

**Salt Cross AAP Legal Challenge: Application for Judicial Review between Rights Community Action and Secretary of State for Levelling Up, Housing and Communities
Royal Courts of Justice November 14 and 15 2023**

Informal notes by Sarah Couch November 16 2023 - as a public observer

Summary

After one and a half days of the various counsels presenting and arguing about the case and some incisive questioning by the judge, the judgement is deferred and could take about 2 months. On the positive side, the judge clearly understood the importance and potential impact of the Inspectors' decision and there were some choice words when replying to counsel for the Secretary of State. She was clearly tired and particularly irritated by the inconsistency in decision making and the government response. "This is terrible policy making!" "You represent the government on a matter of great importance. What is the government's view?" "I am baffled!" But in the end it seems she will reject this part of claim. As this was a 'rolled up hearing' it is not even clear if it the case is 'justiciable' – (able to be decided in court of law)- so I suspect it could be thrown out on procedural issues. Nor are all the commonsense arguments (eg wider implications) legal considerations. The lawyers for Rights Community Action expect some useful commentary even if the judgement does not go their way (in all or in part) and said they will keep us informed. Watch this space!
[contents of square brackets are my additions and comments]

Main players

Judge: Mrs Justice Lieven (usually in family court, but previously planning)

Counsel for Rights Community Action (RCA)(claimant):Alex Goodman KC and Alex Shattock

Counsel for Secretary of State for Levelling Up, Housing and Communities (SoS) (defendant):Mark Westmoreland Smith

Counsel for Grosvenor Developments Ltd (Interested Party): Charles Banner KC (he also represented Grosvenor at the Examination)

West Oxfordshire District Council is also an Interested Party but was not represented

Also in the room

Leigh Day for Rights Community Action: Ricardo Gama and Klara Ipek (paralegal)

Naomi Luhde-Thompson, director Rights Community Action (day one only)

Several familiar faces from Grosvenor

Two District Councillors (most of day one only); Lidia Arciszewska and (I think) Alaric Smith, both on Executive

GreenTEA Sarah Couch (both days); Lucy Dickinson and Tony Bovey (day one)

RCA Grounds for Judicial Review

Ground 1: Misinterpretation of the Written Ministerial Statement

Ground 2: Failure to provide clear reasons for inconsistency with the interpretation of the WMS in other examination reports

Ground 3: procedural fairness

Proceedings

NB there were 4 'bundles' (huge files of documents, relevant case law etc) which we did not see and much evidence was only referred to by number, but not detailed in court. There were also statements from Chris Hargraves (WODC) and Hugh Ellis (TCPA) which were not even mentioned. I did my best to record important points but there may be errors and there are omissions: our knowledge is partial and not informed by legal expertise.

First, Counsel for Rights Community Action (claimant): **went through the claim and ‘grounds’** and also answered the Secretary of State’s written response.

The judge did not seem to be well prepared but at least it gave the RCA KC time go through the background and main points (see Statement of Facts and Grounds¹).

Ground 1: Misinterpretation of the Written Ministerial Statement

Much discussion concentrated on interpretation of an obscure but now notorious Written

Ministerial Statement of 2015 (WMS) from then Secretary of State Eric Pickles. He said that local planning authorities will continue to be able to set energy performance standards that exceed the Building Regulations but also referred to now out of date building standards as the maximum permissible (the then outgoing Code for Sustainable Homes Level 4, now superseded and exceeded by current part L of the Building Regulations). He also anticipated amendments to the Planning and Energy Act 2008, which allowed LPAs to set higher standards, but this was **not** done and the government has stated that it will not do so.

So the argument is that **currently LPAs may set higher standards** (also eloquently explained by Hugh Ellis of TCPA). Several Planning Inspectors have agreed with this and stated that the WMS has been superseded. BEIS (The Department for Business, Energy, and Industrial Strategy) also confirmed to Bath and NE Somerset (BANES) that the WMS was out of date and redundant and this view was upheld in their Local Plan examination, **BUT the Salt Cross AAP inspectors took a very different view**, saying that the WMS is still current policy and LPAs do not have the power to set higher standards; this was also the SoS’s argument.

You might conclude that this makes no logical sense.

Judge summarised “so the WMS has unarguably fallen by the wayside”.

