Practical case points – March 2017

In the last few weeks, the Court of Appeal has handed down three judgments with interesting practical consequences:

- ***Roland Stafford-Flowers v Linstone Chine Management Co Ltd [2017] EWCA Civ 202***

- ***Dunnett Investments Ltd v Secretary of State for Communities & Local Government [2017] EWCA Civ 192***

- ***Oakley v South Cambridgeshire District Council [2017] EWCA Civ 71***

Moreover, there is a recent Planning Court judgment which has very significant consequences for those dealing with Habitats Regulations issues, including those which seriously restrict housing growth:

- ***Wealden District Council v Secretary of State for Communities & Local Government [2017] EWHC 351 (Admin)***

Roland Stafford-Flowers v Linstone Chine Management Co Ltd

Facts

The appellant owned a bungalow which he occupied with his wife in breach of a restrictive covenant. The covenant provided that: a) the bungalow could only be used for holiday or leisure purposes, and that b) it could not be used at all for certain periods of the year. Nevertheless, the appellant and his wife lived there continuously.

In 2012, the respondent management company secured an injunction in the County Court against the appellant and his wife, as well as the owner of

another bungalow, to prevent them from living in their bungalows in breach of the covenant. The same year, the appellant successfully applied to the Council for a lawful development certificate in respect of the original planning condition as he had lived in the bungalow continuously for more than ten years.

Nevertheless, the restricted covenant remained and he appealed to the Upper Tribunal to discharge it under s.84(1) of the Law of Property Act 1925. (The 2012 injunction was stayed.) The Upper Tribunal dismissed the appeal and the appellant appealed to the Court of Appeal.

Judgment

The Court of Appeal agreed with the Upper Tribunal that the appellant had failed to satisfy one of the requirements of s.84(1): that the restriction did *"not secure to persons entitled to the benefit of it any practical benefits of substantial value to them"* (s.84(1)(1A). The Court of Appeal accepted the analysis of the Upper Tribunal that discharging the appellant's covenant could represent the "*thin end of the wedge*". It further held that the Upper Tribunal had clearly found that there was a practical benefit or advantage in being able to enforce the covenant against those who might otherwise not comply with the planning condition, or who became concerned about the changing character of the site and sold their bungalows to those more willing to live alongside others using their properties as their principal homes. Further there was evidence that the existing roads would not be adequate for the increased use that would result if there were significantly more permanent residents.

Practical Point

It may not be enough to secure a lawful development certificate. A covenant may continue to have the same effect as the now unenforceable condition. When considering an application to discharge a covenant the courts are entitled to consider not only whether that particular covenant causes practical benefits of substantial value to beneficiaries, but also the wider situation and whether discharging the covenant would represent the "thin end of the wedge."

Dunnett Investments Ltd v Secretary of State for Communities & Local Government

Facts

The appellant sought to develop a site with full B1 (Business) permission and applied to the LPA for prior approval for a change of use from B1(a) (offices) to C3 (dwellings) under the Town and Country Planning (General Permitted Development) (Amendment) (England) Order 2013 ("GPDO"). However, the permission was subject to a condition which stated:

> *"use of this building shall be for purposes falling within Class B1 (Business) as defined in the Town and Country Planning (Use Classes) Order 1987, and for no other purpose whatsoever, without express planning consent from the Local Planning Authority first being obtained."*

The stated reason for the condition was:

> *"in order that the Council may be satisfied about the details of proposals due to the particular character and location of this proposal."*

When the LPA failed to respond properly to his application, the appellant applied for a lawful development certificate for the proposed use of the site. The LPA refused and the appellant appealed to the Secretary of State. The Secretary of State's inspector dismissed the appeal and held that the wording of the planning condition excluded the right to change the use of land under the GPDO. The appellant's application to the High Court to quash the inspector's decision was dismissed, and it appealed this judgment to the Court of Appeal.

Judgment

The Court of Appeal also dismissed the appeal. It held that the starting point for the interpretation of planning conditions was *Trump International Golf Club*

Scotland Ltd v Scottish Ministers [2015] UKSC 74. This confirms that so long as appropriate caution is exercised there is no bar to implying words into planning conditions, as is possible with conditions in other contexts. The following themes could be discerned from the relevant authorities: (i) a planning condition can exclude the application of the GPDO; (ii) exclusion might be express or implied, however, a grant for a particular use cannot in itself exclude the application of the GPDO; (iii) to exclude the application of the GPDO, the words used in the relevant condition, taken in their full context, must clearly evince an intention on the part of the local planning authority to make such an exclusion.

In applying these, the Court held that the judge's finding was correct: the condition did exclude the operation of the GPDO. The natural and ordinary meaning of the words was that the condition allowed planning permission for other uses, but only permission obtainable upon application to the LPA, not permission granted by the Secretary of State under the GPDO. The Court further held that the context was relevant, as evidenced by the fact that the stated reason for the condition was to enable the Council to exercise control over development. This desire to maintain control was inconsistent with the appellant's reliance on rights under the GPDO.

