Land Use Conference 2023

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Welcome and Introduction

David Elvin KC

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Opening Remarks

Lord Carnwath CVO

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Tate Modern: implications for developers and landowners

Tom Weekes KC and Jenny Wigley KC

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“Much like being on display in a zoo”: the Supreme Court’s decision in *Fearn v Tate Gallery*

Tom Weekes KC

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Donal Nolan (Professor of Private Law at the University of Oxford) said *Fearn v Tate* was:

"…a historic decision in that it is the first time that English law has recognised that a visual intrusion from neighbouring land can amount to the tort of private nuisance (and hence a violation of property rights)".

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16 February 1364:

“Amaury de Shyrlond, clerk, complains that Thomas Chauntecler has a tenement adjoining his land on the west side in the par. of St. Bride de Fletestret…and he has six windows in a stone wall of his tenement…looking on to the pl.'s land, through which he and strangers visiting…and staying…there can see the private business of the pl…Upon viewing the premises the mayor and aldermen find that the nuisances are as alleged. Judgment that *within 40 days etc*. the def…block up the windows and apertures of which the pl. complains.”

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1339 and 1400:

"Austin le Waleys of Woxebregg complains that Stephen son of Stephen de Creye, late citizen, has seven windows and a door (hostium) on the west side of his tenement overlooking the land of the pl. in the par. of St. Martin Orgar, less than 16 ft. from the ground…Judgment after view that he remove the impediments…*within 40 days etc*.

…

Precept of Andrew Aubrey, mayor, to the sheriffs, 20 Jan. 1340, reciting the failure of Stephen son of Stephen de Creye to execute the judgment given against him on 5 Nov. 1339 in the assize brought by Austin le Waleys, and ordering them to put it into effect at his expense and fine him 40s. for contempt."

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The three rules:

- A malicious interference with a neighbour's enjoyment of land is automatically a nuisance.

- The "ordinary use of land" is privileged.

- In all other cases, an activity is a nuisance if, having regard to the locality, it seriously harms the amenity of neighbouring land.

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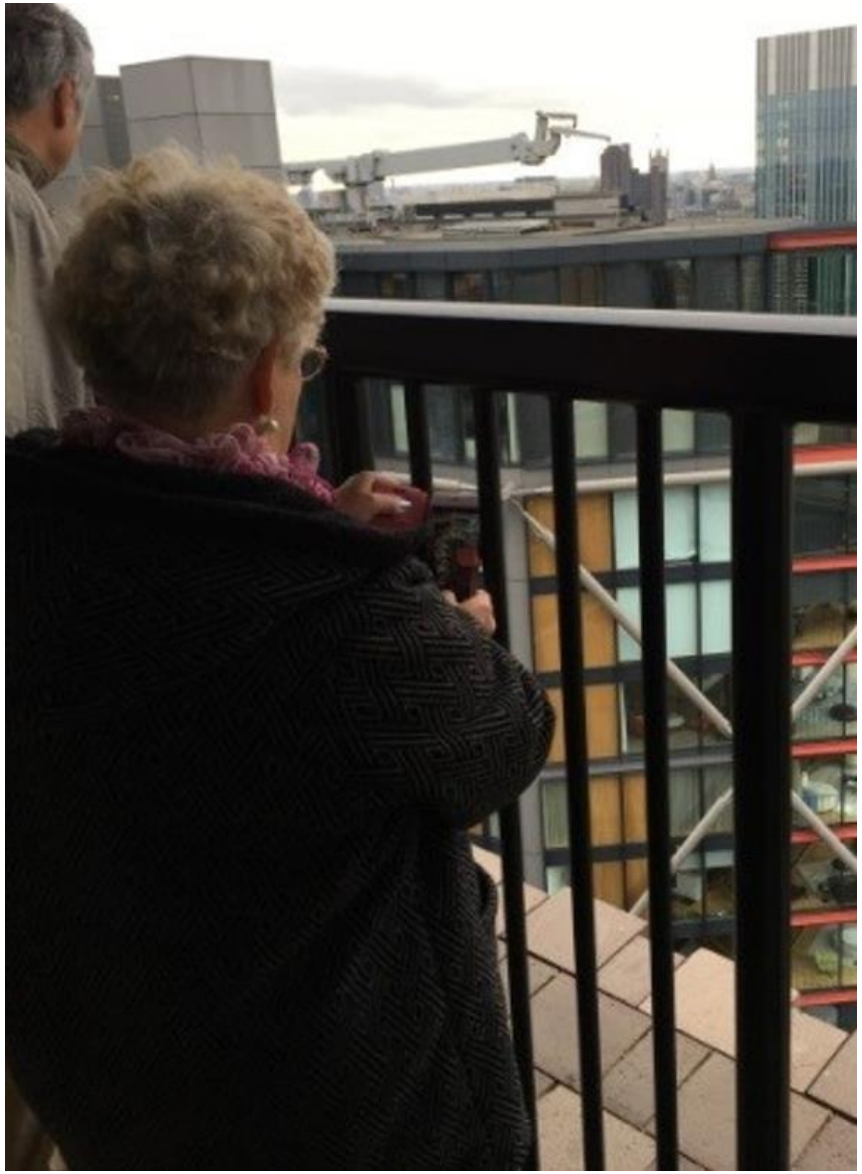

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1967 followers

Looking down from the Viewing Gallery at the Tate Modern Switch House across Neo Bankside, London ## @tate #tatemodern #thames #thisislondon #instalondon #gallery #artgallery #southbank #millenniumbridge #photography #travelgram #mylondon #architecture #architecturephotography

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Tapling v Jones (1865) 20 CB (NS) 164, Lord Westbury C:

"…there is another form of words which is often found in the cases on this subject, viz, the phrase "invasion of privacy, by opening windows". That is not treated by the law as a wrong for which any remedy is given. If A is the owners of beautiful gardens and pleasure-grounds, and B is the owner of an adjoining piece of land, B may build on it an manufactory with a hundred windows overlooking the pleasure-grounds…".

Hunter v Canary Wharf [1997] AC 655.

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Victoria Park Racing and Recreational Grounds Company Ltd v Taylor (1837) 58 CLR 479, Evatt J:

"…an absolute and unrestricted right to overlook or spy upon the premises of another."

Max Siedentopt (born 27 June 1991)

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The three rules:

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Lord Leggatt [37]:

“The right to build (and demolish) structures is fundamental to the common and ordinary use of land, involving as it does the basic freedom to decide whether and how to occupy space comprising the property.”

Dennis v Davies [2010] 1 EGLR 81

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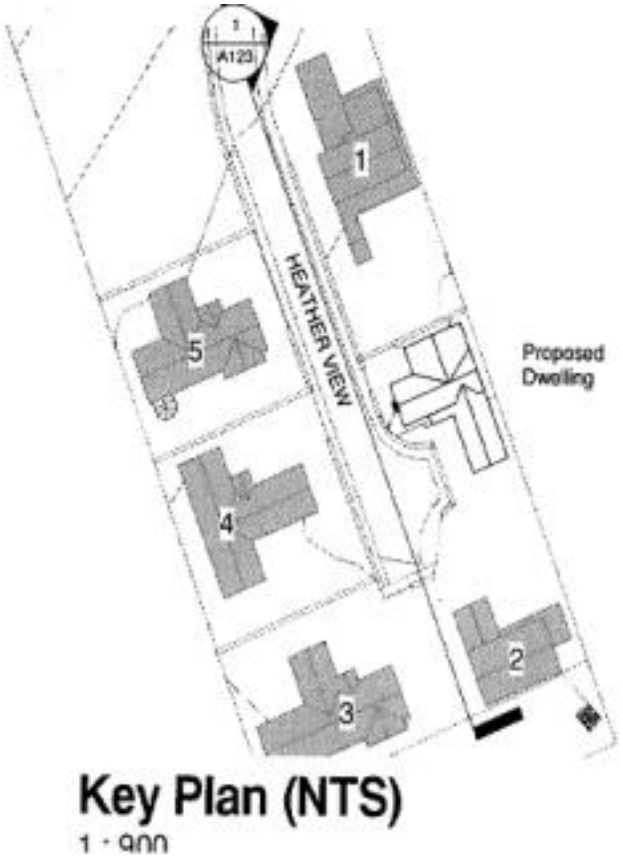
Tupholme v Firth [2015] 9 WLUK 348.



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Andrew Leggatt QC:

"…there are attracted to the premises a number of men of sleazy and unprepossessing mein."

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The judgment explains that Andrew Leggatt QC:

"…bought no 33 in June this year, primarily with a view to providing a base in London for his son and daughter, who are aged 22 and 19 respectively…He has transferred it to his son and daughter but planned, until recently, to spend a substantial sum on improving it for them. The recent developments have made him hold his hand."

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How does planning law interact with all this?
Some inputs and outputs

Jenny Wigley KC

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What was the role of planning in the Tate case?

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- On the facts it was minimal;
- Planning applications proceeded in parallel and neither considered the effect of overlooking / visual intrusion by the viewing gallery to the flats;
- How might the outcome have been different if the issue had been considered as part of the planning determinations?

How did planning law play into the Court Judgments?

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- Detailed examination by the HC (but why?)
- CA: policy suggestion planning law a better medium for controlling "inappropriate overlooking";
- SC clear in explaining how that was wrong as a matter of principle [109 – 110] (also see *Coventry v. Lawrence [2014] UKSC 13)*;
- Different role of the public interest in public law (planning) and private nuisance law.

Role of Article 8 ECHR?

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- Familiar in planning cases;
- Stalled here due to Tate not being a public authority and found not to be exercising ‘public functions’ under s.6 HRA 1998;
- Nevertheless, some reliance on Article 8 by High Court Judge;
- But view of SC (Lord Leggatt): “an unnecessary complication and distraction” [113]

Effect on future planning determinations?

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- Will often depend on which comes first and balance of considerations;
- Potential for overlooking may protect view, but may be outweighed;
- What about agent of change principle (para 187 NPPF)?
- Not just overlooking, visual intrusion;
- Protection of unusual businesses and community uses?

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Potential impediments to development of land formerly in public use

Alex Goodman KC

Kimberley Ziya

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What this talk will cover

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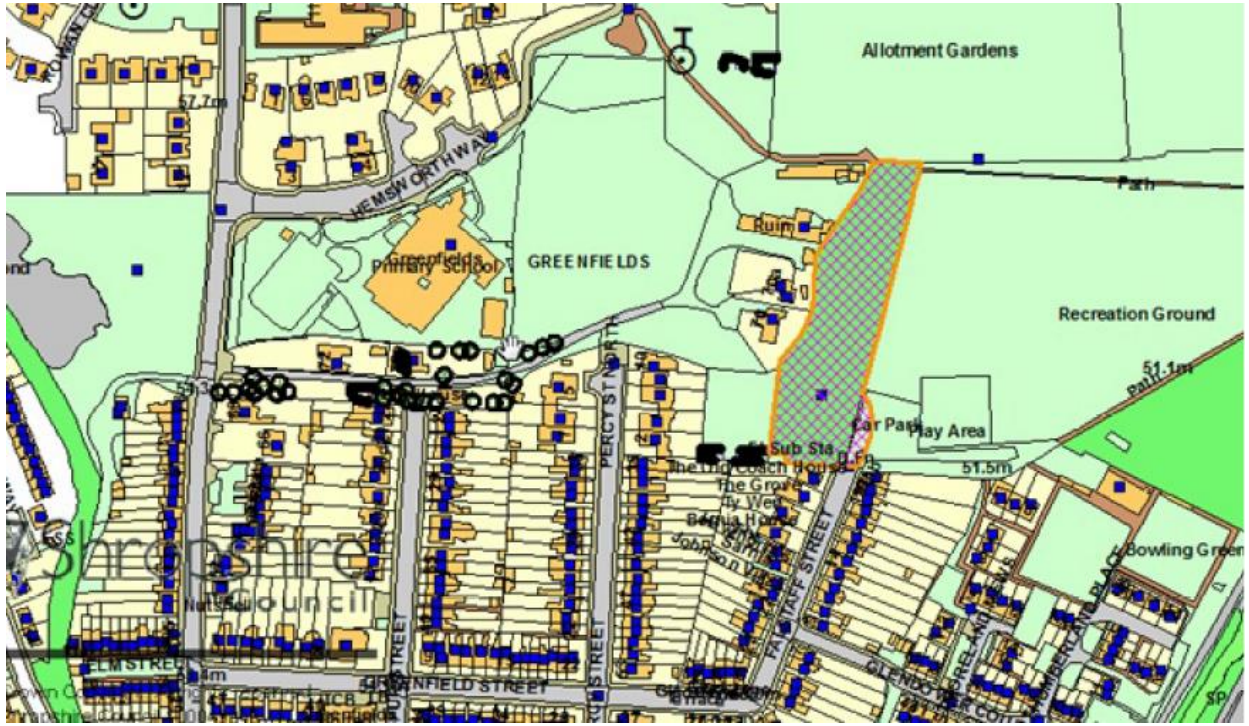
- Summary of the facts
- The decisions of the High Court and Court of Appeal
- The decision of the Supreme Court
- Implications of the Supreme Court's decision

The facts


Allotment Gardens
GREENFIELDS
Recreation Ground
Path
Ruin
Play Area
Bowling Green
Sub Sta
FALSTAFF STREET
PERCY STREET
ELM STREET
GREENFIELD STREET
HEMSWORTH WAY
57.7m
51.1m
51.5m


Greenfields Allotments
Spring Gardens Basketball Court
Greenfields Recreation Ground
Spring Gardens Playground
Shrewsbury
Greenfields Bowling Club
Falstaff St
Marshalls Ct

How to Preserve Openness?

