IN THE COURT OF APPEAL
(CIVIL DIVISION)

Claim no

ON APPEAL FROM THE DIVISIONAL COURT
LEWIS LJ AND HOLGATE J
CO/3024/2020

B E T W E E N :-

THE QUEEN
on the application of
RIGHTS: COMMUNITY: ACTION

Appellant

and

THE SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT

Respondent

APPELLANT'S PERMISSION SKELETON

Recommended essential reading (estimated 2 hours):
-The Judgment below
-Chronology
-This skeleton

INTRODUCTION AND SUMMARY OF APPEAL

1. Are three statutory instruments that significantly modify the system of town and country planning in England within the scope of EU Directive 2001/42/EC ("the SEA Directive") and the Environmental Assessment of Plans and Programmes Regulations 2004 ("the SEA Regulations")? That is the sole question on which permission to appeal is sought.

2. In this skeleton argument, the Appellant sets out why, contrary to the decision of the Divisional Court ("the Court below"), it has a real prospect of demonstrating that the answer to this question is "yes", and moreover why this question is one of significant public importance.

3. In the Court below, the Appellant challenged three planning SIs, two of which significantly expanded permitted development rights ("The PD SIs"[1]) and one of which deregulated planning use classes ("the Use Class SI"[2]).[3]

4. The Appellant challenged these SIs on three grounds: strategic environmental assessment, equalities impact assessment and a composite public law ground. All three grounds were dismissed by the Court below. The Appellant now appeals the findings of the Court below on **ground 1 only**.

5. Ground 1 of the claim in the Court below contended that the three SIs were unlawful because they should have been subject to a strategic environmental assessment ("SEA") as required by the SEA Directive and the SEA Regulations. The Court below dismissed this ground on the basis that the three impugned statutory instruments did not fall within the scope of the Directive, because they did not either

   (1) set the framework for future development consent of projects, or

   (2) modify an existing framework for future development consent of projects,

   and therefore they were not "plans and programmes" that required a Strategic Environmental Assessment.

6. The Appellant submits that the Court below erred in this finding. The sole ground of appeal is that the impugned SIs *are* within the scope of the Directive, because they *do* set the framework for future development consent of projects under EU law, or alternatively, because they modify an existing framework for future development consent of projects. In the Appellant's submission, the Court below erred in its conclusion to the contrary in the following ways:

   (1) Contrary to the Court's conclusion, the framework for future development consent includes not only the rules which govern whether development consent should be

[1] The Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 2) Order 2020/755 and The Town and Country Planning (General Permitted Development) (England) (Amendment) (No. 3) Order 2020/756.
[2] The Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020/757.
[3] A detailed summary of the effect of these SIs, and how they interact with the existing planning system under the Planning Acts, can be found at [19]-[63] of the judgment of the Court below.

granted, but also the rules which dictate the matters for which development consent is required. Hence (for example) a change to the UCO expands the classes of change of use that do not require consent, and shrinks the classes of development that do. That is setting the framework for the future grant of development consent at the most basic structural level, by defining what requires development consent.

If this were not the case, then it would be possible to subvert the whole SEA regime by the simple expedient of removing certain forms of activity from the definition of development. It would be contrary to the spirit and purpose of the SEA Regulations and the SEA Directive to conclude that lesser changes, which would still allow development to be controlled and simply define the manner in which those controls should operate, should be the subject of SEA, but that changes which might have a greater environmental impact, because they remove all control, should not. That is particularly the case where (as here) the changes would not fall within the regime for Environmental Impact Assessment ("EIA").

(2) In the context of the PD SIs, the Court below wrongly applied an unduly narrow construction of the term "development consent" and concluded that this term was synonymous with the formal grant of planning permission in UK law:

(a) EU law is clear that "development consent" is a wider term than this, and includes both the grant and implementation of projects.

(b) Under the terms of the PD SIs, the 'development consent' for the purposes of EU law is not limited to the development order itself (which only approves the general principle of development) but includes the prior approval decision of the local authority allowing development to proceed. It is not until the prior approval process is complete that there is a set of approved plans which identify precisely what it is that has been permitted. It is only when prior approval is formally granted that a planning permission "crystallises" (*Murrell v SSCLG* [2012] 1 P.& C.R. 6 ("*Murrell*")) and becomes something valuable, tangible and individual to the project in question.

