

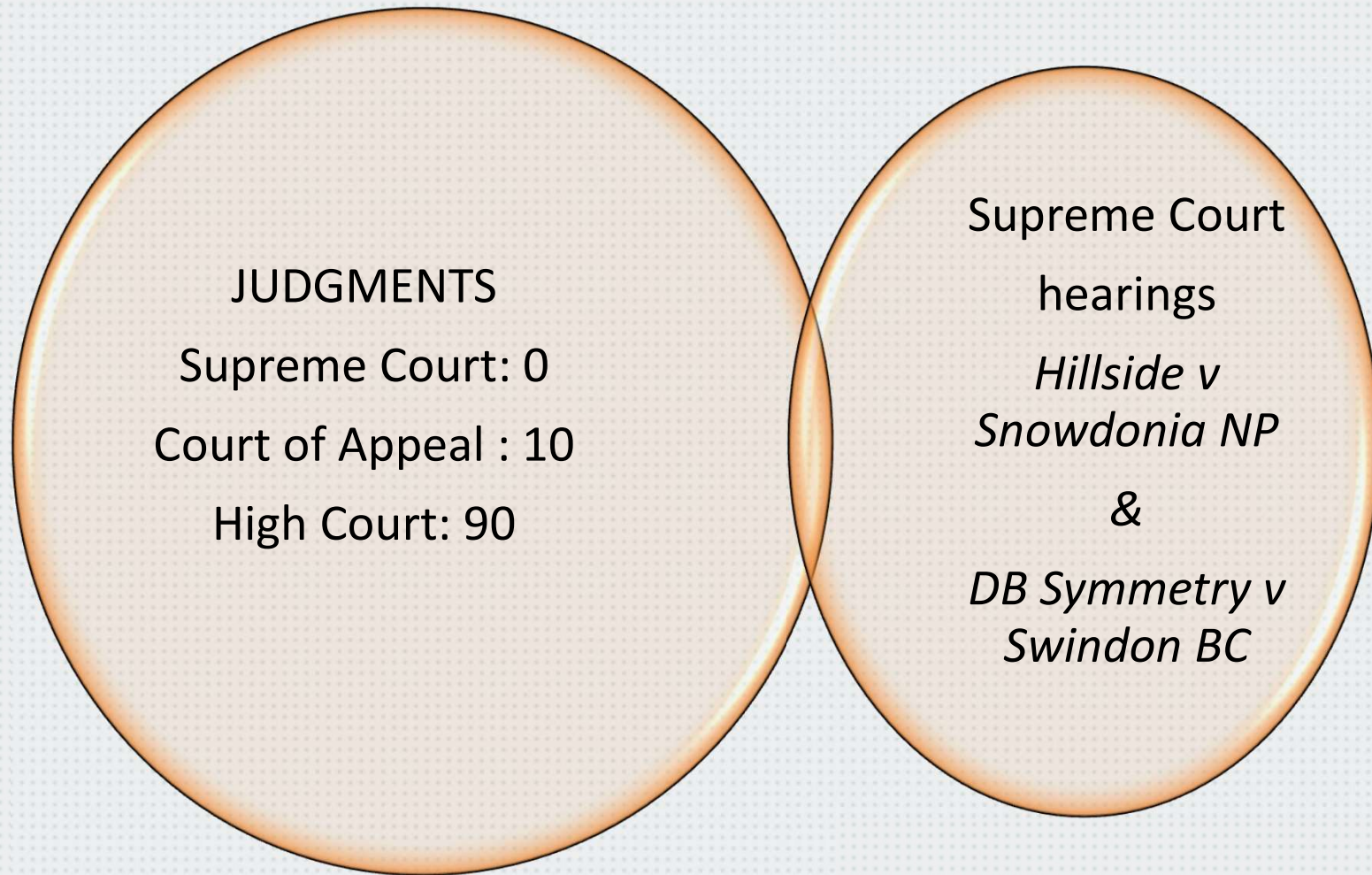
● ● ●
● ● ● cornerstone
● ● ● barristers

RTPI East of England Planning Law Update

Case Law Review –
The last 12 months in the courts

Mrs Harriet Townsend
Friday 4 November 2022

Data – the year to date....



The Case Law Review ...



