Neutral Citation Number: [2024] EWHC 2034 (Admin)

Case No: AC-2024-LON-000321
AC-2023-LON-0003839
AC-2024-LON-001238

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/08/2024

Before :

MRS JUSTICE LIEVEN

- -

Between :

THE KING
(on the application of)
(1) WICKFORD DEVELOPMENT COMPANY LIMITED

Claimant One

and

THE KING
(on the application of)
(2) WITHAM NELSON INVESTMENTS LTD

Claimant Two

and

THE KING
(on the application of)
(3) SMAR HOLDINGS LIMITED

Claimant Three

and

SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS

Defendant

- -
- -

Mr Robin Green (instructed by **Holmes & Hills LLP**) for **Claimant One**
Ms Heather Sargent and Mr Charles Bishop (instructed by **Government Legal Department**) for the **Defendant (Wickford Development matter)**
Mr Richard Banwell (instructed by **Taylor Haldane Barlex Solicitors LLP**) for **Claimant Two**
Mr Hugh Richards and Ms Jessica Allen (instructed by **Jury O'Shea LLP**) for **Claimant Three**

Mr Zack Simons and Mr Edward Arash Abedian (instructed by **Government Legal Department**) for the **Defendant** (**Witham Nelson** and **Smar Holdings** matters)

Hearing dates: **25-27 June 2024**

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 2 August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives

.....

MRS JUSTICE LIEVEN

Mrs Justice Lieven DBE :

1. This judgment concerns three applications for judicial review of the Secretary of State for Environment, Food and Rural Affairs' ("SSEFRA") decisions upholding restocking notices ("RSN") served by the Forestry Commission ("FC") under the Forestry Act 1967 ("the 1967 Act").

2. In *Wickford Developments* the Claimants were represented by Robin Green, and the Defendants were represented by Heather Sargent and Charles Bishop. In *Witham Nelson* the Claimants were represented by Richard Banwell and the Defendants were represented by Zack Simons and Edward Arash Abedian. In *Smar Holdings* the Claimants were represented by Hugh Richards and Jessica Allen and the Defendants were represented by Zack Simons and Edward Arash Abedian.

3. The three decisions are:

    a. In *Wickford Developments* the decision of 6 November 2023 to uphold the RSN;

    b. In *Witham Nelson* the decision of 12 October 2023 to uphold the RSN;

    c. In *Smar Holdings* the decision of 6 November 2023 to uphold the RSN.

4. The cases each concern the same statutory powers and the same decision making functions. In each case trees were felled on land owned by the Claimants and a RSN was served by the FC. The Claimants then appealed to a Reference Committee ("RC"), which produced a Report that was sent to the Minister. The Minister had the report and a submission in each case. She then made the decisions under challenge.

5. The structure of this judgment will be as follows:

    a. Outline of Grounds;

    b. The statutory scheme and Court of Appeal decision in *R (Arnold White Ltd) v Forestry Commission* [2023] PTSR 242 ("*Arnold White*");

    c. The facts of the three individual cases;

    d. The submission on each individual case;

    e. Conclusions.

The Grounds

6. There is considerable overlap of issues, particularly between the *Witham* and *Smar* cases. However, they each raise different legal issues. In summary the Grounds are as follows.

7. *Wickford;*

    a. Ground One –

        i. failure to address the Claimant's first Ground of objection that the RSN was an abuse of power by the FC by reason of assurances that had been given to Parliament in 2006, during the consideration of the introduction of s.17A of the 1967 Act;

        ii. A failure to give reasons if the Minister did consider the objection.

    b. Ground Two – misdirection in law by the Minister, relying on the reasoning of the RC, in respect of the meaning of "garden" as set out by the Divisional Court in *Rockall v DEFRA* [2008] EWHC 2408;

    c. Ground Three – failure to properly address the Claimant's objection on the grounds of disproportionate impact of the requirement to plant 242 trees;

    d. If any of the above Grounds are made out, whether the decision would have been "highly likely" to be the same, pursuant to s.31(2A) Senior Courts Act 1981.

8. *Witham Nelson;*

    a. Ground One – whether the decision was ultra vires/irrational in the light of the RC's finding that it was inevitable that the trees would be removed after the shortened maintenance period;

    b. Ground Two – whether the RC and the Minister unlawfully remitted the question of an alternative area of land to the FC;

    c. Ground Three - whether the RC erred in refusing to determine or consider legal issues.

9. *Smar Holdings;*

    a. Ground One – the RC erred in law by stating that the "planning regime" would be undermined if the appeal was allowed;

    b. Ground Two – the Minister erred in law by not considering the public interest in allowing the appeal;

    c. Ground Three – the approach to the use of an alternative site was irrational;

    d. Ground Four – the process adopted was unfair.

Statutory framework

10. The FC was initially established under the Forestry Acts 1919 to 1945. It is now governed by Part I of the 1967 Act.

11. The FC is the appropriate forestry authority in relation to England (s.1(1A)). It is under a "general duty" to promote the "interests of forestry, the development of afforestation and the production and supply of timber and other forest products in England" (s.1(2)). That general duty includes "promoting the establishment and maintenance in England ... of adequate reserves of growing trees" (s.1(3)).

12. In discharging its functions under the 1967 Act, the FC shall, so far as may be consistent with the proper discharge of their functions, "endeavour to achieve a reasonable balance" between:

    (a) "the development of afforestation, the management of forests and the production and supply of timber" (s.1(3A)(a)) and

    (b) "the conservation and enhancement of natural beauty and the conservation of flora, fauna and geological or physiographical features of special interest" (s.1(3A)(b)).

13. Section 8A imposes a general duty on Ministers in performing their functions under the 1967 Act to "have regard to the national interest in expanding the forestry resources of England …". Section 49(1) provides that the "Minister" means "the Secretary of State as respects England … ".

14. Part II of the 1967 Act contains provisions relating to the "Power to Control Felling of Trees".

15. Section 9(1) to (4) states:

> "**9 Requirement of licence for felling.**
>
> (1) A felling licence granted by the appropriate forestry authority shall be required for the felling of growing trees, except in a case where by or under the following provisions of this Part of this Act this subsection is expressed not to apply.
>
> (2) Subsection (1) above does not apply—
>
> (a) to the felling of trees with a diameter not exceeding 68 centimetres or, in the case of coppice or underwood, with a diameter not exceeding 15 centimetres; or
>
> (b) to the felling of fruit trees or trees standing or growing on land comprised in an orchard, garden, churchyard or public open space; or
>
> (c) to the topping or lopping of trees or the trimming or laying of hedges.
>
> ….

(4) Subsection (1) above does not apply to any felling which—

(a) is for the prevention of danger or the prevention or abatement of a nuisance;

(b) is in compliance with any obligation imposed by or under an Act of Parliament, including this Act;

(c) is carried out by, or at the request of, an electricity operator, because the tree is or will be in such close proximity to an electric line or electrical plant which is kept installed or is being or is to be installed by the operator as to have the effect mentioned in paragraph 9(1)(a) or (b) of Schedule 4 to the Electricity Act 1989;

(d) 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 or the enactments replaced by that Act." [emphasis added]

16. The term "garden" is not defined in the 1967 Act. In *Rockall v Defra* [2008] EWHC 2408 (Admin) the Divisional Court held:

"(1) There is no "all-embracing test" for whether land is a garden for the purposes of the 1967 Act [1] and [16].

(2) There is a "factual flexibility" inherent in the 1967 Act [1].

(3) In order to identify whether land comprises of garden, it is necessary not only to look at its appearance and its characteristics, but also to its use. It is necessary to look at how the particular occupier in question used the land [15-17].

(4) S.9 of the 1967 Act suggests that felling which does not need a licence should be in some way ancillary to the use of the land in question as an orchard, garden, churchyard or public open space ([17], citing McInerney v Portland Port Limited [2001] 1 PLR 104).

(5) There is nothing in the statutory provisions which dictates that a garden which has fallen into disuse cannot become a garden again until it is established [23].

(6) A mere assertion of intention may well be insufficient to establish and satisfy the burden upon a defendant to show that he did not need a licence. The position will depend upon all the facts and circumstances of the case [19]."

17. Where *"land which had been a garden has been disused for two and a half years so as to be, in effect, overgrown, [it] is no longer to be considered a garden unless there is some evidence which suggests that there is an intention in relation to the use of that land which could enable the court to conclude that the historical categorisation of it as a garden could properly be said to continue";* (*McInerney v Portland Port Ltd* [2001] 1 PLR 104 at [10]).

18. In *McInerney* at [12], the Court approached the question whether the land is comprised in a "garden" as a question of judgement for the decision-maker (there, the magistrates) which could be vitiated if irrational. In *Rockall* the Court set aside the decision of the Crown Court because it had reached a view to which it was not entitled on the evidence (at [15], [21], [24]).

19. The FC may grant a licence on application under s.10, and it can be subject to conditions.

20. Section 17 makes it an offence to fell trees without a licence:

> "**17 Penalty for felling without licence.**
>
> (1) Anyone who fells a tree without the authority of a felling licence, the case being one in which section 9(1) of this Act applies so as to require such a licence, shall be guilty of an offence and
>
> (a) in relation to an offence committed in Wales, liable on summary conviction to a fine, or
>
> (b) in relation to an offence committed in England, liable on summary conviction to a fine.
>
> (2) Proceedings for an offence under this section may be instituted within six months from the first discovery of the offence by the person taking the proceedings, provided that no proceedings shall be instituted more than two years after the date of the offence."

21. Section 17A is central to the present case. The FC may serve a restocking notice on a person where "it appears to" it that the person has committed an offence under s.17 and they have a specified form of estate or interest in the land in question (s.17A(1) (as substituted by the Regulatory Reform (Forestry) Order 2006)). Section 17A provides:

> "**17A Power of Commissioners to require restocking notice after unauthorised felling.**
>
> (1) The appropriate forestry authority may serve a notice under this section (a "restocking notice") on a person where—
>
> (a) it appears to the appropriate forestry authority that he has committed an offence in England or Wales under section 17 of this Act,
>
> (b). . . . . .
>
> and ... he has such an estate or interest in the land in question as is mentioned in section 10(1) of this Act.
>
> (1A) A restocking notice is a notice requiring the person on whom it is served—
>
> (a) to restock or stock with trees the land or such other land as may be agreed between the appropriate forestry authority and him; and

> (b) to maintain those trees in accordance with the rules and practice of good forestry for a period, not exceeding ten years, specified in the notice.
>
> (1B) A restocking notice served by the Commissioners is a local land charge; and for the purposes of the Local Land Charges Act 1975 the Commissioners are the originating authority as respects the charge.
>
> (2). . . . . .
>
> (3) Subject to the provisions of this Act, in considering whether to issue a restocking notice the Commissioners shall—
>
> (a) have regard to the interests of good forestry and agriculture and of the amenities of the district;
>
> (b) have regard to their duty of promoting the establishment and maintenance of adequate reserves of growing trees; and
>
> (c) take into account any advice tendered by the regional advisory committee for the conservancy comprising the land to which the restocking notice would relate."

22. Section 17A was inserted in its original form by the Forestry Act 1986. It originally provided that a RSN could only be served if a criminal offence had been committed. However, it was amended in 2006 to remove this requirement. The statutory amendment went through a special Parliamentary process involving the then Parliamentary Regulatory Reform Committee. This provision is critical to Ground One in the ***Wickford*** case, and the process of the amendment is referred to below at [78] and [79].