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- Dr Day first approached solicitors in 2018, in the run up to a *second* planning application for development as housing following an earlier grant.

Village Green?

- Section 15C(1) of the Commons Act 2006 provides:

(1) The right under section 15(1) to apply to register land as a town or village green ceases to apply if an event specified in the first column of the Table set out in the relevant Schedule has occurred in relation to the land ("a trigger event").

- Schedule 1A to the Commons Act 2006 sets out the first "trigger event" as being:

An application for planning permission, or permission in principle, in relation to the land which would be determined under section 70 of the 1990 Act is first publicised in accordance with requirements imposed by a development order by virtue of section 65(1) of that Act

How to Preserve Openness?

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Waste Land of the Manor?

- Section 193 of the Law of Property Act 1925 confers rights on the public of air and exercise over waste lands. Waste lands include “manorial waste”.
- A subspecies of common land.
- Should be registered on the register of common land.

Footpaths?

- Easily diverted

Challenge to Unlawful Disposal?

- Possible, but well out of time.

Planning

- Raised the status of the land as being public trust land as a planning objection.
- When Council held it was not a material planning consideration, the decision was judicially reviewed

High Court Claim

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- Judicial Review of Decision to Grant Planning Permission for 15 houses
- Aarhus Costs Cap

Before Lang J:

- Volumes of Historic Evidence
- Concluded that the site was purchased in 1925 and held pursuant to statutory trust either under the Public Health Act 1875 or the Open Spaces Act 1906
- Temporary use as allotments as part of the “Dig for Victory” project under war time powers did not affect the analysis
- Nor did the land falling into abeyance in the 1970s and its use as a nursery by the Council in the 1990s

High Court Claim

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Argument:

- Trusts for recreational enjoyment of land by the public by right are creatures of section 164 of the Public Health Act 1875 and section 10 of the **Open Spaces Act 1906**.
- Land consisting of or forming part of an open space as defined by section 270 of the **LGA 1972** may be freed from trust by virtue of a disposal under section 123(2A) of the **LGA 1972**
- **BUT** requires satisfaction of the preconditions that:
  - notice of an intention to dispose of the land is advertised prior to disposal and
  - objections to disposal are considered.
- So the trust was not discharged
- Shropshire Council's failure to inquire into and ascertain that a public trust and recreational rights pertained over the Site and that the Site was open space was accordingly a public law error (ground 1). As was the failure to take into account material considerations related to open space (ground 2).

High Court Claim

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- Judge allowed the claim on grounds 1 and 2

- But granted no remedy, pursuant to s.31(2A) of the Senior Courts Act 1981. She held that the Respondent should have considered the legal implications of the sale by the Town Council to CSE. However, she considered that, if it had done so, it would have concluded that the right under the statutory trust, insofar as they subsisted, could not be enforced against CSE, by virtue of sections 128(2) and 131(1) of the **LGA 1972**: at §118

- s.128(2) LGA 1972 provides that the disposition "shall not be invalid" as a result of the non-compliance and that the purchaser "shall not be concerned" to establish whether there has been compliance

Court of Appeal

Dr Day appealed to the Court of Appeal.

a.Held at **CoA§45** that section 128(2)(b) of the **LGA 1972** expands the circumstances beyond those prescribed by subsection 123(2B) of the **LGA 1972** by which a disponee may take title to land free from statutory trusts;

b.At **CoA§ § 64-65** Public rights of recreation over the Site did not subsist in any form following the disposal to CSE, notwithstanding the failure to comply with the requirements of section 123(2A) of the **LGA 1972**.

c.At **CoA§65** held that public recreational rights under the statutory trust were not material to the decision whether to grant planning permission for the development of the Site.

The Supreme Court's Decision

Starting point

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"For many years Parliament has recognised the importance for local communities of having green spaces where people can take exercise, play sport and meet each other in the outdoors. Certainly, the events of recent years blighted by the Covid-19 pandemic with compulsory lock downs and social distancing have confirmed that recreation areas have a vital role to play in the physical and mental well-being of people living in an urban environment."

"Legislation has conferred powers on local councils to acquire and lay out recreation grounds and provide them to residents. Where a local authority uses the powers conferred by the Public Health Act 1875… or the Open Spaces Act 1906… to acquire and provide recreation land or open space to the public, the land is subject to a statutory trust in favour of the public and members of the public have a right to go onto the land for the purpose of recreation."

The Supreme Court's Decision
The issue

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- **<u>s.123(2A) and (2B) of the LGA 1972</u>**
  - Before disposing of land subject to a statutory trust the council must advertise their intention to do so in the local paper for two consecutive weeks & consider any objections
  - If the council complies with that procedure → land is freed from any public trust

- What if they don't comply?
  - **<u>s.128(2)</u>** provides that the disposition "shall not be invalid" as a result of the non-compliance and that the purchaser "shall not be concerned" to establish whether there has been compliance

- **But what happens to the statutory trust?**

The Supreme Court's Decision

The nature of the rights created by the statutory trust

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- Statutory trusts created by the PHA 1875 and OHA 1906 [34]-[40]
- Restrict the ability of the local authority to use the land subject to the trust for any purpose other than recreation and confer rights on the public to use the land for that purpose: see case law on this at [42]-[49]
- Not analogous to private trusts → no overreaching pursuant to/by analogy with s.2(1) of the LPA 1925 [50]-[52]

The Supreme Court's Decision

The nature of the rights created by the statutory trust

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- Council argued that the obligations imposed on a local authority by the statutory trust cannot be divorced from the ownership and/or control over the land by that authority because the statute doesn't impose obligations on 3rd parties
- Inconsistent w/ CA's conclusion that the statutory trust would not be extinguished if the purchaser had actual notice of the trust and the LA's non-compliance
- **SC held that simple transfer of the land into private ownership is <u>not</u> sufficient to extinguish the statutory trusts** [57]
- If that were the case, there would be hardly any need for s.123(2B) or s.128(2)(b) & the restrictions on sales of statutory trust land would be very easily circumvented
- Rights are analogous with rights in town & village greens and over public highways which clearly survive the transfer of land into private ownership [58]

The Supreme Court's Decision

The nature of the rights created by the statutory trust

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"I would therefore reject the argument that the answer to the present case is simply that as soon as the land comes into private ownership, the trust must be extinguished. There is no support for such a conclusion in the authorities and the cases on village or town greens and public highways suggest that analogous rights can co-exist with private rights."

The Supreme Court's Decision
Construction of the statutory provisions

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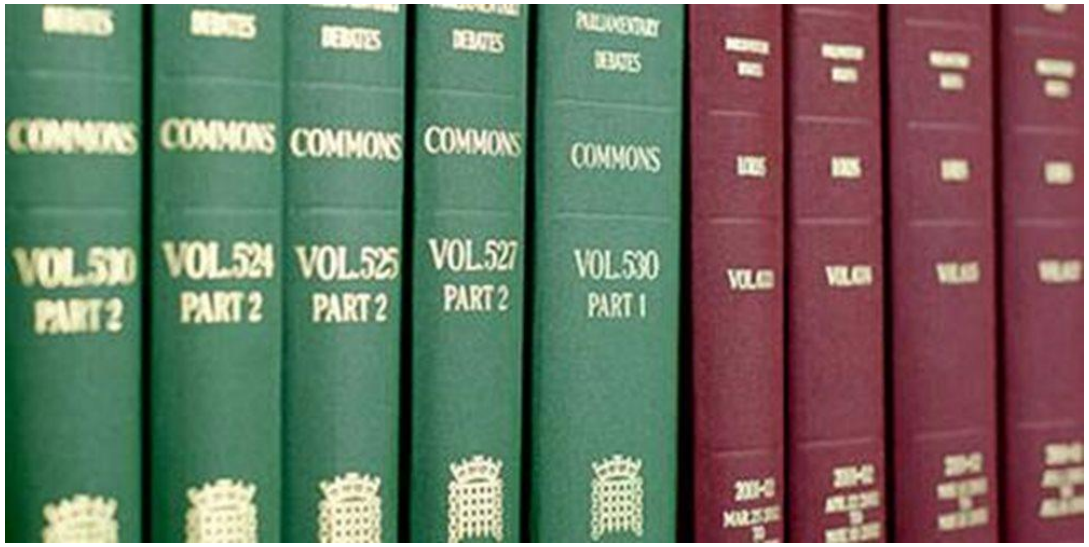
"Like the Court of Appeal, I consider that the answer to this appeal lies in the proper construction of the statutory provisions. With that in mind, I turn to consider the evolution of the local authority's powers in respect of their land in general and recreation grounds or open spaces in particular."



The Supreme Court's Decision
Construction of the statutory provisions

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Local Government Act 1933

- ss.163-165: power to LAs to let or sell land or appropriate it for another purpose
- In most cases ministerial consent/approval required
  - Exception: lease for a term not exceeding 7 years
- Could only sell land (w/ consent of Minister) if no longer required for the purpose for which it was acquired or was being used
- s.179(d): nothing in those provisions authorised a disposal *"in breach of any trust"*

The Supreme Court's Decision
Construction of the statutory provisions

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Town and Country Planning Act 1959

- s.26: removed the requirement for ministerial consent for some sales
  - But not for disposals of "open spaces" – s.26(2)(a)
- "Open spaces" = "any land laid out as a public garden or used for the purpose of public recreation, or land being a disused burial ground" – s.57(3), importing the definitions from earlier statutes
- s.29: provided that where consent was required and not obtained:
  - The disposal was not invalid by reason of the lack of consent; and
  - The disponee "shall not be concerned to see or inquiry whether any such consent has been given"

The Supreme Court's Decision
Construction of the statutory provisions

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***Blake v Hendon Corporation* [1962] 1 QB 283**

- Question: was the LA in occupation of land subject to a statutory trust for rating purposes unless and until it had done something to "dedicate" the land to the public?
- Answer: No
  - Nothing over and above acquiring the land under s.164 of the PHA 1875 required
  - The power to let the land conferred by the LGA 1933 was subordinate / supplementary to the main power in s.164 of the PHA 1875 & could only be used if compatible w/ the full use of the park by the public

The Supreme Court's Decision
Construction of the statutory provisions

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***Laverstoke Property Co Ltd v Peterborough Corpn* [1972] 1 WLR 1400**

- Land acquired by Peterborough under the OSA 1906 but no longer required for that purpose
- Sold subject to a special condition that P obtain the necessary ministerial approvals/consents and release the land from the obligations of the OSA 1906
- P did not satisfy the special condition; purchaser built offices on the land
- P argued that it could sell the land pursuant to s.165 of the LGA 1933 and that the requirement for consent had been removed by s.26(a) of the TCPA 1959
- Court said no: s.179(d) of the LGA 1933 made clear that s.165 did not authorise a disposal in breach of trust and s.10 of the OSA 1906 expressly created a trust

The Supreme Court's Decision
Construction of the statutory provisions

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The LGA 1972 as originally enacted

- Repealed the LGA 1933 and provided new powers for LAs to acquire, appropriate and dispose of land
- s.123(3) allowed for the disposal of "public trust land" subject to conditions:
  - Total land disposed of has to be less than 250 square yards
  - 2 weeks' advertisement in local newspaper required before disposal
- If those conditions were met, then the land would *"by virtue of the disposal, be freed from any trust arising solely by reason of its being public trust land"*
  - Wording first appeared when clause considered by the HL in Committee

The Supreme Court's Decision
Construction of the statutory provisions

LANDMARK CHAMBERS

The LGA 1972 as originally enacted

"The intention behind the amendment was said by the Earl of Gowrie when moving the amendment to be "to put beyond doubt that where public walks or pleasure grounds or public open space is appropriated or disposed of, to the very limited extent allowed under the Bill, the land is freed from any public trust so that it can be used for the purpose for which it is appropriated or disposed of": see Hansard (HL Debates), 18 September 1972, col 798—799."

The Supreme Court's Decision
Construction of the statutory provisions

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The LGA 1972 as originally enacted

- s.128(2) – same form as it is now; based on s.29(1) of the TCPA
- s.128(3) – disapplied ss.26 & 29 of the TCPA 1959 to avoid overlap with the powers granted to LAs by the 1972 Act
- s.131(1)(a) – replaced s.179(d) of the TCPA 1959 but with a carve out for statutory trusts:

> "*Nothing in the foregoing provisions of this Part of this Act or in Part VIII below – (a) shall authorise the disposal of any land by a local authority in breach of any trust, covenant or agreement which is binding upon them,* ***excluding any trust arising solely by reason of the land being held as public walks or pleasure grounds or in accordance with section 10 of the Open Spaces Act 1906***"

The Supreme Court's Decision
Construction of the statutory provisions

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The LGA 1972 as amended [by the Local Government, Planning and Land Act 1980]

"(2A) A principal council may not dispose under subsection (1) above of any land consisting or forming part of an open space unless before disposing of the land they cause notice of their intention to do so, specifying the land in question, to be advertised in two consecutive weeks in a newspaper circulating in the area in which the land is situated, and consider any objections to the proposed disposal which may be made to them.

