Landmark Chambers

Welcome to Part 3 of Landmark Chambers' Planning High Court Challenges webinar series

The recording may be accessed here.

Your speakers today are…

Landmark Chambers

Lord Carnwath (Chair)

David Elvin QC

Topic:
Recent development in Habitats Law

James Maurici QC

Topic:
The future of planning High Court challenges:
JR reform, the Planning White Paper, the Environment Act 2021,
levelling up and beyond

Your speakers today are…

Landmark Chambers

Tim Buley QC

Topic:
The role of the OEP under the Environment Act 2021

Georgina Fenton

Topic:
Practice and procedure update (including Aarhus costs)

Landmark Chambers

The role of the OEP under the Environment Act 2021

Tim Buley QC

OFFICE FOR ENVIRONMENTAL PROTECTION: REGULATOR'S REGULATOR

Landmark Chambers

- The Environment Act 2021 establishes the Office for Environmental Protection ("OEP") as a body corporate. Now live: Office for Environmental Protection | oep (theoep.org.uk)
- Section 23(1) says:

  (1) The principal objective of the OEP in exercising its functions is to contribute to—

  (a) environmental protection, and

  (b) the improvement of the natural environment.

- The OEP is not, however, given direct functions in relation to the protection of the environment (e.g. environmental permitting, flood defence, planning oversight etc). These functions are left with the appropriate pre-existing public body / regulator. Rather, the OEP is given two broad sets of functions:
  - "Scrutiny and advice functions", under sections 28-30
  - "Enforcement Functions", under sections 31-41

- These functions are all to be exercised in relation to acts of other public bodies, so that the OEP is best thought of as a regulator of other environmental regulators.
- Original conception was of a body that would replace EU Commission, but this is fundamentally problematic. Role of EU Commission was to monitor of compliance by UK, as EU Member State, with overriding EU legislation. Role of OEP is to monitor compliance of UK public bodies with UK environmental law

OFFICE FOR ENVIRONMENTAL PROTECTION: STRATEGY, AND LIMITS IN RELATION TO CLIMATE CHANGE

Landmark Chambers

- Under section 23, the OEP is required to prepare a strategy setting out how it intends to exercise its functions. No such strategy published as yet – OEP website indicates early / mid 2022. Strategy required to contain "enforcement policy" which explains its approach to whether cases are "serious", and which has regard to the "particular importance" of:

  ... prioritising cases that it considers have or may have national implications, and the importance of prioritising cases—
  (a) that relate to ongoing or recurrent conduct,
  (b) that relate to conduct that the OEP considers may cause (or has caused) serious damage to the natural environment or to human health, or
  (c) that the OEP considers may raise a point of environmental law of general public importance.

- The OEP's remit means that there is a potential overlap between its role and that of the Committee on Climate Change ("CCC"). The OEP is not, in general, precluded from considering issues in relation to climate change, but the possibility of overlap is recognised in the 2021 Act in various ways:
  - Under section 23(5), OEP's strategy required to set out how it intends to avoid overlap with CCC.
  - Under section 26, the OEP and CCC must enter into a memorandum of understanding on avoiding overlap and co-operation
  - The OEP's scrutiny functions are in some respects limited in relation to climate change.

OEP ADVICE AND SCRUTINY FUNCTIONS

Landmark Chambers

- OEP's advice and scrutiny functions are given by sections 28-30:
  - Under section 28, the OEP has functions in relation to the monitoring of environmental plans and targets
  - Under section 29, the OEP has a function of monitoring and reporting in relation to the "implementation" of environmental law
  - Under section 30, the OEP has a function in giving Ministers of the Crown "advice" about changes to environmental law.

- Not directly relevant to High Court Planning litigation, but fruits of these functions (e.g. reports etc) may of course become important ammunition in such litigation.

OEP – ENFORCEMENT FUNCTIONS

Landmark Chambers

- OEP has enforcement functions under sections 31-43 of the Act. All such functions relate (see section 31(1)) to

  ... failures by public authorities to comply with environmental law ...

- Three main enforcement functions:

  (i) Consideration of complaints and carrying out of investigations (sections 33-38);

  (ii) Bringing proceedings for "environmental review" (section 39);

  (iii) Bringing and intervening in claims for judicial review (section 40).

- The first two of these, *complaints / investigations* and *environmental review*, are linked, in that the latter can only take place upon the completion of the former. Judicial review is separate albeit some understanding of the OEP's role in judicial review is important in understanding the other functions.

"FAILURE TO COMPLY WITH ENVIRONMENTAL LAW"

Landmark Chambers

- Section 31(2) says as follows:

  … a reference to a public authority failing to comply with environmental law means the following conduct by that authority—

  (a) unlawfully failing to take proper account of environmental law when exercising its functions;

  (b) unlawfully exercising, or failing to exercise, any function it has under environmental law.

- Environmental law is defined in section 46:

  … any legislative provision to the extent that it (a) is mainly concerned with environmental protection and (b) is not concerned with an excluded matter [access to information, defence or taxation]"

- Questions / problems:
  (i) Definition of "failure to comply" appears to *narrow* meaning of this phrase
  (ii) What is scope of OEP's consideration of environmental law? Is it limited to judicial review scrutiny, or can it carry out more detailed factual investigation and determine facts for itself?
  (iii) Note limitation to "legislative" provisions
  (iv) Mostly focussed on "public" environmental law, but OEP could arguably consider e.g. commission of statutory torts by statutory undertaker

OEP – COMPLAINTS AND INVESTIGATIONS

Landmark Chambers

- Members of the public may make a "complaint" to the OEP concerning an alleged failure to comply with environmental law (section 33)

- No limitation on subject matter, and can include planning related matters including grant of planning permission

- Either pursuant to such a complaint, or of its own motion, the OEP may carry out an investigation in relation to possible failures to comply with environmental law, under section 34. Note that OEP is not limited to investigating complaints, but may also initiate investigation of its own motion.

- Process further delineated in sections 35-37, including duty to keep complainants informed, and power to issue information notice seeking information relating to the alleged breach.

OEP – DECISION NOTICES

Landmark Chambers

- Under section 37, OEP can issue a "decision notice" if it concludes that public authority has failed to comply with environmental law and that the failure is serious (section 35(1)). In such a case, the decision notice:

  A decision notice is a notice that—

  (a) describes a failure of a public authority to comply with environmental law,

  (b) explains why the OEP considers that the failure is serious, and

  (c) sets out the steps the OEP considers the authority should take in relation to the failure (which may include steps designed to remedy, mitigate or prevent reoccurrence of the failure).

- Public authority must then indicate whether it intends to take the steps recommended (section 37(5))
- So "remedy" is in in (c). Note limitations:
  - OEP recommendation is *non-binding*
  - OEP does *not* have power to *set aside, quash or undo* the action in question
- So fruits of investigation may not have much implications for the individual planning decision, or satisfy the complainant

OEP – ENVIRONMENTAL REVIEW

Landmark Chambers

- Section 38(1) provides that OEP may apply to the court (in England and Wales, the High Court) for an environmental review where it has issued a decision notice and continues to think that the conditions for issue of that notice (serious failure to comply with environmental law) are made out.
- Critical features:
  - Can only be brought at *conclusion* of investigation, following issuing of decision notice
  - Subject of application / claim is conduct in decision notice i.e. the original conduct of the public body which the OEP has investigated. Thus in effect this is a *statutory review / JR* of that decision (section 38(2))
  - No time limit for bringing of ER claim
    - No time limit by reference to timing of original decision
    - No time limit by reference to timing of ER investigation or decision notice
    - Statutory ouster clauses are ignored (section 38(4)). So e.g. OEP would be entitled to bring ER of grant of planning permission by Secretary of State on appeal, or even grant of DCO
    - "Highly likely" test does not apply
- Role of court specified by section 38(5):

  On an environmental review the court must determine whether the authority has failed to comply with environmental law, applying the principles applicable on an application for judicial review

OEP – ENVIRONMENTAL REVIEW REMEDY

Landmark Chambers

- Section 38(1) provides that OEP may apply to the court (in England and Wales, the High Court) for an environmental review where it has issued a decision notice and continues to think that the conditions for issue of that notice (serious failure to comply with environmental law) are made out.
- Section 38(2) – subject of application is conduct in decision notice
- Role of court specified by section 38(5):

  On an environmental review the court must determine whether the authority has failed to comply with environmental law, applying the principles applicable on an application for judicial review.

