CASE LAW UPDATE

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INTRODUCTION

1. This update will be split into 2 parts.

2. First, it will explore 3 significant Court of Appeal judgments dealing with enforcement matters:

    a. ***Binning Property Corporation Ltd v. SSCLG*** **[2019] EWCA Civ 250 (*"Binning"*)**

    b. ***Dill v. SSCLG*** **[2018] EWCA Civ 2619 (*"Dill"*)**

    c. ***Huddlestone v. Bassetlaw DC*** **[2019] EWCA Civ 21 (*"Huddlestone"*)**

3. Second, in the last year or so, local planning authorities have been making use of particular powers (prohibitory injunctions and Community Protection Notices) in novel or ambitious ways. This trend will be examined.

RECENT CASES

Leave to appeal in s289 appeals: *Binning*

4. The Court of Appeal confirmed in *Binning* that there is no avenue to appeal to the Court of Appeal against a refusal of permission by the High Court on a challenge under s289 of the Town and Country Planning Act 1990 ("TCPA 1990").[1]

[1] All statutory references are to the Town and Country Planning Act 1990 (as amended) unless stated otherwise.

Binning's case

5. Binning sought to appeal an Inspector's decision upholding an enforcement notice to the High Court under s289(6). The High Court had refused leave for their s289 challenge. Binning then sought to appeal that refusal of leave to the Court of Appeal. The live issue for the Court of Appeal was whether, on a s289 challenge, the Court of Appeal had jurisdiction to hear an appeal against a refusal of leave by the High Court.

6. The Court of Appeal had previously held that it did not have any such jurisdiction in several cases, the most recent being *Walsall MBC v SSCLG* [2013] EWCA Civ 370.

7. However, Binning argued that these authorities were no longer good law as a result of recent developments. In particular, Binning:

   a. identified reform of the costs capping procedure under Aarhus Convention claims as one basis for the court now treating s289 challenges as akin to judicial review; and

   b. argued that, as the Court of Appeal now had jurisdiction to entertain appeals against refusals of permission for leave by the High Court on a s288 challenge, there was no longer any justification for any discrepancy between a s288 challenge and a s289 challenge. This was because, Binning argued, there could no longer be any argument about a 'disparity' between s288 and s289 challenges.

Judgment

8. The Court of Appeal refused the application.

9. The Court held that, although there may have been changes elsewhere, there had been no significant change to the scheme for enforcement or, more particularly, the provisions for appeals under s289.

10. In his judgment, Lindblom LJ said that, although previous decisions had referred to the absence of a leave filter in s288 challenges, the relevant authorities did not rest on that difference.

11. He further emphasised the desirability of swiftness and certainty in enforcement action and that the finality of the High Court's decision on leave was conducive to that.

12. Further, Lindblom LJ did not accept that changes to the Civil Procedure Rules, particularly Practice Direction 8C and CPR 52.10 concerning 'planning statutory review appeals' and CPR Part 45 on costs in relation to Aarhus Convention claims, bore on s289 challenges. He said that the CPR confirmed a deliberate distinction between a 'planning statutory review' under s288 and a s289 appeal.

Practical Points

13. The avenues for appeal (in terms of decisions on leave) remain more restrictive in s289 challenges than they are in s288 challenges or applications for judicial review.

14. When seeking leave to challenge under s289, the decision of the High Court is final except in cases of unfairness or misconduct.

15. Notwithstanding that, the decision does not change the position for appeals concerning decisions on a ground (A) appeal, for which a s288 challenge must also be brought. As a result of this, a refusal of leave on this ground alone can still be appealed to the Court of Appeal.

When a listed building is not a building: *Dill*

16. Against a backdrop of listed building enforcement proceedings, the Court of Appeal in *Dill* was asked to rule on how to approach the issue of what to do when a listed building is not a 'building' within the meaning of TCPA 1990.

Background

17. Two 18th century limestone piers, each surmounted by a lead urn (or finial) were moved to Idlicote House in 1973 having previously been located at various other properties. Idlicote House was Grade II listed and, in 1986, the two piers and urns were themselves separately Grade II listed.

18. In 1993, Idlicote came into the ownership of Mr Dill, who, not appreciating that the piers were listed, sold them abroad in 2009 for £55,000. Their whereabouts since then are unknown.

19. Stratford-on-Avon DC became aware of this sale in 2014 and, after correspondence, Mr Dill sought retrospective listed building consent to remove the piers and urns. The Council refused that application and issued a listed building enforcement notice requiring their reinstatement.

20. Mr Dill sought to appeal both the refusal and the listed building enforcement notice, in the course of which submitting that the Inspector could (and ought to) conclude that, notwithstanding their individual listing in 1986, the piers did not constitute a 'listed building'.