(2B) Where by virtue of subsection (2A) above . . . a council dispose of land which is held (a) for the purposes of section 164 of the Public Health Act 1875 (pleasure grounds); or (b) in accordance with section 10 of the Open Spaces Act 1906 (duty of local authority to maintain open spaces and burial grounds), the land shall by virtue of the disposal be freed from any trust arising solely by virtue of its being land held in trust for enjoyment by the public in accordance with the said section 164 or, as the case may be, the said section 10."

The Supreme Court's Decision
Conclusions

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- **s.128(2) does <u>not</u> operate to extinguish the rights enjoyed by the public under statutory trusts <u>unless</u> the bespoke procedure set out in s.123(2A) and (2B) has been complied with**
- Because:
  - General powers conferred on LAs to buy, appropriate, lease and sell land have always been subject to special conditions or restrictions
  - Statutory trust land has generally been treated as different from other land & wide powers applicable to disposals treated as not overriding the public's rights under the statutory trust
    - Consistent line in the case law to this effect [93]-[100]

The Supreme Court's Decision
Conclusions

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- Parliament would have been in no doubt that "very clear words indeed" were needed in order for a power to dispose of land to be effective in extinguishing the public's rights under statutory trusts [101]
- Clear words were used in s.123(3): *"freed from any trust…"*
- The generally applicable provision in s.128(2)(b) cannot override the provisions of s.123(3)
- It is not a "cure all" and *"a purchaser would be wrong to think that buying land which appears to be an open space from a local authority is bound to be trouble-free because of section 128(2)"*
- Nor does s.131(1)(a) assist the authority [112]

The Supreme Court's Decision
Conclusions

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"I therefore respectfully differ from the analysis both of Lang J and of the Court of Appeal. Section 128(2)(b) in my judgment neither extinguishes the public rights under the statutory trust as the Court of Appeal held nor has the effect that the rights, in so far as they subsist, cannot be enforced against CSE the purchaser, as Lang J held."

"It would not be appropriate to comment on where that leaves the rights and obligations of Shrewsbury TC, CSE and the residents of the Greenfields area or whether and how the terms of section 128(2) can be brought to bear in future discussions between CSE and Shrewsbury TC as vendor of the disputed land, should CSE wish to unwind that sale. It is enough for the purposes of this appeal to conclude that the continued existence of the statutory trust binding the land would clearly have been an important consideration for Shropshire Council when considering CSEs planning application."

The Supreme Court's Decision
Conclusions

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- Appeal allowed
- Grant of PP quashed
- Impossible to say that it is highly likely that the outcome of the planning application would not have been substantially different if the mistake had not been made

"If, as a result of this appeal, other local authorities and parish councils … take stock of how they acquired and now hold the pleasure grounds, public walks and open spaces that they make available to the public to enjoy then that, in my judgment, would be all to the good."

Reflections on Supreme Court

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- “ It is enough for the purposes of this appeal to conclude that the continued existence of the statutory trust binding the land would clearly have been **an important consideration** for Shropshire Council when considering CSE’s planning application.”
- The Supreme Court did not overrule cases in other contexts to the effect that matters contained in separate legislative schemes need not be considered for planning purposes.
- See for example *R v Solihull Borough Council, Ex parte Berkswell Parish Council* (1999) 77 P. & C.R. 312.
- *British Railways Board v. the Secretary of State for the Environment* [1993] 3 P.L.R. 125 in which the House of Lords held that there is no absolute rule that the existence of difficulties for the developer in meeting conditions imposed, even if apparently insuperable, must automatically lead to a refusal of permission.

Reflections on Supreme Court

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Section 131 LGA 1972 provides (as relevant):

(1)Nothing in the foregoing provisions of this Part of this Act or in Part VIII below—

(b) shall affect, or empower a local authority to act otherwise than in accordance with, any provision contained in, or in any instrument made under, any of the enactments specified in subsection (2) below and relating to any dealing in land by a local authority or the application of capital money arising from any such dealing.

(2) The enactments referred to in subsection (1)(b) above are— …

(k) any local Act (including an Act confirming a provisional order).

Can statutory trusts be discharged by section 123(2B) of the LGA 1972 where land is held under a local act?

Reflections on Supreme Court

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Other statutory restrictions on disposal of open space need to be carefully addressed.

For Example: Green Belt (London and Home Counties) Act 1938

The 1938 Act established the first mechanism for the creation and protection of Green Belt around London by providing for local authority acquisition of land; an ability for private landowners to declare land as green belt, and for the use of covenants. Once acquired under the 1938 Act Green Belt land was thereafter protected against development without ministerial consent (s.10) and protected against disposal without ministerial consent (s.5), but use for recreation, agriculture and camping was permitted (s.27).

Reflections on Supreme Court

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What Happens to the Proceeds of Sale of Land disposed of in breach of trust?

Upon sale of the public trust land, does the Council owe to the beneficiaries of the statutory trust (the inhabitants of its area?) a fiduciary duty as regards the proceeds of the sale to be reinvested in the remaining statutory trust land?

Wider Consequences of Sale in Breach of Trust

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On 16th April 2020 a Public Interest Report regarding Governance weaknesses in relation to the Town Council's Annual Governance and Accountability Return for the year ending 31st March 2020 was sent to the Secretary of State by the appointed auditors under Schedule 7 of the **Local Audit and Accountability Act 2014** stating Shrewsbury Town Council:

"…must put robust procedures in place to ensure that an oversight such as this (the disposal of the site) is not permitted to recur. Where there should be any future sale of land STC must be able to demonstrate that it has taken sufficient steps to establish the legal status of that land and act in accordance with all relevant legislation prior to sale..."

Shrewsbury Town Council "unreservedly apologises to the residents of Greenfields".

Final Reflection on Supreme Court

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- *Lady Rose SCJ held*

"If, as a result of this appeal, other local authorities and parish councils decide to follow that advice and take stock of how they acquired and now hold the pleasure grounds, public walks and open spaces that they make available to the public to enjoy then that, in my judgment, would be all to the good"

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Injunctions: wild camping, environmental protestors and the traveller community

Samantha Broadfoot KC, Myriam Stacey KC, and Yaaser Vanderman

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Introduction

Samantha Broadfoot KC

Land Use Conference 2023

CONTEXT

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- Over 60 cases citing the Canada Goose judgment i.e. since the Court of Appeal judgment in March 2020

- Large number of reported cases in recent years

- Huge variety of situations: e.g.
  - Seeking to restrict protests outside a primary school aimed at teaching about LGBT issues - *Birmingham City Council v Afsar & Ors;* 2019 and 2020
  - Anti-fur demonstrations outside a store in London: *Canada Goose v PU* [2020] EWCA Civ 303

- To stop/manage protestors demonstrating at the claimants' sites for breeding animals for medical and clinical research: *MBR Acres Ltd v Free the MBR Beagles* [2021] EWHC 2996 (QB)

- To prevent animal rights protesters interfering with the running of the Epsom Derby horse race: *Jockey Club Racecourses Ltd v Kidby* [2023] 5 WLUK 421

- Unauthorised encampments – including injunctions against unidentified and unknown persons who may in the future set up unauthorised encampments on LA land – *LB Barking and Dagenham* [2022] EWCA Civ

- Variety of environmental protests – for example:

  - *TFL v Lee & others* [2023] EWHC 402
  - National Highways cases re M25 – e.g. [2023] EWHC 1073 (KB)
  - Injunction to prohibit unlawful protests intended to impede nationally significant pipeline - *Esso Petroleum Co Ltd v Breen* [2023] EWHC 2013

Importance of procedural rigour

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- Notice requirements
- Service
- Additional jurisdictional threshold test when it comes to freedom of expression
- Approach to persons unknown and what are known as newcomers

Human Rights - balance

- Articles 10 (freedom of expression) and 11 (freedom of assembly)
- Does not apply where a C is alleging trespass on private land from which the public are generally excluded
- May apply where it involves land which the public have some legal entitlement to access – e.g. public highway, park land, other public spaces.
- Note, however, difference between direct action and simple protest

- The consequence of those rights being engaged is that the Court will have to consider the question of proportionality i.e. whether a fair balance is struck between the legitimate aim and the requirements of freedom of expression and / or assembly.

Seeing private law injunctions in a public law context

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- Private law civil remedies not always well suited to the task of seeking to control what may in fact be public disorder

- Other tools to bear in mind: eg
  - Anti-social behaviour injunctions
  - Gang injunctions
  - Public Space Protection Orders

  Restrictions on who may bring proceedings and other requirements such as consultation.

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Protest and Persons Unknown Injunctions

Procedural points

Myriam Stacey KC

Land Use Conference 2023

Outline

- Urgency and notice
- Persons Unknown
- Service
- Draft Order
- Third party disclosure
- Contempt

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Urgency and Notice

Without notice? CPR

- Ordinary interim application rules: CPR 25 and PD25A paras 2.1 - 2.4.
- General rule = file and serve AN and evidence, *not less than 3 days* before hearing: CPR 23.3, 23.4, 23.7(1) & (3) and PD23A para 4.1.
- Application may be made without serving if permitted by (a) a rule; (b) a practice direction; or (c) a court order": CPR 23.4(2).
- Court power to grant interim remedy on without notice application if "*good reasons for not giving notice*" (CPR 25.3(1)).
- BUT should take steps to notify R informally of the application "*except in cases where secrecy is essential*": PD25A para 4.3(3).

Without notice? Section 12(2) HRA 1998

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- Imposes jurisdictional threshold test.

- Court no power to grant injunction which would interfere with freedom of expression against an absent or unrepresented party unless it is satisfied:

> *"(a) that the applicant has taken all practicable steps to notify the respondent; or*
>
> *(b) that there are compelling reasons why the respondent should not be notified*."

No notice?

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- *Birmingham City Council v Afsar* [2019] §20 (Warby J).
- "Exceptional", esp. where Art 10 ECHR is concerned:

  "*Urgency can only be a compelling reason for applying without notice if there is simply no time at all in which to give notice. Modern methods of communication mean that will rarely, if ever, be the case ….*" §53

- Risk that Rs would take steps to "*defeat purpose of the application*"?
- Possibility of escalation not, of itself, enough.

No notice?

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- Evidence must explain why no notice given: CPR 25.3(3)

- Duties arise at without notice hearing:

  – full and frank disclosure of all matters of fact and law that are material to the application.

  – to make note of hearing (including the Court's judgment) and serve on R without delay: CPR 25.3.9; 25.3.10.

  – to apply for and obtain return date: PD25A 5.1(3)

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Persons Unknown

Persons Unknown

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- No conceptual / legal prohibition re injunction against Persons Unknown.

- MUST be (per *Canada Goose* [2020] 1 WLR 2802 §82):
  (1) defined by reference to unlawful conduct sought to be prohibited;
  (2) impossible to name and join as named defendants
  (3) capable of being identified and served if necessary by alternative service.

- This includes ‘newcomers’: *Barking & Dagenham* [2023] QB 295, §93.

- Pending SC judgment - heard in February 2023 (*Wolverhampton v London Gypsies and Travellers*).

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Service

Service

- Essential to make Ds subject to the jurisdiction of the court: *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] 1 WLR 1471 (SC).

- Personal service on named Defendants (3rd party disclosure – more on that later).

- Persons Unknown – alternative service required: CPR r.6.15 (claim); CPR 6.27 (other documents).

- "*Can reasonably be expected to bring the proceedings to the attention of the defendant*": *Cameron* at §21; *HS2 v Persons Unknown* [2022] EWHC 2360 §144.

- Evidence: why order sought; the alternative method proposed; why C believes it is effective means of bringing proceedings to attention of D.

Service

- Can include extensive areas of land / national infrastructure: *HS2 v Persons Unknown* [2022] EWHC 2360; *National Highways Ltd v Persons Unknown* [2023] EWHC 1073; *Shell v Persons Unknown* [2022] EWHC 1215.
- Constructive knowledge relevant: *TfL v Lee* [2023] EWHC 402 §31-32.
- Order must comply with CPR r.6.15(4): specify method, date of deemed service and period for defence. Include provision for future documents.
- Strict compliance with Order required: *MBR Acres Ltd v McGivern* [2022] EWHC 2072, §78

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Order

Draft Order

Canada Goose guidelines, §82:

- Prohibited acts to correspond with the tort.
- Lawful conduct *only* to extent that no other proportionate means of protecting rights.
- Clear and precise language - persons must know what they can and cannot do.
- Legal terms (e.g. trespass, harassment, nuisance) to be avoided.
- Intention permissible if strictly *necessary* (i.e. as part of the tort) and understandable.
- Clear geographical and temporal limits.

