Commercial Property ~ August 2023

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Commercial Landlords Hit Hard in Gym Clubs' COVID-19 Restructuring

High Court Blocks Housing Development on Edge of Domesday Book Village

Outdoor Advertising, Light Pollution and a Legal Battle Over a Bus Shelter

Planning Permission for Exploratory Gas Drilling in Scenic Location Upheld

Renewal of Commercial Leases – It Can All Come Down to Judicial Discretion

**Commercial Landlords Hit Hard in Gym Clubs' COVID-19 Restructuring**

The COVID-19 pandemic has prompted the restructuring of numerous businesses and that can mean commercial landlords having to take severe financial haircuts. That was certainly so in the case of a once successful chain of gyms whose business was devastated by the onset of the virus.

The chain, which relied heavily on office workers to generate membership fees, had contracted dramatically in the face of the pandemic and the changes in lifestyle that it engendered. It had been kept afloat by substantial loans from its main shareholder, who was its only secured creditor. She was not, however, prepared to continue funding the business in the absence of a court-sanctioned restructuring plan.

The plan put forward by the company was a complex one. However, if it were put into effect, the majority of commercial landlords from whom the company rented premises would be forced to accept a reduced rent for a three-year period or, in some cases, no rent at all.

Under judicial supervision, nine meetings of various classes of creditors were held with a view to obtaining approval for the plan. Four of the classes of creditors voted in favour of the proposal, but five – entirely made up of landlords – voted against it by substantial margins.

The company nevertheless asked the High Court to sanction the plan under Section 901F of the Companies Act 2006. Subject to certain conditions, Section 901G of the Act – the so-called 'cram down' provision – enables judges to sanction a restructuring plan even where one or more classes of creditors have not voted in favour of it by the 75 per cent majority usually required. The company's application was, however, opposed by five dissenting landlords.

Ruling on the matter, the Court expressed the view that the company should have made more effort to engage with the landlords. It noted that, when businesses encounter financial difficulties, it is far more beneficial to seek to cooperate and negotiate with creditors rather than to assume that there will be hostility and opposition.

In nevertheless exercising its discretion to sanction the plan, the Court found that the most likely alternative would be to place the company in administration with a view to a swift pre-pack sale of part of its business and assets. If that course were taken, the dissenting landlords' estimated recoveries would be substantially smaller than those they would receive if the plan were put into effect.

Given that four of the meetings had approved the plan by the requisite 75 per cent majority, and that the dissenting landlords would be no worse off if it were given effect, the conditions attached to Section 901G were satisfied.

**Partner Note**

*In the Matter of Fitness First Clubs Ltd [2023] EWHC 1699 (Ch)*

**High Court Blocks Housing Development on Edge of Domesday Book Village**

In a planning context, local authority decision-making is only as good as the advice on which it is based. The High Court made that point in quashing planning consent granted for a controversial housing development on the edge of a historic village mentioned in the Domesday Book.

The site of the proposed four-home development was an undeveloped field, a small part of which lay within the village conservation area. There were a number of listed buildings nearby and access to the development would be via an unclassified lane that was itself considered a heritage asset.

In turning down a previous application to develop the site, the local planning authority (LPA) cited, amongst other things, the significant harmful impact of the proposal on the protected lane. Crucially, however, the owners of the site were subsequently granted a lawful development certificate (LDC) under the Town and Country Planning (General Permitted Development) (England) Order 2015.

The LDC authorised the creation of a means of access to the lane so that the site could be used, for up to 14 days a year, for the purpose of holding a market. It thus created a fallback position that the owners could potentially take up if they were again refused planning consent. Another factor was that the LPA could not show that it had in hand a five-year supply of housing land. That, the owners argued, meant that a tilted balance in favour of the development applied.

After the owners amended their proposal and again sought planning consent, their application was granted on the casting vote of the chairman of the LPA's planning committee. In upholding a challenge to the permission brought by the local parish council, however, the Court detected errors of law in advice given to members of the committee by the LPA's professional planning officers.

Members were not adequately directed in written form on how they should approach the contentious fallback position. Important issues were conflated in an officer's report and its conclusion that the development would cause no harm to listed buildings was infected by flawed logic. Members were not provided with a proper understanding of how to weigh the adverse impact of the proposal on heritage assets against public benefits and whether the tilted balance applied.

We can advise you on all aspects of planning law. Contact **<<CONTACT DETAILS>>** for advice.

**Partner Note**

*R on the Application of Widdington Parish Council v Uttlesford District Council [2023] EWHC 1709 (Admin)*

**Outdoor Advertising, Light Pollution and a Legal Battle Over a Bus Shelter**

Light pollution generated by hi-tech digital advertising displays can be a source of bitter complaint. However, such concerns were insufficient to persuade the High Court to overturn permission granted for the inclusion of one such display in a proposed new bus shelter.

A householder launched judicial review proceedings against the backdrop of a local authority's multi-million-pound plans to replace its aging bus stop infrastructure and an outdoor advertising provider's proposal to install digital liquid crystal displays at 158 existing advertising sites in the area, including 110 bus shelters.

The focus of his complaint was the proposed inclusion of such a display in a new bus shelter to be built a few metres from his home. The shelter formerly featured back-illuminated, double-sided posters in paper form, but its replacement would be fitted with one of the new state-of-the-art displays.

There was no need to obtain planning permission for the replacement shelter in that the proposed works fell within the ambit of the Town and Country Planning (General Permitted Development) (England) Order 2015. The provider, however, required advertising consent under the Town and Country Planning (Control of Advertisements) (England) Regulations 2007.