- Remedy:
  - Statement of non-compliance ("SONC") (section 38(6))
  - Where SONC made, may also grant any remedy available on judicial review, and subject to certain limitations relating to prejudice to third parties.

- Response
  - Public body must also publish a statement as to steps it proposes to take. But not for court to specify or recommend steps. No obvious remedy if steps are nugatory or not in the event complied with

RESTRICTION ON ER REMEDIES

Landmark Chambers

- Primary / first remedy in ER, if successful, will be “statement of non-compliance” under section 38(5) and (6)) – that is, a “statement ... that the authority has failed to comply with environmental law”

- Major controversy in Parliament over court’s ability to grant remedies in ER beyond that. Final upshot is that it can grant Any remedy available on judicial review other than damages, but subject to satisfaction of “condition A” or “condition B”.
  - Condition A:

    (9) Condition A is that the court is satisfied that granting the remedy would not—

    (a) be likely to cause substantial hardship to, or substantially prejudice the rights of, any person other than the authority, or

    (b) be detrimental to good administration.
  - Condition B:

    (10) Condition B is that Condition A is not met but the court is satisfied that-

    (a) granting the remedy is necessary in order to prevent or mitigate serious damage to the natural environment or to human health, and

    (b) there is an exceptional public interest reason to grant it.

- Condition A will look familiar from section 31 SCA 1981, but is not linked to “delay”. In practice it means that is likely to mean that no substantive remedy can be granted in the great majority of cases
- Condition B provides a get out, but will presumably be limited to rare cases

MISMATCH BETWEEN OEP AND ER REMEDIES

Landmark Chambers

- Where it finds a failure to comply with environmental law, the OEP issues a decision which must explain the nature of the breach, why it is serious and:
  …set[] out the steps which the OEP considers the authority should take in relation to the failure (which may include steps designed to remedy mitigate or prevent recurrence of the failure).

Limitations:

  - Non-binding
  - OEP can only recommend / invite authority to do something which it has power to do. But in many or most cases, the authority will be *functus officio* (see *In re Denton Road, Twickenham, Re* [1953] Ch 51) and unable to reverse the action which is the subject of complaint. This severely limits the remedies which the OEP can grant / recommend

- By contrast, court on environmental review can grant judicial review remedies such as quashing order and the like. The subject of the environmental review is, not compliance with the OEP's recommendation, but the underlying subject of complaint / investigation. But court cannot recommend, or enforce, OEP's wider recommendations.

- This mismatch is likely to undermine both procedures:
  - Complainant whose real aim is to reverse the action complained of will not be attracted to OEP process, knowing that OEP cannot grant the remedy that is sought and that it will depend on further court action at end of process.
  - OEP is left with no means of enforcing wider recommendations

OEP INVESTIGATIONS AND ER: POSSIBLE "TARGETS" IN PLANNING

Landmark Chambers

- What are the possible targets of these OEP enforcement powers in the planning context:
  - Planning permissions Potentially radical new ability to bring challenges to planning permissions outside of the mechanisms provided for in the Planning Acts, with no time limit, no "highly likely" protection, etc. But may be rare in practice:
    - Not attractive to complainants for "mismatch" reasons, loss of control of process
    - Restrictions on remedies will be key, generally will protect planning permissions
    - OEP's strategic priorities means that it is unlikely to become involved in routine, even important, planning cases routinely
  - DCOs: Similar considerations apply, may be more likely to meet OEP's "seriousness" threshold
  - Plan-making Challenge here would fit in with OEP's strategic priorities. Will be interesting to see court's approach to grant of remedies *vis a vis* quashing of individual policies, prejudice to third parties

OEP JR

Landmark Chambers

- Section gives the OEP power, *inter alia,* to seek judicial review of other public bodies, but only where it considers that "the conduct" in issue constitutes a serious failure to comply with environmental law and where it considers that making a claim for judicial review:

  … (rather than proceedings under sections 36 to 39) is necessary to prevent, or mitigate, serious damage to the natural environment or human health.

- This is called the "urgency condition", presumably on the basis that it limits judicial review to cases which are too urgent for investigation / environmental review.

- Not quite its effect, because it would also appear to justify judicial review where investigation / environmental review could not provide an appropriate remedy i.e. in cases where a quashing order is needed.

- Probably cannot be used to enforce OEP recommendations in a decision notice, because refusal to comply with recommendation will not generally itself be a failure to comply with environmental law.

- OEP nevertheless potential major new player in environmental, including planning, judicial review.

Landmark Chambers

The future of planning High Court challenges: JR reform, the Planning White Paper, the Environment Act 2021, levelling up and beyond

James Maurici QC

Introduction

- *“It is difficult to make predictions, especially about the future”*

- Look at the future of Planning High Court challenges, consider:

  - (i) The Judicial Review and Courts Bill;
  - (ii) The Planning White Paper;
  - (iii) The Environment Act 2021 (excluding the OEP);
  - (iv) The levelling up agenda;
  - (v) Other recent and likely to continue trends in the cases.

The Judicial Review and Courts Bill

Landmark Chambers

- Pattern of Government since c. 2012:
  - (i) Incremental changes to judicial review aimed at limiting it;
  - (ii) Issuing consultation papers etc proposing numerous & radical changes and then doing something much less
- The Judicial Review and Courts Bill follows this pattern …
- But we can expect more changes …

Judicial Review and Courts Bill

- Only one of two clauses at all relevant to Planning High Court challenges;
- S. 1 provides

> *"A quashing order may include provision—*
>
> *(a) for the quashing not to take effect until a date specified in the order, or*
>
> *(b) removing or limiting any retrospective effect of the quashing"*

Judicial Review and Courts Bill

Landmark Chambers

Court to consider:

(a) the nature and circumstances of the relevant defect;

(b) any detriment to good administration that would result from exercising or failing to exercise the power;

(c) the interests or expectations of persons who would benefit from the quashing of the impugned act;

(d) the interests or expectations of persons who have relied on the impugned act;

(e) so far as appears to the court to be relevant, any action taken or proposed to be taken, or undertaking given, by a person with responsibility in connection with the impugned act;

(f) any other matter that appears to the court to be relevant. the nature and circumstances of the relevant defect.

The Planning White Paper (1)

- Speech on the economy on 30 June 2020, the Prime Minister, Boris Johnson, argued that "*newt-counting delays*" slowed down house building. He said that, in the recovery from the Covid-19 pandemic, we would "*build better and build greener but we will also build faster*".
- August 2020 The long-awaited Planning for the Future white paper was launched on 6 August 2020
- Consultation closed October 2020
- Since then yet another new S/S, and no real idea where this is heading …
- So more recently PM conference speech pledges no homes on green field sites:
  - Knocked off course several Local Plans
  - Is this policy? No. See:
    - ***R. (Cala Homes (South) Ltd) v Secretary of State for Communities and Local Government*** [2011] 1 P. & C.R. 22;
    - ***R. (Friends of the Earth Ltd) v Heathrow Airport Ltd*** [2021] 2 All E.R. 967

The Planning White Paper (2)

Landmark Chambers

- Gove's statements Delphic …
- *"It is only fair to say that the planning white paper was mischaracterised by many."*
- *"There is so much that is good in it, but it is important that we listen to concerns that were expressed in order to ensure that an already powerful and compelling suite of proposals is even more effective."*
- Gove had earlier said he was currently considering all the responses to the White Paper and will make announcements "*on the next steps in due course*."
- Prediction: much quietly shelved … reform but limited …

The Planning White Paper (3)

Landmark Chambers

- (1) Unlikely we will see “zoning” now?
  - But if we do legal issues?
  - (i) SEA vs EIA of Plans;
    - NB, clear more needed for EIA than SEA, given higher level: see ***R. (Plan B Earth) v Secretary of State for Transport*** [2020] P.T.S.R. 1446
    - Same issues for habitats: see ***R. (Buckinghamshire CC) v SST*** [2013] EWHC 481 (Admin) citing ***Commission v UK*** Case C-6/04 [2005] ECR I-9017 adverse effects on sites to be considered to the extent possible at each successive stage, where the level of detail in the plan or project permitted more specific assessments.
  - (ii) Speeding up Plan making vs increased work and importance of plans …
  - (iii) Legal challenges to Plans.
- (2) Infrastructure Levy, still struggling with legal issues from CIL … see e.g. recent controversy over ***Stonewater v Wealden DC*** [2021] EWHC 2750 (Admin).
- (3) Replacement of s. 106? Really?