We will cover 20 cases:-

- The SC judgment expected on 2-11-22 – *Hillside*
- 8 CA judgments

and 10 High Court judgments which concern

- The meaning of words/policy phrases (5 cases)
- EIA (2 cases)
- Climate Change (1 case)
- Prior approval (2 cases)
- CIL (1 case)
- Matters of great social importance (1 case)

Hillside – Court of Appeal



- PP in 1967 for 401 dwellings within the Snowdonia NP. Layout on a masterplan. Subsequent ‘drop-in’ permissions over decades, then in 2017 the LPA said no longer legally possible for the 1967 pp to be relied upon.
- Landowner sought a declaration that the remainder of dev on the masterplan would be lawful. HC and CA agreed with the LPA, saying the physical differences between what had been built and what had been permitted in 1967 made it impossible to carry out development compliant with the latter
- Appeal to SC heard on 4-7-21 and due for judgment on 2-11-22.

Hillside – SC judgment due 2-11-22



This Photo by Unknown Author is licensed under [CC BY-SA-NC](#)

CA case 1



Planning permission and tree felling

R (Arnold White) v Forestry Commission Lindblom SPT, Holroyde, Coulson LJ

- Outline consent + felling licence with restocking conditions + FC enforcement of restocking (July 2020) + full planning permission inconsistent with restocking....
- Judicial review by would be developer.
 - Dismissed for delay: the substantive decision attacked by A was the FC enforcement notice. Correspondence about its withdrawal generated by A in 2021 was not amenable to jr, was not a decision.
 - Grant of full pp did not override or replace the FC enforcement requirements.

CA Case 2



Planning permission and protected habitats

R (Wyatt) v Fareham BC Linblom SPT, Singh, Males LJJ

- Natural England's technical guidance note on calculation of a nutrient budget and the achievement of "Nutrient neutrality" necessary for lawful grant of pp came under attack but was held to be lawful [§55].
- Held: LPA performed its Appropriate Assessment under the Habitats Regulations lawfully and pp was lawful.
- Males §118: LPA did not accord precisely with the NE procedure but its decision was lawful as there was good reason not to follow it.

CA Case 3

Planning permission and SEA



R (Rights: Community: Action) v SSHCLG Lindblom SPT, Coulson, Birss, LJJ

- Revisions in pd rights introduced by amendment of GPDO in 2020 were the subject of this jr claiming those changes required strategic environmental assessment.
- Held: pd rights are not a plan or programme. They are planning consents, not a framework within which a consent is granted. Accordingly the SoS did not have to carry out an SEA before amending PD rights in 2020.

CA Case 4

Planning permission and EIA



R (Finch) v Surrey County Council Lewison LJ, Linblom SPT,
Moylan LJ

- The LPA granted pp for commercial extraction of oil in Surrey. The development was EIA development. The ES failed to include an assessment of ‘downstream’ emissions caused by the use of the petrol manufactured from the crude oil extracted by the development.
- The jr raised several grounds, all have fallen away save the argument that those emissions had, as a matter of law, to be assessed in the ES because they are significant indirect effects of the development on the environment.

CA Case 4

Planning permission and EIA



R (Finch) v Surrey County Council contd

- Holgate J had held that those emissions were as a matter of law, not indirect effects of the development for which planning permission was sought.
- The CA disagreed but nevertheless dismissed the appeal, by a majority. Why? And what will the Supreme Court make of this when it hears the further appeal next year?

CA Case 4

Planning permission and EIA



R (Finch) v Surrey County Council contd

- The CA unanimously held that the adequacy of the ES was a matter for the LPA (the traditional approach).
- The LPA had initially requested exactly this assessment in its scoping opinion, but subsequently accepted the developer's reasons for declining to do so.
- Lindblom SPT and Lewison LJ concluded the LPA had acted lawfully.
- Moylan LJ dissented. In his view cogent reasons were needed (and had not been given) for not assessing an impact agreed to be inevitable in the event of development proceeding.

CA Case 5

Planning permission – scope & meaning



Barton Park Estates Ltd v SSHCLG Lindblom SPT, Males, Lewis LJJ

- An Inspector concluded that the use of a permitted caravan site for stationing 80 caravans year round would fall outside the scope of a planning consent and be a m.c.u. from that permitted, albeit there was no condition on that consent limiting numbers.
- The key was in the description of development permitted by the consent. The CA considered when and how the first instance *I'm Your Man* principles are applicable and endorsed the Inspector's approach.
- Appeal dismissed.