23. Section 17B provides for appeals against a RSN:

> "**17B Appeal against restocking notice.**
>
> (1) A person on whom a restocking notice has been served who objects to the notice or to any condition contained therein may by notice served within the prescribed time and in the prescribed manner request the Minister where the restocking notice relates to land in England or Wales to refer the matter to a committee appointed in accordance with section 27 of this Act; and—
>
> (a) the Minister shall, unless he is of the opinion that the grounds of the request are frivolous, refer the matter accordingly; and
>
> (b) the committee, after compliance with subsection (3) of that section, shall thereupon make a report to the Minister.
>
> (2) The Minister may, after considering the committee's report, direct the appropriate forestry authority to withdraw the notice or to notify the objector that it shall have effect subject to such modification as the Minister shall direct."

24. Section 24 provides for a notice requiring compliance with conditions or directions in a felling licence. This provision was central to the decision in *Arnold White*. Section 25 gives a right of appeal against a s.24 notice, and s.25(1) is in the following terms:

> "**25 Appeal against notice under s. 24.**
>
> (1) If a person to whom a notice under section 24 is given claims—
>
> (a) that the works in question have been carried out in accordance with the conditions of the felling licence or, in the case of felling directions, that they have been complied with; or
>
> (b) that the steps required by the notice to be taken are not required by the conditions or directions, he may by a notice served on the Minister where the notice is given in respect of land or trees in England or Wales, in the prescribed manner and within the prescribed period after the receipt of the notice under section 24, request the Minister to refer the matter to a committee appointed in accordance with section 27 below."

25. The constitution of – and process to be followed by – the RC is found in s.27. The RC must have a chairman appointed by the Secretary of State, plus two other members selected from a panel appointed by the Secretary of State following consultation for the conservancy in which the trees are growing. They may be paid by the Secretary of State. Members may not be a Forestry Commissioner or an employee of the FC.

26. The requirements which the RC must follow when considering an appeal are set out in s.27(3) as follows:

> "(3) On any reference being made to them under this Part of this Act a committee appointed in accordance with this section shall–
>
> (a) afford to the person concerned with the subject-matter of the reference an opportunity of appearing before them and of making representations to them on the matter in question;
>
> (b) if they think fit, or are so required by the said person, inspect the trees or land to which the reference relates; and
>
> (c) take into consideration any information furnished to them by the appropriate forestry authority as to the performance within the conservancy in which the trees are growing of their duty of promoting the establishment and maintenance of adequate reserves of growing trees."

27. A RSN is enforceable under the scheme of ss.24, 24A, 25 and 26 of the 1967 Act read with s.17C. The FC may undertake the restocking directly (s.24(3)) and recover expenses under s.26.

28. Failing to take steps required by the notice is an offence (s.24(4)).

The factual background

29. The facts of the three cases are entirely distinct and bear upon the separate grounds that are being advanced in each case.

Wickford Developments

30. In June 2017 Wickford acquired a parcel of land ("the site") lying to the south of Newton Hall, Dunmow. The intention was to use this land in connection with a scheme of residential development immediately to the south, east and west of the site.

31. Wickford commissioned a woodland management plan for the site dated 27 June 2017 and in accordance with that plan selective tree removal took place in October and November 2017. A total of nine trees were felled.

32. On 22 November 2017 a local resident reported the felling to the FC. The FC contacted Wickford, which agreed to stop any felling operations on the site. FC officers visited the site the next day.

33. In May 2018 the Crown Prosecution Service ("CPS") acting on behalf of the FC initiated a prosecution against Wickford and the tree surgeon responsible for the felling operations on site. Each was charged as follows:

> *"… between 21/11/2017 and 22/11/2017, at land to the south of Newton Hall, near Great Dunmow, Essex, was responsible for the felling of trees at the aforementioned land, without the authority of a licence issued by the Forestry Commission under section 9(1) of the Forestry Act 1967, contrary to section 17(1) of the Forestry Act 1967, as amended."*

34. Wickford and the tree-surgeon pleaded not guilty to this offence. Their defence was that no trees had in fact been felled on 21 or 22 November 2017, and in any event the site was land comprised within a garden and therefore no felling licence was needed.

35. After a number of adjournments of the proceedings, on 3 March 2020 the CPS served a notice of discontinuance bringing the prosecution to an end. The discontinuance notice stated:

> *"I am writing to inform you that I have today sent a notice to the Justices' Chief Executive, under section 23 of the Prosecution of Offences Act 1985, discontinuing the following charges against your client:*
>
> *Fell a growing tree without a section 9(1) felling licence 21/11/2017 - 22/11/2017. The effect of this notice is that your client no longer need to attend court in respect of these charges and that any bail conditions imposed in relation to them cease to apply.*
>
> *The decision to discontinue these charges has been taken because there is not enough evidence to provide a realistic prospect of conviction.*
>
> *This decision has been taken on the evidence and information provided to the Crown Prosecution Service as at the date of this letter. If more*

> *significant evidence and/or information is discovered at a later date the decision to discontinue may be reconsidered. …"*

36. On about 25 June 2020 the FC served RSN RN12/20-21 on Wickford. The notice stated:

> *"It has been established that you felled trees on land lying to the south of Newton Hall, Dunmow (CMG 2AS), without a felling licence in contravention of the provisions of the Forestry Act 1967. The Forestry Commissioners, in pursuance of their powers under Section 17A of that Act, hereby give notice requiring you to carry out the restocking specified in the schedule below".*

37. Condition 1 of the schedule to the notice begins: "Before 30th June 2021 the felled area outlined in blue on the map attached to this Notice must be restocked with broadleaf species to achieve no less than 1,100 equally spaced stems per hectare. This equates to 242 trees at this site".

38. By notice of objection dated 14 August 2020 served on the Defendant under s.17B of the 1967 Act Wickford objected to the RSN and condition 1 of the schedule on the grounds that:

> (1) it was an abuse of the power in s.17A of the 1967 Act to serve a restocking notice in circumstances where
>
> (a) a prosecution had been brought and discontinued and
>
> (b) no further prosecution could be brought in respect of the alleged offence in the notice;
>
> (2) no such offence could have been committed because the land in question was garden land for the purposes of section 9(2)(b) of the 1967 Act and therefore no felling licence was required;
>
> (3) the offence with which Wickford had been charged – unauthorised felling between 21 and 22 November 2017 – could not have been committed because no felling took place on the dates alleged;
>
> (4) condition (1) of the schedule to the notice states that the felled area must be restocked with broadleaf species to achieve no less than 1,100 equally spaced stems per hectare, which equates to 242 trees at the site. This number of trees greatly exceeds the number of trees that were on the site in 2017 and in requiring this number of trees to be planted the notice was grossly disproportionate.

39. The matter was referred by the Defendant to a RC.

40. On 11 May 2023 written submissions and a bundle of documents on behalf of Wickford were submitted to the RC.

41. On 19 May 2023 a hearing took place before the RC at which Wickford's representatives and representatives of the FC appeared and made representations. The RC also inspected the site.

42. On 7 November 2023 Wickford's legal representatives received a letter from the FC stating, inter alia:

> *"… the Minister has decided to modify the notice based on the conclusions of the Reference Committee. Therefore, pursuant to section 17B(2) of the Forestry Act 1967, the Forestry Commissioners have been directed by the Secretary of State to notify you that the Restocking Notice 12/20-21 dated 25 June 2020 shall have effect, including the Schedule and Map attached to the Notice with modification to retain current natural regeneration on the site and extend the date of compliance to allow a further planting season for the completion of the remaining restocking. Forest Services will issue the official (signed) versions of these in due course."*

43. Following a request by Wickford's legal representative, on 9 November 2023 the FC provided a copy of the RC's report. A request for further information was met with the following email response of 15 November 2023 from the FC (the author being the secretary to the RC):

> *"… Thank you for your e-mail. I am sorry for having taken time to understand what I can share in this regard, but I am unable to share with you my direct communications with the Minsters Office. Even if your request was made under the provisions in the Environmental Information Regulations 2004 (which are broadly similar to the Freedom of Information Act) the exceptions to disclose under Regulation 12(4)(e) internal communications and Regulation 5(d) the confidentiality of proceedings would be applied.*
>
> *However, I can advise you that the Minister was provided with the original Restocking Notice, the Objection and the Meeting Notes with the Committee's conclusions. I was advised by the Ministers Private Secretary (as is part normal processes for communicating Minister's decisions) that the Committee's conclusions had been accepted in full. I then communicated this to both the Objector and Officials in the Forestry Commission.*
>
> *As you will know from the requirements of the Forestry Act the decision is made by the Minister after considering the Committee Report, the decision is not made by the Committee or by the Forestry Commission. My role is limited to facilitating and supporting the referral to the Reference Committee and the subsequent submission of its Report and communicating back the outcome (Minister decision). If you are seeking to challenge the Minister's decision, then I suggest that you direct your enquires to the Department (Defra) not to me in my role as Committee support. …"*

44. Following consideration of the RC's report and the above email response, on 24 November 2023 Wickford sent a pre-action protocol letter before claim to the Government Legal Department ("GLD") setting out its proposed grounds of challenge and inviting the Defendant to agree to a quashing order. On 14 December 2023 the GLD requested an extension of time to respond until 12 January 2024. The GLD's response on behalf of the Defendant was received in the evening of 12 January.

Wickford Reference Committee's Report

45. The following paragraphs from the RC's Report are relevant:

> *"1. The Reference Committee agreed that the legal issue raised by the Objector, namely that the serving of the Restocking Notice followed a discontinued prosecution, was beyond the remit of the Committee to conclude upon. The Reference Committee noted further that the Objector accepted this, and that the Objector's intention in raising it was for the sake of exhausting available processes for the sake of justifying Judicial Review as a remedy of last resort.*
>
> *2. The Reference Committee therefore agreed that the focus of their report would be whether the land could have been considered a garden and therefore exempt from the requirement for a felling licence, and if this requirement did apply, whether the Restocking Notice was a proportionate response.*
>
> *3. The Reference Committee considered the Objector's claim that in the distant past the landscaped vista may have been considered a garden. The Reference Committee understood that it was on this basis, given the precedent in case law in Rockall, that the Objector argued that the land was being restored to garden land in the plans submitted by Wickford Development Company.*
>
> *…*
>
> *5. The Reference Committee agreed that changing the land from historically landscaped vista to multiple gardens for new dwellings was not a restoration of a garden.*
>
> *6. The Reference Committee noted that the age of some of the trees on the site suggested that natural regeneration had taken place on the site for at least 20 to 60 years prior to the felling. The Reference Committee also accepted the evidence from Forest Services that typical features of a garden were absent from the site, and noted that these were evidently absent during their own site inspection.*
>
> *7. The Reference Committee considered the letter provided by the Objector wherein Mr Hammond refers to the land as 'remaining a garden'. The Reference Committee agreed that this was not sufficient to establish conclusively whether the land was a garden or not.*
>
> *8. The Reference Committee further considered the language of the Woodland Management Plan (WMP) provided in the Objector's bundle. The Reference Committee agreed that a WMP would be more likely to be commissioned for a woodland than a garden, and noted that the WMP used multiple terms to refer to the site including 'woodland' and 'wooded area'. The Reference Committee noted that the report prepared prior to the felling predominantly referred to the area as woodland and not a garden.*

9. The Reference Committee considered that claims of restoring the land to a garden appeared only to have arisen after the allegation of illegal felling took place and was not evidenced to be a factor at the time of the felling.