Environment Act (1)

- Section 17(1) requires the Secretary of State to prepare a policy statement on environmental principles ("EPPS").
- This is defined in section 17(2) as "*a statement explaining how the environmental principles should be interpreted and proportionately applied by Ministers of the Crown when making policy*"
- Section 17(4) of the Environment Act requires the Secretary of State to be satisfied that the EPPS will contribute to the improvement of environmental protection and sustainable development.
- Section 19(1) provides that a Minister of the Crown must, when making policy, have due regard to the EPPS currently in effect.

Environment Act (2)

- The principles are set out in section17(5) as follows:
  - *"(a) the principle that environmental protection should be integrated into the making of policies,*
  - *(b) the principle of preventative action to avert environmental damage,*
  - *(c) the precautionary principle, so far as relating to the environment,*
  - *(d) the principle that environmental damage should as a priority be rectified at source, and*
  - *(e) the polluter pays principle."*
- Section 19(2) clarifies that the statement does not require a Minister to do or refrain from doing anything that would "*have no significant environmental benefit*" or "*would be in any other way disproportionate to the environmental benefit*" (emphasis added).
- The Government consulted on the draft EPPS between 10 March 2021 to 2 June 2021.

Environment Act (3)

- In the draft EPPS - lots on proportionality: *"This policy statement will contribute to the improvement of environmental protection by setting out how the principles should be interpreted and proportionately applied by Ministers so that they are used effectively and embedded in policy to protect the environment."* Is this a concern?
- Draft EPPS contains further definitions of the principles and guidance on their application, and their interaction. Definitions still quite limited …
- Draft EPPS gives examples of possible actions that could be taken as a result of having considered the principles may include: (1) Amending policy options or including an additional policy option in the initial design of a policy, which reflects consideration of the environmental principles. (2) Reframing the policy to accommodate the principles. (3) Embedding a principle in law or guidance. (4) Postponing a policy.
- Interim OEP gave advice on draft EPPS.

Environment Act (4)

"The legal duty to have due regard to this policy statement applies to Ministers when making policy. Policy can be broadly understood as an intended course of action adopted to achieve an objective. Making policy means making a new policy or making a substantial change to an existing policy.

Examples of policy include the process of making, developing, revising4 or repealing:

- *proposals or activities that lead to legislation;*
- *national policy statements, strategies and frameworks;*
- *Ministerial statements marking substantial changes in policy;*
- *policies, strategies and frameworks prepared by public bodies that Ministers are required by statute to approve;*
- *any other document that sets out a substantial change in approach to an established policy position.*

Policy vs individual decisions

The duty is not designed to capture individual regulatory, planning or licensing decisions made by Ministers or authorities acting on their behalf"

Environment Act (5)

- **WHY DO WE NEED ALL OF THIS?:** These principles are derived from EU Treaties not retained EU law.
- **SCOPE**: NB but EPPS only applies to Ministers of the Crown making policy.
- NB on Precautionary Principle ("PP") – how else relevant:
- (i) PP embedded in some EU legislation, e.g. Habitats Directive, which was transposed into UK law and is now retained EU law;
- (ii) Some CJEU cases suggest the PP is a general principles of EU law, and these are retained EU law;
- (iii) Article 393 of the Trade and Co-operation Agreement.
  - Parties commits to respecting the internationally recognised environmental principles to which it has committed, such as in the Rio Declaration in particular: (a) the principle that environmental protection should be integrated into the making of policies, including through impact assessments; (b) the principle of preventative action to avert environmental damage; (c) the precautionary approach referred to in Article 356(2);
  - EU (Future Relationship) Act 2020, s. 29 gives effect to Agreement.

Environment Act (6)

- (iv) Is the PP part of domestic law more generally?
  - ***R v Secretary of State for Trade and Industry ex p Duddridge*** [1995] 3 CMLR 231 says no;
  - Some other domestic cases seems to have proceeded on basis it was: e.g. CA in Preston ***New Road Action Group v Secretary of State for Communities and Local Government*** [2018] Env LR 18 and ***R (Plan B Earth) v Secretary of State for Transport*** but decision reversed in SC.
- (v) Is it part of common law as customary international law?
  - See O McIntyre and T Mosedale, "The precautionary principle as a norm of customary international law" (1997) 9 Journal of Environmental Law 221;
  - A Trouwborst, *Evolution and Status of the Precautionary Principle in International Law* (2002)
  - customary international law is presumptively part of the common law: ***R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs*** [2016] AC 1355 (SC), paras. 144-151 (Lord Mance)

Environment Act (7)

- Other principles find outlet beyond situations where EPPS applies?
- See ***Fishermen and Friends of the Sea v Minister of Planning, Housing and the Environment*** [2017] UKPC 37 per Lord Carnwath

  > *"The Polluter Pays Principle ("PPP" or "the Principle") is now firmly established as a basic principle of international and domestic environmental laws. It is designed to achieve the "internalization of environmental costs", by ensuring that the costs of pollution control and remediation are borne by those who cause the pollution, and thus reflected in the costs of their goods and services, rather than borne by the community at large (see eg OECD Council 1972 Recommendation of the Council on Guiding Principles concerning International Economic Aspects of Environmental Policies; Rio Declaration 1992 Principle 16)."*

- Refers to multiple sources of international law for principle …
- Common law?
- Not much basis for other principles in our case-law.

Levelling up

- THE NEXT BIG THING?
- Importance underlined by renaming of Department.
- Good Law Project JR of the Levelling Up Fund
- See Pork Barrel Politics (crowdjustice.com) "*The huge £4.8bn fund pretends to be the centrepiece of a levelling up agenda – but we think it's just a way to funnel money into constituencies of political benefit to the Conservative Party.*"
- Granted permission.
- Grounds relate to Equality Act and lack of transparency.

- Subsidy control (what was State aid) issues?

Other trends (1)

- It has been quite a year for legal challenges to DCOs under the 2008 Act, with the first four successful challenges having taken place:
  - (1) Manston Airport DCO: consent to judgment.
  - (2) Norfolk Vanguard windfarm DCO: ***R (Pearce) v SSBEIS*** [2021] EWHC 326 (Admin).
  - (3) The A38 Derby Junctions DCO: consent to judgment
  - (4) The A303 Stonehenge DCO: ***R (SAVE) v SST [***2021] EWHC 2161 (Admin)

See this trend likely to continue …

I predicted this back in 2009, see Judicial review under the Planning Act 2008 J.P.L. 2009, 4, 446-451

Taken a while for this prediction to come true …

Other trends (2)

- Plus seen rise of first substantive JRs to:
  - (i) adoption of NPSs (see the Heathrow/ANPS litigation, 6 JRs); and
  - (ii) refusals to review NPSs, see:
    - ***R (Vince & Others) v SSBEIS*** (CO/1832/2020) JR claim against unlawful failure by SoS to review the Energy NPSs, settled when review announced;
    - JRs threatened of SST decision of 6 September 2021 not to review ANPS - see e.g. https://goodlawproject.org/update/government-legal-commitment/ … not launched
- Rise of these NPS challenges seem to me driven by cases like ***R (Thames Blue Green Economy Ltd) v Secretary of State for Communities and Local Government*** [2016] JPL 157 and ***R (Scarisbrick) v Secretary of State for Communities and Local Government*** [2017] EWCA Civ 787 and limits of what can be challenged in DCO process where NPS in place. See also ***R (Spurrier) v SST*** [2020] PTSR 240 at paras. 97 – 112.

