BCLP. Client Intelligent

Insights

"AS YOU WERE": CHALLENGE TO NEW USE CLASSES ORDER AND PERMITTED DEVELOPMENT RIGHTS DEFEATED IN THE COURTS

Nov 18, 2020

SUMMARY

On Tuesday 17th November the High Court dismissed legal challenges to the Government's most recent amendments to the Use Classes Order and General Permitted Development Order. In this blog we discuss the judgement.

Introduction

Campaign Group "Rights:Community:Action" had challenged the statutory instruments (SIs) setting out the proposed changes. The statutory instruments – two relating to permitted development and one related to use classes – were passed in the summer of 2020 as part of the Government's response to the economic challenges of Covid-19.

The claim raised three grounds of challenge against the responsible Secretary of State for Housing, Communities and Local Government (SoS), as follows:

1. That each proposal should have been subjected to a strategic environmental assessment under the 2004 European Directive

2. That for the two permitted development rights SIs the SoS failed to discharge his public sector equality duty under the Equality Act 2010, and

3. That the SoS's approach to consultation had been unlawful. This ground split into four sub-grounds:

    (a) The SoS failed to give due regard to responses to the consultation which led to the proposals, and he had decided to proceed irrespective of the views expressed in consultation

(b) He ignored the advice of his own experts, in particular as set out in the findings of the Clifford Report and the "Building Better, Building Beautiful Commission"

(c) It was unfair to treat this consultation differently from the recent consultation on permitted development rights for 5G masts, where further technical consultation was promised, and

(d) The SoS had promised further consultation before allowing permitted development rights for the demolition of existing buildings and the construction of new dwellings in their place (Class ZA rights) but failed to honour that promise

In its judgment on 17th November the Divisional Court of Lord Justice Lewis and Mr Justice Holgate dismissed all grounds of challenge.

Commentary

So the 2020 amendments to the Use Classes Order and the Permitted Development Order have survived challenge.

That result probably surprises few people. Challenges to legislation are very difficult to sustain.

A close examination of the claimant's material reveals that its primary concern in this challenge was overturning laws that (they said) would lead to poor quality housing and its damaging effect on health and well-being. They would result – said the claimants – in a return to slum housing of the Victorian era.

Put in that way the challenge was sure to attract media interest. But, alas for the claimant, good headlines do not a successful challenge make. The Court's role in any judicial review is confined to examining the lawfulness of the process leading to a decision. It will not second-guess the desirability of the outcome. Channelling Baroness Hale in the most recent Brexit litigation the judgment begins with a reminder about "what this case is and is not about" – a warning given, no doubt, with one eye on the gathering storm that is the Government's current "Independent Review of Administrative Law" being conducted by Lord Faulks.

So what was the case about?

Mostly it was about the application of orthodox judicial review principles to the Government's consultations and their outcome, with a sprinkling of equalities law and European law thrown in for good measure. And mostly it was the facts rather than any emerging new law that dictated the outcome. For example it was concluded that on the facts the Government had indeed undertaken an equalities assessment, and that it had indeed fairly and properly reported the consultation responses to the SoS before the SIs were made. Two arguments were disposed of with ease.

Three grounds deserve more detailed analysis comment:

(A) The Court concluded it was unarguable to say that the SoS had ignored the advice of his own experts. On the contrary he had commissioned the two reports mentioned and had been reminded of their conclusions in his briefings. Experts have had a pretty bad press lately, whether of the economic or the medical kind. But this is no modern phenomenon. In many ways it was foreshadowed years ago in the wonderful *Yes Minister,* where a beleaguered civil servant laments his position in the service noting *"I will rise no higher. Alas I am an expert".* What seems clear here is that the recommendations of the Government's experts was accorded no special weight in the decision-making, but at least their expertise was not used to undermine their advice

(B) The Court concluded that the Strategic Environmental Assessment Directive did not apply to the SIs because they were not a "plan or project" within the meaning of the Directive. They either delineated where planning permission was not needed (UCO) or defined the circumstances in which planning permissions would be granted (PD), but that they did not set the criteria against which a planning authority would decide future applications for permission. In passing, the Court added that if the claimant's argument were correct it would have had wide-ranging implications including the need to assess any future article 4 direction. That, said the Court, was a novel argument. "Novel" – another damning *Yes Minister* epithet

(C) Finally it was conceded by all parties that the SoS had indeed promised further consultation before proceedings with permitted development right ZA and that he had not done so. How did he get away with that, then? The answer – said the Court – lies in the extraordinary circumstances that the changes were intended to combat. The impact of COVID-19 on the economic climate meant that drastic measures were warranted. There was no legitimate expectation of further consultation despite the promise because the need to proceed immediately was a proportionate response to the crisis

The result was met with a dignified press statement from the claimant today saying that they respect the decision. But the statement also indicated that they will be appealing. Unusually the press statement previews the likely grounds of appeal, one of them noting that the response to a temporary economic crisis has resulted in a permanent change to legislation.

"This is a case that must be appealed" concludes the claimant's press statement. We will know soon enough whether this is to be attempted. But for sure the claimants face an even steeper uphill struggle after Tuesday's decision. For now it is a case of "as you were".

RELATED PRACTICE AREAS

- Planning & Zoning
- Real Estate

MEET THE TEAM

Tim Hellier

London

tim.hellier@bclplaw.com
+44 (0) 20 3400 4243