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Third Party Disclosure

Third Party Disclosure Orders

- Once Defendants are identifiable – duty to join and personally serve.
- CPR 31.17; s.34 Senior Courts Act 1981 – power to order disclosure by a person not a party to the proceedings
- Threshold test: (a) likely to support A's case or adversely affect that of another party; and (b) disclosure necessary to dispose fairly of the claim or to save costs.
- 'Forward-looking' orders now difficult to secure.
- Cautious approach: *National Highways v Persons Unknown* [2023] EWHC 1073: "*Ordering disclosure against non-parties is an exception and not the normal rule and the power is to be exercised with caution"* (Cotter J).

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Contempt

Enforcement – procedure

- CPR Part 81 (pre- and post- 1 October 2020): different procedural paths.
- Application as of right in protest cases. Inadvisable where breaches are inadvertent / trivial: *MBR Acres v McGivern* [2022] EWHC 2072 (Nicklin J).
- CPR 81.4(2)(a)-(s): mandatory information.
- Written evidence, attested to by affidavit or affirmation.
- Personal service of underlying order: *MBR Acres v Maher* [2002] 3 WLR 999.
- CPR 81.7: directions as court thinks fit. Power to issue bench warrant.

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Injunctions

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Outline

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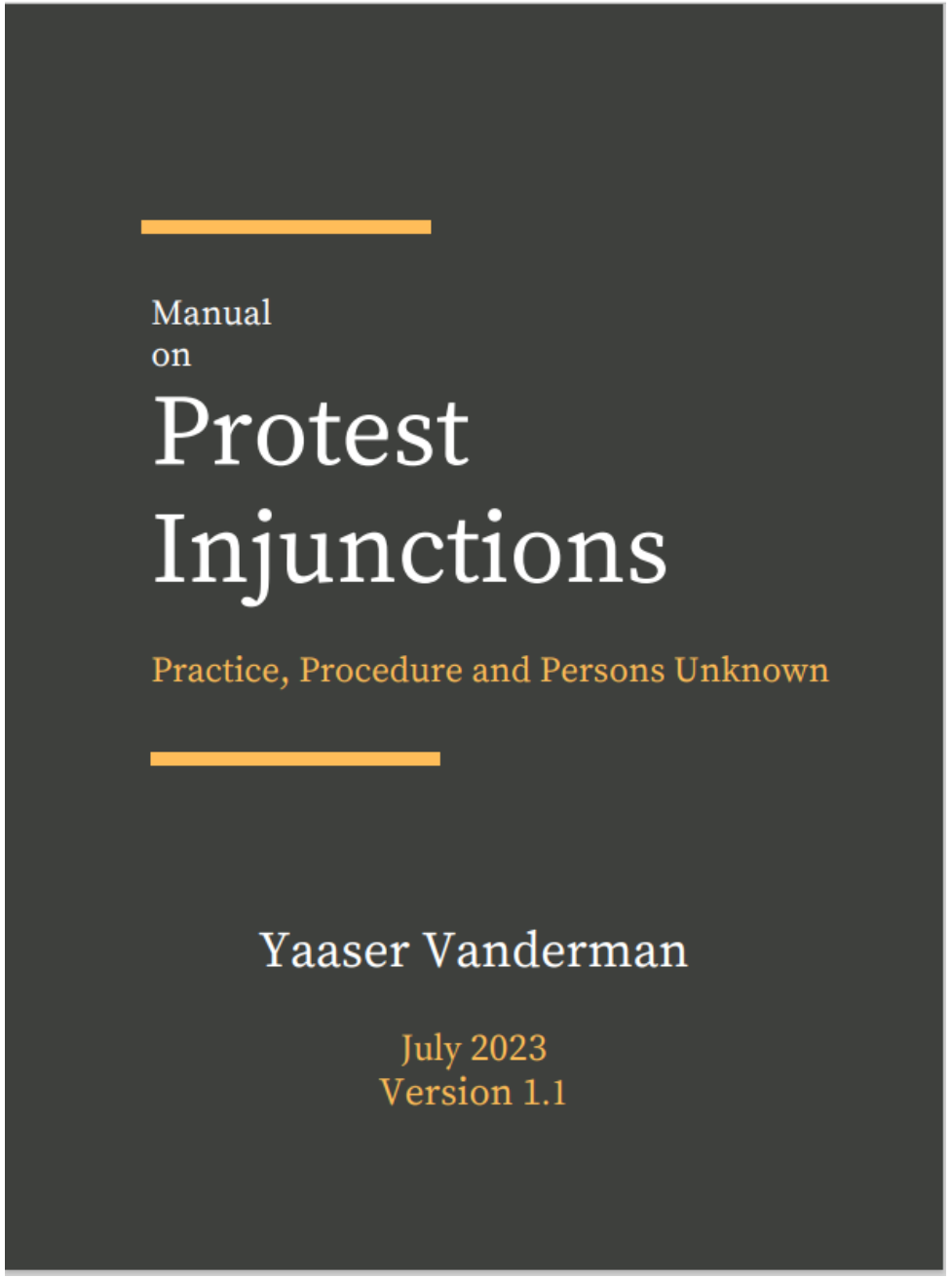
- Causes of action
- Interim injunctions and final injunctions
- Human rights
- Contempt - sanctions



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Causes of action

Causes of action

- Trespass
- Private nuisance
- Public nuisance
- Economic torts – conspiracy to injure by unlawful means
- Harassment?

Trespass

- Need to demonstrate a better right to possession than the occupiers (*HS2 v Persons Unknown* [2022] EWHC 2360 (KB), para. 77):
  - *"better"*: even a licensee has a good claim: *Manchester Airport v Dutton* [2000] QB 133.
  - *"right to"*: even a licensee *not yet in possession* has a good claim: *Dutton* [2000] QB 133. See also *HS2* re powers to take temporary possession rights.
  - "*possession*": whether C controls access to the land by others and in general decides how the land will be used: *Mayor of London v Hall* [2011] 1 WLR 504, para 21.

- A landowner whose title is not disputed is *prima facie* entitled to an injunction to restrain a trespass: *Snell's Equity* and *HS2*, para. 74.

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Interim and Final Injunctions

Interim Injunctions

- *American Cyanamid* test
  - s.12(3) Human Rights Act 1998?

- Precautionary injunctions
  - "*real and imminent risk*"
  - "*grave and irreparable harm*"

- For a summary of the tests that need to be satisfied see *Shell UK v PU* [2022] EWHC 1215 (KB), para. 23

- Renewing interim injunctions or progressing the claim?

- Manual, p32ff

Final Injunctions

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- Duty to progress the claim
  - Summary judgment (no real prospect of successful defence)
  - Default judgment (if Part 7 claim)
  - Trial (expedited following directions)
- But continuing need for annual reviews
- Awaiting Supreme Court judgment in *Wolverhampton CC v London Gypsies and Travellers*

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Human Rights

Human Rights

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- Private land - *DPP v Cuciurean* [2022] 3 WLR 446, paras. 40-50

- Public land - always comes down to proportionality:
  - Persuasion or compulsion?
  - Breaches of criminal law
  - Importance of location to protestors
  - Potential to protest elsewhere
  - Interfering with rights of others
  - Duration of protest
  - Democratic processes

- Manual, p.58ff

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Contempt - sanctions

Contempt - sanctions

- Role of Claimant: *Navigator Equities Ltd v Deripaska* [2022] 1 WLR 3656 (CA), paras. 135-138 (Carr LJ)

- Options – imprisonment, fine or confiscation of assets (CPR 81.9)

- Purpose of sanction: *National Highways v Buse* [2021] EWHC 3404 (KB), para. 28 (Johnson J); *Cuciurean v SST*[2022] EWCA Civ 1519, §105 (Edis LJ).

- Factors to be considered: see *AG v Crosland* [2021] 4 WLR 103, para. 44 and *National Highways v Heyatawin* [2021] EWHC 3078 (KB), para. 49.

- Discounts – e.g. civil disobedience, early admission, impact on others,

- Purging contempt

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Water, water everywhere: managing water resources and impacts of development under the current and emerging environmental regimes

David Forsdick KC, Luke Wilcox and Charles Bishop

Land Use Conference 2023

The basic problem

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- Development world can no longer assume that new developments can simply plug into existing water supply and sewerage systems with a ready supply of potable water from acceptable sources. Can also no longer assume that foul water will be appropriately treated before discharge so that the environmental impacts can be ignored.
- As stress on the capacity of the water sewerage systems increases, how development can properly be served by the water system is increasingly important at earlier stages of development proposals, development control decision making, plan making and public debate.
- The interplay between development and water/sewer resources and infrastructure is a very topical area of law with a number of complex strands which we will seek to introduce today.

Stress on the system

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- The media is (correctly) increasingly focusing on stress in our water and sewerage systems:

1. Excessive abstraction from watercourses especially in environmentally sensitive areas
2. Depleted groundwater
3. Inadequate water storage capacity (reservoirs) and drought orders
4. Inadequate capacity of our sewerage systems leading to excessive use of storm overflows with polluting discharges
5. New development and impact on SPAs/SACs
6. Impacts of other polluting run-offs
7. Non-compliance with permits/licences and/or legal obligations
8. Inadequate enforcement of environmental controls

Stress on the system

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- This is leading to:

1. Public concern manifested in planning and local plan objections along the lines of “the water system and environment cannot cope with demands from new development here”
2. Demands for water neutrality; nutrient neutrality; and demonstration of adequate capacity throughout the water and sewerage system to accommodate works
3. Lack of confidence of planning decision-makers in assurances on adequacy of capacity in the system and efficacy of *Grampian* conditions
4. Concern about appropriateness of leaving water supply and sewer issues entirely to other statutory regimes.

Stress on the system

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- Manifesting in the adequacy of the system becoming:

1. a key and fundamental issue in much planning and associated decision making;
2. a potential major hurdle to securing permission and then to delivery;
3. a source of much litigation;
4. the subject of increasing legislative and political activity; and
5. the subject of huge plans (potentially having to be publicly funded through water bills) which themselves will impact plan making and planning decision making.

   This is increasingly a key battleground in planning decision making and not limited to the nutrient neutrality issue.

The fundamental underlying problem

- Water supply: inadequate rainfall because of climate change and excessive abstraction is leading to lower river flows and water tables alongside inadequate storage capacity (reservoirs) and increasing demand especially from new development (unless restrained).

- Sewer system: as demonstrated by monitoring data which has only recently started to be systematically collected and published, the sewer system has inadequate physical capacity to accommodate flows especially in rainfall conditions such that storm overflows designed to operate in storms only now operate even when there is no rainfall.

- System as a whole: there has been a paucity of information and monitoring and (alleged) failures of enforcement.

Structure of talk

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- Nutrient neutrality
- Wider issues
- Recent legislative and case law developments
- Identification of issues that developers need to address, councils need to be alive to and environmental organisations may wish to pursue.

Nutrient neutrality – what is the problem?

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- Nature of the issue:
  - Foul (and surface) water runoff from housing developments
  - Eutrophication = environmental harm
  - Affects all wetlands – mostly SPAs, but some SACs and Ramsar sites too

Nutrient neutrality: the role of the CJEU

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- Nutrient neutrality developed largely in response to two CJEU decisions on the Habitats Directive:
  - *People Over Wind v Coillte Teoranta* [2018] PTSR 1668 – can't take mitigation measures into account at HRA stage 1
  - The *"Dutch Nitrogen"* case [2019] Env LR – can only authorise nitrogen-depositing works where there is no reasonable scientific doubt as to the absence of environmental impact

Nutrient neutrality: NE's response

- In response to those judgments, NE developed the concept of "nutrient neutrality" – permission for any development which adds to the nutrient load of a wetland catchment area can be authorised if, and only if, mitigatory measures are included which cancel out the effect of the increased load

  – E.g. housing developments may purchase a pig farm and convert it into pastureland – the reduced nitrogen from the conversion "neutralises" the increased nitrogen from the development

Why is it so controversial?

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- Holding up housebuilding!
- Two reasons:
  - Difficulty in securing mitigation
  - Refusal of RM applications for outline housing developments where no demonstration of nutrient neutrality

C G Fry v SSLUHC [2023] EWHC 1622 (Admin)

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- 2015 - C G Fry obtained outline permission for multi-phase housing development (650 dwellings) in Wellington, Somerset
- June 2020 - Applied for, and secured, RM for phase 3 (190 dwellings), but subject to pre-commencement conditions
- August 2020 – NE guidance on nutrient neutrality for the Somerset Levels and Moors Ramsar site published
- June 2021 – C G Fry seeks discharge of RM conditions, and is refused because of absence of nutrient mitigation for whole of phase 3

C G Fry v SSLUHC [2023] EWHC 1622 (Admin)

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- Three grounds of challenge in the Planning Court:

  (1) Habitats Regulations post-Brexit do not permit appropriate assessment at RM/discharge of conditions stage

  (2) NPPF cannot require appropriate assessment at RM/discharge stage for Ramsar sites

  (3) If appropriate assessment can be required, it is limited to the subject matter of the conditions, rather than being for the whole phase

C G Fry v SSLUHC [2023] EWHC 1622 (Admin)

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- Planning Court (Sir Ross Cranston) rejected all three grounds:

(1) Claimant correct on a literal reading of the Habs Regs … but claimant's approach contrary to the purpose of the regs, contrary to the Habs Directive (which remains of direct effect), and contrary to authority

(2) NPPF capable of requiring RM-stage AA in Ramsar cases: the consequence of the RM approval (i.e. the authorisation of the harmful development) creates a sufficient nexus between the approval and the impact

C G Fry v SSLUHC [2023] EWHC 1622 (Admin)

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(3) Ground 3 failed as well, because *"the thing which is to be the subject of the appropriate assessment is the thing which will be permitted by the authorisation, so that where the decision is the final stage in granting authorisation for a development, it is the development which is to be assessed"* (para 69)

- UKSC refused permission to appeal on a leapfrog basis

Nutrient neutrality – what next?