Other trends (3)

- Review of NPSs built into Planning Act, s. 6;
- Where SoS decides not to review or to review and not change or to review and change, judicial review provided for under s. 13 of the2008 Act;
- S. 6 provides *"[i]n deciding when to review a national policy statement the Secretary of State must consider whether—*
- *(a) since the time when the statement was first published or (if later) last reviewed, there has been a significant change in any circumstances on the basis of which any of the policy set out in the statement was decided,*
- *(b) the change was not anticipated at that time, and*
- *(c) if the change had been anticipated at that time, any of the policy set out in the statement would have been materially different."*
- See https://www.gov.uk/guidance/planning-act-2008-guidance-on-the-process-for-carrying-out-a-review-of-existing-national-policy-statements
- In my view this unlikely to stem the tide …

Landmark Chambers

Practice and procedure update (including Aarhus costs)

Georgina Fenton

Introduction

1. New Part 54 Practice Directions
2. Disclosure and Duty of Candour
3. New directions for OPHs
4. Aarhus Costs
5. General points on costs
6. Setting aside refusal of PTA
7. Delay

Landmark Chambers

New Part 54 Practice Directions

The new Practice Directions

Landmark Chambers

- Before 31 May 2021 CPR Part 54 was supplemented by four PDs: 54A, 54C, 54D and 54E (PD 54B had been previously revoked).

- Amendments to CPR Part 54 which came into effect from 31 May 2021:
  - PD 54A: General provisions relating to judicial review
  - PD 54B: Urgent applications and other applications for interim relief
  - PD 54C: Administrative Court (Venue)
  - PD 54D: Planning Court Claims
  - PLUS: Administrative Court Electronic Bundle Guidance

NB: The rules relating to planning court claims have not undergone any substantive changes. The main changes are in relation to PD54A.

PD 54A (1)

Landmark Chambers

- The changes made to PD 54A were prompted by concerns expressed by the Court of Appeal in a number of cases, including ***R (Dolan and others) v Secretary of State for Health and Social Care*** [2020] EWCA Civ 1605. In that case the Court highlighted (at [116]-[118])
  - the importance of “procedural rigour”;
  - the need to avoid “excessive prolixity and complexity in what are supposed to be concise grounds for judicial review”;
  - and the need to avoid a “rolling” approach to judicial review where multiple subsequent amendments to the claim are made.

PD 54A (2)

Landmark Chambers

- The changes to PD 54A now mean that the following page limits apply:
  - Statement of Facts and Grounds: 40 pages
  - Summary Grounds: 30 pages
  - Detailed Grounds: 40 pages
  - Skeletons: 25 pages
  - Hearing bundle: if exceeds more than 400 pages, then need a core bundle

Landmark Chambers

Disclosure and Duty of Candour

Pre-action

- PD 54A does not deal with the pre-action stage.
- JR Pre-action Protocol aims to ensure parties "*understand and properly identify the issues in dispute in the proposed claim and share information and relevant documents*" (para. 3(a)).
- Paragraph 13 says:
  i. Requests for documents should be **proportionate** and **limited to what is properly necessary** for C to understand why the decision has been taken.
  ii. D should comply with any request which meets these requirements "unless there is good reason for it not to do so".
  iii. Where the court considers that a public body should have provided relevant documents and/or information, it may **impose costs sanctions**.
- Paragraph 23 says D's response should: (i) enclose any relevant documentation requested by C or explain why the documents are not enclosed; and (ii) where documents cannot be provided within the time scales required, then give a clear timescale for provision.

Pre-permission

Landmark Chambers

Disclosure

- PD 54A, paragraph 6.2 (2):

  "*The Summary Grounds should identify succinctly any* ***relevant*** *facts. Material matters of factual dispute (if any) should be highlighted. The Grounds should provide a brief summary of the* ***reasoning underlying the measure*** *in respect of which permission to apply for judicial review is sought* ***unless*** *the defendant gives reasons why* ***the application for permission can be determined without that information***"

- So, in short, the obligation in terms of disclosure is to:

  (i) identify succinctly the relevant facts; and

  (ii) provide a brief summary of the underlying reasoning, unless permission can be determined without this.

Duty of Candour

- PD 54A makes no explicit mention of the Duty of Candour at the pre-permission stage.

Post-permission

PD 54A

- Para 10.1 "*In accordance with the **duty of candour**, the defendant should, in its Detailed Grounds or evidence, identify any relevant facts, and the reasoning, underlying the measure in respect of which permission to apply for judicial review has been granted*."
- Para 10.2 "***Disclosure is not required** unless the court orders otherwise*."

Paragraph 10.1 is significant because:

(1) **For the first time** there is explicit reference to Duty of Candour in CPR rules or PD;

(2) This suggests that the Duty of Candour obligation is most clearly engaged at the detailed grounds/evidence stage, rather than pre-permission;

(3) The way that the duty is expressed is focused on identifying the relevant facts and any underlying reasoning, and **NOT** the provision of documents.

Landmark Chambers

New directions for OPHs

Oral Permission Hearings

Landmark Chambers

- New directions imposed for oral permission hearings in the High Court.
  1. 30 min hearing;
  2. C must file an electronic Permission Hearing Bundle within 14 days of letter;
  3. If C wishes to produce skeleton it must be filed 7 days before the hearing and be no more than 10 pages;
  4. C must file an authorities bundle 7 days before;
  5. Failure to comply with these Directions will result in the case being referred to a judge to consider whether the claim should be struck out, or other order made;
  6. Any application to vary these Directions must be made on notice to any D and IP.

Landmark Chambers

Aarhus Costs

R (Friends of the Earth Ltd) v Secretary of State for Transport [2021] PTSR 941

Landmark Chambers

- Judgment handed down January 2021.
- Court of Appeal had ordered the Secretary of State to pay the costs of Friends of the Earth, amounting to £70,000.
- The question was whether this sum was inclusive or exclusive of VAT.
- It was held that the capped costs recoverable from a Claimant or Defendant as specified in CPR r 45.43 in an Aarhus Convention claim (as defined in CPR r 45.41) are, consistently with that Convention, **absolute and unqualified figures and so fall to be treated as <u>inclusive</u> of VAT**.

R (CARA) v North Devon DC [2021] EWHC 703 (Admin)

- Judgment handed down in March 2021.

- Applied *R (Friends of the Earth Ltd) v Secretary of State for Transport* [2021] PTSR 941 to hold that the Interested Party's cost liability was limited to £35,000 inclusive of VAT.

- The court varied the cost order accordingly, holding that this was the "fair course".

Landmark Chambers

General points on costs

Multiple costs at permission stage (*Mount Cook* costs) (1)

- Established position: if permission is refused at the permission stage, multiple defending parties are prima facie entitled to seek their costs (AoS and SGR) from the Claimant (as per ***R (Mount Cook) v Westminster City Council*** [2017] PTSR 1166).

- This position was challenged in ***CPRE Kent v Secretary of State for Communities and Local Government*** [2021] 1 WLR 4168 on the basis that it is inconsistent with the decision in ***Bolton Metropolitan District Council v Secretary of State for the Environment (Practice Note)*** [1995] 1 WLR 1176.

Multiple costs at permission stage (*Mount Cook* costs) (2)

Landmark Chambers

- The Supreme Court noted three important points:
  - *a)* *Bolton* can be distinguished: it concerned the award of costs after a substantive hearing and pre-dated the introduction of the CPR Rules.
  - b) Despite judicial calls for the CPR to include the procedure for cost applications at the permission stage, no amendments to that effect have been made.
  - c) In planning cases, overall costs are often controlled by Aarhus caps.