(3) The court below was wrong to conclude that, if neither the system of use classes under the Town and Country Planning (Use Classes) Order 1987 (SI 1987 No. 764

("the UCO") or the permitted development regime under the Town and Country Planning (General Permitted Development) (England) Order 2015 (SI 2015 No. 596) ("the GPDO") amounted to a plan or programme, that the SIs did not alternatively amount to a *modification* to local development plans, which are uncontroversially plans within the scope of the Directive.

Whether or not they change or amend the wording of development plans as originally drafted, all three SIs have a stark impact on how existing local development plans are applied in practice. The substantive effect of removing decisions from local authority control is that many local development policies that consider mixed use or the location of homes will be rendered nugatory. Substantively, the changes amount to a modification to existing plans or programmes for the purposes of the Directive.

(4) Overall, it is respectfully submitted that the approach of the Court below was contrary to the purpose of the SEA Regulations and the SEA Directive. That purpose is the protection of the environment. The Secretary of State conceded during the hearing in the Court below that he could not maintain that these reforms would not have a significant impact on the environment, in the absence of an environmental assessment. It is within the spirit and purpose of the Directive and the Regulations for these significant legislative changes to be considered 'within scope'.

7. On this basis, the Appellant contends that an appeal has a real prospect of success. However, it also submits that the point is of public importance, which is another substantial reason why permission to appeal should be granted. In particular, although dismissing the Appellant's claim for the reasons set out in paragraph 5 above, the Court below rejected the Respondent's alternative submission that there was no requirement for SEA because the three SIs were not likely to have significant environmental effects. However, notwithstanding its conclusion that the PD SIs did not "set the framework for future development consent" because they were themselves the grant of development consent, the Court also concluded that they would not have required assessment under the Environmental Impact Assessment regime. If the decision of the Court below is correct, it means that it is possible to make far-reaching changes to the planning system which are likely to have significant environmental effects without any requirement for those changes to be the subject of environmental assessment under either the SEA or the EIA regime. In the Appellant's submission, that outcome is both surprising, and wrong.

THE REQUIREMENTS OF THE DIRECTIVE

8. Article 3 of the SEA Directive provides that a strategic environmental assessment ("SEA") is required in respect of all plans and programmes that are likely to have significant environmental effects. Article 3(4) provides:

> *"4. Member States shall determine whether plans and programmes, other than those referred to in paragraph 2, which set the framework for future development consent of projects, are likely to have significant environmental effects."*

9. Article 2 defines "plans and programmes" as follows:

> *" 'plans and programmes' shall mean plans and programmes, including those co-financed by the European Community, as well as any modifications to them:*
>
> *— which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and*
>
> *— which are required by legislative, regulatory or administrative provisions".*

10. The Directive has been transposed into domestic law by the SEA Regulations. The requirement to carry out environmental assessment for a plan or programme which sets the framework for future development consent of projects and is likely to have significant environmental effects is found in reg 5(4).

11. It was common ground in the hearing in the Court below that the SIs were *"subject to preparation and/or adoption by an authority at national, regional or local level"* and were *"required by legislative, regulatory or administrative provisions."* The issue before the Court below was whether they set the framework for future development consent of projects.

THE GROUND OF APPEAL

12. The court below erred in finding that the impugned SIs were not within the scope of the Directive. The impugned SIs do set the framework for future development consent of

projects, and thus amount to "plans or programmes" within the scope of the Directive; alternatively, the three SIs modify existing plans or programmes within the scope of the Directive, namely local development plans.

A. The Court below applied an unduly narrow construction of the concept of "the framework" for future development consent. The framework for future development consent of projects includes the rules which dictate the matters for which development consent is required

13. A key part of the reasoning of the Court below was its view that the SIs do not "set the framework" for future development consent. In this regard, the Court focussed on the question of whether the SIs set rules which governed whether or not (in cases where it was required) permission should be granted.

