been sent out and received pursuant to the relevant statutory requirements and the authority's Statement of Community Involvement. Indeed, it seemed, without more, that a Court would have been persuaded that those letters had, on the balance of probabilities, been sent as required. However, when the authority's position was probed further by way of a Summary Reply and separate correspondence requesting the provision of further evidence in support of the authority's assertions, it was discovered that – due to a fault in the authority's print room – the letters had in fact not been sent out at all.

Had the claimant not decided to press further by means of the Summary Reply (for which no procedural entitlement exists) and through further correspondence, then the claim (which the authority ultimately conceded) may well never have actually got off the ground at all.

This is in many respects a salutary lesson. There is no suggestion that the LPA deliberately set out to deceive or breached the duty of candour, it appears it just did not double check that the letters had in fact been printed and sent out until specifically requested to do so.

It seems to us, therefore, that the obvious approach to be adopted is for prospective claimants in judicial review to be alive to the fact from a very early stage that they can seek disclosure ultimately from the Courts and to highlight to the authority that they are prepared to do so where information and/or documents relevant to the challenge being argued has not been forthcoming. Equally, authorities and Government bodies need to be aware that whilst fishing exercises will not be tolerated by the Courts, co-operation and candour is expected.

In Westferry, pre-action correspondence took that very approach by highlighting the desire to see the communiques about the scheme before the decision was made. Although the response did not reveal the evidence, it did elicit the essential explanation/admission.

Nevertheless, even where interesting levels of communication and views are revealed by those involved in the decision process when pressed, it may be that the Courts will simply view the same as part and parcel of the usual wheels of democracy. Take, for instance, *Broadview v SSCLG* [2016] EWCA Civ 562, which involved lobbying by the local MP Andrea Leadsom MP against a called in wind farm. Although numerous emails and evidence of direct communications with the Under SofS as well as the SofS were revealed through FOI, upon consideration of the same the Court of Appeal found no bias (albeit it raised some concerns about the nature and conduct of lobbying). In *R (on the application of Legard) v Kensington and Chelsea RLBC* [2018] EWHC 32 (Admin), despite disclosure evincing lengthy and detailed communications and lobbying between the campaign leader for certain sites in West London to be allocated as a local green space in the NDP he was also promoting with the Council officers as well as the NDP examiner (and of which one such site owner had been wholly unaware), Dove J concluded that these revealed no apparent bias or unfairness.

There are also other means of gathering further information and documentation relevant to a prospective claim. These include requests by way of i) Freedom of Information requests (pursuant to FOIA 2000); (ii) requests for environmental information (under EIR 2004); and iii) CPR Part 18 requests for further information/clarification.

In respect of the FOI and EIR in particular, in order for these to be an effective tool, a prospective claimant needs time (which often they simply do not have, given the tight time limits for JR/ statutory review). It is also relevant to note that the application of statutory exemptions can prevent release of the relevant information when it is required.

In some circumstances, Part 18 requests can also be of limited utility, not least because - as with applications for specific disclosure – they tend to be most successful when deployed subsequent to earlier pleadings. As such, they are something of a blunt instrument in those claims that depend upon early sight of relevant documents and the Courts will need to be persuaded that these are not desperate fishing exercises.

Nevertheless, it remains the case that the ability to seek such information and to press for explanations when the question arises can be powerful if and when deployed appropriately and with a strategic eye as to timing.

ANOTHER JUDICIAL SLAP ON THE VIRTUAL HAND

John Pugh-Smith

There come along occasions in a lawyer's life when a Planning Court judgment brings a wry smile and, perhaps, even a virtual fist pump. It may be recalled that in *Bovale Limited v Secretary of State for Communities and Local Government* [2008] EWHC 2143 (Admin) Mr Justice Collins[2] attempted to curb the practice of the Secretary of State, through the (then) Treasury Solicitor, to ambush a claimant in a s.288 challenge by, in effect, withholding its defence until the hearing date had been fixed. However, his attempt to lay down, in effect, a requirement to serve grounds of defence with the acknowledgment of service was roundly rejected by the *Court of Appeal* [2009] EWCA Civ 171. It held, in trenchant terms, that it was for the Rules Committee rather than a judge too freely exercising his case management powers, to vary the rules and practice directions. Subsequently, though not until October 2015, through the permission filter and the need to file, with the acknowledgment of service, summary grounds of defence[3] that the procedural gap was actually filled.