- The Supreme Court held:
  - a) If permission is refused, C **may** be liable to more than one D and/or IP for the costs of preparing and filing their AoS and SGR.
  - b) It is **not necessary** for the additional Ds and/or IPs to show ‘exceptional’ or ‘special’ circumstances in order, in principle, to recover those costs.
  - c) However, to be recoverable, those costs must be **reasonable** and **proportionate**.

Determination of cost issues

Landmark Chambers

- Other important point from *CPRE*, was the application and reiteration of *R (Gourlay) v Parole Board* [2020] 1 WLR 5344.
  - The Court of Appeal has the principal responsibility for monitoring and controlling the developing practice in relation to orders for costs.
  - Accordingly, absent an error of law of general public important, the Supreme Court is very slow to intervene in such matters.

- In *CPRE*, the Supreme Court held that it is "wrong to treat its [the CA's] rulings on principles of practice as binding legal precedents from which it could not depart … Nonetheless, it was appropriate for the Court of Appeal to review a decision laying down a principle of practice **only where there was a sufficient reason to do so**, such as where there has been a material change of circumstances or where a previous case had been decided per incuriam" (at [18]).

Landmark Chambers

Setting aside refusal of PTA

CPR 52.30 (1)

Landmark Chambers

- Under CPR 52.30 a party can apply to re-open a final determination refusing permission to appeal in a JR.

- The wording of CPR 52.30 demonstrates that it is a high test to be met:

  "(1) The Court of Appeal or the High Court **will not** reopen a final determination of any appeal unless—

  (a) it is **necessary** to do so in order to **avoid real injustice**;

  (b) the circumstances are **exceptional** and make it appropriate to reopen the appeal; and

  (c) there is **no** alternative effective remedy."

CPR 52.30 (2)

Landmark Chambers

- The difficulty in meeting the test to re-open a final determination was reiterated recently in ***Wingfield v Canterbury CC*** [2020] EWCA Civ 1588.
- The opening paragraph of the judgment states: “The question raised by these renewed applications, put at its simplest, is this: when must an unsuccessful litigant accept “No” for an answer?”
- The Court of Appeal went on to hold that:

  > “unmeritorious applications under CPR 52.30 […] undermine the principle of finality in legal proceedings. They also impose an unnecessary burden on the court’s resources, impede access to justice for litigants in other proceedings, including those with the benefit of costs protection in Aarhus Convention claims, and are damaging to the rule of law itself”.

- The lesson: **CPR52.30 should be used very sparingly**.

CPR 52.30 (3)

- ***Mariana v BHP Group PLC* [2021] EWCA Civ 1156**. Claimants' relied upon CPR r.52.30 to appeal against the refusal of permission to appeal a strike out of their claim.
- The court held that the "**stringent test"** imposed by CPR 52.30 was **satisfied** because:

  a) in refusing permission, the judge had failed to address essential points that went to the heart of the claimants' challenge;

  b) that failure critically undermined the integrity of the process for granting PTA;

  c) if the judge had grappled with the essential points there was a "powerful probability" that the outcome would have been different, and that he would have granted PTA.

- However, this was a "**most unusual case**" where the claim was of exceptional importance and the issues raised of wide general importance.
- In conclusion: CPR 52.30 can be relied upon successfully but only in exceptional circumstances.

Landmark Chambers

Delay

R (Croyde Area Residents Association) v North Devon District Council [2021] P.T.S.R. 1514

Landmark Chambers

- High Court judicial review of a grant of planning permission dating back to 2014.

- The High Court exercised its discretion to grant the extension of time, despite
  a) the judicial review being issued more than 6 years late
  b) the developer obtaining a Lawful Development Certificate based on the 2014 Permission and,
  c) the Lawful Development Certificate having not been challenged in the 6 weeks allowed under Planning Acts.

- Two overriding factors:
  a) harm that would flow from upholding the planning permission given it would allow for development in an AONB which had never been lawfully permitted;
  b) It would undermine the credibility of the planning system if a permission granted in complete error was not quashed.

- Interestingly, this case was given permission to appeal to the Court of Appeal, but the appeal has been withdrawn.

R (Flyde Coast Farm) v Flyde BC [2021] 4 All ER 381

Landmark Chambers

- Considered the time limits that apply to challenges to Neighbourhood Plans under section 61N of the TCPA 1990.
- The making of neighbourhood development orders or plans is a seven step process. Section 61N makes separate statutory provision about challenges to step 5 (consideration of the independent examiner's report), step 6 (holding a local referendum) and step 7 (making the order or plan).
- The court considered the scenario where a challenge is brought to the making of a neighbourhood development order or plan which is based upon a challenge to an earlier step in the prescribed process, which is said to invalidate the making of the order or plan itself.
- It held: a party cannot wait and challenge for errors in stages 5 and 6 by way of a Judicial Review of stage 7.

Landmark Chambers

Recent development in Habitats Law

David Elvin QC

Introduction

- Environment Act 2021
  - There are many provisions which may impact on habitats and conservation e.g. the provisions for biodiversity net gain (Part 6), conservation covenants (Part 7), local nature recovery strategies, species strategies and protected site strategies (Part 6).
  - The species and protected site strategies seem likely to overlap with protections under the 2017 Regulations.
  - There are specific powers, with some protections, to amend the provisions of the 2017 Regulations
- Nutrient neutrality in the discharge of effluent from new developments and appropriate assessment – ***R (Wyatt) v Fareham BC & Ors.*** [2021] EHWC 1434 (Admin)

The Environment Act: ss. 112-113

Landmark Chambers

- New provisions conferring powers to amend the Conservation of Habitats and Species Regulations 2017
- One major provisions, introduced by the HL as cl. 115, did not survive Parliamentary "ping-pong" … it would have prevented any reduction in protection embodying the notion of non-regression present in the earlier version of the Brexit agreements but omitted from the agreed version.
- ss. 112-113 contains powers for the Secretary of State to amend the general duties and Part 6
- The reasons for the creation of these powers appears questionable. The manner in which these powers may be exercised in conjunction with the new strategies appears unclear at present.

The Environment Act: s. 112

Landmark Chambers

- S. 112 permits amendment to the 2017 Regs for the purposes in s. 112(2) and also for those matters in (3)-(5) (to clarify the scope of reg. 9). S. 112(2) purposes are:

  "(a) to require persons within regulation 9(1) of the Habitats Regulations to exercise functions to which that regulation applies—

  (i) to comply with requirements imposed by regulations under this section, or

  (ii) to further objectives specified in regulations under this section,

  instead of exercising them to secure compliance with the requirements of the Directives;

  (b) to require persons within regulation 9(3) of the Habitats Regulations, when exercising functions to which that regulation applies, to have regard to matters specified by regulations under this section instead of the requirements of the Directives.

  (3)The regulations may impose requirements, or specify objectives or matters, relating to—

  (a) targets in respect of biodiversity set by regulations under section 1 or 3;

  (b) improvements to the natural environment which relate to biodiversity and are set out in an environmental improvement plan."

The Environment Act: s. 112

Landmark Chambers

- S. 112(4) and (5) confers power on the SoS to "impose any other requirements, or specify any other objectives or matters, relating to the conservation or enhancement of biodiversity that the Secretary of State considers appropriate" and to make consequential amendments to any amendments made for the purposes in s. 112(2).
- Although cl. 115 has not survived, s. 112(6) and (7) set some boundaries:

  "(6) In making regulations under this section the Secretary of State must have regard to the particular importance of furthering the conservation and enhancement of biodiversity.

  (7) The Secretary of State may make regulations under this section only if satisfied that the regulations do not reduce the level of environmental protection provided by the Habitats Regulations."
- The weakness in these provisions are that the first is a "have regard" requirement only and the second is not absolute but only "if satisfied" though there are some protections in (8) and (9) requiring the SoS to lay before Parliament, and publish, a statement explaining why he is satisfied under (7) and to consult such persons as the SoS considers appropriate.