…

13. The Reference Committee agreed that the standard restocking practice of 1100 stems per hectare was not unreasonable, and did not find the Objector's argument against the conditions in the notice to be justified on silvicultural grounds. The Reference Committee agreed that restoration of canopy cover to the site was likely to be achieved by following the conditions set out in the Restocking Notice, but noted that the removal of natural regeneration on the site for the sake of restocking would be ill advised.

Conclusions

14. The Reference Committee concluded, based on observations on site, aerial photographs from the Objector and the Forestry Commission, the Objector's WMP, and the designations in Forest Services' submission, that the land was not a garden at the time of the felling, nor had it likely been one in at least the 60 years prior to the felling.

15. The Reference Committee concluded that the future use of the site at the time of the felling was to develop the land as gardens for multiple adjacent dwellings, not the restoration of an historical garden to a manor house.

16. The Reference Committee concluded that the felling required a felling licence, and that in the absence of one that a Restocking Notice is a reasonable and proportionate response to the offence of unlicenced felling.

17. The Reference Committee concluded that any Restocking Notice now served should take into consideration the natural regeneration already on the site as part of its conditions, given the amount of time elapsed since the initial felling and the appeal against the subsequent Restocking Notice reaching the Reference Committee.

18. The Reference Committee concluded that the current Restocking Notice should stand subject to two minor modifications namely 1) a new compliance date to allow a planting season to complete the required works, and 2) to allow successful natural regeneration to count towards meeting the restocking requirements with new planting making up for any shortfall." [emphasis added]

Witham Nelson

46. Witham Nelson purchased land to the north of 179 Kiln Road, Thundersley, Benfleet SS7 1SJ ("the site") on 6 January 2017 with the intention of obtaining planning permission and developing the site.

47. Witham Nelson instructed the preparation of an Arboriculture Report (dated 25 April 2017).

48. This was submitted to the Castle Point Council along with three tree plans (SHA 368 TP, SHA 368 TOP, and SHA 368 DA) in an application for outline planning permission.

49. Outline Planning Permission was granted on 21 December 2017 for the erection of 7 houses, subject to the approval of the specified reserved matters and approved plans. That planning permission specified the retention of all the trees identified on the Report as "priority" and "desirable."

50. In January 2019, Morgan Dakin Homes Ltd (managing agents for the site on behalf of Witham Nelson) sought a quote from "Tree Fella Ltd" (an Arboricultural and waste management company) with a view to undertaking a clearance of foliage at the site. The contractor carried out the work. Witham say they did not instruct Tree Fella to clear the trees on the site

51. On 4 November 2019 Mr Phil Rickells (an investigation officer working for Department for Environment, Food & Rural Affairs ("DEFRA")) wrote to Wickford stating that it had begun an investigation into alleged offences relating to the unlawful felling of trees at the site. Witham Nelson responded stating that at no point did it give an instruction to Morgan Dakin Homes to organise the felling of any trees without obtaining a licence. Furthermore, it is understood Tree Fellas were engaged to carry out the site works and they were in discussions with Castle Point Local Authority prior to any clearance being done. Additionally, the work was completed prior to the March-September period specified in Condition 12 of the Outline Planning Permission as being a time less likely to interfere with the bird breeding season.

52. On the 29 May 2020 full Planning Permission was granted by Castle Point Borough Council for nine residential bungalows on the site. Part of the application documents included a Revised Arboricultural Assessment (dated 22 January 2020) prepared by Eco Planning UK. It is to be noted that Conditions 2 and 3 accompanying the full planning permission specified, inter alia, that:

> *"None of the trees identified for retention on Drawing No 3 within the submitted Revised Arboricultural Assessment undertaken by Eco-Planning UK, dated 22nd January 2020 shall be removed from the site and no works shall be undertaken to such trees, without the prior formal consent of the Planning Authority" and, "all works on site shall be undertaken in accordance with the provisions of the submitted Revised Arboricultural Assessment undertaken by Eco-Planning UK, dated 22nd January 2020."*

53. Further correspondence took place between the parties including a letter dated 25 August 2020 from Mr James Murdoch (Regulations Manager at the FC) which stated that it had investigated a case of alleged illegal tree felling at the site and that a criminal investigation had now concluded. He wrote in the following terms:

> *"From the details provided, I can confirm that it appears to the Forestry Commission that an offence has been committed by your company under section 17 of the Forestry Act 1967 (as amended).*
>
> *This is because no exemption to the need for a felling licence under the Forestry Act applies to the trees or land in question, and the volume of timber felled is such that a licence to fell the trees should have been obtained from the Forestry Commission before the felling took place. Moreover, the investigation shows that your company has liability for the felling undertaken on the site.*
>
> *The Forestry Act 1967 provides the Forestry Commissioners with a number of powers with which to address a breach of the regulations. These include referring cases for prosecution and / or securing the restocking of a felled site through a Restocking Notice.*
>
> *Having considered this case, I have decided that issuing a Restocking Notice is the most appropriate action. The Forestry Act 1967 was amended by the Regulatory Reform Order (Forestry) 2006 to provide the Forestry Commissioners with the option of serving such a Notice on an owner without first securing prosecution, where it appears to the Commissioners that an offence has been committed. . .*
>
> *The Restocking Notice will require you to restock the site with trees.*
>
> *So that you have the opportunity to agree and understand the work required by the Notice, please contact your local Woodland Officer, Lindsay Allen . . . to discuss the restocking prescriptions. . .*
>
> *If you are seeking planning permission for the felled area, you should be aware that the granting of planning permission will not override the conditions of the Restocking Notice. Nor is this the case is [sic] planning permission granted in the interim between the felling occurring and the Notice being served. . ."*

54. It seems from that letter that Mr Murdoch was unaware that full planning permission had already been granted on 29 May 2020. This was discussed at the meeting on Site on 24 September 2020. Importantly, Witham Nelson had also offered to restock an alternative area of land, rather than restock the site, but this offer appears to have been declined.

55. On 3 November 2020 the FC served the Company Secretary of Witham Nelson with a RSN requiring the restocking of 330 trees on the site and requiring that they be maintained for a period of 10 years (the maximum duration required by statute). The RSN erroneously includes a stretch of land (485 sqm in size) on the south of the site (towards Kiln Road) owned by Shell. The land owned by Shell is approximately 10%

of the land identified in the RSN. It is accepted that this land does not belong to Witham Nelson and is outside its interest and ownership.

56. Witham Nelson lodged an appeal against the RSN on 18 January 2021 along with accompanying Grounds of Objection dated the same date. Further "Written Submissions on Behalf of the Appellant" dated 9 June 2023 were sent to the RC in advance of the hearing. The appeal before the RC took place on 26 June 2023, (two years and seven months after the RSN was served and over four years since Tree Fella vacated the Site).

57. By letter dated 12 October 2023, Mr Angus Thornes was notified by Mr Mark Kourie (Secretary to the RC) that the Forestry Commissioners had been directed by the Secretary of State to notify him that the RSN had been confirmed with a modified maintenance period to expire 10 years after its original issue along with an extended date for compliance. It was further stated that an updated RSN would be supplied in due course. The result of this is that the maintenance period is reduced to 6.5 years.

58. The Reference Committee Report was supplied to the Claimant by way of email by Mr Kourie on 13 October 2023 along with a copy of attached email correspondence between Mr Kourie and James Murdoch dated between 9-10 August 2023. Mr Kourie's email of 13 October set out the following:

> *"Please find the Reference Committee report attached. Two things to highlight:*
>
> *1. The Reference Committee proposed that Forest Services consider whether restocking an alternative area would be acceptable (for a 10 year period), given the inevitable development on site. When approached with this option, Forest Services did not accept, hence the committee's other option of a reduced maintenance period. I have attached a copy of the refusal from FS for your reference.*
>
> *2. The letter does not make it clear that the modified Restocking Notice will not include the land erroneously mapped in the original notice. My apologies for this! It is a result of poorly applied stock text. Please be assured that the revised Restocking Notice will not include the unowned strip of land and the number of trees required will be appropriately reduced (based on a stocking density of 1100 stems per hectare). This is agreed by the Reference Committee at par[sic] 19 and so must be complied with. Forest Services have been instructed to produce the revised notice which removes this unowned strip of land."* [emphasis added]

59. The email correspondence between Mr Kourie and Mr Murdoch consisted of an invitation from the RC to the FC asking it to consider whether restocking an alternative area of land would be preferable:

> *"The Reference Committee for the above case have concluded that the Restocking Notice is an appropriate and proportionate response to an act of unlicensed felling, have recommended that Forest Services and the*

> *Objector consider whether restocking an alternative area would be preferable (with a maintenance period of 10 years).*
>
> *They have further concluded that if restocking an alternative area cannot be agreed, then the Restocking Notice maintenance period should be reduced by 3 years and 6 Months [from the date of planting the trees].*
>
> *For the purposes of my reporting to the Minister to proactively provide the best recommendations to her, please confirm whether Forest Services will consider negotiating an alternative area with the Objector."*

60. Mr Murdoch responded on 10 August 2023 with the following:

> *"The Forest Services has had no new information to substantiate a silvicultural reason to agree an alternative restocking area. Given that, there's no rational basis for us to change our original decision to restock the felled area."*

Witham Nelson Reference Committee Report

61. The RC Report set out the basis for declining Witham Nelson's appeal.

62. As part of its reasoning, the Report acknowledged the unusual circumstances of the case and made the following findings:

> *"11. . . . the Reference Committee further considered the position of the Objector in this case having already implemented full planning permission through beginning the development of drainage at the entrance to the site. This means that the planning permission will remain in effect beyond the maintenance period of the Restocking Notice. The Reference Committee therefore accepted that should the Restocking Notice be complied with, then any restocked trees will inevitably be removed once the legal obligation for maintenance expires. The Reference Committee considered that this may nullify any advantages of the restocking beyond this period (restoration of canopy cover, biodiversity gain, species corridor maintenance, etc.)*
>
> *12. The Reference Committee accepted that withdrawing the Restocking Notice on this basis could set an unacceptable precedent whereby felling controls through both planning and felling licence regimes could be circumvented. For example, given the prospect of development, a nefarious actor may, in the hope of both avoiding the felling licence process and removing trees from the consideration for planning permission, fell trees without a licence, subsequently obtain full planning permission, and avoid any Restocking Notice by way of appeal or by referring to a precedent whereby full planning permission nullified a Restocking Notice.*
>
> *13. On the other hand, the Reference Committee also accepted that this case necessarily leads to the loss of the restocked trees, and that in the context of long term objectives (such as biodiversity net gain or indeed the*

preservation of growing timber reserves) the practical consequences of upholding the Restocking Notice may appear to some more as the temporary frustration of development prospects than it does the restoration of canopy cover.

Ground 3: That the Forestry Commission's service of the Restocking Notice was not lawful because full planning permission was granted before the notice was serviced

14. The Reference Committee considered the Objector's claims that the granting of full planning permission in advance of the service of the Restocking Notice means that the Restocking Notice was not lawful.

15. The Reference Committee agreed that as a point of law any challenge to the Restocking Notice on this basis would be better considered under Judicial Review. They did however agree that the granting of planning permission subsequent to an act of illegal felling is not the retrospective exemption of that felling from the requirement for a felling licence.

Ground 4: That the Forestry Commission failed to exercise proper discretion in issuing a Restocking Notice, essentially that a Restocking Notice is not a reasonable or proportionate response

16. The Reference Committee agreed that any points of law with respect to the fettering of discretion by the Forestry Commission is a matter beyond the remit of the Reference Committee and best examined under judicial review.