Court of Appeal

21. The Court of Appeal refused the appeal.

22. It noted that 'building' was not a term defined in the Listed Buildings Act but rather was defined in the TCPA 1990. Despite submissions having been made as to

whether the piers themselves satisfied either the definition of a 'building' in TCPA or met any of the well-known considerations set out in cases such as *Skerritts of Nottingham Ltd v. Secretary of State for the Environment, Transport and the Regions (No.2)* [2000] JPL 1025, the Court held that these considerations were not relevant here.

23. This was because the listing was determinative of the question, not whether the piers constituted buildings for the purposes of the Acts.

24. The court held that listed building protections apply not only to structures listed in their own right (as here), but also to objects or structures fixed to a listed building or by being within the curtilage of a listed building. Neither the Inspector, nor the Court, could go behind the listing of the piers.

Practical points.

25. **First**, the designation 'listed building' applies more widely than 'building' under the TCPA and that listed building protections may apply to many things which are not 'buildings' for the purposes of the TCPA.

26. **Second**, this case serves as a useful reminder for both Councils and owners that there is no time limit for serving a listed building enforcement notice, neither is there a time limit in pursuing criminal prosecution for works undertaken without Listed Building consent.

27. **Third**, this case raises some questions for both the owners and the Council which have no obvious answers:

    a. How does the owner comply with the requirement to reinstate when he has no idea of their whereabouts and it is effectively impossible for him to comply with it?

b. How does a Council envisage actually enforcing the listed building enforcement notice (either through prosecution or injunction) where, at the very least it must suspect, that compliance with the requirements is impossible?

Compensation and Stop Notices: *Huddlestone*

28. In *Huddlestone*, the Court of Appeal considered the circumstances where compensation is payable for loss said to have been caused by a stop notice that was served by a Council pursuant to s186.

Background

29. In 2006, permission was granted for a change of use of land for siting holiday lodges. That permission was subject to 24 conditions, 12 of which required approval of details before development commenced. Development was subsequently carried out before there had been compliance with any of the pre-commencement conditions.

30. Between 2009 and 2011 the Council served three enforcement notices. The first was quashed on appeal (on a ground (C) appeal), the second notice was withdrawn and the third notice was varied and upheld on appeal. The first notice was accompanied by a stop notice under s183.

31. Mr Huddleston claimed compensation from the Council for loss as a result of the Stop Notice served alongside the first (quashed) enforcement notice. The Council refused to pay compensation, relying on s186(5)(a) TCPA which provides that no compensation is payable under s186 where at any time when the stop notice is in force the activity prohibited by the notice constituted or contributed to a breach of planning control.

32. Mr Huddlestone appealed the decision on compensation to the Upper Tribunal who found in favour of the Council.

Case in the Court of Appeal

33. In the Court of Appeal, Mr Huddlestone argued that the existence of the 2006 permission meant that his activities did not "constitute or contribute to a breach of planning control" and that s.186(5)(a) therefore did not operate to prevent his claim.

34. The Court dismissed the appeal, upholding the judgment of the Upper Tribunal that the relevant question was what the actual circumstances were at the time the stop notice was in force. It noted, "This concept is not difficult, or surprising. The subsection means what it says, nothing more and nothing less."

35. The Court further approved the judgment of the Upper Tribunal that the scheme of compensation under TCPA 1990 is predicated on there being an actual loss, not a hypothetical one.

36. In addition, the Court rejected the argument that s186(5) ought to be read as allowing compensation in circumstances where development had been carried out in breach of pre-commencement conditions. It held that s186(5) was expressed in terms that were neither ambiguous nor opaque, nor did they conflict with the principle that a statute ought not to be construed as taking away property rights without compensation unless the intention to do so is clear.

37. The Court further rejected Mr Huddlestone's argument that the stop notice (which required the cessation of "introduction and siting of any further accommodation units") effectively prohibited future development of the site whether or not in compliance with the 2006 permission. In doing so, the Court noted that the introduction of further units would have constituted a breach of planning control since the failure to discharge the pre-commencement conditions precluded the introduction of further units onto the site in a manner which would comply with the 2006 permission.

38. The Court noted that, throughout the period of the stop notice being in effect, no attempt had been made to seek approval of the outstanding details under the 2006 permission and that the stop notice did not purport to prevent that happening.

39. It concluded by observing that even if a loss had been incurred, such losses arose from Mr Huddlestone's failure to discharge the pre-commencement conditions on the 2006 permission, not from the service of the stop notice.

Practical points

40. Huddlestone serves to underscore the need for an accurate analysis of the actual circumstances existing in the period of the stop notice before seeking compensation.

41. The statutory compensation scheme requires that authorities (and if necessary the Tribunal) grapple with the circumstances as they actually were in the period while the stop notice was in force and address only actual losses which are directly attributable to the stop notice, not some other imaginary or hypothetical factual scenario or losses, or losses attributable to sources other than the stop notice.