The Environment Act: s. 113

Landmark Chambers

- Reg. 9 of the 2017 Regulations is a general duty to secure compliance with "the Directives"
  - "(1) The appropriate authority, the nature conservation bodies and, in relation to the marine area, a competent authority must exercise their functions which are relevant to nature conservation, including marine conservation, so as to secure compliance with the requirements of the Directives."
  - Reg. 9(2) sets out a non-exhaustive list of functions to which 9(1) applies "in particular"
  - "(3) Without prejudice to the preceding provisions, a competent authority, in exercising any of its functions, must have regard to the requirements of the Directives so far as they may be affected by the exercise of those functions."
- The reference to "the Directives" is to the Habitats and Wild Birds Directive as modified post-Brexit by reg. 3A for the national site network and its management objectives (reg. 16A).
- The Defra policy paper (6.9.21) states confidently -
  - "This power will enable alignment of the Regulations with our new world leading targets, particularly the 2030 species abundance target, and our binding international obligations."

The Environment Act: s. 113

Landmark Chambers

- S. 113 permits amendments to Part 6 of the Habitats Regs but within the context that it again requires the SoS to "*have regard to the particular importance of furthering the conservation and enhancement of biodiversity*"
- S. 113(3) only permits regulations again if SoS "satisfied that the regulations do not reduce the level of environmental protection provided by the Habitats Regulations" and (7) requires an explanation of this to be laid before Parliament and consultation as in s. 112
- Why have these powers been created?
- The September 2021 policy paper notes -
  - "Where the evidence suggests that amending the Regulations can improve the natural environment, make the processes clearer and more legally certain to help recover the condition of our sites, we will have the means of doing so swiftly. Defra plans to publish a Nature Recovery Green Paper before the end of the year. The paper will set out our approach to driving nature recovery and provide the primary vehicle for developing and engaging on our future plans and proposals."

The Environment Act: s. 113

Landmark Chambers

- See also Expl Notes §956 (HL version) "*where evidence suggests that amending the regulations can make the processes clearer and more legally certain to improve the condition of protected sites and the broader natural environment*".
- It is not clear what is legally uncertain about Part 6.
- The provisions are very rigorous (***R. (Champion) v North Norfolk DC*** [2015] 1 W.L.R. 3710 applying the requirements set out in e.g. ***Sweetman v An Bord Pleanala*** (C-258/11) [2014] P.T.S.R. 1092) and have generated issues e.g. with regard to new development and nutrient impacts on protected waters (e.g. ***R (Wyatt) v Fareham BC*** [2021] EWHC 1434 (Admin)), but the issue does not appear to be one of legal certainty.
- Contrast the Government's Report of the Habitats and Wild Birds Directives Implementation Review (March 2012) which focused on streamlining the procedure. Para 11 noted:

  "11. It is vital that we maintain the integrity of the purpose of these Directives. In the vast majority of development cases, where major problems do not arise, it is important that the authorisation process under the Directives is as easily understood, accessible and efficient as possible. In those relatively few cases in which problems arise, for one reason or another, there can be unwelcome delays and additional costs for developers, uncertainty for the local communities and the environment, and a risk of clouding the reputation of the Directives as a whole..."

Species conservation strategies: s. 109

Landmark Chambers

- Defra Policy Note - "a new mechanism to safeguard the future of particular species at greatest risk. The strategies will find better ways to comply with existing legal obligations to protect species at risk and to improve their conservation status.".
- SCS may be published by Natural England (and reviewed subsequently) with regard to any species of flora or fauna and may (s. 109(4)) relating to an identified area in any part of England
  - Identify areas or features in the strategy area of importance to conservation of the species
  - Identify priorities regarding conservation or enhancement of habitats
  - How NE proposes to exercise its functions to improve the conservation status of the species
  - Include NE's opinion on
    - the giving of approvals or consents by other public authorities which might affect the conservation status of the species within the area
    - Measures appropriate to take to avoid, mitigate or compensate for adverse impact of the conservation status of species in the area that "might arise from a plan, project or other activity"
- LPAs and any prescribed authority must cooperate with NE in the preparation and implementation of SCSs so far as relevant to their functions (s. 109(6)). Does "cooperation" include compliance with advice regarding approvals and measures? Relationship to local plans? SoS may given guidance to LPAs as to the discharge of this duty (s. 109(7)).

Protected site strategies: s. 110

Landmark Chambers

- Similar to s. 109, NE given wide powers in respect of local area issues. NE may publish (and amend) a strategy to improve the conservation and management for a protected site to to manage the impact of plans, projects or other activities (wherever undertaken) on the conservation and management of the protected site. The HL Expl Notes give SANGS as an example (§917).
- Protected sites (England only) = European sites, SSSIs, marine conservation zones. PSS may include NE's opinion on
  - (a) include an assessment of the impact that any plan, project or other activity may have on the conservation or management of the protected site (whether assessed individually or cumulatively with other activities),
  - (b) include Natural England's opinion on measures that it would be appropriate to take to avoid, mitigate or compensate for any adverse impact on the conservation or management of the protected site that may arise from a plan, project or other activity,
  - (c) identify any plan, project or other activity that Natural England considers is necessary for the purposes of the conservation or management of the protected site, and
  - (d) cover any other matter which Natural England considers is relevant to the conservation or management of the protected site.
- Consultation under s. 110(5) with public bodies, but only with the public if NE considers they should be consulted (s. 110(5)(g)). Contrast mandatory consultation with landowners for SSSIs under WCA 1981.

Protected site strategies (2)

Landmark Chambers

- Bodies consulted must cooperate in the preparation of a PSS so far as relevant to their particular functions (s. 110(7)). SoS may give guidance on the discharge of that duty to cooperate
- s. 111(10) "A person must have regard to a protected site strategy so far as relevant to any duty" under the Habitats Regs 2017, ss. 28G-28I WCA 1981 and ss. 125-128 Marine and Coastal Access Act 2009.
- In connection with the various strategies, which are potentially more far-reaching that the policy or notes suggest, these confer a greater extent of power on NE in respect of decisions respecting species, and protected sites, which are intended to be more influential on local authority decision and plan making than at present. The various duties to cooperate (the concept has not been an unqualified success in plan-making) given rise to some uncertainties and scope for dispute and the effect on local decision-making may be significant.
- PPS may place greater burdens on LAs and NE when current circumstances suggest that this is unwise unless the strategies are seen as a means for NE to give their views for a local area in an omnibus form to dictate the course of decisions and plans – though with an apparently lesser degree of accountability than at present. It appears to permit greater control with regard to SSSIs than under the WCA
- The relationship between the new strategies and existing species and habitats protection is not clear and the new may presage a reduction in the manner of protections afforded by the existing mechanisms given the apparent overlap in concepts in ss. 109 and 110 and the powers under ss. 112-113 in order to find a "better way".