…

18. The Reference Committee accepted that while every effort can be and should be made to ensure Restocking Notices are generally resilient to future circumstances, these cannot be the determining factors in whether a Restocking Notice is appropriate or not. What is material are the circumstances at the time of felling and the silvicultural status of the site. The Reference Committee therefore agreed that a Restocking Notice is an appropriate response to the felling on this site, given the silvicultural characteristics of the site at the time of felling." [emphasis added]

63. In the section entitled "Additional Issues" the following is stated:

"23. The Reference Committee considered the prospect of any restocked trees being immediately felled once the maintenance period of the Restocking Notice expires. Fully accepting the regulatory justifications for continuing in this vein, the Reference Committee considered whether restocking an alternative area may be specifically appropriate in this case. The Reference Committee acknowledged that the standard practice with respect to planting alternative areas is to do so only for sound silvicultural reasons, where the land is for example flooded or renders tree planting otherwise impossible. The Reference Committee considered that this case is unusual because of the time elapsing between its various

stages allowing for the enactment of planning permission to take place. In this case, this means that the site's development is all but inevitable. Given that the trees are therefore almost certainly to be removed after the expiry of the Restocking Notice, the Reference Committee suggested that an alternative planting area may be preferable for the sake of any longer-term establishment of restocked trees and the associated benefits of this in terms of biodiversity net gain and protecting timber reserves."

64. The Report's conclusions are at [24]-[29]:

"Conclusions

24. The Reference Committee concluded that no exemption applied at the time of the felling and that therefore a felling licence was required (Ground 1).

25. The Reference Committee concluded that any points of law related to the infringement of property rights is a point of law beyond their remit. The Reference Committee nonetheless concluded that it would be unwise to recommend withdrawing the Restocking Notice on the basis that future development is inevitable, as this risks setting an unacceptable precedent whereby both planning and felling licence regimes could be circumvented and are therefore undermined (Ground 2).

26. The Reference Committee concluded that the subsequent granting of full planning permission did not satisfy the requirement for an exemption to apply at the time of the felling and that this does not therefore provide a satisfactory justification to conclude that the Restocking Notice should be withdrawn (Ground 3).

27. The Reference Committee concluded that a Restocking Notice is an appropriate and proportionate response to an act of unlicensed felling (Grounds 4 & 5).

28. The Reference Committee concluded that the mitigating circumstances in this case may warrant reducing the 10 year maintenance period of the Restocking Notice so that it ends 10 years from the date of the original notice rather than 10 years from the issue of a modified notice.

29. The Reference Committee concluded that the Minister may wish to consider whether presenting Forest Services and the Objector the opportunity to restock an alternative area may be a preferable outcome given the near inevitability of any restocked trees being removed for the sake of the extant and enacted planning permission on the site." [emphasis added]

Smar Holdings

65. In February 2019 Smar Holdings ("Smar") began felling trees on the land at Keynsham Garden Centre, Hicks Gate, Keynsham, Bristol, BS31 2AD ("the Land") without a felling licence. The Land forms part of an emerging housing allocation in the Bristol

City Council Local Plan Review. Bristol City Council has identified the Land as suitable for development and has proposed to include the Land in a wider parcel allocated as a Strategic Development Location for a mixed use new neighbourhood (500-750 homes). The land is identified in the Bristol Local Plan Review Consultation Draft (March 2019).

66. After a preliminary site visit on the 27 February 2019, the FC's Woodland Officer returned to site on 1 March 2019 to obtain timber measurements. It was concluded that over 53m3 had been felled, comprising of 8 field maple trees and 17 poplar trees.

67. On 9 March 2020, pursuant to s.17A of the 1967 Act, the RSN was served on Smar. On 5 May 2020, through Smar's agent (Stokes Morgan Planning Ltd), Smar appealed to the Defendant. Pursuant to s.27 of the 1967 Act, the Defendant referred the matter to the RC. On 2 June 2023 the RC conducted an appeal site visit and hearing.

Reference Committee Report

68. By letter and email dated 7 November 2023 the Secretary to the Committee informed Smar that the Secretary of State had decided to uphold the RSN "based on the conclusions of the [Reference Committee]."

69. Smar's case to the Committee and to the Secretary of State included:

a. Issue 3. Should the requirements of the RSN be varied so as to allow the redevelopment of Area B for housing within the next 10 years if so required in the public interest?

b. Issue 4. In all the circumstances of this case, should any re-stocking take place on alternative land?

70. The Committee reached the following conclusions on these issues:

a. Issue 3:

(1) It accepted that the draft allocation meant that the Land may be removed from the Green Belt and allocated for development.

(2) Allowing the RSN to be modified to allow development to take place within 10 years if the allocation is confirmed would *"undermine both the felling licence regime and planning regime with respect to lawful tree felling".*

(3) Replacing felled trees and housing development were both in the public interest but it was not for the Committee "to establish which of these public interests should take precedence".

b. Issue 4:

(1) It accepted that the restocked trees could lawfully be removed after 10 years in the event that the land was allocated for development.

(2) It accepted the Land could become available for development before that.

(3) But that did not amount to a "silvicultural justification that the [Land] is ill suited to Restocking".

(4) The alternative area had not been shown to be suitable and similar to the Land.

71. The Report's conclusions are set out in full in [18]-[22]:

"Conclusions

18. The Reference Committee concluded that the area mapped out by Forest Services in the Restocking Map is correct and should be treated as a single area for a single act of illegal felling.

19. The Reference Committee concluded that the Restocking Notice is a proportionate and reasonable response to an act of illegal felling, and that it's conditions being 1100 stems per hectare across the whole site with 20% allowance for open ground is appropriate.

20. The Reference Committee concluded that while competing claims about public interest were made, these bore no material impact on the appropriateness of the 10 year maintenance period stipulated by the Restocking Notice conditions. The Reference Committee considered this period appropriate, and modifying the notice to allow felling for the sake of potential development would undermine the forestry and planning regulations around tree felling.

21. The Reference Committee concluded that an alternative restocking area was not justified, and that no appropriate silvicultural reason was immediately evident preventing the current site from being restocked.

22. The Reference Committee therefore concluded that the Restocking Notice could stand unmodified but for a new compliance date to allow an additional planting season for the Objector to complete the works."

72. In sending the documents from the RC to the Minister for Forestry, the Secretary to the Committee, Mark Kourie, enclosed a Note to the Minister dated 28 September 2023 marked "Official Sensitive". This note was not disclosed to Smar until disclosed with the Defendant's pre-application protocol response.

73. The Note included:

a. "11. It would be most unusual for Ministers to reject the conclusions and recommendations of the Committee. I am not aware of any reason why the Committee's recommendations should not be accepted in full in this case."

b. "17. Enforcement processes are an essential element of the protection of our trees and woodlands, and there has been a strong commitment to

this, this could be undermined if the recommendations of the Committee are not followed."

74. The Minister upheld the RSN on 6 November 2023.

Submissions

Wickford

75. There are three wholly distinct Grounds in the *Wickford* case. Ground One relates to whether the minister erred in law in upholding the RSN given the assurances that the FC had given to the Regulatory Reform Committee of Parliament in 2006 when supporting the amendment to s.17A of the 1967 Act. Ground Two alleges that the Minister erred in law in the interpretation of the caselaw on the meaning of a "garden". Ground Three alleges a failure to consider the proportionality of the RSN.

76. Section 17A of the 1967 Act had been introduced in 2006. In its original form it required that a RSN could only be served where there had been a conviction under s.17 of the 1967 Act. However, in 2006 s.17A was amended to provide that a RSN could be served "where it appeared to" the FC that an offence under s.17 had been committed.

77. This amendment was enacted under the Regulatory Reform Forestry Order 2006 (SI 2006/780).

78. The process adopted entailed the Regulatory Reform Committee of the House of Commons considering the proposed amendment and producing a report which was then laid before Parliament. Mr Green relies on the terms of that Report to submit, both before the RC and before this Court, that it was an abuse of process for the FC to serve a RSN on Wickford, given the particular facts of this case. He submits that the RC and the Minister simply failed to deal with this argument, and as such they erred in law.

79. The relevant passages of the Regulatory Reform Committee Report dated 29 November 2005 are as follows:

> *"42. The Commissioners consider that the no reasonable right or freedom would be lost as a result of the proposed power for them to impose re-stocking requirements. They also believe that, by permitting that a person can be required to restock felled trees without existing condition of his first having been convicted of the relevant offence being satisfied, that the person's freedom would actually thereby be enhanced, as he would not necessarily be prosecuted in circumstances where he might currently be. This reasoning seems questionable; but in these circumstances the relevant consideration under the Standing Order and statutory test is that no person should be compelled to carry out restocking unless that person has indeed committed the offence of unlawfully felling trees under the 1967 Act (or he has to carry out the remedial work as the freeholder of the land, in a situation where the person responsible for felling the trees no longer retains such an interest in the land as would enable him to comply with a remedial notice). However, we consider that no reasonable right or freedom would be lost, given the proposal maintains a right of*

appeal against a restocking notice where the service of that notice or its terms might be in some way unfair.

…

52. It is proposed that a person could have a legal duty to carry out remedial works imposed on them as a result of a decision of the Forestry Commissioners, in circumstances where at present that person could be required to perform those works only after being found guilty of the necessary offence in the courts. The Commissioners have stated that there is no intention that the standard of proof required before a re-stocking notice is issued will in practice be lessened, so as to make it possible for re-stocking to be required in cases where a conviction would presently be unlikely or impossible. They further argued that the process of determining whether a re-stocking notice should be served on someone is concerned with questions of fact, and that this is a judgement "which the Commissioners would be qualified to make". Essentially, they seem to consider that the existing requirement to obtain a prosecution is without a practical justification or beneficial purpose, given their belief that they will always be in a position to reach a justified conclusion on whether a person has committed the relevant offence. The relevant question therefore appeared to us to amount to whether there is any necessary protection for the public in the need for the Commissioners to obtain a conviction before they may require restocking works to be carried out. If there are no questions of fact which the Commissioners could not determine as readily, effectively and impartially as a court, there would not be any necessary protection in the current requirement to secure prosecution.

…

54. The Commissioners argued in support of their proposal that the current need to obtain a conviction as pre-condition for requiring re-stocking has given rise to a situation in which the "existing provisions have not been effective". This view is derived from their argument that there are many cases where the relevant offence has certainly been committed but no prosecution is ever attempted as it would not in their view be in the public interest to do so (and thus enable the service of a restocking notice) for reasons such as the offence having been committed in ignorance. On this basis, the Commissioners believe the existing enforcement machinery gives rise to active problems, in addition to their view that there is no practical benefit in requiring prosecutions as pre-condition for enforcement when they believe that they are already in a position to establish for themselves whether the relevant act has in fact been committed.