A planning officer's report considered that the display, together with smaller screens suitable for public information, would be acceptable in terms of design and that their size, positioning and brightness would result in a neutral impact on the immediate area. The council granted advertising consent subject to a number of conditions, including a restriction on the brightness level of the display's night-time illumination.

Challenging that decision, the householder argued that he and his neighbours had a legitimate expectation that they would be consulted before consent was granted. There was, he argued, a failure to consider a local planning policy which required advertising positively to contribute to an area's character and appearance. He said that there had been no assessment of the impact of the display, particularly in terms of light pollution, at the specific bus shelter.

Dismissing his case, however, the Court found that the council had, in substance, taken the policy into account. The focus of the Regulations was in any event on amenity and public safety: improving the public realm and positively enhancing the setting of advertising were only relevant in that context.

Although the planning officer's report referred to advertising providing an income stream to the council, the Court rejected arguments that immaterial considerations had been taken into account. The council had used best practice to determine as a matter of planning judgment the degree of illumination it would approve at the specific bus shelter. There was nothing exceptional about the provider's application and the council had given no clear, unambiguous and unqualified undertaking that it would be the subject of public consultation.

It is important to source expert legal guidance in matters concerning planning and light pollution. Our specialist team can advise.

**Partner Note**

*R on the Application of Whiteside v London Borough of Croydon [2023] EWHC 1806 (Admin)*

**Planning Permission for Exploratory Gas Drilling in Scenic Location Upheld**

The UK is transitioning towards renewable sources of energy but, so far as planning policy is concerned, extraction of fossil fuels for now remains essential to meet the nation's needs. The point was made by the High Court's decision to uphold planning permission for an exploratory gas drilling operation in an area renowned for its scenic beauty.

The site was within an area of great landscape value and very close to an even more heavily protected area of outstanding natural beauty (AONB). An energy company applied for planning permission to sink exploratory boreholes, together with construction of on-site and highways infrastructure. The temporary permission sought was for a period of three years, after which the site would be restored to agriculture.

In refusing the application, the relevant county council cited highway safety concerns and the impact of the development on the appearance, quality and character of the landscape. On the recommendation of a planning inspector who presided over a lengthy public inquiry, however, the company's appeal against that refusal was upheld. Planning permission was granted by the Minister of State for Housing.

The minister, who made the decision on behalf of the Secretary of State for Levelling Up, Housing and Communities, accepted that the proposal would cause harm to the area's character and appearance and degrade the setting of the AONB. However, he found that such harm would be tempered by the short-term nature of the project. In the light of the role fossil fuels continue to play in meeting national energy needs, he gave great weight to the benefits of natural gas exploration.

The planning permission was challenged by the borough council for the area and a local campaign group. They argued that the minister disregarded Paragraph 176 of the National Planning Policy Framework, which requires great weight to be given to conserving and enhancing the landscape and scenic beauty of AONBs.

The campaign group further contended that the decision was fatally inconsistent with another ministerial ruling, published on the same day, by which planning permission was refused for an exploratory gas drilling project in another part of the country.

Rejecting those complaints, however, the Court noted that harm to an AONB from a temporary development can, in principle, attract moderate, as opposed to great, weight in the overall planning balance. The inspector recognised the area's high sensitivity and conducted a focused analysis of the harm to the AONB. He made specific reference to Paragraph 176 in his report following the public inquiry and that indicated that he had it well in mind.

Turning to the question of alleged inconsistency, the Court observed that the sole reason why planning permission was refused for the other project related to climate change and unmitigated greenhouse gas emissions from the site. Climate change was not one of the main issues in the case before the Court and the decisions were not so similar as to give rise to an unlawful inconsistency.

The law pertaining to development and areas of outstanding natural beauty is complex. Our expert team can advise.

**Partner Note**

*Protect Dunsfold Ltd v Secretary of State for Levelling Up, Housing and Communities and Others; Waverley Borough Council v Secretary of State for Levelling Up, Housing and Communities and Others [2023] EWHC 1854 (Admin)*

**Renewal of Commercial Leases – It Can All Come Down to Judicial Discretion**

A commercial landlord may, for any number of reasons, be keen to see the back of a tenant. However, as one case showed, the question of whether a business tenancy should be renewed can in the end come down to an exercise of judicial discretion.

A company's tenancies of two sets of retail premises were protected under Part II of the Landlord and Tenant Act 1954. When the company sought new leases under Section 26 of the Act, the landlord issued counter-notices objecting to renewal. Following a hearing, however, a judge directed the landlord to grant the company fresh tenancies on terms to be decided by the court, if not agreed.

The judge found that, owing to the company's breach of its repairing obligations under the leases, the premises were in a substantial state of disrepair when the counter-notices were served. He also found that the company had persistently delayed in paying rent. He nevertheless went on to exercise his discretion in the company's favour.

He noted that the couple who were the guiding minds behind the company derived their livelihoods from the business, which served the local community. They had inherited the premises in poor condition and, albeit belatedly, they had personally borrowed a substantial sum and spent it on repairing them. He was confident that they would not permit the company to breach its leasehold obligations again.

In rejecting the landlord's challenge to that outcome, the High Court noted that the judge had criticised aspects of the couple's behaviour as unsatisfactory or wrong. He did not, however, find that they had been dishonest, nor was he obliged to do so on the evidence. In a careful and detailed ruling, the judge was entitled to exercise his discretion in the way he did. The landlord's challenge to an order requiring it to pay 75 per cent of the company's legal costs was also dismissed.

If you are involved in a lease dispute related to commercial property, we can assist. Contact us for advice.

**Partner Note**

*Gill v Lees News Ltd [2023] EWHC 403 (Ch)*

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