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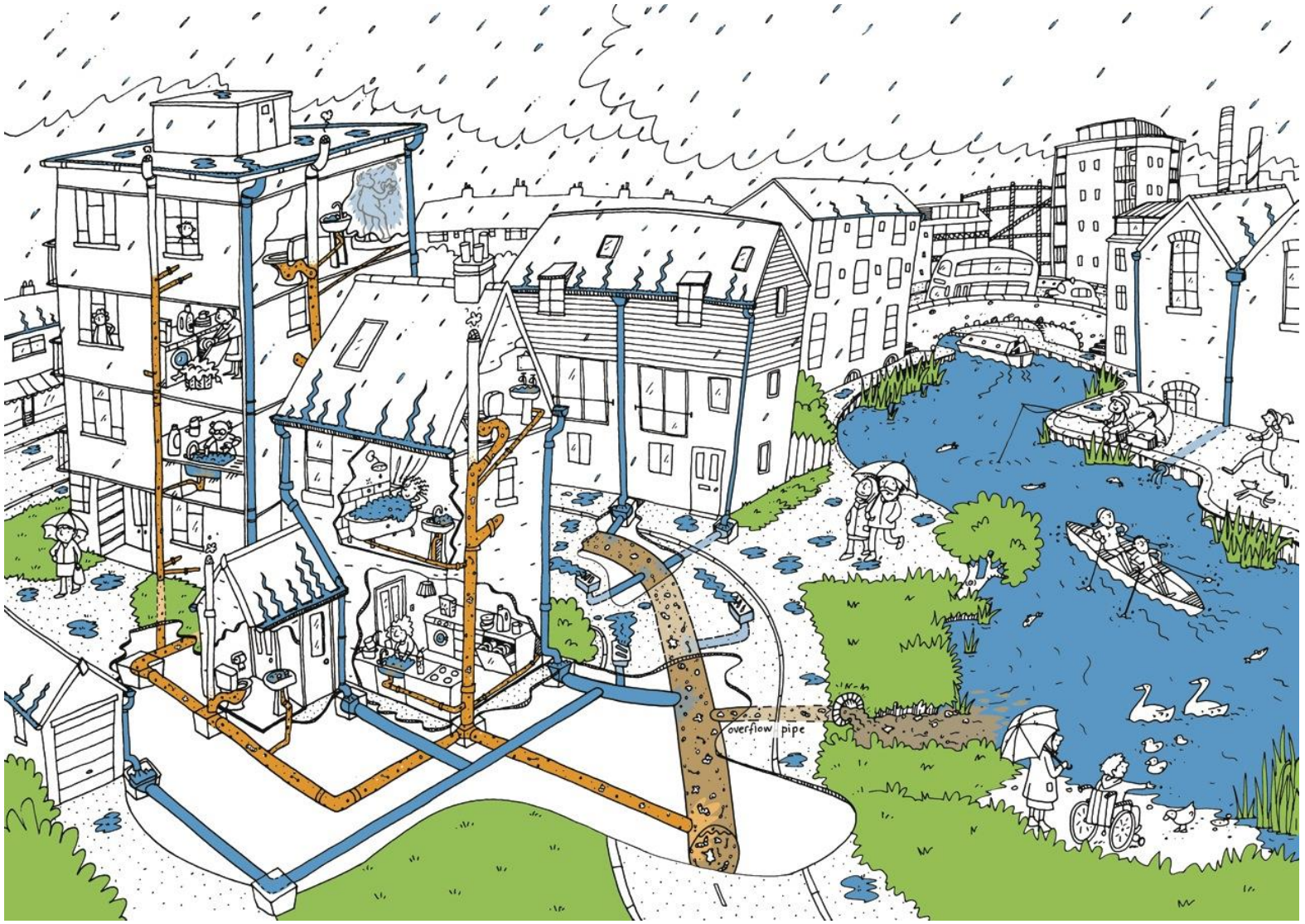
- Fast-moving area:
  - Direct effect of Art 6(3) expires at end of 2023
  - Government sought to amend the LURB to deem development to be nutrient neutral … but defeated in the House of Lords
  - Central and local government mitigation schemes
  - *C G Fry* in the Court of Appeal

The wider issues

- In what follows we will focus on the following:

1. Statutory and policy attempts to address the wider issues
2. What role does planning have in the wider issues given the separate statutory schemes?
3. Issues on water supply for major developments
4. Inadequate sewerage capacity - the problem, the law, the timescales, the current implications.

Combined sewer overflows or storm overflows



- Source: Thames21 (https://www.thames21.org.uk/combined-sewer-systems/)

Scale of the problem

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- Around 15,000 storm overflows in England discharging to either inland water bodies, estuaries or the coast.
- In 2022, 52% of storm overflows spilled more than 10 times 39% more than 20 times; 20% more than 40 times and 11% more than 60 times.
- Storm overflows release partially or completely untreated sewage. Discharges contain high levels of nutrients causing toxic algal blooms, meaning the oxygen in water drops to levels which have an adverse or fatal impact on aquatic organisms. Also links between discharges and increase in pharmaceuticals in rivers, including antibiotics. Affects both fish and antimicrobial resistance. Significant impact on ecosystem health.
- Also harmful to humans.

The water and sewerage statutory schemes

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Principally in Water Industry Act 1991 (alongside Environmental Protection Act 1990 and Environment Act 2021):

1. Rights to connect new development to water supply and sewers
2. Abstraction of water
3. Obligations to provide adequate potable water
4. Obligations to collect and treat all sewerage – s.94 and reg 4 Urban Wastewater Treatment Regulations 1994
5. Controls on quality of discharges
6. Requirement for water resource management plans

These are all enforced by the Environment Agency, Ofwat or the Secretary of State for Environment, Food and Rural Affairs.

Regulation of storm overflows

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- Two principal ways in which sewage discharges are regulated:
  - Section 94 of the Water Industry Act 1991 read with reg. 4 UWTR 1994
  - Environmental permits

- This sits alongside other environmental controls, including Habitats Regulations, EIA, and Water Framework Regulations.

- Reg. 4 obligation includes an obligation to provide adequate capacity to treat all sewerage and not to discharge untreated sewerage except in exceptional (storm) conditions unless providing sufficient capacity would entail excessive cost (in other words would not be “BTKNEEC”): reg 4 UWWTR 1994 and s.94: see Commission v. UK (Storm Overflows) [2013] 1 CMLR 24.

Recent additions to the statutory scheme

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- Environment Act 2021 interventions designed to address capacity issues:
  - Drainage and wastewater management plans under s.94A WIA 1991 (not yet in force) – to show how the WaSCo will manage and develop its sewerage system to meet its statutory obligations – shadow plans have been developed to inform 2024 OFWAT price review;
  - Setting environmental long term targets including water quality, biodiversity and species abundance and requiring them to be met (ss1 - 7 EA 2021)
  - Storm overflow reduction:
    - Requirements to monitor and report on use of SO (progressively embodied in permits since 2016) (s141DB WIA 1991)
    - Storm Overflow Discharge Reduction Plan: s.141A WIA 1911 – published in 2022 with progress reports (s.141B), annual reports from WaSCos and EA on frequency of use of storm overflows (s.141C/D) and “instantaneous publication” of storm overflow usage (s.141DA)
    - S.84 EA 21 – report on actions needed to eliminate all storm overflows and costs and benefits – no requirement to undertake those actions.

Recent litigation on excessive use of storm overflows arising from inadequate sewerage capacity

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- Concern as to gaps in the statutory scheme regarding excessive use of storm overflows and lack of enforcement against them has led to three recent developments:
- *R (Wild Justice) v Ofwat* [2023] EWCA Civ 28*:* challenged Ofwat's failure to enforce the requirements to provide adequate treatment. However, claim was framed broadly and failed as there was some enforcement.
- WildFish OEP complaint: WildFish complained to the OEP about the failure of the EA and Ofwat to enforce reg. 4 UWWTR in terms of the inadequacy capacity in the system. The OEP investigation is ongoing.
- *R (WildFish + MCS & Ors) v SSEFRA* [2023] EWHC 2285 (Admin): challenge to Storm Overflows Discharge Redution Plan on basis it appeared to legitimise discharges which were already unlawful. Court held the Plan did not cover any existing failures of WaSCos to comply with reg 4 UWWTR in terms of infrastructure capacity. Judgment sets out the respective duties of WaSCos, the EA and Ofwat in detail. Follow-up claims against WaSCOs, Ofwat and EA expected.

Are water issues relevant to land use given the separate statutory schemes?

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- The *Gateshead MBC v SSE* [1995] Env LR 37 line of cases is often (albeit wrongly) understood as requiring a strict demarcation between the roles of the different regulatory regimes – here the water legislation deals with water and sewerage issues and the planning legislation deals with planning issues.

- NPPF para 188 states that the focus of planning policy and decisions should be on whether the proposed development is an acceptable use of land and "planning decisions should assume that pollution control regimes will operate effectively".

- In that context, how can water and sewerage related issues under the 1991 Act be relevant to land use development control? Why should planning be concerned with matters addressed under the 1991 Act?

Barratt Homes v Welsh Water [2009] UKSC 13

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- There is a disconnect between the “rights” and “duties” in legislation, and the practical reality on the ground.

- *Welsh Water* case: an absolute right to connect a new development to a sewerage system even though there was inadequate capacity in the sewers in that location. The absolute right to connect and the facts on the ground were fundamentally inconsistent and would result in sewerage on the streets.
- But EWCA and UKSC indicated that the appropriate response would normally be to impose a *Grampian* condition on the grant of permission restricting occupation until the WaSCos increased capacity, marrying up the planning and water legislative schemes.

- How far does that approach stretch? How else may the disconnect manifest?

Adequacy of sewerage system: an example

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- An EIA application for a major housing allocation which is reliant on sewerage treatment works “X”. The WaSCo consultation response to the application raises no issue with the capacity of the system, but X is known to rely on storm overflow Y as an escape valve under storm conditions, which drains into an environmentally sensitive but not SPA/SAC watercourse. A third party objector produces evidence from EA monitoring data which shows that Y is regularly used other than in storm conditions. Works to remedy the problem are not in the WaSCo’s current or next five-year asset management plan, or are judged to fail the “BTKNEEC” test, and so will not be delivered in a timescale consistent with the development timeline. Any works to resolve the issue would involve a major construction project.

Adequacy of sewerage system: an example

- What needs to be assessed in the EIA: see *R (Llandaff North Residents Association) v Cardiff Council* [2023] EWHC 1731 (Admin). The works to resolve the issue can be a separate project where that project serves wider purposes and wider developments (but is that right if the only thing which triggers the works is the allocation?).
- As to plan decision-making:
  - Clarity should be sought from WaSCos as to its plans to mitigate the issue and the timelines and what the justification for not upgrading sooner is, given the legislative requirements.
  - *Grampian* conditions: it is arguably not sufficient to say "not to occupy until adequate capacity in sewerage system created" because: (1) is there confidence in WaSCos assessment; and (2) lacking in specificity of what adequate capacity means. Could require that, irrespective of the legislative exceptions, works to deliver increased storage capacity equivalent to the expected storm flows from the development site.
- Other action:
  - LA/developer could seek to require the WaSCo to upgrade the storm overflow and its storage capacity so as to meet the reg. 4 requirements in a short timeline.
  - LA/developer could ask EA/Ofwat to enforce, citing *WildFish*, the *Commission v UK* decision and the OEP investigation.

Water inadequacy and Water Resources Management Plans

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- Two overlapping issues:
  - (1) is there adequate availability of water in locality without harming the environment or over-stressing water resources?
  - (2) the availability of physical infrastructure to store water or to bring it in from elsewhere?
- This is meant to be addressed in Water Resources Management Plans under ss37A – 37D WIA 1991. These are intended to lead to comprehensive coverage to deliver schemes which ensure enough water in the right place at the right time, subject to funding.
- In East Anglia, South East and London especially, WRMP preparation is revealing significant strains through existing water table depletion, the environmental sensitivity of increased abstraction, the need for large scale transfers of water, and solutions being only deliverable in long term.

Water inadequacy and Water Resources Management Plans

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- As a result, adequate water and water efficiency of development is centre-stage in planning decision-making for new development:
  - Plan making: where to place major development to ensure it will be adequate served in the required timescale.
  - Land acquisition: the availability of water resource in a suitable timeframe without incurring large infrastructure costs.
  - Planning decision-making: beyond the above, the residual environmental effects of supply of that additional water and water neutrality *Grampian* conditions (similar to nutrient neutrality).