The weight given to the NPPG (guidance, not policy) was also discussed.

The judge noted that the Future Homes Standard (FHS) which is “zero carbon ready” would probably be in force before homes were built, which is a bit worrying. FHS is **not** zero carbon and in several aspects has significantly lower or even absent standards compared to the AAP KPIs (energy efficiency, embodied carbon, 100% annual renewable energy generation etc).

RCA KC said that the Salt Cross decision **leads to uncertainty in adopted plans with zero carbon policies**- this is a very important point which the judge acknowledged, but worryingly she said although there may be an error in law , should a judge be dealing with it?

Should it be subject to JR?

There was a long discussion on whether the challenge was too early as it is on the basis of the Inspectors’ recommendation not on the final AAP. Whether it should be challenged once the AAP is adopted, but it was acknowledged this would mean WODC acting against itself.

The RCA KC said that although the Inspectors’ make recommendations for Main Modifications (MMs) **they are in effect a determination** as WODC must accept them or withdraw the whole AAP- ie there is no discretion. The RCA KC said the decision was an illogical and unpragmatic outcome.

Judge then asked if the case is ‘justiciable’ - (able to be decided a court of law)- with lengthy

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[Salt Cross Garden Village Statement of facts and grounds ... Squarespace](#)

<https://static1.squarespace.com › static › Salt+Cr...>

In a report dated 1 March 2023 and published on 7 March 2023, the examining Inspectors of the **Salt Cross** Garden Village Area Action Plan (“the AAP”) ...

reference to case law including a case about the right to speak on behalf of an Osprey! This was not resolved so I assume there is a risk that it does not get as far as JR wholly or partially.

SoS Counsel stated 'it is not amenable to JR'.

Later there was discussion at which point the AAP becomes a 'local development document' with reference to two differing cases. Judge's view was that it was not until it was adopted and hence this meant (I think) the ground was not statutorily 'ousted'. RCA KC says in their view it is amenable to JR.

Ground 2: Discussion on process (Failure to provide clear reasons for inconsistency with the interpretation of the WMS in other examination reports). The fact that the Inspector refused to give reasons for his decision on Policy 2 until WODC had consulted on his MMs; and had encouraged RCA to respond and said they would take responses into account.

Case law cited by RCA KC; showing RCA were not a 'busybody' (as this is the purpose of the organisation) and that they are a 'person aggrieved'

SoS tried to argue that RCA should have been involved at an earlier stage and are not affected by the judgement. *Also that both Grounds are needed. RCA KC argues against this that saying if Ground 1 (misinterpretation of WMS) is sent back to Inspectors as an error of law, it could result in different MMs and retention of at least elements of Policy 2. SoS argued against this later.

Judge: [Inspectors /SoS] say Policy 2 is too prescriptive.

RCA: Inspectors lack of sense of realism and understanding.

Judge: "yes it feels very uncomfortable."

RCA: Inspectors must give reasons for disagreement by analysis. "Decision does not grasp the intellectual mettle (nettle) of the argument."

Judge: they need to explain why the basis of reasoning is the WMS. There are **2 different Inspectors approaches to WMS and Local Authorities will be confused. She is confused about SoS approach.**

RCA: Lancaster inspection waiting for Salt Cross decision. 80% emissions reduction needed by 2035 so it is crucial now.

Ground 3: procedural fairness

RCA: Inspectors' obligation and failure to identify fundamental concerns at an early stage and work with LA to address these. WODC and RCA [and others] asked for reasons and Inspectors refused.

They did not ask for any more evidence or allow participants to discuss concerns in detail prior to the final report [in fact at examination they refused extra justification from WODC]. **So contrary to guidance and procedural propriety.**

Asks court to make a judgement, to send to SoS/quash MMs on Policy 2.

Counsel for Secretary of State for Levelling Up, Housing and Communities (defendant): Mark Westmoreland Smith. Attempts to explain why WMS given weight.

Judge: Where does it explain that basis of WMS has changed? Do they understand?

SoS assumes so; says government review of status of WMS in process.

Judge: policy should make it clear that standards are minimum not maximum and apply flexibly.

If [AAP] can only require building regulations what is the point of Policy 2?

