**Case Name:** *The King (on the application of Smar Holdings Limited) v the Secretary of State for the Environment, Food and Rural Affairs [2025] EWCA Civ 1041 (30 July 2025)*

**Full case:** Read here.

**Commentary:**

The Court of Appeal allowed the appeal brought by the Secretary of State for the Environment, Food and Rural Affairs ("the SoS") against the judgment of Lieven J in the High Court which quashed the SoS's decision to uphold a forestry restocking notice.

This decision was only the second time the Court of Appeal considered the intersection of the planning and forestry statutory regimes, the first being the decision in *R (Arnold White Estates Limited) v Forestry Commission* [2022] EWCA Civ 1304, which was considered at length in the judgment of the Court of Appeal and in the decision on appeal. In summary, the Court of Appeal in this case determined that:

1. In exercising felling controls, only the interests of good forestry, agriculture and local amenity, as well as the duties set out in s.1 of the Forestry Act 1967 are relevant, not the broad public interest in delivering development.
2. Other than those matters, the planning merits of a proposed development are not relevant to the exercise of felling controls under the Forestry Act 1967, whether or not the scheme has been granted planning permission or is the subject of an allocation in an adopted or emerging development plan document.
3. The exemption from felling control set out at s.9(4) of the Forestry Act 1967 applies only to trees felled after, not before, a grant of planning permission.
4. When exercising felling controls under the 1967 Act, the decision-maker is not obliged to consider the development potential of the felled land, nor the possibility or implications of s.9(4)(d) applying in the future.

Background to the appeal

Trees were unlawfully felled without a felling licence on land near Bristol owned by Smar Holdings limited ("Smar"), located in the Green Belt. The Forestry Commission issued a restocking notice that required Smar to replant the land with trees maintained against damage for 10 years. Smar then appealed against the restocking notice under S.17B of the Forestry Act 1967, claiming that the notice would undermine the proposed inclusion of the land as part of a strategic allocation in Bristol City Council's local plan review. Smar pointed out that even if the felled area were to form part of the development plan allocation and planning permission were to be granted, the effect of the restocking notice was that the development could not be carried out for the 10-year period while the maintenance requirements of the notice remained in force. Smar added that it would not be "in the wider public interest" to blight the development potential of the land "by inappropriate tree protection". The "interests of amenity" would best be served

by "considering the future of the land in the planning context, rather than simply requiring the land to be restocked without considering possible alternative uses in the public interest".

The High Court hearing

The Secretary of State decided to uphold the restocking notice and so Smar Holdings then applied for judicial review. The application was dealt with by Lieven J in the High Court, along with two other applications for judicial review against the determination of s17B appeals, in a single judgment. The Judge allowed the applications for judicial review brought by Smar and by Witham Nelson ("WN"), quashing the Secretary of State's decision to uphold the notices, while rejected the application brought by another company, Wickford Development Company Limited ("Wickerford").

Smar relied upon the following four grounds of challenge in the High Court:

1. The Committee erred in law by stating that the planning regime would be undermined if the restocking notice were modified in the manner suggested by Smar
2. When considering that modification, the committee and SoS erred in law by not taking into account the public interest in the permitted development, including the delivery of housing.
3. The committee and defendant erred in law by requiring a "silvicultural justification" for them to be able to approve restocking on alternative land.
4. The process adopted was procedurally unfair, in that the secretary to the committee was an official of the Forestry Commission, on the Department, and so was able to advance the Commission's case without Smar being able to participate.

Smar submitted that at the heart of their case – reflected in the interdependency of grounds 2 and 3 – is a tension between the planning system and the forestry licencing regime, where if a tree restocking notice is in place trees cannot be felled, even if felling is "immediately required" in order to carry out development under a planning permission, but tree felling without a licence is permitted under S.9(4)(d) of the Forestry Act 1967 (i.e. where it is "immediately required" for the purpose of carrying out development authorised by a grant of planning permission).

Lieven J rejected the submission for the Secretary of State that the planning implications of a restocking notice are legally irrelevant in the determination of an appeal under s.17B unless a full planning permission had been obtained prior to the service of that notice. She upheld ground 2 of the WN claim, while the putative error identified under

ground 3 was held to be immaterial, as it could not have affected the outcome of the S.17B appeal.

The Judge also upheld Ground 1 of Smar's claim, but that this error was not sufficient to quash the defendant's decision, applying S.31(2A) f the Senior Courts Act 1981. However, this error was compounded by errors under grounds 2 and 3 such that the decision was quashed.