R (Together Against Sizewell C) v SoS for Energy Security and Net Zero [2023] EWHC 1526 (Admin)

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- Major new infrastructure such as this required bringing water to the area as its current capacity was inadequate, but it was not decided where that would come from or how. A question arose as to that infrastructure and the environmental impacts of extracting more water potentially from SAC/SPAs to supply the project.
- The Examining Authority of the DCO could not recommend approval because there was no assured supply of water and it was not possible to address its environmental effects.
- Argument raised that provision of water was covered by WIA 1991 and so not of direct concern to the planning system, as it would be dealt with under WRMPs which would be subject to SEA and Habitats Assessments, and until those WRMPs the impacts could not be assessed.
- SoS decided that WRMPs and Sizewell were separate projects and so the issue could be addressed separately.
- JR brought on basis that “project” under the habitats legislation necessarily included the water supply or that the impacts of the water supply solution had to be considered under the cumulative impacts requirement.
- Permission was refused following a rolled-up hearing by Holgate J, but permission to appeal that determination was granted by the Court of Appeal, and a hearing is listed for 1-2 Nov.

Response to water inadequacy

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- Irrespective of the outcome in Sizewell C, the case highlights a significant growing area of concern. How does the planning decision maker progress an application when it knows that there is insufficient water supply capacity in the area and no identified solution to secure supply in the required timeframe?
  - *Welsh Water*-type *Grampian* condition?
  - Adjourn the decision until a solution is identified and assessed?
  - Refuse because no adequate solution has been demonstrated?
  - Leave it to the WRMP to resolve and assess?
- The proposed approach appears to be settling on *Grampian* conditions but what if:
  - Multiple attempts to find a cost effective solution have all failed;
  - The decision-maker forms the view that the extent of the problem simply demonstrates the inappropriateness of the location for the development; or
  - The decision-maker considers that Grampians will be undeliverable within a realistic timescale.
- Potential scope for the approach of the Examining Authority in Sizewell being applied more generally on the planning merits?

Breakout Session One

Main Room

Overcoming Impediments to the Development of Land: Legal and Practical Issues

David Forsdick KC, Toby Watkin KC and Toby Oldham (Legal & Contingency)

Newman Room (room across the corridor)

Noisy neighbours and other activities likely to be prejudicial to human health or a nuisance

David Elvin KC and Richard Turney

Breakout Session One – Main Room

LANDMARK CHAMBERS

Overcoming Impediments to the Development of Land: Legal and Practical Issues

David Forsdick KC, Toby Watkin KC and Toby Oldham

Land Use Conference 2023

Objectives

- Review key features of:
  - S. 84, Law of Property Act 1925
  - S. 203, Housing and Planning Act 2016
  - Title Insurance

- Consider advantages/disadvantages

- Practical advice on selection and use

Speakers

David Forsdick KC
Landmark Chambers

Toby Watkin KC
Landmark Chambers

Toby Oldham
Technical Director,
Legal and Commercial Contingency

s. 84, Law of Property Act 1925 – the Power

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(1) The [Upper Tribunal (Lands Chamber)] shall... have power from time to time, on the application of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction....

s. 84, Law of Property Act 1925 – Ancillary Powers

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(1)….. and may direct the applicant to pay …. such sum… as the Tribunal may think it just to award….

(1C) … the power to modify… includes the power to add such further provisions restricting the user of or the building on land affected as appear to the [Tribunal] to be reasonable….

s. 84, Law of Property Act 1925 – The Grounds

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"on being satisfied that..."

(1) The covenant is **obsolete** (Ground (a))

(2) There is **agreement** to the discharge or modification between all those with the benefit of the restriction (Ground (b))

(3) The restriction **restricts a reasonable use** of the land and confers no practical benefit of substantial value or advantage on the persons entitled to the benefit of it (or is contrary to the public interest) and the loss of the covenant can be compensated in money (Ground (aa))

(4) **No injury** will be caused to those entitled to the benefit of the covenant by reason of its discharge or modification (Ground (c)).

Ground (a) – Obsolescence

*"(a) that by reason of changes in the **character of the property** or **the neighbourhood** or **other circumstances** of the case which the Lands Tribunal may deem material, the restriction ought to be deemed obsolete"*

- "character of the property": e.g. extensive, and long-standing, earlier breaches of covenant (but beware).
- "character of… the neighbourhood": is the purpose for which the restrictions were imposed no longer capable of being served (*Re Shaw's Application)*
- *"other circumstances":* is the covenant no longer realistically capable of enforcement for some other reason.

Ground (c) – No injury

*"(c) that the proposed discharge or modification **will not injure** the persons entitled to the benefit of the restriction"*

- Generally means no compensation
- Usually operates on frivolous objections
- Often relied upon with ground (aa) in the alternative

Ground (aa) – Impedes reasonable user

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*"(aa) That (in a case falling within subsection (1A) below) the continued existence thereof **would impede some reasonable user of the land for public or private purposes** or, as the case may be, would unless modified, so impede such user"*

"(1A) [Where] … the Lands Tribunal is satisfied that the restriction, in impeding that user, either:

*(a) does not secure to persons entitled to the benefit of it any **practical benefits of substantial value or advantage** to them; or*

*(b) is **contrary to the public interest***

***and** that **money will be an adequate compensation** for the loss or disadvantage (if any) which any such person will suffer from the discharge or modification."*

Ground (aa) – *Re Bass Ltd* (1973) 26 P&CR 156

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7 questions:

(1) Is the proposed user reasonable?

(2) Do the covenants impede that user?

(3) Does impeding the proposed use secure to the objectors practical benefits?

(4) If so, are those benefits of substantial value or advantage?

(5) Is impeding the proposed user contrary to the public interest?

(6) If the answer to (4) is ‘no’, would money be an adequate compensation?

(7) If the answer (5) is ‘yes’, would money be an adequate compensation?

Ground (b) – No injury

"(b) That the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction... have agreed, either expressly or by implication, by their acts or omissions, to the same being discharged or modified."

- More useful than it looks.
- Consent may be inferred from lack of response to the application.

Compensation

"... such sum by way of consideration as the Tribunal may think it just to award under one, but not both, of the following heads, that is to say:

(i) sum ***to make up for any loss or disadvantage suffered*** *by that person in consequence of the discharge or modification; or*

(ii) a sum to make up for any effect which the restriction had, ***at the time when it was imposed,*** *in reducing the consideration then received for the land affected by it."*

- Limb (i) compensation will be modest, but possibly not if (aa) succeeds because of public interest
- Limb (ii) may be substantial.

Costs (UT practice direction, paras 15.7-15.11)

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- Successful objectors (with standing) normally get their costs paid by the applicants.
- But unsuccessful objectors will **not** normally pay the applicant's costs unless they have acted unreasonably.

Practical Advice

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(1) <u>Carefully</u> consider validity of covenant:

- Do not assume that, because it is on the title, it is valid and enforceable by someone.
- Annexation is often a problem.

(2) Consider other options (e.g. s. 610 of the Housing Act 1985, s. 203, title insurance)

(3) Consider timings:

- Consent provisos: you really have to ask first.
- Need for planning permission, and therefore a scheme.
- Benefits of alternative, lawful schemes.

Practical Advice

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(4) Remember it is discretionary

***George Wimpey Bristol v. Gloucestershire Housing Association Ltd* [2011] UKUT 91 (Rose)**

"I would add that, if [the ground] had been made out, it is unlikely that I would have exercised the discretion that I have to modify the covenant. This is because I find on the evidence that the extensive works which Wimpey Homes have carried out on the application land were not an inadvertent action resulting from the discovery of the covenant at a late stage in the development programme…"

Practical Advice

LANDMARK CHAMBERS

(4) Remember it is discretionary

***George Wimpey Bristol v. Gloucestershire Housing Association Ltd* [2011] UKUT 91 (Rose)**

"... Rather, they were the result of a deliberate strategy of forcing through the development on the restricted land in the face of many objections from those entitled to the benefit of the restriction, to the point where they had so changed the appearance and character of the application land that the Tribunal would be persuaded to allow them to continue with the development. It is appropriate for the Tribunal to make it clear that it is not inclined to reward parties who deliberately flout their legal obligations in this way."

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s.203 Housing and Planning Act 2016 and related powers

David Forsdick KC

Land Use Conference 2023

Section 203 – power to override easements etc

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The Power (s.203(1)):

> "A person may carry out building or maintenance work to which this subsection applies even if it involves
>
> (a) interfering with a right or interest, or
>
> (b) breaching (i) a restriction as to the user of land arising by virtue of a contract; or (ii) an obligation under a conservation covenant."

S.203 thus provides a *full* defence to any injunction or damages claim for development in breach of such rights.

"Relevance right of interest" means (s.205) any easement, liberty, privilege, right or advantage annexed to land and adversely affecting other land

"Obligation under a Conservation covenant" is reference to Part 7 of the Environment Act 2021 – namely a covenant to conserve the natural environment or the natural resources of land and similar

The s.203 Qualifying Requirements

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1. There is a planning consent for the work (PP, GPDO or DCO)
2. Work is carried out on land that has at any time on or after the relevant day (a) become vested in or acquired by a specified authority; or (b) has been appropriated for planning purposes (s.246(1) TCPA 1990)
3. The authority could acquire the land compulsorily for the purposes of the work;
4. The work is for purposes related to the purposes for which the land was vested, acquired or appropriated.

"Specified Authority" is very broad – LAs, ministers, "a body established under any Act"; SU - or a specified company acting on behalf of a specified authority

Broadly the same approach applies to "other qualifying land" – being land vested in UDC, LHA, Housing Action Trust, HCA, NAW

S.203 Exclusions

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s.203 does not cover:

1. A right of way that is a protected right - s.203(9) – namely a right vested in a SU or conferred under the electronic communications code
2. National Trust land held inalienably

Compensation Obligations

If the s.203 override is relied on, liability generally arises to pay compensation "for any interference with a relevant right or interest in breach a restriction". (Liability does not arise for breach of a conservation covenant.)

Fundamentally, compensation is to be assessed under s.10 CPA 1965 on the basis of diminution in value of the retained land and not on a ransom value basis: *Holliday v. Breckland DC* [2012] JPL 116 (decided under s.237 TCPA 1990).

The effect of s.203 is thus to transform the property right into a limited compensation right – and to remove the ability to prevent development by injunction or ransom value demands.

The statutory purpose of the scheme is to unlock development potential in the public interest.

Meeting Requirements – initial general observations

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1. Power is a significant interference with private property rights – therefore right only applies if *all* statutory requirements are *fully* met.
2. It's legislative justification lies in the need to unlock development potential of land in the public interest and for specified purposes. It must not be seen as a generalised right to override – but a specific ability to override for specified (public) purposes e.g. to secure the better planning of the area.
3. It has the effect of avoiding ransoms and ransom strips – but it must not be exercised for the purpose of transferring the value of the strip to the landowner. All steps towards generating the s.203 right must be necessary and appropriate to achieve the relevant purpose. Failure of bona fide negotiations (absent the s.203 power) may justify its use

Meeting the Requirements – General Obs (2)

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1. There is no statutory procedure required to be followed to trigger s.203
2. Once the requirements are met, the infringement is authorised.
3. This means that the central battleground when development proposed will interfere with existing rights normally has to be earlier in the process – at the planning stage, the acquisition stage or, most particularly the appropriation stage.
4. That means that any plan of action by developers or LAs that will ultimately rely on s.203 *has to* ensure that the public law justification for that plan of action which will ultimately interfere with private law rights is considered at the earlier stages.

Meeting the Requirements – Planning Permission

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S.203 requires a planning consent *for* that which will cause the interference.

Given that the grant of permission opens the route to S.203, LAs considering use of s.203 should ensure that at *planning stage:*
(a) the acceptability of the intended interference is assessed in planning terms (does the blocking of the right to light create unacceptable light issues in existing development; does removing a right of way sterilise land) *and*

(b) Ideally the proportionality of the intended interference with the private law rights is considered - in other words, do the public benefits of the proposal outweigh the impact on private law rights.

Meeting Requirements – Acquired

If a developer intends to develop but cannot because of a ransom situation can ask LA to purchase in a back to back deal (need to be careful about SDLT) to clean the title.

These are normally effective if properly structured.

However in deciding whether to agree the Council is likely to be exercising a public function and so should abide by the general principles above before acquiring with a view to overriding private rights.

And that includes the proportionality of the intended interference with the private law rights - do the public benefits of the using the public powers to acquire (namely facilitating the development) outweigh the impact on private law rights.

Meeting the Requirements - Appropriated

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1. If the LA already owns the land for other purposes it must appropriate the land to planning purposes first.
2. Under s.122 LGA 1972 it may only do so if it is *no longer required* for the purposes for which it was held. In that exercise it is required to consider the public need within the locality for the existing use (*Dowty Boulton Paul* [1973] 2 All ER 491)
3. Save for that it is a broad evaluative judgement for it not readily susceptible to JR as long as a judgement is reached on that question on rational grounds
4. Appropriation should be demonstrably through a formal, deliberative process - R(Goodman) v DEFRA *[2015] EWHC 2576 (Admin)* – properly documented
5. Key Point - In deciding whether to appropriate when reliance on s.203 will follow it is good practice and legally necessary to undertake the balancing act – is the appropriation which will lead to the infringement of property rights justified in the public interest – setting out the public benefits and private impacts.