14. In the Appellant's submission, that was an unduly narrow approach, since the framework for future development consents is not simply the rules governing whether permission should be granted, but also the rules which define or affect those things for which permission is required. That is setting the framework for the future grant of development consent at the most basic, structural level. Hence, for example:

    (1) The UCO SI significantly expands the classes of change of use that do not require consent, and shrinks the class of development that do.

    (2) In granting permission (subject to prior approval) for various classes of development which would previously have required an application to be made, the PD SIs have removed the decision whether, as a matter of principle, those classes of development are acceptable from the jurisdiction of local planning authorities.

15. Both these things affect the "framework for future development consent", because certain things which previously required planning permission no longer do, while others require a different, more limited consideration by the local planning authority before development can be carried out.

16. As was submitted before the Court below, there is CJEU authority on this point. In *Thybaut v Region Wallonne* (C-160/17) [2019] Env. L.R. 8, the European Court found that a Belgian Order decreeing certain land an urban land consolidation area was within

the scope of the SEA Directive. Although a consolidation area, such as that at issue, did not in itself lay down any positive requirements, it did allow for derogation from existing planning requirements, which was sufficient to bring it within scope:

> *"58. It follows that, although such an instrument does not, and cannot, lay down positive requirements, the possibility which it lays down of allowing a derogation from the planning rules in force to be obtained more easily amends the legal process and consequently brings the consolidation area at issue in the main proceedings within the scope of art.2(a) and art.3(2)(a) of the SEA Directive."*(emphasis added)

17. If, contrary to the above, the Court below is correct, the consequences will be profound. It would be possible to subvert the SEA regime by simply defining "development" so narrowly that planning permission was required in respect of hardly anything. Overall, the impact of removing control over development is potentially far greater than the impact of refining the rules which state how control should be exercised. It is contrary to the spirit and purpose of the SEA Regulations and the SEA Directive to conclude that lesser changes, which would still allow development to be controlled and simply define the manner in which those controls should operate, should be the subject of SEA: but that changes which might have a greater environmental impact, because they remove all planning control, should not.

B. The court below wrongly applied an unduly narrow construction of "development consent"

18. The Appellant submits that the Court below erred in concluding that the European law term "development consent" maps directly onto "planning permission" in the domestic context:

    (1) "Development consent" is not defined in the Directive, but Draft Article 2(c) of the original Commission proposal for the SEA Directive provided that *"'development consent" means the decision of the competent authority which entitles the developer to proceed with a project."* Thus the key question for deciding whether a given framework is a "framework for future development consent of projects" is whether

it sets the process and criteria for determining whether a project can practically proceed or not.

(2) In that regard, the Directive is not just concerned with the formal, technical grant of planning permission, but also the practical implementation of those permissions. In *APS Onlus v Presidente del Consiglio dei Ministri* (Case C-305/18), the CJEU at [50] stated that

"the notion of "plans and programmes" relates to any measure which establishes, by defining rules and procedures for scrutiny applicable to the sector concerned, a significant body of criteria and detailed rules for the grant and implementation of one or more projects likely to have significant effects on the environment" (emphasis added).

19. The court below erred in its narrow focus on the technical grant of planning permission for these purposes. It failed to consider the key steps that come before and after that technical grant of planning permission, which determine whether a project can in fact proceed or not: namely, how "development" is defined, and how approval is granted by local authorities for projects to actually proceed. This error led the Court below to wrongly conclude that the PD SIs were not within the scope of the Directive.

20. In particular, the court below wrongly concluded that, because the GPDO operates through the mechanism of a "grant" of planning permission, the detailed body of criteria under the permitted development regime cannot be considered as a framework for the *future* development consent of projects: despite the fact that these rules are project-specific and require project-level approval.

21. Only once prior approval is granted does a planning permission "crystallise" (*Murrell*). This is the point at which a specific, project-level right is created. Development which takes place before this stage is unlawful. Indeed, sine prior approval includes matters such as detailed design, until prior approval has been granted, it is impossible to say (in any concrete sense which is capable of being constructed) what it is that the applicant is entitled to build. Thus, the detailed system of prior approval is a framework for the future development consent of projects. To say that development consent has already been granted does not reflect the practical reality of permitted development rights, as a project can never proceed if it does not meet the local authority's prior approval criteria, which

includes detailed considerations of design, flood risk, transport impacts, and local amenity.