Now, in a recent decision of Mr Justice Holgate,[4] *Westminster City Council v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 1472 (Admin) has effected a suitable "judicial slap" for another prevalent practice of parties not properly engaging with the requirements for the final disposal of a challenge through a consent order. Here, the Judge required the parties to attend, remotely, to explain the reasons for failures to comply with directions and the late settlement of the claim. Following the hearing on 5th March 2020 Mr Justice Holgate delivered an ex tempore judgment in which he expressed his strong disapproval of such lackadaisical conduct. However, his judgment has a wider application. The Judge remarked:

2 Former Lead Judge of the Administrative Court
3 Practice Direction, para. 5.5
4 Planning Liaison Judge since 2017

*"**43.** I would say straight away that the behaviour which occurred here does not, in my experience, represent conduct typical of the claimant or its legal representatives or officials.*

***44.** But unfortunately, looking at the position in the Planning Court overall, what happened in the present case is not uncommon. In a significant proportion of the cases dealt with by consent orders or withdrawal, the court was notified of the settlement less than 10 days before the hearing. In some instances, the court was notified after the judge had spent time, sometimes a day or more, pre-reading the papers, or even on the day of the hearing. It has therefore become important for the court to emphasise the need for parties to adhere to good practice and to correct and discourage bad practice"*

The Council had made two section 288 challenges against planning inspector decisions. The substantive hearing of them had been listed for a one-day hearing on 5 March 2020. On 12 February, the Council had sent a draft consent order to the other parties with a view to settlement. In the Judge's words: *"It was accompanied by a schedule to justify the making of the order containing only 4 terse paragraphs. They simply stated that the key issues in this litigation had been decided by the Court of Appeal on 18th December 2018, the majority of decisions by planning inspectors reflected that judgment, the legislation which had given rise to the issues had been repealed and the Claimant did 'not consider it a proportionate use of resources to continue this claim to final determination'. On any view it was a very straightforward document requiring little time to prepare".* It had also had not referred to payment of the Secretary of State's costs although the Council was required to pay them by reason of CPR Part 38 (Discontinuance). The Court had not been notified of the intention to settle until 26 February. It had directed that a draft order be filed by 28 February explaining the lateness of the settlement, the failure to apply for an extension of time, the delay in sending the consent order to the Court and the reasons for the Council's failure to comply with directions that had been given as to the filing of trial bundles and skeleton arguments. The Council did submit a draft consent order which provided for the discontinuance of both claims, the vacation of the hearing date and, in that version, payment of the Secretary of State's costs. However, no explanation had been provided for these procedural failures. In a letter dated 4 March, the Council had given an explanation about the costs discussions but which was inconsistent with a later, undisputed, chronology provided by the Secretary of State.

Here, the Judge considered that the Council's letter of 4 March was lacking in candour and gave a misleading impression to the Court; that a draft consent order agreeing to pay the Secretary of State's costs should have been sent with the letter of 12 February; and the Court should have been properly informed at that stage about what was happening with the claims. The parties were obliged to inform the Court as soon as possible after becoming aware that a case was likely to settle to help it to further the overriding objective and also of the duty of candour (as explained in *R. (Khan) v Secretary of State for the Home Department* [2016] EWCA Civ 416 at para. 48).

In that regard, and, as touched upon in Victoria Hutton's article on Westferry and this week's follow up by Celina Colquhoun and Jonathan Darby, the "duty of candour" runs throughout the judicial review or statutory challenge process. As Lord Justice Beatson comments in Khan (at para. 48):

> *"It must also be borne in mind that the duty of candour is a continuing one. It includes a duty to reassess the viability and propriety of a challenge in the light of the respondent's acknowledgment of service and summary grounds."*

There was also an issue as to why the Council's tactical decision to discontinue the proceedings was not taken until three weeks before trial, although it was clear that the decision had been

reached by early February. The Court's ability to deal with its caseload in accordance with the targets in CPR Practice Direction 54E depended upon all parties taking a realistic view of their prospects of success. Settlements which occurred at a late stage for no good reason undermined the efficient running of the court in the interest of all users. Paragraph 12.2.1 of The Administrative Court Judicial Review Guide 2019 set out good practice to be followed by parties in order to comply with their duty to help the court and further the overriding objective in CPR rule 1.1.