Meeting the Requirements - CPO

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The authority must have been able to acquire the land compulsorily *for the purposes of the proposed works.*

Therefore:

1. The authority must be able to point to the power which it could have used to acquire the land; and
2. It should satisfy itself that exercise of that power on the facts for the works would have been justified.

Thus, s.203 can be seen as an alternative or a possible short cut through the need to CPO for statutory purposes to clean the title. It is appropriate for the Council to satisfy itself that a CPO would be justified on the facts of a particular case.

Meeting the Requirements – Sticking to purposes

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The works actually carried out that interfere with rights must be “related to the purpose for which the land was vested, acquired or appropriated. The Council cannot therefore appropriate for “purpose x” and then do works for “purpose y”

Hence advisable to use the broadest powers of acquisition - planning purposes : s.226 as long as compliant with all case law thereunder; or appropriation.

The words “related to” give wide scope for variation.

Changes to the specific project are permissible without infringing the “purpose” rule.

Issues

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Classic cases

1. LA holds land and wants to sell for development. Promises to use s.203 to override rights. Owner of rights offers to sell rights at market value. Can LA appropriate and override rights to remove ransom and reduce payment?
2. Landowner subject to ransom which makes development unviable or impossible. Negotiations fail. LO suggests back to back transaction to clean title via s.203. Can LA engage to override rights?
3. LA holds surplus open space/education/highway/ which it wishes to develop. Can it appropriate to planning purposes to then override private law rights.

Exercise of powers leading to s.203

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Developers seeking to get LPA to use s.203 should provide (and LPAs considering such requests should require):

1. Evidence as to need to override the restrictions if development is to happen
2. Evidence as to attempts to negotiate surrender of rights and unrealistic ransom demands being persisted in and why those demands cannot be acceded to
3. What the public benefits are of the development compared to a development which would not infringe the rights
4. Framework of back to back deal with analysis of SDLT impacts
5. Legal analysis to demonstrate s.123 compliance in back to back deal

Toby Oldham, Director of Underwriting

Date: 12th October 2023

L&C – Title Insurance

Legal & contingency Ltd

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L&C HAS BEEN UNDERWRITING LEGAL INDEMNITIES FOR 30 YEARS

WE ARE UNDERWRITERS

WE ARE A LLOYD'S COVERHOLDER

TEAM OF IN-HOUSE EXPERTS UNDERWRITING AND CLAIMS

LEGAL & CONTINGENCY
EXPERTS IN LEGAL INDEMNITIES

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What Insurance does

- ✓ Allows transactions and funding to progress smoothly
- ✓ Provides protection from potential financial loss
- ✓ Works in the grey areas where there is no or little certainty

What it can't do

- Doesn't remove or reduce the risk of potential action
- Doesn't guarantee any specific outcome
- Doesn't guarantee end aspirations, eg. end developed value or that insured's plans can actually be implemented

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How does insurance work with s84 LPA and s203 HPA

- It generally doesn't, but it can … it's a timing thing
- At an underwriting (pre-policy) stage, they are not always mutually exclusive – we may want to consider prospects of s84 and/or s203 as part of the underwriting process
- We have numerous examples of policies we have issued where insurance has worked with s84 LPA or s203 HPA
- At a claims stage s203 or s84 may represent potential routes to resolution of the claim

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Communications with third parties

- BEFORE POLICY: may result in no policy being available or cover excluded in relation to those parties
- AFTER POLICY: may result in a breach of policy conditions or an exclusion to indemnity

Get proper advice – including from Toby and David …

AND …

consider insurance *before* you commit to a certain course

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TIMING

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PRE-PLANNING

POST PLANNING

MID-DEVELOPMENT

POST-DEVELOPMENT / CONTINUED USE

LEGAL & CONTINGENCY
EXPERTS IN LEGAL INDEMNITIES

Question Time

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Breakout Session One – Newman Room

LANDMARK CHAMBERS

Noisy neighbours and other activities likely to be prejudicial to human health or a nuisance

David Elvin KC

Richard Turney

Land Use Conference 2023

Common law principles: liability (1)

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- ***Clerk & Lindsell*** –
  - "a condition or activity which unduly interferes with the use or enjoyment of land. In ordinary speech, smells and smoke and a variety of different things may amount to a nuisance in fact, but whether they are actionable as the tort of nuisance will depend upon a variety of considerations and a balancing of conflicting interests. An actionable nuisance in incapable of exact definition…"
- ***Fearn v Board of Trustees of the Tate Gallery*** [2023] 2 WLR 339 – nuisance by overlooking from Tate Britain, principles restated:
  - Nuisance is concerned with the actionable interference with rights in or over land, to be judged objectively by the standards of the ordinary person [9] - [11]. Claim based on diminution in utility or amenity value and not personal discomfort by the occupiers. Potential nuisances are not actionable [43].
  - Nuisance balances competing interests between neighbouring landowners. The first question is whether D's use of land has caused a substantial interference with the ordinary use of C's land - [21]
  - Nuisance does not result from the ordinary use of land to be judged having regard to the character of the locality and having regard to the principle of give and take between adjoining uses providing that ordinary use is undertaken "conveniently"/reasonably. [24]-[41]

Common law principles: liability (2)

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- No defence of "coming to the nuisance" or that D could have taken steps to avoid the nuisance – ***Lawrence*** [47]-[58]; ***Fearn*** [42]-[46]***.*** No defence to nuisance that using land reasonably, or in public interest nor that design of C's property made it particularly sensitive to the activity complained of nor is it a defence if the C could have taken remedial steps Public interest relevant only to remedy ***Fearn*** [47], [114]-129]
- Can reliance be placed on a **prescriptive right** to commit what would otherwise be a nuisance?
  - In principle, if it is capable of being a right at law e.g. an easement or prescriptive grant, but it will depend on what is claimed and the facts
  - ***Coventry (t/a RDC Promotions) v Lawrence*** [2014] A.C. 822 t [32]-[46]
  - To claim a prescriptive right will require proof of continuity of a nuisance for a 20 year period
  - That the nuisance was of a consistent level or frequency over the prescriptive period
- Noise could be especially hard to establish as a prescriptive right if levels, duration and frequency have fluctuated over time. Not much latitude to be afforded to variations in level or frequency of noise. ***Lawrence*** at [39] because of potential effect on enjoyment.
- Express grant of right/easement possible but will need to be sufficiently clear as to what level and quality of noise permitted and, ideally, how to be determined and at what times

Common law principles: immunity

- Public interest relevant only with regard to remedy, not liability. In terms of public interest in defence, in ***Dennis v MOD*** Buckley J held that undoubted public interest should not be inflicted disproportionately on individual D who should be expected to bear the costs of the effect of that interest (Harrier jets from nearby RAF base) but met by damages. See ***Fearn*** at [114] and [119]-[120]
- Statute may expressly or impliedly authorise an inevitable consequence even if otherwise a nuisance – ***Allen v Gulf Oil Refining*** [1981] AC 1001 providing no negligence in giving effect to the authorisation and burden of proving the nuisance is inevitable lies on the party exercising the statutory authority. If negligent, there is liability to the extent the nuisance is caused by that negligence ***Tate & Lyle v GLC*** [1983] 2 AC 509.
- Special context of DCOs under the Planning Act 2008

Noise nuisance

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- ***Sturges v Bridgman*** (1879) 11 Ch. D. 852 noise from manufacturing in confectioner's shop in Wigmore St disturbed physician's new consulting rooms in Wimpole St – injunction granted on the basis that it was not consistent with the character of the locality ("*what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey*")
- ***Gillingham BC v Medway (Chatham) Dock Co*** [1993] QB 343 – noise from commercial dock traffic part of character of area changed by planning permission and not (public) nuisance
- ***Sampson v Hodson Pressinger*** (1984) 12 H.L.R. 40 – creation of roof terrace and garden on flat roof that inevitably caused noise disturbance to flat below.
- ***Southwark LBC v Mills*** [2001] 1 AC 1 day to day noise between flats (defective insulation) rejected as nuisance since it was an ordinary use of the flats – "necessary and inevitable incidents of the ordinary occupation of residential property" (Lord Millett)
- ***Fouladi v Darout*** [2018] EWHC 3501 (Ch) - Noise caused to the occupiers of the flat below where upper flat flooring inadequate to prevent significant noise transmission. Noise transmission caused by recent works carried out which had been undertaken or chosen by Ds. Landlord could be liable in nuisance caused by tenants if L had actively participated in the cause of the nuisance.

Noise nuisance: case study – RAF noise cases

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- Two cases in last 20 years where noise nuisance claims brought against RAF, turned on different facts
- ***Dennis v MOD*** [2003] Env LR 34 (noise of harrier jets from RAF Wittering)
  - Liability established; rural character of the area not changed by the presence of RAF Wittering since 1916 since noise from Harriers had increased considerably. Military use not "ordinary user".
  - Damages awarded; Injunction not sought (Crown) but declaration refused in public interest [47]-[48]
- ***Jones v MOD*** [2022] Env LR 13 (noise of fast jet training at RAF Valley/RAF Mona on Anglesey)
  - Liability rejected; character of the area (predominantly rural but with noise from fast jets since 1951) had not changed for many years and was sufficient to establish that fast jets were a long-established part of the locality. Fast jet training was an ordinary use in that area.
  - Preferred Lord Carnwath in ***Lawrence*** at [190] to that at [72] that an overall judgment should be reached whether any change in intensity or character of an activity amounted to a nuisance
  - Found as a fact that that intensity of the nuisance had not increased and the RAF had acted reasonably to keep disturbance to a reasonable minimum
  - Noise levels measured in the village and the site were not significantly different
  - In any event Cs had introduced a new use on their land (holiday park) which was more sensitive to the noise than previously rather than water supply premises

Regulatory control and nuisance

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- Planning permission cannot itself sanction a nuisance though it may be relevant to the question of the character of the neighbourhood since may lead to changes in that character. ***Gillingham BC v Medway (Chatham) Dock Co*** [1993] QB 343***;*** ***Watson v Croft Promosport*** [2009] 3 All ER 249; ***Barr v Biffa Waste Services*** [2013] QB 455.
- Suggestion that a "strategic" planning decision may change the character in ***Watson,*** considering earlier dicta, unclear and not treated with any enthusiasm in ***Barr***. Appears in conflict with general principle (endorsed by the Supreme Court) and difficult to define.
- General principle affirmed in ***Lawrence*** [95] (can expect planning authority to assume if a development causes a nuisance there will be enforceable rights); ***Fearn*** [109]-110] and ***Barr*** endorsed.
- The mere grant of an environmental permit does not change the character of the area - ***Barr***

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Nuisance: the “public law” dimension

Richard Turney

Land Use Conference 2023

What is “statutory nuisance”?

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- The same test for “nuisance”
  - Consequently the same principles as found in private nuisance cases apply in respect of the enforcement of statutory nuisance
- But to be enforced against must fall within the categories identified in the Environmental Protection Act 1990
- Wide ranging set of matters covered by the EPA 1990 e.g. specific provision for noise in streets

Enforcement of statutory nuisance (1)

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- Section 79(1) EPA 1990 defines “statutory nuisances” to include “(g) noise [including vibration] emitted from premises so as to be prejudicial to health or a nuisance”
  - Exception for defence premises
  - Exception for aircraft
- Statutory *duty* on local authorities to inspect for statutory nuisances
- Section 80: the abatement notice, including *duty* to serve notice in some circumstances for noise
- Section 80(4): offence of failing to comply with notice, subject to “best practicable means” defence

Enforcement of statutory nuisance (2)

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- Right of appeal to magistrates' court under s 80(3) against an abatement notice
  - See Statutory Nuisance (Appeals) Regulations 1995/2644
  - Magistrates may quash or vary the notice in the appellant's favour, or dismiss the appeal

- Section 82 Environmental Protection Act 1990: summary proceedings for person aggrieved
  - Allows for enforcement of prohibition on statutory nuisance by a member of the public
  - Proceedings instituted by summons in magistrates' court

Best Practicable Means ("BPM")

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- Defined in s 79(9):

(9) In this Part "best practicable means" is to be interpreted by reference to the following provisions—

(a) "practicable" means reasonably practicable having regard among other things to local conditions and circumstances, to the current state of technical knowledge and to the financial implications;

(b) the means to be employed include the design, installation, maintenance and manner and periods of operation of plant and machinery, and the design, construction and maintenance of buildings and structures;

(c) the test is to apply only so far as compatible with any duty imposed by law;

(d) the test is to apply only so far as compatible with safety and safe working conditions, and with the exigencies of any emergency or unforeseeable circumstances;

and, in circumstances where a code of practice under section 71 of the Control of Pollution Act 1974 (noise minimisation) is applicable, regard shall also be had to guidance given in it.

