Case Name: *Arnold White Estates Ltd v The Forestry Commission* [2022] EWCA Civ 1304 (06 October 2022)

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Commentary:
This was an unsuccessful attempt to obtain permission for judicial review, permission to bring the claim having twice been refused. This appeal dealt firstly with the time limits in which a claim for judicial review must be brought, and secondly with the interaction between a felling licence granted under the Forestry Act 1967 and a planning permission for development of the same site.

The claimant had obtained outline planning permissions for different forms of mixed-use development in 2013 and in 2016. In 2018, it applied to the Forestry Commission for (and was granted) a licence to clear and thin trees on the site, subject to a condition requiring re-stocking of the felled areas by 30 June 2020. Trees were felled pursuant to the licence. At the end of July 2020, the Forestry Commission (the defendant) served a notice under section 24 of the 1967 Act to require that the felled areas be restocked in accordance with the licence conditions, with a period of 15 months in which to comply.

The claimant then obtained planning permission for an access through the site and the installation of SuDS, the permission being dated September 2020 and subject to a standard condition requiring that the development be carried out in accordance with the approved details. There was overlap between the areas in which felling had occurred and in which development was to take place. Some months later, the claimant wrote to the defendant expressing its view that, since it was their intention to implement the 2020 permission as soon as possible, it was no longer necessary to comply with the restocking condition. The defendant disagreed and so the claimant sought to challenge the defendant's decision not to withdraw the section 24 notice.

The first part of the judgment is concerned with the timeliness of the application for judicial review (which, generally, must be brought within 3 months of the grounds arising). The claim purported to be in respect of a “decision” made by the defendant in April 2021 not to withdraw the section 24 notice and, if this date was adopted, the claim was not out of time. Giving judgment, Sir Keith Lindblom SPT found that the claimant’s actual complaint was against the initial issue of the section 24 notice, which had occurred in July 2020, and thereafter the maintenance of the notice following the grant of incompatible planning permission in September of that year. He found no reason why the claim could not have been brought promptly, and that no justiciable decision had been made through the course of the correspondence between the parties in early 2021. The judge declined to extend the period in which the claim could be brought,

commenting that "Unless there is truly a new decision, the clock is not set running again by correspondence which only articulates a decision already made."

The second question to be resolved by the court was whether the Forestry Commission's "decision" to maintain the section 24 notice was lawful and this was addressed, notwithstanding the earlier conclusion that the claim was out of time and that the decision in issue was not a decision at all. On behalf of the claimant, it was argued that the maintenance of the enforcement notice was irrational, because compliance with the restocking condition would prevent the development of the land for a period of ten years (this being the period for which the re-planted trees must be maintained). Had the licence not been granted, the felling might have subject to the exception created by section 9(4)(d) of the 1967 Act, in which a licence is not required for felling which *"is immediately required for the purpose of carrying out development authorised by planning permission granted or deemed to be granted under the Town and Country Planning Act 1990…"* This being so, the claimant sought to persuade the court that the licence condition had been rendered redundant by the subsequent grant of planning permission.

This line of argument did not find favour with the judge, who concluded that:
The land use planning system and the legislation for forestry comprise separate but co-ordinated statutory schemes. They are among several regulatory regimes which can bear on the progress of development on a site. They do not belong to a legislative hierarchy in which the planning system ranks above, and takes precedence over, the legislation for forestry…The two statutory schemes are designed to operate together where proposals for development engage them both. And the respective roles of the Forestry Commission and local planning authorities undoubtedly have much in common. But the remit and responsibilities of the latter cannot be said wholly to subsume those of the former. [71]

In this case – had the claimant sought reserved matters approval in respect of the 2016 outline permission, or obtained full planning permission, prior to the felling of the trees it might have been able to rely on the exception under section 9(4)(d). As a consequence of the order in which it had chosen to proceed, however, the claimant was bound by the licence conditions.

Of some interest is the court's cautious (and obiter) finding that the Forestry Commission does not have any power (express or implied) to amend or withdraw a section 24 notice once it has been served, save in limited circumstances. It does have, however, the discretion not to proceed with enforcement action if it considers that it is not expedient to do so.

Case summary prepared by Aline Hyde