SoS: Elementa report does not justify KPIs. [very odd as similar (LETI) KPIs accepted in other Local Plans found sound].

Ground 1 SoS: Inspectors understood WMS.

Judge: Inspectors failed to take into account changes which undermine WMS. **"How do you take account of BEIS saying WMS/NPPG no longer carry weight?"** She was not happy with the answer. "That doesn't cut it!" She was clearly irritated by the inconsistency in decision making and the

government response. **“You represent the government on a matter of great importance. What is the government’s view?”**

SoS: it is lawful.

Judge “it may be lawful but not acceptable.” **Government policy should be consistent and coherent. I am baffled.**

SoS : SoS is correct in interpretation.

Discussion between RCA KC and SoS on whether WMS relates to planning conditions or conditions to policy.... Inconsistency in case law

Ground 2 SoS: Inspectors do not have different interpretation of WMS just different **weight**.

Judge: Inspectors make directly different decisions [on the same evidence]. “How does government explain that? This is terrible policy making!”

SoS : WMS is being addressed but does not know when.

Judge: this is all a matter of weight and discretion with completely different decisions “Certainty is key to housing delivery”.

SoS: to be consistent doesn’t need consistent decisions. Inspectors are interpreting WMS consistently but applying it differently [!!!]

SoS: RCA not involved in examination.

Judge: not relevant.

SoS: Case law: **A flawed consultation process is not necessarily unlawful.**

Judge: “I am baffled!”

Day 2

Counsel for Grosvenor Developments Ltd: Charles Banner KC:

Banner: Timing of challenge wrong; should be when AAP adopted as above. Claimant’s navigation of ‘ouster’ premature.

Judge: but if recommendation is a determination?

Banner: **MMS only has legal effect on WODC**; no effect on 3rd parties until adoption. Mentions relevant case.

Judge: not sure that’s right. **“One mustn’t take a sentence out of context Mr Banner”**

Banner : on [inferior] status of applicant. RCA is the wrong applicant. They should have been involved earlier. Do not have sufficient interest.

Judge: “Really? I have never heard the suggestion that if one claimant is better placed than another claimant...” **“you are going to have to do better on this.”**

Banner: RCA consultation response thin

Judge: **“that doesn’t follow”** you don’t have to send a long response to be noticed.

...might persuade Mr W-S to sort out the policy

Banner asks court to disallow JR “I don’t want to be over puritanical..” Later Judge corrects him to ‘purist’ not ‘puritanical.’

Ground 2:

Banner says other reports [Local Plans etc] were not drawn to Inspector’s attention. [This is wrong]

Judge asks for evidence, Banner cannot reply, judge seems exasperated.

Ground 3:

Banner: Use of WMS/NPPG not unfair and does not prove prejudice. Notes WODC have not taken action. All aspects must be satisfied to be sound. Judge disagrees (discussed above*)

SoS: more discussion and disagreement of RCA claim, largely repetitive. Argues Inspectors recommendation is not a determination as WODC had a choice [not really!]

RCA replied to Mr Banner:

No suggestion of ouster on prematurity

There **are** legal consequences to third parties; it affects the public at large.

There is no limit on challenges. This is appropriate time to challenge.

In this case public interest is served by NGOs.

Judge: Inspector is decision maker.

RCA: **WMS is internally inconsistent. Why give weight to an irrational policy?**

Judge: [on policy changes] have to apply in a sensible manner- how can I interpret this? Is there any authority saying look at the broader context? She began to lose patience.

RCA: Ground 2 will succeed.

Judge: **Should [Ground 1] be to 'place no weight on WMS?'**

Judge [on lack of clarity on WMS] **unhappy leaving the case in this "sorry state". Ill judged to proceed on Ground 1, uncomfortable.**

She suggested an adjournment and invited RCA to apply to amend the claim on Ground 1. This would also have allowed additional evidence but SoS would resist this so judge decided not to allow an application as it would "cause more trouble than it's worth."

It then finished very quickly with judgement deferred.

She asked for chronologies and other cases.

Leigh Day say it is likely she will now reject Ground 1 (Misinterpretation of the Written Ministerial Statement, as the judge concluded it should be about weight) but that she should make useful comments and make a judgement on grounds 2 and 3. It may take 2 months.