Construction sites

- Control of Pollution Act 1974 makes provision for control of noise on construction sites through serving notices imposing conditions (s 60) or through seeking prior consent (s 61) which may be subject to conditions

- Gives a defence to a prosecution under s 80(4)

- But does not give a defence to proceedings under s 82 by person aggrieved

Construction and operation of major infrastructure

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- Noise of construction of projects may be governed by specific provisions in authorising instrument (e.g. DCO)

- Section 61 consents provide a defence to local authority enforcement, but not to “person aggrieved” enforcement

- Consequently now common practice to provide that defence in DCOs (see e.g. Art 7 of SI 432/2022

Construction and operation of major infrastructure (2)

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- Nuisance from operational effects will depend upon the means of consent
- If authorised by DCO, defence of statutory authority (s 158 Planning Act 2008) and right to claim compensation (s 152)
- If authorised by other statutory means (e.g. TWAO, hybrid bill), defence of statutory authority together with right to claim compensation under Part 1 Land Compensation Act 1973
- If authorised by planning permission, no automatic defence available

Case study: Mynydd Clogau windfarm

- Permission for construction of windfarm granted following inquiry and extensive consideration of noise impacts
- Noise consistently shown to be compliant with conditions
- Neighbour still able (in principle) to complain to the magistrates under s 82
- Terms of permission likely to be relevant to:
  - Whether a nuisance at all (Coventry v Lawrence [2014] A.C. 822, per Lord Neuberger at [96])
  - Whether BPM used

Key points

- For infrastructure developers, route to consent may be important
- For neighbours, *terms* of consent should be focused on in decision-making process
  - Will those terms provide sufficient protection?
  - How (and by whom) will they be enforced?

Breakout Session Two

Main Room

Conditional contracts and development agreements — "onerous planning permission clauses" — how to draft them and how to enforce/escape from them

David Holland KC and Rupert Warren KC

Newman Room (room across the corridor)

Asylum Accommodation — housing and planning issues in the Courts and future problems

Tim Mould KC

Breakout Session Two – Main Room

LANDMARK CHAMBERS

Conditional contracts and development agreements — "onerous planning permission clauses" — how to draft them and how to enforce/escape from them

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Land Use Conference 2023

Breakout Session Two – Newman Room

LANDMARK CHAMBERS

Asylum Accommodation – housing and planning issues in the courts

Tim Mould KC

Land Use Conference 2023

The Home Secretary's responsibilities

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- Statutory responsibility to provide accommodation and other support to asylum seekers and their dependants who would otherwise be destitute.
- S.95 Immigration and Asylum Act 1999 r.5 Asylum Seekers (Reception Conditions) Regulations 2005
- If asylum seeker/dependants appear destitute while application for support being considered, SSHD must provide temporary support/accommodation
- S.98 IAA r.5 2005 Regulations
- "Destitute" includes cases in which person does not have adequate accommodation or means to obtain it

Impact of COVID pandemic

- **Prior to COVID pandemic** - Asylum seekers held at a clearance centre (48 hrs) moved into interim accommodation (2-3 weeks) before being placed in dispersed accommodation (usually conventional or local authority housing) until their claims were determined, then sent out into the community.

- **During COVID pandemic** - asylum seekers whose claims had been determined no longer compulsorily moved out of dispersed accommodation, creating blockage in throughput at interim centres; rate of processing application severely reduced; significant increase in arrivals in small boats.

Braintree District Council v SSHD [2023] EWHC 1076 (KB) at [13]-[14] [17]-[18]

Increasing demand – other factors

- Small boat arrivals at unprecedented levels since early 2021
- 8466 arrivals in 2020
- 28526 arrivals in 2021
- 45000+ arrivals in 2022
- Trend remains upwards – almost all submit asylum claims
- Afghan Relocation & Assistance Policy/Citizens Resettlement Scheme
- August 2021 evacuation brought 15000 people to UK
- April 2023 - 8,000 Afghan nationals in bridging accommodation – hotels

Braintree District Council v SSHD [2023] EWHC 1076 (KB) at [19]-[22]

Current position

- March 2023 – 109,000 asylum seekers in need of accommodation (Home Office estimate)
- Expected to increase to between 120,000-140,000 by end 2023 (HO estimate)
- Huge increase in need for interim accommodation

Braintree District Council v SSHD [2023] EWHC 1076 (KB) at [15]-[16]

Home Office response

- Provision of “contingency” accommodation – block booking hotels for particular periods – prior discussion with LPAs
- January 2022 – Manston “processing facility” opened with capacity to house temporarily 1,600 people
- October 2022 – Manston accommodating 4,000 people – severe overcrowding
- HO began to “spot book” hotels on per room basis as urgent relief measure
- Controversial with local authorities – see injunction cases (below)
- Early 2023 – review/site selection of Ministry of Defence sites to provide contingency accommodation
- 3 sites selected – RAF Wethersfield, RAF Scampton, site at Bexhill

Spot booking hotels – legal challenges

- Ipswich Borough Council v Fairview Hotels and Serco Ltd [2022] EWHC 2868 (KB)
- Great Yarmouth BC v Al-Abdin and Serco [2022] EWHC 3476 (KB)
- LPA claims for injunctions under section 187B Town and Country Planning Act 1990 on basis that proposed use of hotels to accommodate asylum seekers was unauthorised material change in their use from hotel to hostel use
- Holgate J heard *inter partes* applications for interim injunctions
- Applications failed in Ipswich
- Application succeeded in Great Yarmouth

Hotel claims – analysis (1)

- Holgate J applied classic *American Cyanamid* principles – Ipswich at [98]-[141]; Gt Yarmouth at [48]-[79]
- In both cases there was a triable issue – whether the proposed use of the hotel would involve a material change of use and thus a breach of planning control (Ipswich at [98]-[104]; Gt Yarmouth at [48]-[56])

Hotel claims – analysis (2)

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- Holgate J resolved the "balance of convenience" by focusing on the flagrancy and degree of planning harm that would result from the alleged breach of planning control – would the planning harm would be "substantial" – see Ipswich at [93]
- Balance favoured interim injunction in Gt Yarmouth – flagrant breach as hostel use contrary to strong development control policy applied to specific area and existing enforcement notice protecting hotel use – see [40], [67], [79] and compare Ipswich at [117], [131], [138]
- Holgate J characterised the result in Gt Yarmouth as founding upon the "special" circumstances of that case – primarily the existence of policy GY6
- No section 187B "hotel to hostel" case has gone to a final hearing

Military bases – legal challenges

- Braintree District Council v SSHD and SSD [2023] EWHC 1076 (KB); [2023] EWCA Civ 727
- R (West Lindsey District Council) v SSHD [2023] EWHC 1400 (Admin)
- Braintree involved a claim by the LPA for a final injunction under s.187B of the TCPA to restrain SSHD from using the site at RAF Wethersfield as contingency accommodation for asylum seekers. Waksman J held that the court lacks jurisdiction to consider granting an injunction under s.187B against Crown land. The Court of Appeal upheld the judge's decision.
- West Lindsey is a claim for judicial review of the SSHD's decision to deploy RAF Scampton as contingency accommodation for asylum seekers. Kerr J refused an interim injunction. The substantive claim is to be heard this month.

Braintree – the jurisdiction question (1)

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- RAF Wethersfield owned by MOD and therefore Crown land.
- The TCPA binds the Crown (s.292A) BUT subject to express provision made by Part 13 (ss.292A(2)).
- Ss.296A(2) –

  "A local planning authority must not take any step for the purposes of enforcement in relation to Crown land unless it has the consent of the appropriate authority".
- Ss.296A(4) –

  "A step taken for the purposes of enforcement is anything done in connection with the enforcement of anything done or required to be done or prohibited by or under this Act".

Braintree – the jurisdiction question (2)

“In our view an application for an injunction under section 187B is undoubtedly a "step taken for the purposes of enforcement". Section 187B is one of a series of provisions comprised in Part VII of the 1990 Act, whose collective description, in the heading of that Part, is "Enforcement". It is manifestly an enforcement provision. Its explicit purpose is to enable the local planning authority to restrain, by means of an injunction granted by the court, any "actual or apprehended breach of planning control", regardless of whether it has exercised or proposes to exercise any of its other powers under Part VII. If an authority applies to the court for such an injunction, as the council has done here, it is in our view clearly taking a "step for the purposes of enforcement" within the definition in section 296A(4)”.

Braintree (CA) at [51]

Military bases – the Part 19 Class Q PD right

- A.3(2) GPDO 2015 grants planning permission for –

"*Q. Development by or on behalf of the Crown on Crown land for the purposes of –*

(a) preventing an emergency;

(b) reducing, controlling or mitigating the effects of an emergency; or

(c) taking other action in connection with an emergency".

Q.1(b) Use of the land must cease before the expiry of 12 months beginning with date on which the development began.

Class Q PD right – what is an emergency?

- Q.2 –

"(1) For the purposes of Class Q, "emergency" means an event or situation which threatens serious damage to –

(a) human welfare in a place in the United Kingdom; or

(b) the environment of a place in the United Kingdom; or

(c) the security of the United Kingdom.

(2) For the purposes of sub-paragraph (1)(a), an event or situation threatens damage to human welfare only if it involves, causes or may cause –

…

(c) homelessness;…".

An emergency within the scope of Class Q?

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- SSHD in Braintree [81] –

"The Defendants contend that the unprecedented numbers of asylum seekers which the Secretary of State is legally obliged to support, combined with the absence of suitable accommodation, is an event or situation for the purposes of Class Q".

- Waksman J in Braintree [82] ff concluded Class Q applicable.
- A situation which develops over time can become a Class Q emergency. Real prospect of significant numbers of asylum seekers becoming homeless in the absence of available contingency accommodation threatens serious damage to human welfare. Not merely a policy choice but a statutory obligation in play. Development would reduce, control, mitigate effects.

Scope of Class Q – where are we now?

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- Waksman J's conclusions in Braintree are *obiter.*
- Court of Appeal in Braintree declined to rule on Class Q issue as dismissal of appeal on jurisdiction issue was determinative of appeal [64]
- Court of Appeal had in mind pending claims for judicial review by West Lindsey District Council and others seeking to challenge the lawfulness of SSHD's reliance on Class Q PD right in bringing forward MOD sites as contingency accommodation for asylum seekers.
- On 11 May 2023, Kerr J refused an interim injunction restraining SSHD from implementing the Class Q PD right at RAF Scampton, applying *American Cyanamid* principles – see [2023] EWHC 1400 (Admin) at [79]-[93].

Scope of Class Q – where are we now?

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- On 14th July 2023, following an oral hearing Thornton J gave permission for judicial review claims to proceed on the following grounds –

  (1) SSHD is not entitled to rely on the Class Q PD right as there is no Class Q "emergency". It is noteworthy that the claimant, a neighbouring resident, has been given permission to rely on expert evidence analysing the reasons why the "situation" relied on by SSHD has arisen.

  (2) The negative EIA screening direction given by the Secretary of State for Levelling Up, Housing and Communities is defective in law with the result that the SSHD is not permitted to rely on the Class Q PD right (see A.3(10) of the GPDO 2015).

  (3) SSHD has failed to discharge her PSED – s.149 of the Equality Act.

Military sites – future use

- The *West Lindsey* litigation is concerned primarily with the lawfulness of the SSHD's reliance on the Class Q PD right to authorize the development of military sites for use as contingency accommodation for asylum seekers.
- Class Q PD right limited in duration – use to cease within 12 months.
- Extended use requires authorization under Part 3 of TCPA by grant of planning permission on application or under Special Development Order.
- Expectation that SSHD will seek SDO(s).
- Cf R(Hough) v SSHD [2022] EWHC 1635 (Admin) – Napier Barracks No 2.

Lieven J held SDO for extended use of Napier Barracks unlawful on ground that SSHD had failed to discharge PSED in relation to proposed extended use of facility for up to 5 years – [106]-[109].

Other pending cases

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Ships and barges as contingency accommodation

On 10 October, Holgate J held oral permission hearing on judicial review claim contending that stationing of *Bibby Stockholm* at Portland is development amenable to development control under Part 3 of the TCPA – R(Parkes) v SSHD. Decision to be given on 11 October.

Rwanda appeals – R(AAA and others) v SSHD [2023] EWCA 745

Supreme Court heard SSHD's appeals on 9th -11th October.

Essential issue – political or legal?

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- SSHD evidence (see above in Braintree case) is that impact of COVID pandemic, small boats crisis and Afghanistan have combined to create situation of emergency which demands urgent supply of contingency accommodation which cannot be met sustainably or effectively through spot booking hotels – cost and legal risk. Hence military sites and barges.
- Local authorities and neighbouring residents case that political choice by SSHD not to resource processing of asylum applications is real cause of problem. Evidence is said to show that majority of applications are ultimately successful and applicants move into community. Not on analysis an emergency but a problem of SSHD's own making which can be remedied by resourcing the asylum claims process and thereby freeing the logjam in temporary accommodation available for use in discharging statutory duties.

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Question and Answer Session

David Elvin KC (Chair), Tim Mould KC, Toby Watkin KC, Richard Turney and Luke Wilcox

Land Use Conference 2023

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Thank you for listening

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