CA Case 6

Planning permission – scope & meaning



Manchester City v SSHCLG Lewison, Dingemans, Davis LJ

- Enforcement Appeal Inspector granted pp for mcu of dwellinghouse to form 4 commercial units (these are then listed with ref to the Use Classes Order).
- Imposed no condition limiting changes of use: said it was unnecessary. Decision quashed by HC; and appeal dismissed.
- Held a failure to apply *I'm Your Man* led the Inspector into error. The permission resulted in 4 planning units each with its own use class.

CA Case 7

Policy interpretation



- Corbett v Cornwall Council Lindblom SPT, Moylan, Stuart-Smith LJ
- JR of LPA's decision to grant planning permission for a single dwelling on basis of local policy permissive towards housing development '**immediately adjoining**' settlements.
- The court gave the phrase a broad interpretation and upheld the LPA's decision. The words "*should not be given an unduly prescriptive meaning ... They allow the decision maker to judge, on the facts, whether the site and proposed development can be regarded as sufficiently close to the settlement in question to be 'immediately adjoining'.*" [§24].

CA Case 8

CIL Exemptions from Liability



R (Gardiner) v Hertsmere BC Lindblom SPT, Edis, Davis LJJ

- Held: The exemption from liability to CIL for self-builders (reg.54B) is not available where the development is permitted retrospectively [s.73A]
- Reason: to claim such an exemption a person has to assume liability for CIL after planning permission is granted and before development commences.

HC Case 1

The meaning of ...curtilage



Hiley v SSLUHC Knowles J

- Successful legal challenge to decision to dismiss a s.192 CLD.
- Familiar concept – less familiar context: pd rights in the curtilage of an existing industrial building [GDPO Sch.2 Part 7 Classes H and J].
- Site is a green field with pond. Inspector focused on size.
- *Blackbushe Airport* is the leading case on meaning and shows judicial reluctance to give definitive / prescriptive definitions.
- Bottom line: There is no test that curtilage has to be small but that does not mean relative size is irrelevant [§42].

HC Case 2

The meaning of ...extension to a building



Warwick v SSLUHC Eyre J

- New buildings are generally inappropriate in the green belt. Exceptions include: “the extension or alteration of a building” NPPF §149(c)
- The Inspector allowed appeal, finding that an outbuilding, separate from the dwellinghouse, was an extension to that house within §149(c).
- Must an extension be physically attached to the thing extended? Apparently not. [§52]. Council’s challenge dismissed.

HC Case 3

The meaning of ... "in accordance with"



Swire v Canterbury City Council Holgate J

- Outline pp for major mixed use development of a 42ha site.
- JR of later approval of masterplan and of non-material amendment applications. Argued that the masterplan failed to accord with the parameter plans of the outline consent and so conflicted with condition 6 raising the question what does the phrase 'in accordance with' mean.
- Held: the phrase means 'in agreement or harmony with; in conformity to; according to', and may well involve matters of judgment and degree [§43-44].
- Claim dismissed.

HC Case 4

EIA and in combination effects



R (Goesa) v Eastleigh BC Holgate J

- JR of permission for an extension to the existing runway at Southampton Airport. Forecasts in ES assumed Flybe (90% of 2019 passengers) but it folded in 2020. Dismissed.
- Several grounds including para 11(d) tilted balance(!)
- EIA point: failure to consider cumulative effects of GHG emissions in combination with other 'existing and/or approved' projects.
- J looked in depth at the ES's methodology and concluded that it was a legitimate way of considering in combination effects.

HC Case 5

EIA Screening and the PSED



R (Hough) v SSHome Lieven J

- JR of Special Development Order made by the SoS for use of Napier Barracks for asylum accommodation.



- Lucid review of authorities on the PSED, confirming the role played by an EqIA – a useful resource.

HC Case 5 contd.

EIA Screening and the PSED



R (Hough) v SSHome Lieven J contd.

- EIA Screening process: reg.64 does not require transparency of the screening process; and the implications for the nearby housing development did not have to be considered.
- Public Sector Equality Duty (s.149 Equality Act 2010): there was an obvious equalities impact requiring assessment and the EqIA which looked at a short interim period to Sept 2021. Matters such as community relations/harassment and victimisation over the proposed 5 year period should have been assessed.
- Decision quashed for breach of the PSED.