Nutrient neutrality and appropriate assessment

Landmark Chambers

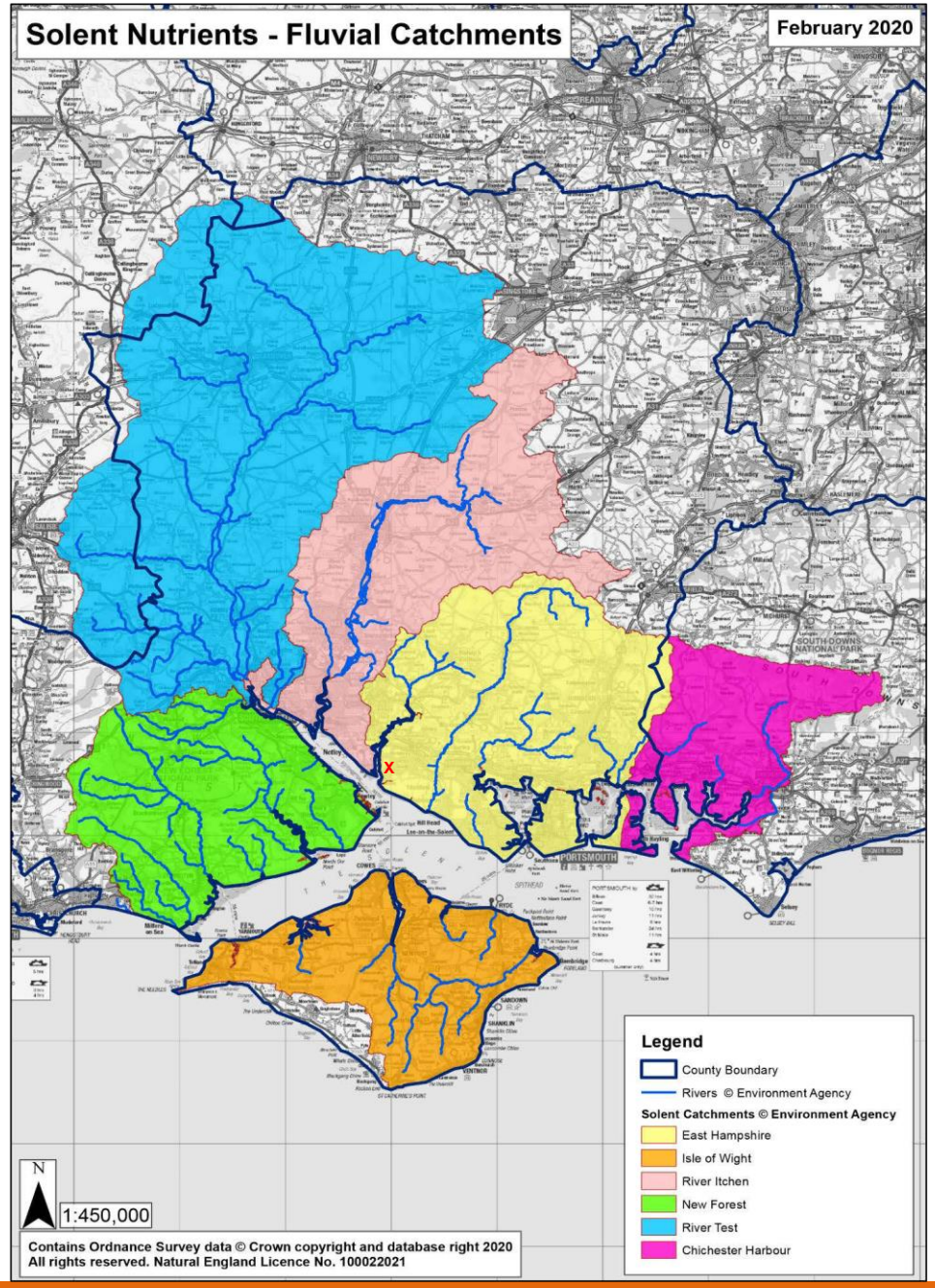
- An important issue at present is the extent to which the discharges of effluent from development (including housing) may have an adverse impact on protected waters/sites due to the increase in nutrients, especially nitrogen compounds, in the water.
- Natural England has issued advice (which was in its 5th edition) as to dealing with the effects of nutrient discharge into the Solent, its SPA and SACs and the 12 local planning authorities concerned. This is a precursor to national guidance. Similar issues have occurred elsewhere with the country: see e.g. *Advice on Nutrient Neutrality for New Development in the Stour Catchment in Relation to Stodmarsh Designated Sites (Nov. 2020)*
- See *Advice on achieving nutrient neutrality for new development in the Solent Region (June 2020)* - https://www.push.gov.uk/wp-content/uploads/2020/06/Natural-England%E2%80%99s-latest-guidance-on-achieving-nutrient-neutrality-for-new-housing-development-June-2020.pdf
- The terms of the advice, seeking to achieve nutrient neutrality, came under scrutiny by Jay J. in ***R (Wyatt) v Fareham BC & Ors.*** [2021] EHWC 1434 (Admin), in the form of a challenge to the decision of the LPA to grant permission for new housing and its application of the NE advice. A case heard together with it was quashed for other reasons (unfairness): ***R (Save Warsash) v Fareham BC & Ors*** [2021] EWHC 1435 (Admin).

Nutrient neutrality and appropriate assessment

Landmark Chambers

- The advice explains the problem:
  - "1.1 The water environment within the Solent region is one of the most important for wildlife in the United Kingdom. It is internationally important for its wildlife and is protected under the Water Environment Regulations and the Conservation of Habitats and Species Regulations as well as national protection for many parts of the coastline and their sea. There are high levels of nitrogen and phosphorus input to this water environment with sound evidence that these nutrients are causing eutrophication at these designated sites. These nutrient inputs currently mostly come either from agricultural sources or from wastewater from existing housing and other development. The resulting dense mats of green algae and other effects on the marine ecology from an excessive presence of nutrients are impacting on the Solent's protected habitats and bird species"
- The advice notes the current uncertainty and continuing study of the issue and adds:
  - "1.3 One way to address this uncertainty is for new development to achieve nutrient neutrality. Nutrient neutrality is a means of ensuring that development does not add to existing nutrient burdens and this provides certainty that the whole of the scheme is deliverable in line with the requirements of the Conservation of Habitats and Species Regulations 2017 (as amended). "

Figure 1 Solent Catchment Area *Contains public sector information licensed under the Open Government Licence v3.0*



Landmark Chambers

Nutrient neutrality and appropriate assessment

- Advice:
  - "1.3 One way to address this uncertainty is for new development to achieve nutrient neutrality. Nutrient neutrality is a means of ensuring that development does not add to existing nutrient burdens and this provides certainty that the whole of the scheme is deliverable in line with the requirements of the Conservation of Habitats and Species Regulations 2017 (as amended).
  - 1.4 This report sets out a practical methodology to calculating how nutrient neutrality can be achieved. This methodology is based on best available scientific knowledge, and will be subject to revision as further evidence is obtained. It is our advice to local planning authorities to take a precautionary approach in line with existing legislation and case-law when addressing uncertainty and calculating nutrient budgets."
- Very similar advice in the Stodmarsh Advice https://www.ashford.gov.uk/media/l3dgnfyu/stodmarsh-nutrient-neutral-methodology-november-2020.pdf

Nutrient neutrality and appropriate assessment

Landmark Chambers

- “1.3 One way to address this uncertainty is for new development to achieve nutrient neutrality. Nutrient neutrality is a means of ensuring that development does not add to existing nutrient burdens and this provides certainty that the whole of the scheme is deliverable in line with the requirements of the Conservation of Habitats and Species Regulations 2017 (as amended).
- 1.4 This report sets out a practical methodology to calculating how nutrient neutrality can be achieved. This methodology is based on best available scientific knowledge, and will be subject to revision as further evidence is obtained. It is our advice to local planning authorities to take a precautionary approach in line with existing legislation and case-law when addressing uncertainty and calculating nutrient budgets.”
- “4.6 For those developments that wish to pursue neutrality, Natural England advises that a nitrogen budget is calculated for new developments that have the potential to result in increases of nitrogen entering the international sites. A nutrient budget calculated according to this methodology and demonstrating nutrient neutrality is, in our view, able to provide sufficient and reasonable certainty that the development does not adversely affect the integrity, by means of impacts from nutrients, on the relevant internationally designated sites. This approach must be tested through the 'appropriate assessment' stage of the Habitats Regulations Assessment. The information provided by the applicant on the nutrient budget and any mitigation proposed will be used by the local planning authority, as competent authority, to make an appropriate assessment …”

Nutrient neutrality and appropriate assessment

Landmark Chambers

- "4.7 The nutrient neutrality calculation includes key inputs and assumptions that are based on the best-available scientific evidence and research. It has been developed as a pragmatic tool. However, for each input there is a degree of uncertainty. For example, there is uncertainty associated with predicting occupancy levels and water use for each household in perpetuity. Also, identifying current land / farm types and the associated nutrient inputs is based on best-available evidence, research and professional judgement and is again subject to a degree of uncertainty.
- 4.8 It is our advice to local planning authorities to take a precautionary approach in line with existing legislation and case-law when addressing uncertainty and calculating nutrient budgets. This should be achieved by ensuring nutrient budget calculations apply precautionary rates to variables and adding a precautionary buffer to the TN calculated for developments. A precautionary approach to the calculations and solutions helps the local planning authority and applicants to demonstrate the certainty needed for their assessments.
- 4.9 By applying the nutrient neutrality methodology, with the precautionary buffer, to new development, the competent authority may be satisfied that, while margins of error will inevitably vary for each development, this approach will ensure that new development in combination will avoid significant increases of nitrogen load to enter the internationally designated sites."

