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Planning law, while it has its particularities, is not an island. It is "a piece of the continent, a part of the main" of the wider law.

This short address will look at three recent decisions of the Supreme Court in which the Court has applied general legal principles in order to inform and develop planning law.

Trump

The case of *Trump International Golf Club Scotland Limited v Scottish Ministers* [2015] UKSC 74 ([2016] 1 WLR 85) was the final stage of the dispute between the Trump Organisation and the Scottish Government over the Scottish Government's support for a proposal to build an offshore wind-farm within view of the Trump golf resort near Aberdeen. The case (in which I gave the judgment of the court) raised a point of statutory interpretation and a point about the construction of planning conditions.

The statutory interpretation point was whether a consent under s36 of the Electricity Act 1989 only be granted to a party who held a licence to generate, transmit or supply electricity under the 1989 Act (or was exempt from the requirement to hold such a licence)?

This was a question which required an application of general principles of statutory interpretation. It is a very well-established principle of statutory interpretation that legislative intention is the paramount consideration. This principle was essential in determining the Appellant's challenge on s36. The Act does not prohibit constructing a generating station without a licence or the benefit of an exemption. Nor does it restrict the ability to apply for consent under section 36 to licenced or exempt entities. If the interpretation advanced by the Appellant was correct, one might have expected express language to this effect to be used. The Appellant's submission depended on the court's acceptance that Parliament sought to limit who may apply for a section 36 consent through circumlocution and implication. This was not a position that the Court could accept in light of general principles of statutory interpretation.

It is a further very well-known principle of statutory interpretation that a Court may take note of the policy reasons behind an enactment (as part of its consideration of the context) without canvassing their merits. In the *Trump* case it was clear that there was nothing in the policy background to the 1989 Act which required the Court to take a different view of the statutory provisions.

This application of normal rules of statutory interpretation would, I think, case no surprise to planning lawyers. The application of general principles of interpretation to planning conditions may have appeared more of a novelty.

The Appellant's second argument was that condition 14 of the consent granted to the wind-farm developer (which required the submission and approval of a design statement) was void for uncertainty. However, the Court concluded that even if condition 14 were unenforceable it could not invalidate the consent as a whole; condition 14 was not a fundamental condition which determined the scope and nature of the development. In any case, a planning condition is only void for uncertainty if it can be given no sensible or ascertainable meaning. This high bar was not satisfied in the circumstances.

In light of these conclusions, the Court was not required to consider whether terms could be implied into the consent. However, I gave the view, with which Lord Carnwath expressly agreed, that there is no complete bar to implying terms into the conditions of planning permissions. This was a significant development in planning law as it had previously been considered that, due to the public nature of a planning permission document, it was essential that any condition was clearly and expressly imposed and, accordingly, it was not possible for a condition to be implied (*R (on the application of Sevenoaks DC*) *v First Secretary of State* [2004] EWHC 771 (Admin).

In coming to the conclusion that there was no such bar to implied terms in planning conditions, it helped to consider a wider perspective on the law of implied terms. As noted in the judgment, there has been a general harmonisation of the interpretation of contracts, unilateral notices, patents and testamentary documents. However, differences in the nature of documents will influence the extent to which the court may look at the factual background to assist interpretation; and there is limited scope for the use of extrinsic material in the interpretation of a public document, such as a planning permission or a s.36 consent. Courts must be great cautious about implying terms into public documents which give rise to criminal sanctions (s36 provides that the construction of a generating station otherwise than in accordance with the consent is a criminal offence) but there was no reason for excluding implication altogether. Lord Carnwath went into further detail on this point. In analysing the English authorities including *Sevenoaks* he concluded that there was no reason to "exclude implication as a technique of interpretation, where justified in accordance with the familiar, albeit restrictive, principles applied to other legal documents. In this respect planning permissions are not in a special category."

This wider perspective, involving the application in planning law of rules of interpretation developed more broadly will enable courts in future cases to imply words into a condition if it is necessary to do

so in order to enable the condition to achieve its purpose. In some cases, it may not be possible to infer a condition which was apparently erroneously omitted from a planning permission (see the recent case of *Lambeth LBC v Secretary of State for Communities and Local Government* [2017] EWHC 2412 (Admin)). Nevertheless, recourse to this interpretive tool may prove to be useful in the future.

Hopkins

A further example of the Supreme Court's application of general legal principles in a planning case is the 2017 joined appeals, *Suffolk District Council v Hopkins Homes Ltd and Richborough Estates Partnership LLP v Cheshire East Borough Council* [2017] UKSC 37 ([2017] 1 WLR 1865). These appeals turned on the proper interpretation of paragraphs 14 and 49 of the National Planning Policy Framework ("the Framework") and, in particular, the meaning of "relevant policies for the supply of housing." This was significant because, in terms of the Framework, such polices should not be considered up-to-date where a council could not show a five-year housing supply. Paragraph 14 of the Framework included the 'tilted balance' provision which requires that where the development plan is silent or its policies out-of-date, permission should be granted unless "any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the polices in the Framework as a whole."