HC Case 6

The Net Zero Strategy



Friends of the Earth, ClientEarth, Good Law Project and Joanna Wheatley v SSBEIS Holgate J, 18 July 2022

- The Net Zero Strategy is the s.14 CCA 2008 report required asap after the setting of the 6th Carbon Budget for 2033-37 (the first budget with a net zero 2050 target).
- Held: the SoS had failed to comply with ss.13 and 14 CCA 2008 in ways specified in a lengthy judgment, notably inadequate were the briefing he received esp on quantitative matters and how to make up the predicted 5% shortfall against budget.
- See §214, §216-217 and §252-254.
- Ordered SoS to lay a fresh report by end March 2023.

HC Case 7

PD rights – scope of prior approval



CAB Housing v SSLUHC Holgate J (now under appeal)

- 3 challenges to dismissed appeals against refusal of prior approval: the scope and extent of issues capable of influencing a prior approval decision.
- ‘Adjoining’ means ‘neighbouring’ and is not confined to those premises contiguous with the building[§82].
- Where the GDPO para AA.2(3) uses the word ‘including’ it does not provide an exhaustive list.
- The pd right is ‘contingent’ on prior approval [§71].

HC Case 8

Prior approval and existing use rights



Spedding v Wiltshire Council Fraser J

- In deciding that prior approval for a change of use from agricultural buildings to flexible commercial was not required, the LPA erred and its decision was quashed.
- Reasons:
 - The LPA failed to consider whether the use was within the **curtilage** of the building; and
 - Although the farm was not in active use, the LPA treated that lawful use as a **fallback** without considering whether it was likely that the lawful use would be resumed.

HC Case 9

Community Infrastructure Levy



Heronlea v SSLUHC Lang J

- A developer's challenge to the findings of an Inspector on an appeal against the amount charged failed.
- The authority had granted **social housing relief**. However, the development ceased to be eligible because a commencement notice was not served before development began.
- Reason: reg.51(7)a) CIL Regs.

HC Case 10

The Holocaust Memorial



London Historic Parks and Gardens Trust v Min. Housing Fraser J



- Planned since 2015; >50 sites considered; pp granted 2021; quashed; permission to appeal refused. What next?

Cases page 1 of 2

Court of Appeal



- *Hillside Parks Ltd v Snowdonia NPA* [2020] EWCA Civ 1440, but nb Supreme Court judgment due 2-11-22
- *R(Wyatt) v Fareham BC* [2022] EWCA Civ 983
- *R (Rights: Community: Action) v SSHCLG* [2022] Env LR 21
- *R (Finch) v Surrey County Council* [2022] EWCA Civ 187
- *Barton Park Estates Ltd v SSHCLG* [2022] EWCA Civ 833
- *Manchester City v SSHCLG* [2021] EWCA Civ 1920
- *R (Corbett) v Cornwall Council* [2022] EWCA Civ 1069
- *R (Gardiner) v Hertsmere Borough Council* [2022] EWCA Civ 1162

Cases page 2 of 2

High Court



- *Hiley v SSLUHC and East Lindsey* [2022] EWHC 1289 (Admin)
- *Warwick v SSLUHC* [2022] EWHC 2145 (Admin)
- *R (Swire) v Canterbury City Council* [2022] EWHC 290 (Admin)
- *R (Goesa) v Eastleigh BC* [2022] EWHC 1221 (Admin)
- *R (Hough) v SS Home* [2022] EWHC 1635 (Admin)
- *R (Friends of the Earth) v SSBEIS* [2022] EWHC 1841 (Admin)
- *CAB Housing Ltd v SSLUHC* [2022] EWHC 208 (Admin)
- *R (Spedding) v Wiltshire Council* [2022] EWHC 347 (Admin)
- *R (Heronlea (Bushey 4) Ltd) v SSHCLG* [2022] EWHC 96 (Admin)
- *London Historic Parks & Gardens Trust v Minister of State for Housing* [2022] EWHC 829 (Admin)



Mrs Harriet Townsend

htownsend@cornerstonebarristers.com

Please note these slides are provided for training purposes only and do not constitute legal advice.
Copyright asserted by Harriet Townsend.