The Court of Appeal

The Secretary of State appealed that decision on the basis that Lieven J was wrong to hold that "the broad public interest in delivering development" under the town and country planning regime can, and sometimes must, be taken into account in decisions about enforcement under the forestry regime. It was submitted that the judge's conclusions on grounds 2 and 3 of Smar's claim assumed that:

1. There is such a general public interest in the delivery of new housing;
2. The Forestry Act 1967 permits that interest to be taken into account; and
3. That factor was obviously material in this case, such that the defendant was legally obliged to take it into account, and it was irrational for the defendant not to have done so.

Counsel for the Secretary of State submitted that there was no general public interest in delivering housing, as opposed to other forms of development or protecting land from development. The planning system was but one of several statutory schemes that control development, where no one regime has primacy over others save and insofar as Parliament so provided through legislation. The Town and Country Planning Act 1990 is concerned with all aspects of land use planning. The purposes of the FA 1967 and the relevant considerations for S.17A notices and appeals are set out in the legislation and do not include a public interest in the carrying out of development, which falls within the planning regime and, in any event, should not be assumed in advance of a determination under that scheme. Finally, it was submitted that the threshold for a finding of irrationality was high and not reached in the circumstances of the case.

The Court of Appeal broadly agreed with those submissions and found that the Forestry Act 1967 "contains nothing to suggest that planning considerations for development control decisions are relevant to the exercise of any functions [under that Act]… in particular S.17A." In contrast, S.70(2) of the Town and Country Planning Act 1990 provides that the local planning authority shall have regard to the statutory development plan and any other material planning consideration, or any consideration to do with the character of the use of the land, which is a very broad concept.

Summarising its analysis, the Court of Appeal set out at [114] the following:

1. Only the interests of good forestry (and agriculture and local amenity) and the duties in S.1 of the FA 1967 are relevant to the exercise of felling controls;
2. The planning merits of a proposed development (other than matters falling within (1) above) are irrelevant to the exercise of felling controls under Part II of the FA 1967, irrespective of whether the scheme has been granted planning permission or is the subject of an allocation in an adopted or an emerging development plan document;
3. The exemption from felling control in S.9(4)(d) of the FA 1967 only applies to felling which takes place after, not before, the grant of a full planning permission or the approval of reserved matters;
4. In exercising felling controls under Part II of the FA 1967, the decision-maker is not required to take into account the potential for development on a site, the prospect of S.9(4)(d) applying in the future or the implications of that prospect.

Based on this analysis, the Court of Appeal concluded that Lieven J should not have upheld grounds 2 and 3 of Smar's claim for judicial review because the defendant did not take into account the planning merits of the housing development and its delivery. Those matters were irrelevant to the determination of the appeal under S.17B.

The Court then dealt briefly with other issues arising from the hearing. First, it was suggested by Smar in their appeal to the Secretary of State that the restocking notice should have been amended so as to require planning on an alternative area of land, but this was rejected by the Committee and Secretary of State as undermining the planning regime, a conclusion that Smar subsequently successfully challenged under ground 1 of their High Court judicial review application. The Court of Appeal rejected the High Court's analysis for the following reasons:

1. Smar's argument incorrectly assumed that the decision-making process under the planning system completely disregards trees that have been felled, whether lawfully or unlawfully, and any restocking requirements. There was a legitimate concern that the felling of trees before the determination of a detailed planning application will or may pre-empt or distort the planning authority's assessment of the merits of conserving those trees.
2. Smar's proposed modification would have automatically terminated the requirement in the restocking notice for the restocked trees to be maintained whenever a full permission happens to be granted, irrespective of the actual circumstances at that point in time, and so improperly interfere with the ability of the Commission to exercise its judgment as to what approach to enforcement would be in the best interests of forestry at that stage.
3. The proposed modification implied that it was decided under the forestry regime that the merits of conserving the replanted trees may be left to be dealt with

under the planning regime, where it properly should be dealt with under the forestry regime.

The Court of Appeal also noted that, under Ground 3 of Smar's challenge, while an alternative area of land for stocking had been proposed, little or no evidence was submitted to show its suitability and similarity to the felled area for replanting, and so there was a sufficient basis for the committee to reject the alternative land argument. Finally, the Court dealt briefly with Smar's cross-appeal, that the judge's decision should be upheld on the basis of Ground 4, which was concerned with the way in which the SoS was briefed on taking the appeal decision, and the fact it was a Forestry Commission employee who authored the SoS's briefing material, and not a Ministry employee. The Court held that it was "plainly inappropriate for one of the Commission's officials , acting as secretary to the committee, to be submitting to the decision-maker briefing material which included statements as to why the report of the committee should be accepted and the appeal dismissed." However, the inappropriate briefing material was held not to have caused substantial prejudice to Smar, and so did not vitiate her decision on the S.17B appeal.

For all of the reasons outlined above, the Secretary of State's appeal was allowed while the Respondent's Notice was dismissed.

*Case summary prepared by Gregor Donaldson*