…

57. Various statistics relating to the operation of the current enforcement mechanisms are given in the Regulatory Impact Assessment at pages 50 and 51 of the explanatory statement. These indicate that, in England and

> *Wales in 2003/4, 215 cases of alleged illegal felling were reported and 76 were fully investigated, of which 15 finally went to court. 14 of these 15 court actions resulted in a successful prosecution. It is noted on page 51 of the explanatory statement that "The [Forestry Commissioners] would have liked to pursue a larger proportion of those investigated…but did not on the advice of Defra Legal". This appeared to us to indicate that there are more instances of alleged illegal felling in which the Commissioners would like to enforce re-stocking than cases in which the Commissioners believe a successful prosecution could be achieved. The implication seemed to be that, should the Commissioners be given the powers which they propose, they would use that power to enforce restocking in instances where at present the need to prove the relevant offence in court or demonstrate a public interest in prosecuting would make this impossible. It is not clear to what extent any increase in the use of the power could arise from a lower standard of proof or simply a lower cost of taking action under the administrative procedure compared with that currently through the courts.*
>
> *…*
>
> *59. We have considered this issue very carefully. We take the view that the method of determination which the Commissioners propose is sufficiently thorough to protect against the use of the proposed administrative power in relation to frivolous or unsubstantiated allegations of unlawful felling."*
> [emphasis added]

80. Mr Green relies on what was said at paragraph 52 and the assurance by the Commissioners that re-stocking would not be required where a conviction "would presently be unlikely or impossible. "

81. Ms Sargent points to the second part of paragraph 52, 54, 57 and the conclusion at 59. She submits that no assurance as to only serving a RSN where a prosecution could be both brought and succeed was actually given by the FC. In any event, it is clear that the Committee did not rely on any such assurance and were content that the interests of a person served with a RSN could be fully protected by the right of appeal to the Minister under s.17B.

82. Mr Green submits that neither the RC nor the Minister dealt with this Ground of appeal, and if the Minister did take it into account she certainly did not give any reasons for rejecting the argument. He submitted before this Court that even if what the FC said to the Regulatory Reform Committee does not amount to a binding assurance from which it would be an abuse to depart, it certainly was a material consideration with which the Minister, whether directly or through the RC, had to deal.

83. There is a dispute as to whether the Report of the Regulatory Reform Committee can be relied upon and referred to in this Court. Mr Green does not seek to rely on it for the purposes of statutory interpretation, because he accepts that s.17A does not on its face restrict the circumstances in which the FC can serve a RSN, and could not be interpreted to so do. Therefore the basis for reliance on proceedings in Parliament set out in *Pepper v Hart*, for the purposes of resolving an ambiguity, does not apply.

84. However, Mr Green relies on the Report to argue that it would be an abuse of their powers to allow the FC to rely on a RSN where the prosecution was withdrawn (presumably on the grounds that a conviction was unlikely to be achieved); where the FC were outside the time limits to bring a prosecution; and where there was not evidence for the FC to have proved their case beyond reasonable doubt (see [33] above). He submits that neither the RC nor the Minister suggested that the Report could not be relied upon, and the principal submission before this Court is simply that they did not deal with the argument. He submits that there was no legal bar on the Minister considering the Report for the purposes of determining the abuse of power argument.

85. Mr Green relies upon ***R (Spath Holme) v SSETR*** [2001] AC 349, where Lord Bingham said at p.392:

> *"… Here the issue turns not on the meaning of a statutory expression but on the scope of a statutory power. In this context a minister might describe the circumstances in which the government contemplated use of a power, and might be pressed about exercise of the power in other situations which might arise. No doubt the minister would seek to give helpful answers. But it is most unlikely that he would seek to define the legal effect of the draftman's language, or to predict all the circumstances in which the power might be used, or to bind any successor administration. Only if a minister were, improbably, to give a categorical assurance to Parliament that a power would not be used in a given situation, such that Parliament could be taken to have legislated on that basis, does it seem to me that a parliamentary statement on the scope of a power would be properly admissible."*

86. There is no doubt that the RC did not deal with the abuse of power argument. It is one of the (many) oddities of the process in these cases that the RC was extremely reluctant to deal with anything that they thought was a "legal" argument. This is understandable to the degree that there is no legal representative on the RC, nor is there a legal clerk or advisor. Doubtless they normally deal with issues of silviculture and felt themselves to be ill-qualified to deal with legal issues. They therefore declined to deal with them. There are however, two difficulties. Firstly, as a statutory body exercising public law powers it was incumbent upon the RC to exercise those powers lawfully, and in accordance with the normal principles of public law. The obvious answer if they felt themselves to be faced with a submission on a legal issue which they were not confident to resolve was to seek external legal advice. Secondly, if the RC considered it could not deal with a legal issue, it was necessary that the Minister then did so. Otherwise there could, as happened here, be an issue raised that arguably was simply not dealt with.

87. This then leads to the second part of Ground One. Mr Green submits that the RC having refused to deal with the argument, the Minister also failed to do so, or at the very least failed to give any reasons for dismissing it. The Minister's decision is in the letter dated 7 November 2023 and she does not give any reasons for dismissing the abuse of power argument. Ms Sargent submits that there is no duty on the Minister under the statute to give reasons, and none should be imposed by common law. She submits that the Court should assume the Minister took into account the argument it having been raised before her.

88. In respect of the lack of any reasons on the issue she submits there is no general common law duty to give reasons, but accepts that such a duty may arise if a case has special circumstances: *Dover DC v CPRE Kent* [2018] 1 WLR 108. In that case the Planning Committee had rejected the recommendation set out in the Officer's' Report, but had not given reasons for doing so. At [51] and [57], Lord Carnwath set out the circumstances where a duty to give reasons may arise, where the policy reasons for imposing the duty are particularly strong:

> *"51. Public authorities are under no general common law duty to give reasons for their decisions; but it is well-established that fairness may in some circumstances require it, even in a statutory context in which no express duty is imposed (see R v Secretary of State for the Home Department, Ex p Doody [1994] 1 AC 531 ; R v Higher Education Funding Council, Ex p Institute of Dental Surgery [1994] 1 WLR 242 , 263A-D; De Smith's Judicial Review 7th ed, para 7-099). Doody concerned the power of the Home Secretary (under the Criminal Justice Act 1967 section 61(1)), in relation to a prisoner under a mandatory life sentence for murder, to fix the minimum period before consideration by the Parole Board for licence, taking account of the "penal" element as recommended by the trial judge. It was held that such a decision was subject to judicial review, and that the prisoner was entitled to be informed of the judge's recommendation and of the reasons for the Home Secretary's decision:*
>
> *"To mount an effective attack on the decision, given no more material than the facts of the offence and the length of the penal element, the prisoner has virtually no means of ascertaining whether this is an instance where the decision-making process has gone astray. I think it important that there should be an effective means of detecting the kind of error which would entitle the court to intervene, and in practice I regard it as necessary for this purpose that the reasoning of the Home Secretary should be disclosed. If there is any difference between the penal element recommended by the judges and actually imposed by the Home Secretary, this reasoning is bound to include, either explicitly or implicitly, a reason why the Home Secretary has taken a different view ..." (p 565G-H per Lord Mustill).*
>
> *It is to be noted that a principal justification for imposing the duty was seen as the need to reveal any such error as would entitle the court to intervene, and so make effective the right to challenge the decision by judicial review.*
>
> *...*
>
> *57. Thus in Oakley the Court of Appeal were entitled in my view to hold that, in the special circumstances of that case, openness and fairness to objectors required the members' reasons to be stated. Such circumstances were found in the widespread public controversy surrounding the proposal, and the departure from development plan and Green Belt policies; combined with the members' disagreement with the officers' recommendation, which made it impossible to infer the reasons from their*

> *report or other material available to the public. The same combination is found in the present case, and, in my view, would if necessary have justified the imposition of a common law duty to provide reasons for the decision."*

89. Here Mr Green submits that there is a similar gap in understanding, because the RC has not dealt with the issue and the Minister has given no reasons.

90. It is accepted that where there is a duty, then reasons must be intelligible and adequate and must deal with the principal important controversial issues (*CPRE* at [35]; *South Buckinghamshire District Council v Porter (No 2)* [2004] 1 WLR 1953 at [36]).

91. In relation to Ground Two, Mr Green submits that the RC erred in law in its approach to whether the site was a "garden" for the purposes of s.9, in reliance upon the decision of the Divisional Court in *Rockall*. The Claimant argued before the RC that the facts of its case were very similar to those in *Rockall*, because there had been a garden at some point in the past, and there was an intention to recreate it.

92. The Claimant's second objection to the RSN was that the land in question was garden land and therefore no felling licence was required. At [35] of its written submission to the RC the Claimant had summarised its case as follows:

> *"The facts of the present case are similar to those in Rockall. The site was part of the enclosed, landscaped grounds of Newton Hall, a large country house, as shown by historical maps. The land was expressly acquired by the first defendant to be used as garden land in connection with its scheme of development. By letter dated 13 April 2017, months before felling took place, Wickford wrote to the then owner to say that the land would only be used as 'garden space'. It was for this purpose that the trees were felled. There can be no question as to the genuineness of the first defendant's intentions."*

93. As I made clear in the hearing, I have considerable reservations about some of the reasoning in *Rockall*. The test in s.17 is clear, namely whether the land is (at the time of the alleged offence) a garden. The mere intention to create a garden must be irrelevant because it goes to the future and not the present. It may be that the Divisional Court's focus was on the intention to "recreate" the garden as being evidence that the land was still a garden at the present time. There is no dispute that gardens may come in many forms, and do not have to comprise flower beds and lawns, and may include or consist of wooded and "wild" areas. However, there is a distinction between wooded areas and something that would more properly be described as woodland. This is largely a matter of judgement, here for the RC, and falls neatly into what is sometimes described as the "elephant test", most people would recognise a garden if they saw it, even if the parameters of what is a garden may be hard to describe.

94. In the present case the RC referred to *Rockall*, and reached the clear view that the land was not a garden. In my view they did not misdirect themselves on *Rockall*, that intention might have some relevance to whether there is presently a garden which is intended to be restored. If *Rockall* goes further than this, then in my view it is plainly wrong. There is no error of law in the RC's approach.

95. Ground Three is that the requirements of the restocking notice was disproportionate to the number of trees felled, and the Minister and the RC failed to deal with this issue. In the present case nine trees were felled within a parcel of land extending to about 0.33 hectares, which had originally contained 27 individual trees and four pioneer tree groups. The restocking notice required 242 trees to be planted and thereafter maintained for 10 years. The Claimant objected to this on the ground that the requirement was grossly disproportionate.

96. The RC's report dealt with this at [13]:

> *"The Reference Committee agreed that the standard restocking practice of 1100 stems per hectare was not unreasonable, and did not find the Objector's argument against the conditions in the notice to be justified on silvicultural grounds. The Reference Committee agreed that restoration of canopy cover to the site was likely to be achieved by following the conditions set out in the Restocking Notice, but noted that the removal of natural regeneration on the site for the sake of restocking would be ill advised."*

97. Mr Green submits that there was no consideration here of the number of trees actually felled, only what would have been appropriate for restocking a woodland generally. Although the RC did indeed conclude that the notice was a reasonable and proportionate response, this was an assessment based not on the circumstances of the alleged offence but on general silvicultural considerations.

98. It appears that in the large majority of cases where the FC make an RSN the number of trees required to be planted is calculated on the basis of the area, multiplied by a figure of 1100 stems per hectare. There is not therefore any necessary relationship between the number of trees removed in breach of s.9 and the number of trees that have to be planted.

99. Mr Green submits that the sole purpose of the 1967 Act and the scheme thereunder is the protection of trees as a resource, i.e. for their wood. The purpose of s.17A is to remediate the loss of trees caused by the unlawful felling. There therefore must be a reasonable relationship between the number of trees felled and the requirement for restocking under the RSN. He posits the extreme example of one tree felled in an arable field and the RSN requiring the entire field to be replanted with trees.

100. Ms Sargent submits that the RC did consider the number of trees felled, at paragraph 13. She also points to the minutes of the meeting where it is recorded at para 55 that "the Chair asked for clarification regarding the trees being planted, noting that they would be whips not mature trees, and why 240 were appropriate when 9 had been felled."