Regarding the contents of the draft consent order, Paragraph 17 of CPR PD 54A set out the procedure for obtaining the Court's approval of a consent order for the disposal of a case. The draft legal statement needed to be clear, correct and adequately reasoned. This was particularly so as that statement, being contained in the Court order, might affect the subsequent re-examination of the case by the local planning authority or Secretary of State because these matters will generally affect the re-determination. The statement may also affect the application of the doctrines of issue estoppel and abuse of process. It therefore follows that a party contemplating submission to judgment needs to ensure that it initiates the necessary steps sufficiently early to enable all parties, fairly, to have a reasonable opportunity to agree the terms of the order and the statement of the legal basis upon which relief is sought from the court and for a judge to consider approving that order. This needs to be done sufficiently far in advance of any fixed substantive hearing so that the Court's resources can be redeployed rather than wasted, and other cases may be heard sooner.

Accordingly, from the moment when permission is granted, a defendant should be keeping under review whether it is appropriate to submit to judgment, and if so on what grounds. Likewise, a claimant should review the claim from at least the service of detailed grounds of resistance and any evidence in support to see whether that material affects the assessment of the merits, notwithstanding the grant of permission to proceed because at that earlier stage the case crossed the threshold of arguability. Decisions on merit and any action to settle the case should be taken as soon as possible, bearing in mind that cases in the Planning Court generally proceed on a review of documentation. They do not depend on the hearing of live evidence. Whether the motive for settling a case is tactical or based upon a review of the legal merits of the litigation, it is imperative that the party desiring a settlement should act promptly.

The initial judgment concludes as follows:

73. *In the present case, I had been considering whether to make an order for costs in relation to today's hearing against the claimant, and the possibility of awarding those costs on an indemnity basis. The written explanations provided by the claimant were most unsatisfactory for the reasons I have explained and canvassed with counsel this morning. It was those responses which made it necessary for the hearing to take place. The claimant had two opportunities to explain its position in writing and the court was placed in the position of having to rely substantially upon the material provided by the GLD in order to understand some important aspects of what had occurred. The position was not assisted by some of the oral submissions received by the court this morning which did begin to raise 16 doubts in my mind as to whether the necessary lessons from this experience have truly been learnt.*

74. *However, I recognise that a hearing of this nature has probably never taken place before in the Planning Court. Indeed, I am keen that it should not be necessary for it to be repeated at all often. I also pay particular attention to the stance taken by Mr Westmoreland Smith on behalf of the first defendant, who does not ask for any order in favour of his client in relation to today's costs. The GLD has apologised for not notifying the court of the position from 20 February 2020. That, of course, does not deprive the court of jurisdiction to order such*

costs, but, looking at the circumstances in the round, I have decided not to make an additional order of costs in respect today's hearing against the claimant.

After the ex tempore judgment had been handed down, the Court's attention was drawn to the possible need to consider the effect of the provision under CPR rule 2.1.1 for time limits to be varied by agreement of the parties. The Judge responded by stating that the time limits set by the procedural directions for a trial bundle and skeleton arguments did not exclude or modify the application of Rule 2.1. However, that was always subject to the parties' obligation to assist the Court in furthering the overriding objective. Accordingly, agreed extensions of time should not imperil a future hearing date or otherwise disrupt the conduct of the litigation, applying *Hallam Estates Ltd v Baker* [2014] EWCA Civ 661 at [12] and [30-31].

The Judge concluded his Addendum in the following terms:

102. *Since the hearing on 5 March this country has had to deal with the Covid-19 emergency. Strenuous efforts are being made to maintain the operation of our court and tribunal system. The obligation on all parties under CPR 1.3 to help the court further the overriding objective has plainly become all the more important. The need to avoid a fixture having to be vacated and the court's resources wasted as the result of an unjustifiably late discontinuance or settlement must be self-evident.*

So, what are the messages to be conveyed not just to other members of a hard-pressed public sector Legal Department but also to clients? The first, perhaps glibly, is that tide, time and Planning Court judges will wait for no man! Secondly, are the overriding duties that the parties' lawyers have to the Court which override tactical or other reasons for delayed instructions and their outworkings. Thirdly, there is the collective responsibility, particularly from those from the other "planning professions" to take more seriously these overriding duties, and, to respond promptly and sufficiently, whatever may be their "working environment" at the time. Finally, is it not time for the RTPI to review its own guidance, again, and to put it more in line with that from the RICS regarding professional duties and what constitutes sanctionable misconduct? Only in these ways can judicial and public confidence be restored in land-use planning processes as we try to "do different, do better" after Lockdown, and, if we are going to achieve any lasting beneficial changes from the far reaching effects of this Pandemic.