Practical Point

Particular care is required when assessing the flexibility which goes with a permission because planning conditions may expressly or impliedly take away permitted development rights.

Oakley v South Cambridgeshire District Council

Facts

This appeal concerned a challenge to the granting of planning permission by the defendant LPA for the development of a football stadium in the Green Belt. Although the LPA's planning officer had recommended refusal, the

planning committee approved the proposal without giving any reasons for doing so, and the LPA granted permission.

The appellant sought judicial review of the decision in the High Court on the sole ground that reasons should have been given, but the Court held that the LPA was under no duty to do so. She appealed to the Court of Appeal which allowed the appeal.

Judgment

Judgments were given by Elias LJ (with whom Patten LJ agreed) and Sales LJ. Although all three judges held that the appeal should be allowed, Sales LJ took a slightly different approach from that of Elias LJ. Their lordships were concerned not only with whether the LPA should have given reasons in this particular case, but also with the question of when public bodies had a duty to give reasons generally.

In his judgment, Elias LJ says that while there is no general obligation to give reasons under the common law, the tendency is increasingly to require them. Indeed, he suggests that it may be more accurate to say that the common law is moving towards adopting the general rule that reasons should be given unless there is a proper justification for not doing so. Nevertheless, although he says that he is strongly attracted to the notion that reasons should always be given unless the reasoning is intelligible without them, he stops short of endorsing this.

As to the appeal before him, Elias LJ indicates that it is of particular relevance that the planning committee's decision went against the local development plan and that the proposed development was in the green belt. Such circumstances, he says, demanded that reasons should have been given and it was not possible for these reasons to be inferred.

Sales LJ does not go quite so far. He suggests that a duty to give reasons arises where there is an especially pressing need to ensure that the relevant decision-maker has considered matters property, or where a person's private

interest is particularly affected by a decision. Both situations, he says, are applicable to the appeal before him: the decision to grant planning permission appeared to go against the local development plan and also to subvert Green Belt policy. Either one, he indicates, was sufficient to trigger the need to give reasons.

As to whether the committee's rejection of its officers' advice and reasoning automatically triggered a duty to give reasons, Sales LJ says that it did not. However, he further says that as the committee rejected both the reasoning and the advice of the officers it was unable to rely on the report to demonstrate that it had discharged its duty in this case.

Practical Points

Two points can be taken from this case. First, it seems that there may be a trend for the courts to hold that there is a duty to give reasons in more situations rather than fewer. Secondly, planning committees that recommend planning permission be granted against the recommendation and reasoning of the officers and in contravention of local and national policy should expect the permission to be challenged. There will be further challenges based on *Oakley.*

Wealden District Council v Secretary of State for Communities & Local Government

Facts

In this case, the Planning Court tells Natural England how to do its job.

The claimant LPA applied to quash the Lewes Joint Core Strategy ("JCS") by means of statutory review under s.113 of the Planning and Compulsory Purchase Act 2004. The JCS was jointly prepared by Lewes District Council ("D2") and the South Downs National Park Authority ("D3"), the local planning authorities for different parts of Lewes, and it forms part of the statutory

development plan for Lewes. The Secretary of State ("D1") was involved as the JCS was adopted by D2 and D3 following an inspector's recommendation.

The focus of the application was Ashdown Forest Special Area of Conservation ("SAC"), which was designated in 2005. This covers 2,729 ha and lies entirely within the claimant's area. One of the reasons for its designation in 2005 was the extensive areas of lowland heath contained within it. The heath is vulnerable to nitrogen dioxide pollution caused by vehicle emissions.

Natural England, an interested party to the proceedings, provided expert advice to D2 and D3 during the preparation of the JCS concerning the potential effects of planned development on the SAC. Its advice was that it was not likely that the planned development would have a significant impact on the SAC in consequence of increased traffic flows. The main question for the Court was whether D2 and D3 (in following Natural England's advice) acted unlawfully in concluding in their assessment under the Habitats Regulations that it was not likely that the JCS would have a significant effect on the SAC in combination with the Wealden Core Strategy ("WCS").

Judgment

The Court held that Natural England's advice was plainly erroneous, that the only rational conclusion D2 and D3 could have drawn was to reject the advice, and that D1's inspector should have found the JCS to be unsound. It further held, applying traditional public law principles, that the Habitats Regulations assessment was vitiated by Natural England's erroneous advice. This was because: a) D2 and D3, as decision-makers, should have enquired further in the absence of an explanation as to why the traffic flow figures for the JCS and the WCS had not been added together, and b) Natural England's error had directly infected the decision-making process. Furthermore, Natural England's failure to provide a cumulative assessment provided a clear breach of Article 6(3) of the Habitats Directive.

Significance

This is an important case. Much hinges on the advice of Natural England and its equivalent in Wales (Natural Resources Wales). The courts have long emphasised that the expert advice of the appropriate nature conservation body is to be given much weight. Here, however, its approach to in combination assessment has been the downfall of a development plan. The implications are wide-ranging. Key an eye out for further developments.

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