101. More broadly, Ms Sargent submits that there is no proportionality requirement imposed on RSNs, either in the 1967 Act or the caselaw. She submits that there is nothing unreasonable about relying on the figure of 1100 stems per hectare as this is the minimum industry standard for restocking broadleaved woodlands.

102. Finally, Ms Sargent submits that if any of the Grounds are made out the decision is highly likely to have been the same, and the court should apply s.31(2A) of the Senior Courts Act 1981.

Witham Nelson

103. There is some overlap between the issues in the *Witham Nelson* and *Smar* cases. At the heart of both cases is the interrelationship between the 1967 Act and the town planning regime in the Town and Country Planning Act 1990 and the Planning and Compulsory Purchase Act 2006.

104. The relationship between the two schemes was considered by the Court of Appeal in *(Arnold White)*. Strictly, most of the judgment of Sir Keith Lindblom SPT is obiter, because the Court found that the claim was made out of time. However, it is a carefully considered and full judgment given by a judge with enormous experience in the planning field. Therefore although not technically bound by it I give it the maximum weight.

105. The facts of the case were that Arnold White had obtained a felling licence subject to restocking conditions. They had outline planning permission but not reserved matters approval at the point they felled the trees. They subsequently obtained reserved matters approval. Arnold White did not then comply with the restocking conditions on the licence. The FC served a section 24 notice to enforce compliance with the restocking conditions and Arnold White sought judicial review of the refusal to withdraw the notice.

106. Arnold White argued that the subsequent grant of planning permission effectively trumped an extant felling licence, or the conditions imposed upon it and removed the need to comply with any restocking requirement, see [67]. The Court of Appeal roundly rejected this submission, giving three reasons. At [68] the SPT said:

> *"68. I would reject that proposition, for three reasons. The first I have already mentioned. In a carefully constructed and self-contained statutory scheme for the felling of trees, Parliament has explicitly dealt with the relationship between that statutory scheme and the separate statutory scheme for planning. It has provided expressly for the synchronicity between these two regulatory regimes where they are both engaged by proposals for development, reconciling the requirement to apply for a felling licence with the process for granting planning permission. One may assume, I think, that it has sought to legislate as fully as it considered necessary for the different scenarios which might arise.*
>
> *69. Secondly, Parliament did not provide, either in the 1967 Act or in the planning legislation, that the statutory provisions for felling licences would be disapplied, or the conditions imposed on a felling licence and the corresponding requirements of a section 24 notice annulled, automatically and retrospectively, by a later grant of planning permission which would have engaged the exemption in section 9(4)(d) had it been in place before the felling licence was applied for, granted and acted upon. There is no provision either in section 9(4) or elsewhere in the 1967 Act whose effect is that the granting of planning permission for a development*

nullifies the requirements of conditions on an extant felling licence where compliance with those requirements would prevent the development from being carried out or completed, or which gives a future grant of planning permission or reserved matters approval the effect of superseding such requirements. And I do not accept that this can somehow be read into the statutory scheme. So significant a change to the statutory arrangements for felling, which would negate action lawfully taken by the Forestry Commission in issuing a felling licence with restocking conditions, and prevent enforcement action under section 24(2), (3) and (4) , would surely have required explicit provision to be made in the statute itself or by an amendment to it. As Mr Simons submitted, it would have been possible for Parliament to enact such a provision had it intended to do so, but this it has never done.

70. And thirdly, the fact that in this case the council, when it granted outline planning permission in June 2016, took into account the proposed removal of trees in the light of the "Illustrative Masterplan" submitted with the application, and imposed several conditions requiring the submission and approval of details before felling could proceed, does not affect the operation of the statutory provisions themselves or alter the consequences of the restocking conditions incorporated into the felling licence. Nor does the fact that it was always the overt intention of Arnold White Estates to undertake or facilitate development on the site. It was free to apply when it did for the felling licence, before the reserved matters approvals required under the outline planning permission had been granted. And this was what it chose to do, for commercial reasons. It would equally have been open to it, instead, to seek the required reserved matters approvals or a full planning permission for the same development, and it would then, potentially, have been able to take advantage of the exemption in section 9(4)(d) .

71. There is no inherent illogicality in the statutory provisions for felling licences as the Forestry Commission understands them. 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. Parliament has addressed the interaction between them where it has seen the need to do so, in particular in sections 9(4)(d) and 15 of the 1967 Act . Far from subordinating the statutory regime for felling licences to that for planning permission, the enactment of that regime, which explicitly acknowledges the planning legislation, demonstrates the synergy between them. The duties of the Forestry Commission, set out in section 1 of the 1967 Act , require it to take a national view of forestry, to consider national supplies of timber, and to maintain adequate national reserves of growing trees. They go beyond the role of local planning authorities in discharging their development control functions. They involve considerations which would not necessarily be taken into account by those authorities when determining applications for planning permission. 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.*
>
> *72. In this case it was clearly the view of the Forestry Commission when it issued the section 24 notice that it would not be consistent with good forestry and thus in the public interest for Arnold White Estates, having had the benefit of the felling authorised in the felling licence granted on 19 October 2018, to be able to avoid the burden of the restocking conditions which had been imposed on that licence as indispensable requirements if the proposed felling was to proceed. Otherwise, in the exercise of its statutory power to do so, the Forestry Commission would not have decided to issue a formal notice to enforce compliance with those conditions. Nor can it be said that the Forestry Commission was doing anything other than lawfully exercising its power to issue that notice, in accordance with its statutory purpose under section 1 of the 1967 Act ."*

107. At [73] the SPT pointed out that Arnold White had made a commercial decision to fell the trees in the absence of reserved matters approval. There were legal consequences of that decision.

108. It is plain from [74] that the Court of Appeal was concerned about the implications of allowing Arnold White to escape the consequences of the restocking notice, by relying on a subsequent grant of full planning permission.

109. The second argument in the case was that the decision of the FC not to withdraw the restocking notice was irrational because it would prevent the development of the land in accordance with the planning permission for a period of 10 years, see [78]. The Court of Appeal rejected this argument and said at [79] and [80]:

> *"79. That argument was powerfully presented by Mr Elvin. But I am not persuaded by it. If we had to resolve the point in this case, I would hold that the Forestry Commission's refusal to withdraw the section 24 notice was legally sound. I would not accept that, under the 1967 Act , there is an implied general power to withdraw such a notice such as was suggested by Mr Elvin. Nor would I accept that, if the Forestry Commission did have such a power, its failure or refusal to withdraw the section 24 notice it had issued in this case was irrational or otherwise unlawful.*
>
> *80. I would not want to rule out a residual discretion for the Forestry Commission to amend or withdraw a section 24 notice in limited circumstances. Without trying to define the scope of such a discretion, I think it might exist, for example, in a case where it became clear that the notice had been mistakenly issued because of some factual error or misunderstanding, or where some inaccuracy or ambiguity had occurred in its wording. The exercise of the power to amend or withdraw in such a case would of course need to be considered in the particular circumstances as they arose."*

110. The first Ground in *Witham Nelson* is that it was irrational to uphold the RSN in circumstances where it was accepted by the RC that it was "inevitable" the replanted trees would be removed in 6.5 years (having taken into account the shortened maintenance period). The second Ground is that the RC were wrong to remit the issue of whether alternative land for the restocking should be accepted, to the Minister.

111. It is agreed that the hearing before the RC is a hearing "de novo", so the powers and material considerations for the RC are the same as those for the FC when deciding whether to serve a RSN, and in what terms. Under s.17A(3)(a) they must have regard to good forestry and "the amenities of the district". The FC's general powers in s.1 of the 1967 Act involve the duty of promoting the interests of forestry, afforestation and the production and supply of trees, see 1(2). Under s.1(3A) they must balance the development of afforestation with conservation and enhancement of natural beauty, flora etc.

112. Witham's argument before the RC was that there was little or no silvicultural benefit in the RSN because the trees would be removed after 6.5 years, given the grant of planning permission. The RC to a large extent accepted this argument at paragraphs 11-13, saying "the practical consequences of upholding the restocking notice may appear to some more as the temporary frustration of development prospects than it does the restoration of canopy cover". The RC's principal concern, as set out at paragraph 12 seems to have been the risk of setting a precedent for a "nefarious actor", who would fell trees without a licence and subsequently obtain planning permission and avoid the effect of a RSN.

113. Mr Banwell submits that the RC misdirected itself in law by considering that legal issues were outside its remit, see paragraph 16 and therefore not properly understanding the decision in *Arnold White*. Mr Banwell focuses on the last two sentences of [71] of that decision where the SPT said: *"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."*

114. He submits that the RC have taken an absolute message from *Arnold White*, which was neither the legal effect nor the intention of the Court, so at paragraph 10 the RC say "the Committee accepted that this therefore means the Objector is rightly expected to comply with the Restocking notice despite full planning permission being in place." This is not the correct interpretation of what the Court of Appeal said in *Arnold White*.

115. Mr Banwell submits that the origin of the RC's mistaken approach to legal issues can be found in the Reference Committee: Information Note. This document was disclosed to Witham Nelson in the proceedings but is not in the public domain. Mr Banwell told the Court that it was dated 31 March 2023. At paragraph 9 it states:

> *"A public law claim is where, for example, it is claimed that the Forestry Commissioners (through Forest Services) has acted unlawfully, irrationally, or unfairly. These claims should be tested through Judicial Review, and not considered in detail by a Reference Committee. For the purposes of an appeal the power to serve and existence of the Restocking Notice should normally be regarded as a given."*

116. In respect of the relevance of planning permission the Note states:

> *"Q12. Does planning permission trump a restocking notice?*
>
> *A11. The case of Arnold White Estates Ltd v Forestry Commission (2022) highlights the interaction between the planning regime and the Forestry Act 1967, where a development requires the felling of trees. The Court of Appeal held that a subsequent grant of planning permission does not automatically remove the need to comply with the conditions of a felling licence, even if compliance with these conditions would make the development impossible. Therefore, developers should wait for the grant of a qualifying planning permission before felling any trees, rather than obtaining and felling pursuant to a felling licence. Only full planning permission that is granted prior to the felling would count as an exemption to the requirement for a felling licence.*
>
> *Q13. Is allowing the restocking of an alternative area a fair compromise where a restocking notice is being appealed for disrupting planning ambitions?*
>
> *A13. In the initial submission of an appeal against a Restocking Notice, the Form 6A asks whether an appellant wishes to object against the notice, the conditions of the notice, or both. Objectors commonly object to both, with the claim that should the objection against the notice itself fail, that the Reference Committee consider allowing for the restocking area to be modified and an alternative area considered in its place. It has become normal practice for Forest Services, when first issuing the Restocking Notice, to consider allowing the restocking of an alternative area. This is, however, only ever considered acceptable if the original restocking area is not suited to restocking for silvicultural reasons.*
>
> *Allowing alternative area restocking without good silvicultural reasons (for the unsuitability of the felled area) could result in a particularly unhealthy precedent."*

117. It may be that this latter sentence is the source of the RC's frequent reference to the dangers of setting a precedent.

118. Ground Two is closely related to Ground One, but focuses on the issue of restocking on alternative land. The RC failed to reach a conclusion on this issue, but instead referred it to the Minister, see paragraphs 23 and 29.