22. The court below erred in concluding (at [97]) that the references in *Murrell* to permissions accruing or crystallising did not assist. These references in *Murrell* were taken from the Court of Appeal's earlier decision in R (*Orange Personal Communications) v Islington LBC* [2006] EWCA Civ 157; [2006] J.P.L. 1309 (see judgment at [41]), where the issue had been the impact of the designation of a Conservation Area after the coming into force of the SI creating new permitted development rights. The point was of pivotal importance in that case, because – if the Court of Appeal had held that there was an accrued right from the date of the SI – then this would either have significantly curtailed the effects of the designation of a Conservation Area, or potentially required compensation for the effective revocation of that accrued right. The Court of Appeal's conclusion that permission did not accrue until receipt of the LPA's decision on the prior approval application was therefore of much wider relevance than simply the time at which development could be begun (per *Murrell*), and went to the substance of the date at which a right could be said to exist.

C. The Court below erred in concluding that the impugned SIs did not modify the interpretation and application of local development plans

23. The court below erred in its approach to the Appellant's alternative submission that even if the SIs did not amount to a framework for the future development consent of projects themselves, they were nevertheless within the scope of the SEA Directive because they modified an existing plan or programme: namely local development plans.

24. In rejecting this argument, the Court observed that the SIs do not themselves amend or revoke any existing development plan. In the Appellant's submission, that observation wrongly elevates form over substance. Although it is technically correct that the SIs do not alter the wording of any development plan document, they will significantly affect the relevance and application of the policies in those documents. In particular:

    (1) Most local plans will have policies that seek to control changes of use, and the location of new residential and business uses. In circumstances where the SIs have

either removed those changes of use from the definition of development, or granted permission for them, those policies will be rendered entirely nugatory. The framework for future development consent has changed, because those policies no longer regulate the classes of activity covered by the SIs;

(2) When dealing with applications for prior approval, local planning authorities are only entitled to consider the specific matters on which prior approval is required. Policies in their development plans which seek to regulate other aspects of development will cease to be relevant;

(3) Even where development plan policies are still relevant, the weight that may be given to them will be significantly altered by the fact that the principle of the development is no longer in issue: see ***Murrell***.

(4) In considering applications for prior approval, the PD SIs now require applications to be determined by reference to the policies in the NPPF. In replacing one set of policies with another, the SIs have amended the framework for development consent;

25. That impact can be demonstrated by a recent Planning Inspectorate decision which was placed before the Court below (Appeal Ref: APP/V5570/W/19/3243073). In this decision, the Inspector had to consider a conflict with the development plan in the context of the new legislative changes. He found at [12] that:

> *"For the reasons set out above, the proposal would result in a conflict with some of the criteria set out in Policies DM4.2, DM4.3, DM4.4 and DM4.5 of the DMPLP due to the loss of an A1 use, a concentration of A3 uses in a secondary frontage and their effect upon the vitality and viability of the retail function of Finsbury Park Town Centre. However, the change of use no longer constitutes an act of development so the retail use can be lost without the need for planning permission. The changes to the use classes order outweigh the conflict with the development plan."*

26. This is but one example of how the SIs have modified the application of local development plans.

27. In summary, the way in which local development plans will operate in practice has fundamentally changed. The Directive is not concerned with whether the wording of the

plan has changed, but what the practical impact is in terms of environmental consequences.

D. The Court below failed to construe the scope of the Directive in line with the overarching purpose of protecting the environment

28. The overriding aim of the SEA Directive is to ensure that the environmental impacts of proposals requiring formal member state approval are taken into account by decision-makers at the earliest possible stage of the approval process. This aim is apparent from Article 1, which states *"The objective of this Directive is to provide for a high level of protection of the environment".* Because of this, there is a requirement to interpret the scope of the Directive broadly.