John Pugh-Smith FSA FCIArb *practises as a barrister from 39 Essex Chambers. He is also a member of the RICS President's appointment panel. He has acted as advising counsel and also an arbitrator, independent expert and dispute facilitator on a variety of references concerning the interpretation of section 106 and development agreements. He served as one of the DCLG's panel of "Section 106 brokers" and currently acts as one of the two technical advisers to the All Party Parliamentary Group on Alternative Dispute Resolution and as a member of the Design Council's Highways England Design Review Panel.*

PRINCES PARADE: CLARIFICATION OF THE APPROACH TO FLOODING AND POLICY COMPLIANCE

Richard Harwood QC
Stephanie David

Dove J handed down judgment on 22 June 2020 in the case of *R (Martin) v Folkestone and Hythe District Council* [2020] EWHC 1614 (Admin), which considered the reliance on Strategic Flood Risk Assessments ("SFRA") when applying the sequential test under national policy; and reaffirmed the approach that ought to be taken when assessing policy compliance.

The defendant had granted planning permission in relation to a hybrid application for the development of Princes Parade, Hythe including outline permission for 150 residential units and full permission for a much-needed leisure centre. The proposed scheme was to be situated along the coast, immediately south of the Royal Military Canal ("the RMC") – a Scheduled Ancient Monument – and so the practical application of the test under paragraph 196 of the National Planning Policy Framework ("NPPF") therefore also fell for consideration. The decision was challenged by a local resident, Elaine Martin.

Flooding

The Court was asked to determine whether national and local plan policy required the sequential test to be applied based upon the Environment Agency ("EA") Flood Zone maps or the local authority's SFRA.

When the Flood Risk Assessment ("FRA") was prepared for the development site, the EA Flood Zone maps showed that it was located in an area identified as Zone 3. The FRA noted that the site benefited from 1 in 200 year standard of protection from existing flood defences. Consideration was then given to the more detailed and refined flood risk information contained in the SFRA, which includes flood hazard mapping and accounts for the defence infrastructure in the area (in contrast to the EA's maps). Based upon the SFRA, the site was in an area that was at the lowest risk of flooding.

Following publication of the FRA, the EA maps were revised and updated in relation to the application site. This meant that less of the development was identified as being in Flood Zone 3.

The Claimant argued that the officer's report significantly misled the planning committee by failing to apply both national and local policies in relation to the areas at risk of flooding. In particular, relying upon a local plan policy, the Claimant argued that the correct approach required the sequential test to be applied on the basis of the risk of flooding identified within the EA's maps and to seek alternative sites prior to considering the SFRA.

Dove J dismissed the Claimant's interpretation of the local policy, and determined that it required the preparation of the detailed FRA using the SFRA. On the facts, given that the site was at the lowest risk of flooding, the question of searching for other sites pursuant to the sequential test did not arise.

As to national policy, Dove J accepted the defendant's submission (confirmed in the Planning Practice Guidance) that:[5]

> "[P]aragraph 158 [of the NPPF] (giving effect to the principal identified in paragraph 155) identifies that the sequential test, steering new development to areas with the lowest risk of flooding, will be applied on the basis of the findings of the SFRA."

Policy compliance

It was further argued, on behalf of the claimant, that the officer report failed to properly address certain criteria in two local plan policies[6] and

5 Judgment, paragraph 34.

6 The policies were TM8 and LR9.

therefore the report failed to reach a judgement on the extent of compliance with those policies. Accordingly, the committee failed to discharge its duty pursuant to section 38(6) of the Planning and Compulsory Purchase Act 2004, although the report said that the application was a significant departure from the development plan.