119. Mr Kourie, the Secretary to the RC and an employee of the Forestry Commission, emailed Mr Murdoch, the Head of Woodland Regulation on August 9th 2023 in the following terms (note the emails are in reverse order):

> *"Hi Mark*
>
> *Thanks for the below.*

> *Forest Services has had no new information to substantiate a silvicultural reason to agree an alternative restocking area. Given that, there's no rational basis for us to change our original decision to restock the felled area.*
>
> *James*
>
> *Dear James*
>
> *The Reference Committee for the above case have concluded that the Restocking Notice is an appropriate and proportionate response to an act of unlicensed felling, have recommended that Forest Services and the Objector consider whether restocking an alternative area would be preferable (with a maintenance period of 10 years).*
>
> *They have further concluded that if restocking an alternative area cannot be agreed, then the Restocking Notice maintenance period should be reduced by 3 years and 6 months.*
>
> *For the purposes of my reporting to the Minister to proactively provide the best recommendations to her, please confirm whether Forest Services will consider negotiating an alternative area with the Objector.*
>
> *Many thanks*
>
> *Mark"*

120. This email exchange was not placed before the Minister. There was a submission to the Minister dated 5 October 2023 from Mr Kourie, an employee of the FC, rather than an independent civil servant. At paragraph 10 and 13 of the submission Mr Kourie said:

> *"10. Given the inevitability of development on the site, the Reference Committee were concluded [sic} that the Minister may wish to consider presenting Forest Services the opportunity to accept restocking an alternative area, as this may be a preferable outcome given the near inevitability of any restocked trees being removed after the maintenance period expires. I have proactively presented Forest Services with this option in advance of the Minister's decision for the sake of practicality and Forest Services have declined to consider an alternative area.*
>
> *…*
>
> *13. It would be most unusual for Ministers to reject the conclusions and recommendations of the Committee. I am not aware of any reason why the Committee's recommendations should not be accepted in full in this case."*

121. Mr Banwell submits that the RC erred in law by not addressing the alternative land issue themselves. The Minister did not remedy the error because she accepted a fait accompli or veto from the FC rather than considering whether the RSN should be

amended to refer to alternative land, when this was both a plainly material consideration and on the facts the only rational conclusion, taking into account s.17A(1A)(a).

122. Ground Three is that the RC unlawfully declined to determine points of law. The Claimant had relied upon the fact that full planning permission had been granted before service of the RSN. The RC regarded this as a legal issue and simply said it should be brought by way of judicial review, see paragraphs 14-16.

123. Mr Simons emphasised strongly that it was only when a full planning permission was granted (whether by the grant of reserved matters after an outline permission or a single full permission) that the s.9(4)(d) exemption applied. He said that the grant of outline permission "had no bearing" on the legal ability to fell trees. He submitted that the existence of full planning permission was the only relevant consideration for the purposes of the 1967 Act regime. He relied in support of these submissions on ***Arnold White*** at [65] and the Court of Appeal's analysis of when s.9(4)(d) applies.

124. He submitted that the duty under s.17A(3) to have regard to various factors left the weight to be attached to those factors to the FC and then the Minister. It was open to them to be concerned that no loopholes should be capable of being exploited and to conclude that the risk of a setting a precedent outweighed the "risk" of frustrating future development. I note here that on the facts of the ***Witham Nelson*** case the RC accepted that development would be prevented for 6.5 years by the RSN, so this is an actuality rather than merely a risk.

125. He relied heavily on ***Arnold White*** and said that although the legal issues were different, because that case concerned s.24, the situations were wholly analogous and the approach of the Court of Appeal applies to this case "in exactly the same way".

126. In respect of the consideration of applying the RSN to alternative land, Mr Simons said the Minister was guided by the expert input of the FC as summarised in paragraph 10 of the submission. However, he accepted that the Minister had not seen the email exchange between Mr Kourie and the FC about the use of alternative land. He said that the statutory scheme in s.17A(1A)(a) anticipated that any alternative land would be agreed with the FC, although he accepted that the Minister was not restricted to only taking into account alternative land that had been agreed with the FC, and it was open to the Minister to order the FC to amend the RSN to apply to alternative land. However, that was very unlikely to happen because the Minister would not be in a position to disagree with the FC's judgement on the appropriateness of the alternative land.

127. He therefore submitted that there was no misdirection in paragraph 10 of the submission, because the Minister was not being told that she could not accept the alternative land offered only that she should not do so as a matter of judgement.

128. On Ground Three, Mr Simons submits that the RC did fully consider the merits of the appeal. The RC is not made up of lawyers and in his skeleton argument he said: "The correct forum to determine legal points of his kind is through an application for judicial review."

Smar Developments

129. There is considerable overlap between the issues in *Smar* and those in *Witham Nelson.* The key difference on the facts is that the *Smar* land did not at any point have the benefit of a planning permission, but was rather part of an emerging development plan allocation for a large housing site. As is set out at paragraph 31 of the minutes of the RC meeting, Mr Richards on behalf of Smar had proposed that the RSN be amended to add to para 4 of the Schedule to the RSN, which provided for a maintenance period of 10 years:

> *"Unless 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 or enactments replaced by that Act".*

130. The intention behind this was to reflect the position of s.9(4)(d) of the 1967 Act; if planning permission was subsequently granted the trees could be removed. Importantly this would mean that the land would still be restocked, but the maintenance requirement would end if full planning permission was granted.

131. Ground One relates to the RC's comment at paragraph 12 of its report. The RC was dealing with the argument that the RSN should be amended to accommodate future development. They said *"the [RC] agreed [with the FC] that this was not appropriate as it undermined both the felling regime and planning regime with respect to lawful tree felling."*

132. Mr Richards submits that this was a plain error of law because amending the RSN would have no impact on the planning regime. If the site did not get full planning permission then the amendment which he had proposed would not take effect. Therefore there could be no impact on the planning regime from the proposed amendment.

133. Mr Simons argued that the RC's conclusions were correct because the planning regime would be undermined by pre-empting the outcome of the local plan process.

134. Ground Two is that the Minister erred in not considering the public interest in allowing the appeal. Mr Richards submits that the approach of the FC showed a wrong legal approach. In their submissions to the RC the FC had said *"Typically the FC would only ever agree to restocking an alternative local in exceptional cases where naturally occurring events render the felled area unsuitable for restocking… The purpose of a restocking notice is to replace trees that were unlawfully felled in the location at which they were felled."* In their rebuttal to the Claimant's objection the FC said:

> *"Typically the FC would only ever agree to restocking an alternative location in exceptional cases where naturally occurring events rendered the felled area unviable for restocking. For example, if the felled area had been flooded. The FC would expect any man-made barriers to restocking to be rectified to allow compliance with the Notice".*

135. This is in my view plainly the wrong approach. S.17A(1A)(a) places no preference between a RSN on the original land or such other land as may be agreed, and it certainly

places no exceptionality test on either ordering or agreeing that the RSN should be applied to alternative land. The FC through seeking both exceptional circumstances, and that the original site must be rendered unsuitable by something equivalent to an "Act of God", are applying a much higher test than appears in the statute, and arguably are fettering their discretion by so doing. It is clear from the next section of the rebuttal to Smar's objection that the FC is very concerned about setting a precedent which might give an incentive to landowners to not apply for a felling licence by allowing a RSN to be applied to alternative land. However, they have not grappled with the facts of the particular case, and the benefits of using alternative land.

136. That wrong approach by the FC is then taken forward by the RC and the Minister, who both take the view that alternative land can only be provided for if the FC agree to it. Therefore the FC's erroneous approach becomes an error of law by the Minister.

137. Mr Simons submits that the potential precedent effect of allowing the RSN to refer to alternative land was a material consideration to which the RC were entitled to have regard, see *R (Friends of the Earth) v Heathrow Airport Ltd* [2020] UKSC 52.

138. He submits that the RC were fully entitled to take the view that the Forestry regime did not need to yield to the planning regime and that effectively this Ground is fully covered by the dicta in *Arnold White*.

139. Ground Three is that the RC erred in its approach to alternative land. This effectively follows the same analysis as in *Witham Nelson*: whether the RC's approach to alternative land was rational.

140. Ground Four is that the process adopted was procedurally unfair. Mr Kourie in the post hearing advice became in substance an advocate for the FC, with no opportunity for the Claimant to respond. Mr Simons submits that Mr Kourie was simply acting as a civil servant giving advice to the Minister. Even if his role was somewhat blurred, there is nothing to suggest that there was any substantive unfairness.

Conclusions

Wickford

141. Ground One is that neither the RC nor the Minister dealt with the Claimant's argument that it was an abuse of power to serve and then uphold a RSN where the FC had withdrawn the prosecution. The RC decided not to deal with this issue because it raised a legal argument, and simply left it to the Minister. Although the RC could be criticised for this approach, because arguably they were not fulfilling their functions under the statute to make recommendations to the Minister, so long as the Minister properly dealt with the argument, there would be no error of law that would lead this Court to quash the Minister's decision.

142. However, the difficulty in this case is that the Minister's decision does not show that she considered the abuse of process argument either. Ms Sargent submits that there is no duty on the Minister to give reasons and that the Court should assume, given that it was drawn to her attention, that the Minister did consider and reject the abuse of process issue.

143. It is correct that there is no statutory duty on the Minister to give reasons, whereas there is on the RC. There is no general common law duty to give reasons, but such a duty may arise in special circumstances, *Dover DC v CPRE Kent* [2018] 1 WLR 108 at [51]. The situation in *Wickford* exposes the lacunae in the statutory scheme in this regard, similar to that in *CPRE*. The Claimant put a detailed argument on the appeal to the RC and has no way of knowing whether it was taken into account or how it was dealt with by the Minister, thus causing the Claimant significant prejudice. Either the statutory scheme requires the RC to deal with the argument, and give reasons in its report to the Minister, or if they are not required to do so then fairness requires the Minister to explain why she did not accept the argument. Even assuming the Minister did take the issue into account, the Claimant has no way of knowing whether the Minister lawfully considered it or not.

144. As such, this is a case which falls into Lord Carnwath's analysis in *CPRE*, if the Minister either did not accept the RC's reasons, or the RC did not deal with an issue, then there was a duty on the Minister to explain how she had dealt with it. I therefore find Ground One made out.

145. Ground Two relates to the RC's consideration of the case of *Rockall* and whether the land was a garden. The test in s.9(2)(b) is that the land must be, at the date of the alleged offence, comprised in a garden. The fact that there is a bona fide intention to create a garden in the future is only relevant to the extent that the intention casts light on whether the land is at the relevant date a garden. A disused garden may still be a garden, but it must continue to be identifiable as a garden. What those characteristics are will largely be a matter of fact and judgement for the RC. Gardens can take very different forms, from standard domestic gardens with play equipment and flower beds, to large landscaped gardens with multiple trees and wooded areas. However, they must still be identifiable in some way as gardens. To the degree that *Rockall* suggests that the intention to create a garden is alone sufficient to meet the statutory test, it is in my view plainly wrong.

146. In the present case the RC did carefully consider the evidence as to whether the land was currently a garden, and took the view it was not. Their reference to the Guidance Note setting out examples of relevant characteristics does not indicate an error of law. The conclusion that the site was not a garden was one plainly open to them. I note that they went on the site and therefore were in an excellent position to make the relevant judgement. There is nothing in the RC's reasons which suggest that they misapplied the statutory test, or failed to understand the limits on the relevance of the Claimant's future intentions to the matter they had to decide.

147. Ground Three is that the requirements of the RSN were disproportionate given the limited number of trees removed. The FC's use of a standard restocking density when deciding the terms of the RSN is in itself rational and a matter of judgement, well within their statutory discretion and professional judgement. There might be a legal concern, if in an extreme case the FC failed to take into account the number of trees felled. Mr Green's example of one tree felled in a field and a RSN which required 100s of trees planted because of the way the RSN boundaries were drawn might give rise to legal issues, but that is a wholly hypothetical scenario. It is not this case and it would not be appropriate for the Court to speculate as to when and if that might arise. Therefore I reject Ground Three.

