Case Name: *Wickford Development Company Ltd & Ors, R (On the Application Of) v Secretary of State for Environment, Food and Rural Affairs* [2024] EWHC 2034 (Admin) (02 August 2024)

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Commentary: These were joint proceedings in which Mrs Justice Lieven DBE quashed three decisions by the Secretary of State for Environment, Food and Rural Affairs ("**Defendant**") who upheld restocking notices ("**RSN**") served by the Forestry Commission (**"FC"**) under the Forestry Act 1967.

Background

All three challenges were brought by development companies (Wickford, Witham Nelson and Smar) who felled trees without a licence in anticipation of future development. The FC subsequently issued RSNs, which required the restocking of trees on the land. In all three cases, the companies appealed their respective RSNs to a Reference Committee ("**RC"**) who then produced report that was sent to the Defendant. The Defendant upheld the RSN in all three cases.

Two of the cases, *Witham Nelson* and *Smar*, are relevant for the purposes of this summary insofar as they dealt with the interrelationship between the Forestry Act and the Town Planning regime.

In *Witham Nelson*, outline planning permission for seven homes had been granted. The RC suggested in its report that development was "inevitable" on the land subject of the RSN once the relevant maintenance period to protect the restocked trees had lapsed, suggesting to the Defendant that having the trees stocked on alternate land may be a preferable approach.

In *Smar* the land did not have the benefit of any planning permission, however, it formed part of a wider parcel for an emerging housing allocation in the Bristol City Council Local Plan Review.

Relevant Grounds

Ground Three in Witham Nelson

The specific issue raised by Witham Nelson through this ground was that the RC said in their report to the Defendant that whether the delivery of housing was a material consideration was a legal issue and a matter for judicial review.

Citing *R (Arnold White Ltd) v Forestry Commission* [2023] PTSR 242 (where the Court of Appeal set out that the Town Planning statutory regime does not in any sense take precedence over the Foresty Act regime), Lieven J found the Court of Appeal did not hold that when making a Forestry decision the broad public interest in delivering housing development is not to be a material consideration.

Lieven J found that the Defendant effectively had a choice, they could uphold a RSN which would prevent development for the maintenance period (being 6.5 years) and lead to the removal of the restocked trees after that period, or they could modify the RSN to allow it to apply to alternative land, thus allowing the development to come forward and deliver the greater silvicultural benefits. On these facts, the public benefit in the delivery of housing was a material, although not a determinative, consideration and the Defendant erred in not having regard to it.

Therefore, Ground Three was made out (along with the other two grounds advanced by *Witham Nelson*) and their claim was successful.

Grounds One and Two in Smar

It was argued by *Smar* in Ground One that the RC was wrong in law to say that allowing the appeal and a variation to the RSN would "undermine the planning regime". Lieven J found there was no sense in which *Smar* seeking to amend the RSN (by disapplying the maintenance period for the restocked trees in the event planning permission was granted) would undermine the planning regime. She then went on to state that *Smar* were only arguing that the RSN should be varied to allow the trees to be removed if any future planning permission was granted. Thus, it was not in any way undermining the requirement in the RSN to restock in advance of any permission and it was not pre-empting the planning process.

For the same reasons as Ground Three in *Witham Nelson*, Ground Two was also successful and the Defendant erred by not considering the public interest in the delivery of housing. *Smar* were proposing a mechanism that would keep the RSN in place and to be met, unless and until planning permission was granted, or that the RSN should be modified to refer to alternative land. This argument should have been considered on its merits and consideration of the public interest in the delivery of housing. Therefore, the effect of frustrating the delivery by upholding an unamended RSN, should have been a material consideration.

Whilst Ground One alone would have led Lieven J to apply the Senior Courts Act 1981 (i.e. the decision would be highly likely to be the same but for the error), this was compounded by Grounds Two and Three and *Smar's* claim was successful.

Key Takeaway

The key takeaway is the further guidance on the principles from *Arnold White* on the interrelationship between the Town Planning regime and Forestry Act regime, and confirmation from the Court that the delivery of housing is a relevant consideration for RCN appeals.

Case summary prepared by Jack Curnow