Nutrient neutrality and appropriate assessment

Landmark Chambers

- There were a number of grounds of criticism in the case of which the main one related to the use of national averages in 4.18:
  - "4.18 New housing and overnight accommodation can increase the population as well as the housing stock within the catchment. This can cause an increase in nitrogen discharges. To determine the additional population that could arise from the proposed development, it is necessary that sufficiently evidenced occupancy rates are used. Natural England recommends that, as a starting point, local planning authorities should consider using the average national occupancy rate of 2.4, as calculated by the Office for National Statistics (ONS), as this can be consistently applied across all affected areas."
- It was said that the use of the national average was not sufficiently precautionary and was irrational. The LPA was criticised therefore for accepting it in the nitrogen calculations and concluding that there would be no adverse effect on the integrity of the protected sites. NE contended that the approach was based on the best scientific evidence and pointed out that there were other precautionary aspects to the assumptions e.g. local occupancy rates and the fact that larger households use less water than smaller but there was not a direct proportionate relationship.
- Jay J. repeated the approach he had set out in ***Wealden DC v SSCLG*** [2017] EWHC 351 (Admin), at [44]-[47], and drew attention to the distinction between the court's review of the decision and the legal approach required to be taken by the authority to an appropriate assessment.

Nutrient neutrality and appropriate assessment

Landmark Chambers

- He set out his approach at [29]-[37] reviewing UK and EU authority.
  - “29. First of all, it is necessary to underscore the distinction between the degree of rigour the local planning authority must apply to the consideration of its HRAs and the approach this court must take as the reviewing body: the two processes must be kept distinct, pace a number of passages in Mr Jones' skeleton argument which suggested otherwise. The application of first principles impels this conclusion, but I will be referring below to relevant authority.
  - 30. Secondly, the CJEU has stated on a number of occasions that appropriate assessments must be based on "the best scientific knowledge in the field" (***Holohan v An Bord Pleanála*** (Case C-461/17) [2019] PTSR 1054 at para 33) which is both up-to-date and not based on the bare assertion of an expert (on the latter point, see ***Smyth v SSCLG*** [2015] PTSR 1417, at para 83).
  - 31. Thirdly, the absence of adverse effects must be established at the point of consent, which in the present context means the date the appropriate assessment is made (***Cooperatie Mobilisation for the Environment UA, Vereniging Leefmilieu v College van Gedeputeerde Staten van Limburg*** (Case C-293/17) [2019] Env LR 27 (the "Dutch Nitrogen case"), at para 94 of the opinion of Advocate General Kokott).’

Nutrient neutrality and appropriate assessment

Landmark Chambers

- “32. Fourthly, a high standard of investigation is demanded in line with the precautionary principle. This has been stated and reiterated in a large number of cases, including in particular ***Waddenzee*** (Case C-127/02) [2004] Env LR 14 and the ***Dutch Nitrogen*** case. In ***Waddenzee***, Advocate General Kokott stated that the burden on the competent authority was to prove that there would be no adverse effects, not to a standard of absolute certainty but to being "at least satisfied that there is no reasonable doubt as to the absence of adverse effects on the integrity of the site concerned". A requirement of absolute certainty would be impossible of scientific attainment as well as being disproportionate (see paras 99, 104, 107 and 108). The ECJ accepted the Advocate General's interpretation of the Habitats Directive in the light of these general principles of EU law, expressing their conclusions in a slightly different way (see paras 44, 58, 59 and 61). At para 58 the CJEU confirmed that the authorisation criterion in the Habitats Directive "integrated" the precautionary principle.”
- Having considered submissions made regarding the ***Dutch Nitrogen*** case he concluded that it did not alter the approach to be adopted.
- para. 35 to the effect that a competent authority (which includes the Council as planning authority) must give “*condign weight to the expert advice of Natural England*” and “*if minded to deviate from that advice furnish cogent reasons for doing so.*”

Nutrient neutrality and appropriate assessment

- Para. 36 – the decision as to whether the proposals adversely affect the integrity of the protected sites for the purposes of reg. 63(5) of the Habitats Regulations is one for the competent authority applying ***R (Champion) v North Norfolk DC*** [2015] 1 WLR 3170 (Lord Carnwath at [41], referring to Advocate General Kokott in ***Waddenzee*** at [107])
- para. 37 Jay J. warned that if NE's advice relied on was flawed for public law reasons, then the Council's decision would be Challengeable regardless of whether the advice itself was directly challenged, relying on his earlier decision in ***Wealden DC v Secretary of State*** [2017] Env LR 31 at para. 109 (in the context of NE advice that was wrong) -
  - "… if expert advice induces a decision-maker into error in carrying out the judgments mandated by article 6(3), I consider that it would be artificial and wrong to hold that the court should not characterise what has occurred as irrational. The Wednesbury error in the underlying advice creates, without more, an equivalent Wednesbury error in the evaluative assessments carried out in formulating the HRA."
- While Jay J. had concerns about the use of the national average and considered that the Advice should be revised to give clearer guidance on the use of bespoke information (since a different rate would have been best evidence here) but, on the facts, given the other elements of precautionary assumptions he refused to find the grant of permission unlawful on habitats assessment grounds: [85]-[88].

Other decisions

- In ***R. (RSPB) v Natural England*** [2021] EWCA Civ 1637 the Court of Appeal rejected an appeal against Lang J's dismissal of the challenge of the grant of licence for a scientific trial of a brood management scheme for hen harriers. Lang J. had properly considered the application to be one for permission to carry out a research project within s.16(1)(a), rather than a conservation project under s.16(1)(c) and had correctly found the structure and wording of s.16(1) and s.16(1A) to be clear. The "purpose" in respect of which the "other satisfactory solutions" had to be considered was the specific purpose for which the licence was sought. The language of art.9 of the Directive was less precise, but the effect was intended to be the same as that implemented by s.16(1). The judge had correctly held that NE was not required to consider alternative solutions for the evidence-gathering process and had not been required to consider alternative conservation techniques. Brood management in SPAs was not designed to displace hen harriers from their natural habitat, but to reduce their persecution and increase their population.
- ***R. (Langton) v Secretary of State for Environment, Food and Rural Affairs*** [2021] EWHC 2199 (Admin) Griffiths J rejected a challenge to the SoS's "*Next steps for the strategy for achieving bovine tuberculosis free status for England: 2018 review - government response*" to have regard to "the purpose of conserving biodiversity", as required by s. 40 of the NERCA 2006. S. 40 was not engaged because the duty had been discharged previously, when the implications of the statutory purpose of conserving biodiversity had been expressly examined, and second because the document did not effect any change as far as badger culling was concerned, except to suggest that it should be ended in the foreseeable future.

Landmark Chambers

Q&A

We will now answer as many questions as possible.

Please feel free to continue sending any questions you may have via the Q&A section which can be found along the top or bottom of your screen.

Thank you for listening

London
180 Fleet Street
London, EC4A 2HG
+44 (0)20 7430 1221

Birmingham
Cornwall Buildings
45 Newhall Street
Birmingham, B3 3QR
+44 (0)121 752 0800

Contact
clerks@landmarkchambers.co.uk
www.landmarkchambers.co.uk

Follow us
@Landmark_LC
Landmark Chambers
Landmark Chambers