Dove J observed what was required in relation to assessing compliance with policies in a development plan:

> "[T]he policies of the development plan seek to reconcile numerous interests and it would be difficult to find any project of any significance that was wholly in accord with every relevant policy in the development plan. To be in accordance with the development plan it suffices for the proposal to accord with development plan considered as a whole: it does not have to accord with each and every policy. In evaluating a proposal against the development plan not every policy will have precisely the same weight and some will have greater significance to the determination of whether the proposal accords with the plan than others. This is a reality which will be reflected in the approach taken by officers in preparing their committee report, focussing on the more central policies, and taking a lighter touch with others that are less directly engaged or of less moment in the decision at hand, without the need to take a "tick-box" approach to the consideration of the development plan's policies. These are issues of planning judgment…" [7]

He accordingly dismissed this ground of challenge.

Heritage

Given the impact of the application site on the setting of the RMC, the officer's report gave detailed consideration to heritage matters. Whilst the claim did not ultimately turn on this issue, because Dove J determined that *"it was beyond argument that there was careful and detailed consideration"* of the impact on the RMC,[8] the extracts from the officer's report usefully illustrate how national heritage policy ought to be applied. The officer laid out the history of events at the site, how they related to the RMC, and the relationship between the RMC and the development. Consideration was then given to the impact of the proposed development on the RMC; and it was advised that less than substantial harm would be caused. The public benefits of the proposal were then identified and evaluated, before they were weighed against the harm to the RMC.

One day judicial review by telephone

The hearing took place on 24 March 2020 at the start of the Government restrictions in response to the COVID-19 pandemic. This meant that a full one-day substantive judicial review was heard by the telephone, which is perhaps the first of its kind.

The judgment can be found here.

Richard Harwood QC and Stephanie David appeared for the defendant, Folkestone and Hythe District Council, instructed by Anna Russell-Knee of Attwells. They shared their experience of the "virtual" substantive judicial review hearing here.

7 Judgment, paragraph 44, taking into account the comments of Sullivan J in *R v Rochdale Metropolitan Borough Council ex p Milne* (No2) [2001] Env LR 406, at paragraphs 49 and 50.

8 Judgment, paragraph 43.

MISTAKES IN INSPECTORATE DECISIONS: THE INSPECTORATE WILL LISTEN (SO WHY NOT ASK?)

James Burton

We all make mistakes. Even, on occasion, planning inspectors. Sometimes the mistake may lead to a statutory challenge. But there are instances where the mistake makes no difference to the binary outcome of the appeal (dismissed or allowed), but may have important ramifications if left uncorrected.

One such case concerned the Inspectorate decision on the appeal brought by Telford Homes Plc against the decision of Tower Hamlets London Borough Council to refuse permission for residential-led mixed use redevelopment of the site currently occupied by the former (rather striking) headquarters of the London Electricity Board at 255-279 Cambridge Heath Road, in Bethnal Green, London.

The appeal was dismissed on heritage and townscape grounds, but along the way the Inspector's decision letter stated that "Since it was a matter of agreement at the Inquiry that the Council could not demonstrate a five year supply of housing land, paragraph 11d) of the National Planning Policy Framework was engaged…" (paragraph 6 of the DL, effectively repeated against at paragraph 106). In fact, there was no such agreement, and it was not even the Appellant's case at inquiry that there was no 5YHLS. The LPA was quite confident that it could demonstrate a 5YHLS, and that had the argument been raised during the Inquiry it would have challenged it (robustly).

Predictably, news that an Inspector had found the LPA could not demonstrate a 5YHLS began to spread with wildfire-like speed the moment the DL was released, causing the LPA an immediate headache.

What, then, was the LPA to do?

Section 56 of the Planning and Compulsory Purchase Act 2004, within Part 5 of that Act, gives the Planning Inspectorate power to correct certain errors within decision letters, known as "correctable errors". Section 59(5) defines "correctable error" as an error:

a) which is contained in any part of the decision document which records the decision, but

b) which is not part of any reasons given for the decision.

The Inspectorate's Procedural Guide explains that it will make a correction if the Inspectorate considers that it is in the public interest to do so and provided that correction is not "material" and would not have the effect of altering or varying the original decision.

Here, the Inspector had dismissed the appeal **even though** NPPF paragraph 11(d) had been found to be engaged, albeit on the basis of the error, hence the reality was that the error served to underline quite how compelling the heritage/townscape case against the proposals was, but had led to quite an important step in her reasoning (engaging the 'tilted balance').

The LPA wrote to the Inspectorate, asking that it exercise its powers under section 56 to correct the error regarding the 5YHLS.