148. For these reasons I find for the Claimant on Ground One alone. Ms Sargent submits that in those circumstances I should not quash the decision by reason of s.31(2A) of the Senior Courts Act 1981 because it is "highly likely" that the outcome would not have been "substantially different" if the error of law had not been made. The approach to this section was carefully explained in *R (Cava Bien) v Milton Keynes Council* [2022] RVR 37 at [52]. It is a high hurdle, whereby the Court conducts its own assessment. In my view this case is somewhat easier than many to apply s.31(2A) to, because the argument being put was principally a legal one, concerning what the FC said to the Regulatory Reform Committee in 2006, and the legal relevance of that. It is not a case where the Court has to step into policy or factual judgements to be made by the Minister.

149. In my view the s.31(2A) test is made out, because the "abuse of process" argument which the Minister failed to address is wrong and is therefore highly likely to have been rejected in any event. The limited circumstances in which reliance can be placed upon what was said in Parliament were considered by the Court of Appeal in *R (Heathrow Hub Ltd) v Secretary of State for Transport* [2020] 4 CMLR 171 at [158]. It is not at all clear that any of the limited circumstances set out there apply in the present case. The Claimant is not seeking to argue that the words of s.17A are ambiguous, because plainly they are not. The section is clear that there does not need to be a prosecution or that a prosecution could still be brought before a RSN is served. The test is simply that it appears to the FC that the person has committed an offence.

150. Mr Green relies upon *R (Spath Holme Ltd) v SSETRi* [2001] AC 349 at 392 as set out above. However, the assurance that the FC gave to the Regulatory Reform Committee was by no means the type of categorical assurance that Lord Bingham was apparently referring to. There, terms of what was said were broad and general, rather than clear and specific. Further, and in any event, it is apparent from the extract set out at [79] above, that the Regulatory Reform Committee did not actually rely on any specific assurance that the FC had said to them. The Committee report makes clear that they accepted that RSNs could be served even where there could be no prosecution. The safeguard that the Regulatory Reform Committee relied upon was that of the statutory appeal and their confidence that that process would protect the landowner from any unfairness.

151. Further, in my view, Mr Green's argument proves too much. The Claimant was submitting to the RC that a RSN could not be served after the prosecution had been withdrawn and at a time when no further prosecution could be brought, because of the statutory time limits. But those requirements do not appear in the statute, which plainly contemplates that a RSN can be served when there has been no successful prosecution. The only statutory requirement is that it appears to the FC that an offence has been committed. That is different as a matter of language from a requirement that no RSN would be served if no prosecution would succeed. Even if the FC had made an unequivocal representation that no RSN would be served in those circumstances, it is hard to see how the FC could be bound in perpetuity not to rely on the statutory language and not to exercise its powers under the statute. If that was the intention of Parliament then it is reasonable to suppose that Parliament would have amended s.17A to place the restriction on a statutory footing.

152. Mr Green submits that the error was that the Minister did not deal with the argument, rather than that it would necessarily have succeeded. However, in my view, for the

reasons set out I think it is at least "highly likely" that the Minister would have rejected the argument and upheld the RSN in any event. I therefore decline to quash the Minister's decision on the basis of s.31(2A) Senior Courts Act 1981.

Witham Nelson

153. At the heart of both the ***Witham Nelson*** and ***Smar*** cases is the relationship between the 1967 Act and the Planning Acts regimes. To a significant degree this turns on the analysis of the Court of Appeal judgment in ***Arnold White*** and the reliance that the RCs in both cases placed to it. Mr Simons submitted that unless full planning permission had been granted before the RSN had been served, the town planning consequences of the RSN were legally irrelevant considerations which the RC and the Minister should not take into account. In my view this is overstating the effect of the Court of Appeal judgment.

154. It is important to have closely in mind what issues the Court of Appeal was, and was not, dealing with. Firstly, ***Arnold White*** was concerned with a different part of the statutory scheme and different arguments. Mr Elvin was arguing that the reserved matters approval or full planning permission would remove the need to comply with a RSN or a s.24 notice, see [67]. This argument was rejected. The Claimants in the present case put a different argument. It is that the RC and the Minister should have taken into consideration the planning implications of upholding and refusing to vary the RSNs.

155. Secondly, the SPT explained very clearly that the Town Planning regime did not trump or nullify the requirements of the Forestry Act and there was no legislative hierarchy, see [71]. He said that the two statutory schemes were designed to operate together, see the end of the same paragraph.

156. Thirdly, it is plain from [73] and [74] that a significant concern was that the developer/landowner would avoid the effect of the felling licence and in particular the obligation to restock by relying on the planning permission, see the end of [74].

157. However, the Court of Appeal was not dealing with the significantly less ambitious submissions of the Claimants in this case. That the fact of a planning permission or an emerging development plan allocation were capable of being material considerations for the RC and the Minister determining the RSN appeal, and their relevance to an argument that the RSN should be amended to allow the use of alternative land. These issues were not before the Court of Appeal.

158. Ground One and Two in ***Witham Nelson*** are closely related. The RC had accepted that it was "inevitable" the restocked trees would be removed after 6.5 years. Irrationality is a high test and I agree with Mr Simons' that it was open to the RC and the Minister to conclude that even 6.5 years growth could justify a RSN, particularly taking into account the potential precedent effect of finding that the holder of the licence could avoid the obligations under the licence by a subsequent grant of planning permission.

159. However, in my view the balance shifts decisively once the potential for alternative land is taken into consideration. If one focuses simply upon the silvicultural issues, and ignores any planning issues, there is plainly a greater benefit of restocking land where the trees can remain throughout their lives, over a RSN where the trees will be removed after 6.5 years. There was no rational silvicultural reason not to fully consider the offer

of alternative land. It might be that the alternative land was not suitable for restocking but neither the Minister nor the RC ever got that far in the analysis.

160. The RC refused to deal with the alternative land issue, and left it entirely to the Minister, see para 29 of their report, set out above. The Minister, through Mr Kourie, simply referred the matter back to the FC and when they "did not accept", see email of 13 October 2023, the Minister does not appear to have considered the issue further.

161. In my view there are two errors of law here. Firstly, there was no rational basis, within the meaning of Wednesbury irrationality to reject the possibility of alternative land on the facts of this case. It would have provided materially higher silvicultural benefits. The only argument against which appears from the documentation is the potential "precedent" effect of allowing alternative land, see the Guidance Note at [116] above.

162. A previous decision is capable of being a material consideration in the decision making process, see in the Town Planning context *DLA Delivery v Baroness Cumberlege* [2018] EWCA Civ 1305, but it is always open to a decision maker to reach a different decision so long as he gives reasons for doing so, see [28] and [29].

163. It is in my view important that the power to make a RSN under s.17A of the Forestry Act does not differentiate between a RSN on the original land or one on alternative land, see s.17A(1A). If the silvicultural benefit of the RSN relating to alternative land is greater than on the original land, then rationally it is not possible to discern why a potential precedent effect is a material consideration which weighs against allowing the variation of the RSN. The Information Note states that an RSN should only be allowed on alternative land "if the original restocking area is not suited to restocking for silvicultural reasons". Even if this was a lawful approach, there were grounds in the *Witham Nelson* case to find that the original area was unsuitable because the trees would "inevitably" be removed within 6.5 years. This was not a case where there was any expert opinion on the suitability of alternative land, it was rejected as a matter of principle, not one of expert judgement.

164. Secondly, the Minister appears to have delegated the consideration of the alternative land to the FC, without considering the matter herself at all. Although s.17A(1A) (a) refers to alternative land being agreed between the appropriate forestry authority and the landowner, Mr Simons accepted that pursuant to s.17B(2) the Minister could order that the RSN be modified to refer to alternative land. It is therefore the duty of the Minister to consider whether or not to modify the RSN in the way proposed. In this case the Minister simply failed to address that duty, leaving the matter entirely to the FC, and giving no reasons for refusing to modify other than that the FC did not agree to it.

165. For these reasons I allow Grounds One and Two of the *Witham Nelson* claim.

166. Ground Three relates very closely to the points made in *Smar* in Grounds One and Two. *Arnold White* sets out that the Town Planning statutory regime does not in any sense take precedence over the Forestry Act regime. The two are intended to work together. However, that does not mean, and the Court of Appeal did not hold, that when making a Forestry decision the broad public interest in delivering development may not be a material consideration. In my view it is not a mandatory consideration in every case, but it may be relevant on the facts of the case, and it was necessarily relevant here given

the RC's own findings about the inevitability of the trees being removed and therefore the limited silvicultural purpose of simply delaying development.

167. In *Witham Nelson* the Minister effectively had a choice, she could uphold a RSN which would prevent development for 6.5 years and remove the restocked trees after that period, or 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 the facts of that case the public benefit in the delivery of housing was a material, although not a determinative, consideration. In my view the Minister erred in law in not having regard to it.

168. The specific issue raised in Ground Three is that the RC took the approach that this was an issue of law and therefore had to be raised by way of judicial review. In my view this was an erroneous approach. The RC had to deal with the issues raised on appeal, or potentially refer to the Minister. It cannot decline to deal with an issue by saying it is a matter for judicial review. Otherwise the RC is effectively saying that it will not consider whether or not it is making a lawful decision. Judicial review is a remedy of last resort, and the argument being raised was one that routinely administrative tribunals would deal with. Either the RC should have instructed lawyers to give them legal advice, or refer the matter to the Minister. But what they could not do is simply decline to deal with the issue in circumstances where the Minister took the same approach. Therefore Ground Three is also made out.

Smar Developments

169. Ground One is that the RC were wrong in law to say that allowing the appeal would "undermine the planning regime". I find it very hard to follow the logic of Mr Simons' submission. There is no sense in which amending the RSN would undermine the planning regime. He suggests that somehow it would pre-empt the planning decision making process, but this is simply not the case. On the Claimant's proposal the RSN would remain fully effective unless and until planning permission is granted. It is important to understand that Smar were only arguing that the RSN should be varied to allow the trees to be removed if planning permission was granted. So 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.

170. In my view the RSN conclusion that the planning regime would be undermined is irrational.

171. However, if this was the sole Ground, I would be minded to apply s.31(2A) of the Senior Courts Act. Reading the RC report as a whole, the reference to the planning regime was something of a throwaway line, which was not central to their reasoning. In my view it is highly likely that if this was the only error the decision would remain the same.

172. But Ground One is compounded by Grounds Two and Three. Ground Two is effectively the same as *Witham Nelson's* Ground Three. The Minister erred by not taking into consideration the public interest in the delivery of housing and therefore the effect of frustrating that delivery by upholding an unamended RSN. For the reasons set out above, I consider that this is capable of being a material consideration for the Minister. In this case 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 is an argument that should have been considered on its merits, and not simply dismissed because there was no "Act of God" which would have prevented restocking on the original land.

173. The Minister's failure to address these arguments was in my view an error of law. Taking the first three Grounds together, each is made out.

174. Ground Four is the procedural ground that Mr Kourie was giving the Minister advice, and reverting to the FC, without informing the Claimant. There is nothing in principle wrong with a civil servant advising a Minister and inter alia seeking further information from another statutory body. This case is somewhat concerning given the different roles that Mr Kourie seems to have adopted, and the degree to which he appears to have become an advocate for the FC. However, given that I have found for the Claimant on the first three Grounds, and the matter will be remitted on those Grounds, I do not think it necessary to determine Ground Four.