The Court (Lord Carnwath giving the lead judgment) cautioned against an overly legalistic approach to deciding whether or not an individual policy was a "relevant policy for the supply of housing." He considered that "the important question is not how to define individual policies, but whether the result is a five-year supply in accordance with the objectives set by paragraph 47 [of the Framework]. If there is a failure in that respect, it matters not whether the failure is because of the inadequacies of the policies specifically concerned with housing provision, or because of the over-restrictive nature of other non-housing policies. The shortfall is enough to trigger the operation of the second part of paragraph 14." Lord Carnwath was concerned that the courts had hitherto been overly concerned with "doctrinal controversy" over whether there should be a narrow or broad interpretation of paragraph 49 and stated that the court must read it in the broader policy context, having in view the planning objective that the Framework seeks to achieve. "Rigid enforcement," he stated, may frustrate national housing objectives.

Lord Carnwath also observed that the courts should "respect the expertise of the specialist planning inspectors, and at least start from the presumption that they will have understood the policy framework correctly." This principle closely reflects the well-established principle in public law of the

courts showing respect for the expertise of a specialist tribunal in their understanding and application of law to the facts in their specialised field, exemplified in Lady Hale's comments in *Cooke v Secretary of State for Social Security* [2002] 3 All ER 279, paras 15-17 and in *AH (Sudan) v Secretary of State for the Home Department* [2008] AC 678, para 30: in other words it is probable that "they got it right". An analogous rule, relating to the adequacy of reasons, is that there must be a real doubt about whether the law has been correctly applied before the courts will interfere in an exercise of discretion (see *Save Britain's Heritage v Number 1 Poultry Ltd and Others* [1991] 1 WLR 153 per Lord Bridge of Harwich at p168B-E).

Again, therefore, the Court looked to a wider perspective and analysed planning law with this in mind. The result is to encourage planning law to develop in a perhaps more pragmatic rather than formally legalistic manner. This may ultimately, as Lord Carnwath suggests, result in greater achievement of planning policy objectives.

<u>*Dover District Council*</u>

The Court's jurisprudence of applying broad legal principles in the sphere of planning law can also be seen in the case of *Dover District Council v. CPRE Kent* [2017] UKSC 79 ([2018] 1 WLR 108). This was a judicial review claim against the decision of the planning committee of Dover District Council to grant permission for the development of 521 houses in an Area of Outstanding Natural Beauty outside Dover. The challenge was on the basis that the Committee had failed to give reasons for its decision.

Lord Carnwath also gave the judgment in this case, with which the rest of the Court agreed. In the circumstances, the Court found a specific duty to give reasons under the EIA Regulations. However, since it has been a matter of some controversy in planning circles, Lord Carnwath went on to consider the duty to give reasons at common law in some detail. He observed that public authorities generally are under no common law duty to give reasons for their decisions but that fairness may in some circumstances require it, even in a statutory context in which no express duty is imposed (see *R v Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531). The principal justification for imposing a duty to give reasons is often that it is essential to ensure that any error in the decision-making process which may allow a court to intervene is revealed. Without such a duty, the right to challenge by judicial review is rendered hollow.

In the planning law context, it was suggested in *Oakley v South Cambridgeshire District Council* [2017] 2 P & CR 4 that a duty to give reasons did arise where a development would have a "significant and lasting impact on the local community." The Court decided that *Oakley* was correctly decided and

consistent with the general law as decided by the House of Lords in *Doody.* Whilst planning law is a creature of statute, the proper interpretation of the statute is underpinned by general principles derived from the common law. The general legal principle of "fairness" is particularly applicable to planning law as the legality of a planning decision is of legitimate interest to a wider range of public and private parties. In addition, a second common law principle is engaged by planning decisions: the principle of open justice. As the Court observed, this principle applies to statutory enquiries and there is no reason why it should not equally apply to the decisions of a local planning authority.

Dover District Council is therefore a further example of the Supreme Court applying general principles, in this case those of openness and fairness, to give authoritative guidance on a controversial issue in planning law. It did so in this case with a particularly wide perspective. Lord Carnwath noted that the United Kingdom's international obligations under the Aarhus Convention underpinned the reasoning. The result is, according to various commentators, clear guidance which helps to draw pre-existing case law together (perhaps the most significant judgment on the duty to give reasons in the planning context prior to this judgement was the speech of Lord Bridge in *Save Britain's Heritage v Number 1 Poultry Ltd* [1991] 1 WLR 153).

It could perhaps be suggested that there remains some ambiguity about precisely when an authority will be under an obligation to provide reasons. However, some flexibility may be warranted given the diversity of decisions required to be made by authorities. In any case, as Lord Carnwath suggested, it should not be difficult for councils and their officers to identify most cases in which reasons ought to be given with reference to the principles of fairness and openness. Obvious examples include cases where a decision has been made contrary to strong public opposition or where an authority is departing from a planning officer's report.

Thank you.