The Inspectorate gave careful consideration to the request and responded by full letter. It very fairly admitted that the DL contained an error, as there was a 5YHLS at the time of the appeal, but concluded that it could not exercise powers pursuant to section 56 as the error formed part of the reasoning for the decision (albeit that it made it more difficult for the Inspector to reach the conclusion she ultimately did reach, by engaging the tilted balance).

The outcome: a DL uncorrected on its face but now accompanied by an open letter from the

Inspectorate alongside acknowledging the error in the DL and, if anything, underlining the strength of the LPA's case against the appeal scheme.

Hence, even though the Inspectorate decided it could not use its section 56 powers, the ultimate outcome represented an entirely acceptable result for the LPA, and one which it has been able to publicise, bringing an end to any unjustified conclusions regarding its 5YHLS.

The moral: If you do not ask…

James Burton appeared for the (successful) LPA at the appeal and assisted the LPA in achieving resolution of the error on the face of the DL.

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Richard specialises in planning, environment, public and art law, appearing in numerous leading cases including SAVE Britain's Heritage, Thames Tideway Tunnel, Chiswick Curve, *Dill v SoS* and Holborn Studios. Recent cases include housing, retail, minerals, environmental permitting, nuisance, development consent orders, and development plans. He is a case editor of the Journal of Planning and Environment Law and the author of Planning Permission, Planning Enforcement (3rd Edition pending) and Historic Environment Law and co-author of Planning Policy. He is also a member of the Bar Library, Belfast. To view full CV click here.

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

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Celina regularly acts for and advises local authority and private sector clients in all aspects of planning and environmental law. She also regularly appears in the High Court and Court of Appeal in respect of statutory challenges and judicial review. She undertakes both prosecution and defence work in respect of planning and environmental enforcement in Magistrates' and Crown courts. She specialises in all aspects of compulsory purchase and compensation, acting for and advising acquiring authorities seeking to promote such Order or objectors and affected landowners. Her career had a significant grounding in national infrastructure planning and highways projects and she has continued that specialism throughout. *"She has a track record of infrastructure matters"* Legal 500 2019-20. To view full CV click here.

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James specialises in environmental, planning, and related areas, including compulsory purchase and claims under Part 1 of the Land Compensation Act 1973. He acts for both developers and local authorities, as well as national agencies such as Natural England and the Marine Management Organisation. Recent notable cases/inquiries include *Grafton Group UK plc v Secretary of State for Transport* [2016] EWCA 561; [2016] CP Rep 37 (the successful quashing of a CPO promoted by the Port of London Authority after a five week inquiry), *Mann & ors v Transport for London* [2016] UKUT 0126 (LC)R (a successful group action under Part 1 of the Land Compensation Act 1973 and the 1-3 Corbridge Crescent/1-4). James successfully appeared on behalf of the London Borough of Tower Hamlets in the two week tall Building Proposal at the Oval inquiry. James has also appeared frequently in Committee (both Commons and Lords) in relation to HS2. James was named Environmental and Planning Junior of the Year at the Chambers Bar Awards 2015. To view full CV click here.

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Jon is ranked by Chambers & Partners as a leading junior for planning law and is listed as one of the top planning juniors in the Planning Magazine's annual survey. Frequently instructed as both sole and junior counsel, Jon advises developers, consultants, local authorities, objectors, third party interest groups and private clients on all aspects of the planning process, including planning enforcement (both inquiries and criminal proceedings), planning appeals (inquiries, hearings and written representations), development plan examinations, injunctions, and criminal prosecutions under the Environmental Protection Act 1990. Jon is currently instructed by the Department for Transport as part of the legal team advising on a wide variety of aspects of the HS2 project and has previously undertaken secondments to local authorities, where he advised on a range of planning and environmental matters including highways, compulsory purchase and rights of way. Jon also provides advice and representation in nuisance claims (public and private), boundary disputes and Land Registration Tribunal matters. To view full CV click here.

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Stephanie accepts instructions across all areas of Chambers' work, with a particular interest in planning matters (including environmental offences). Stephanie makes regular court appearances, undertakes pleading and advisory work and has a broad experience of drafting pleadings, witness statements and other core documents. She has been instructed to advise on a range of matters, including enforcement notices, environmental offences (such as fly-tipping), and applications for planning statutory review. She has also appeared before the Magistrates Court to obtain entry warrants on behalf of Environmental Health Officers. To view full CV click here.