29. The requirement is emphasised in the recent CJEU case *Terre Wallonne ASBL v Region Wallonne* (Case C-321/18) [2020] 1 C.M.L.R. 1 at [24]:

> *"Lastly, given the objective of the SEA Directive, which is to provide for such a high level of protection of the environment, the provisions which delimit the scope of the directive, in particular those setting out the definitions of the measures envisaged by the directive, must be interpreted broadly."* (emphasis added)

30. Given that the Respondent conceded in the hearing in the Court below that he could not, in the absence of a screening assessment, conclude that there were no significant environmental effects in this case, it is submitted that the Court below erred in its unduly narrow approach to the scope of the Directive.

POINT OF SIGNIFICANT PUBLIC IMPORTANCE

31. There is a point of significant public importance in this case.

32. Although it dismissed the Appellant's claim, the Court below rejected the Respondent's submission that there was no requirement for SEA because the three SIs were not likely to have significant environmental effects. Significantly, notwithstanding its conclusion that the PD SIs did not "set the framework for future development consent" because they

were themselves the grant of development consent, Court also concluded that these SIs would not have required assessment under the Environmental Impact Assessment regime.

33. If the decision of the Court below is correct, it means that it is possible to make far-reaching changes to the planning system which are likely to have significant environmental effects without any requirement for those changes to be the subject of environmental assessment under either the SEA or the EIA regimes. All development control could be repealed without any consideration of the environmental consequences, either by removing things from the definition of development or by amending the GPDO to "grant" permission for them. The result would be a very significant gap between the SEA and the EIA regime, which is inconsistent with the overarching purpose of the SEA Directive.

34. In the circumstances, the decision of the Court below will have profound implications for future policy decisions on further deregulation via permitted development and use class changes. The government recently announced a consultation on 3 December 2020 on the proposal to extend permitted development rights even further (creating a permitted development right for a change from the new Class E to residential use).[4] The government also announced further proposed deregulation of the Use Classes Order. These significant proposed changes will not be subject to any kind of environmental protection requirements if the judgment of the Court below stands.

35. For this reason alone, permission to appeal should be granted. There is a pressing need to determine the scope of the SEA Directive for the purposes of these proposed changes.

AARHUS CONVENTION CLAIM

36. This is an Aarhus Convention claim which was subject to costs capping in the Court below.

37. The Appellant requests that Aarhus Costs protection is maintained at its existing level with an additional cap of £5,000. The Appellant is a newly established environmental

[4] https://www.gov.uk/government/consultations/supporting-housing-delivery-and-public-service-infrastructure

NGO with very limited resources, which justifies the maintenance of a cap at appeal level. The Appellant has submitted an updated statement of financial resources in support of this.

REQUEST FOR EXPEDITION

38. Given the potentially serious environmental consequences of these SIs, if permission is granted the Appellant seeks an expedited hearing in this matter.

REQUEST FOR CJEU REFERENCE

39. If permission to appeal is allowed, the Appellant seeks a reference to the CJEU in relation to the scope of the SEA Directive. This is because there are novel points in this case about the scope of the SEA Directive which the CJEU is best placed to answer. The Appellant submits that the following questions should be asked, as well as any others the Court or Respondent deems necessary:

    (1) For the purposes of determining whether a legislative measure is within the scope of the SEA Directive, can a 'modification' to a plan or programme include a measure which, although it does not alter the wording of the policies within a plan or programme, nevertheless has a significant impact on how those policies must be interpreted and applied in the future?

    (2) For the purposes of determining whether a legislative measure is within the scope of the SEA Directive, can a measure which limits the types of development for which development consent is applied amount to a modification to a plan or programme that would previously apply to those kinds of former development?

    (3) For the purposes of defining a plan or programme within the scope of the Directive, can a framework for the future development consent of projects encompass rules for allowing projects to proceed following a technical grant of planning permission across a wide area via a development order?

CONCLUSION

40. For the above reasons, the Appellant has a strong case that the Court below erred in its approach to the scope of the SEA Directive. Moreover, the questions raised in this appeal have implications for future deregulatory planning legislation that impacts on the environment.

41. If the appeal succeeds, the Appellant seeks the following relief:

    (1) A declaration that the decision to lay the SIs before Parliament was unlawful, and that the SIs are themselves unlawful;

    (2) An order quashing the SIs,

    (3) Costs.

PAUL BROWN Q.C.
ALEX SHATTOCK
Landmark Chambers

4.12.20