"BOROUGH-WIDE" INJUNCTIONS

42. There has been a trend in the last 18 months of local planning authorities obtaining anticipatory injunctions to protect public open spaces and carparks owned and managed by Councils from unauthorised incursions by caravans and fly tipping. It is understood that to date at least 34 local authorities have obtained this type of relief.

43. The legal basis is:

a) Breach of planning control: section 187B of the 1990 Act;
b) Stopping out of the highway: section 130 of the Highways Act 1980;

c) Section 222 of the Local Government Act 1972; and

d) Common-law trespass.

44. The particular legal power which applies may depend on the status of the particular site in question. The Highways Act may apply to a road leading to a Business Park; trespass may be the straightforward approach for land which the local authority owns (but may not apply for common land which is vested in the Crown).

45. The test for an anticipatory injunction for trespass is a strong probability that the trespass will occur and, if it does, it will give rise to irreparable or very substantial harm. This is a higher test than for a planning injunction, but does at least side-step the thorny issue that the stationing of caravans for residential purposes is not *always* a breach of planning control (there are certain PD rights which *may* apply).

46. In some cases, the Court has granted a power of arrest: section 27 of the Police and Justice Act 2006.

47. The usual period for a final order is 3 years.

48. Given that the defendant is usually “Persons Unknown” the defendants have not attended to contest the restraint. Until, Bromley LBC. The charity, London Gypsy Travellers, applied to be an Intervener. It argued that the injunction was disproportionate and unfairly targeted members the gypsy traveller community. At the return date in May 2019, the High Court discharged the interim injunction and refused to grant a final order. Unusually, the trial judge granted permission to appeal. In December 2019 the Court of Appeal will hear the case over 2 days. It will be tasked with judging the efficacy and setting the parameters for these sorts of injunctions. Watch this space.

COMMUNITY PROTECTION NOTICES

49. Section 43 of Anti-social Behaviour, Crime and Policing Act 2014 sets out the power. It provides:

(1)An authorised person may issue a community protection notice to an individual aged 16 or over, or a body, if satisfied on reasonable grounds that—

(a)the conduct of the individual or body is having a detrimental effect, of a persistent or continuing nature, on the quality of life of those in the locality, and

(b)the conduct is unreasonable.

(2)In subsection (1) "authorised person" means a person on whom section 53 (or an enactment amended by that section) confers power to issue community protection notices.

(3)A community protection notice is a notice that imposes any of the following requirements on the individual or body issued with it—

(a)a requirement to stop doing specified things;

(b)a requirement to do specified things;

(c)a requirement to take reasonable steps to achieve specified results.

(4)The only requirements that may be imposed are ones that are reasonable to impose in order—

(a)to prevent the detrimental effect referred to in subsection (1) from continuing or recurring, or

(b)to reduce that detrimental effect or to reduce the risk of its continuance or recurrence.

(5)A person (A) may issue a community protection notice to an individual or body (B) only if—

(a)B has been given a written warning that the notice will be issued unless B's conduct ceases to have the detrimental effect referred to in subsection (1), and

(b)A is satisfied that, despite B having had enough time to deal with the matter, B's conduct is still having that effect.

(6)A person issuing a community protection notice must before doing so inform any body or individual the person thinks appropriate.

(7)A community protection notice must—

(a)identify the conduct referred to in subsection (1);

(b)explain the effect of sections 46 to 51.

(8)A community protection notice may specify periods within which, or times by which, requirements within subsection (3)(b) or (c) are to be complied with.

50. This is a broad power which can be deployed in large array of contexts. To be served, the Council must be satisfied that the recipient of the notice is behaving

unreasonably and in such a way as to cause a ongoing detrimental effect on the quality of life of those in the locality. It could be used:

a) Against anti social behaviour;
b) In a case where the test for a statutory nuisance is not made out; or
c) Instead of a section 215 “clean up” notice.

51. Before a Notice can be issued, the subject must be given a written warning stating that a Notice will be issued unless their conduct ceases to have the detrimental effect. Failure to heed a warning after sufficient time and where that effect continues, may then lead to the issue of a Notice requiring them: to stop doing specified things and/or to do specified things and/or to take reasonable steps to achieve a specified result.

52. A failure to comply with the without reasonable excuse is a summary offence carrying a maximum penalty on conviction of a fine of up to level 4 for individuals, or an unlimited fine in the case of a business or other body. Alternatively, an Authorised Person may issue a Fixed Penalty Notice (max £100) conferring immunity from prosecution for that offence if paid within 14 days.

53. A right of appeal against the service of the Notice or its terms lies to a Magistrates’ Court within 21 days of issue.

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