Coventry Law Journal

2002

Case Comment

Administrative law: the role of estoppel in planning law

Sukhninder Panesar

Steve Foster

Subject: Planning. **Other related subjects:** Equity

Keywords: Change of use; Electricity generation; Estoppel; Planning applications; Planning authorities; Planning permission

Legislation: Town and Country Planning Act 1990 s.64

Case: R. (on the application of Reprotech (Pebsham) Ltd) v East Sussex CC [2002] UKHL 8; [2003] 1 W.L.R. 348 (HL)

*Cov. L.J. 79 Introduction

Although the English legal system, like many others, makes a distinction between private and public law principles and doctrines,1 there are many occasions when private law principles are extended into public law contexts and public law principles into private law. The extension of these principles into their opposite fields is not without controversy. The reason for this relates simply to the fact that the functions of private and public law are different: whereas private law governs the relationship between individuals, public law is concerned with the relationship between individuals at large and the State and its various organs, and as such the decisions of public law decisions affect the public at large and not just the parties involved.2 An illustration of the uncomfortable application of a private law concept in a purely public law context is provided by the recent House of Lords case *R v. East Sussex County Council, ex p Reprotech (Pebsham) Ltd; Reprotech (Pebsham) Ltd v. East Sussex County Council*.3 In this case the House of Lords had to consider the extent to which the private law concept of estoppel was applicable to planning law, in particular, the extent to which informal advice given by a local official, that planning permission was not necessary for the use of land, should be regarded as a binding decision by the local authority which was purporting to act under its statutory powers.

The Facts

The case involved an appeal by East Sussex County Council from a decision given by the Court of Appeal,4 which refused the Council's appeal from an order made by Tucker J5 where he allowed the respondents, Reprotech (Pebsham) Ltd, to seek judicial review of the County Council's decision that no planning permission was required for the generation of electricity at a waste plant. The waste plant was *Cov. L.J. 80 initially built by East Sussex County Council and was vested in a company created by the Council, East Sussex Enterprises Ltd (ESEL). Sometime in 1990 ESEL decided to sell the plant. A number of purchaser were interested in the waste plant, particularly so because the plant had potential to generate electricity with the waste. One question was whether planning permission would be required for the use of the plant for generating electricity, as this would constitute a change of use of the land. A solicitor for one of the prospective buyers consulted Mr. Roy Vandermeer QC who advised them that it would not amount to a material change of use. This advice was reaffirmed by the county planning officer, although no formal application to the county council to determine the matter was made under s.64 of the Town and Country Planning Act 1990.6

A further issue on the facts related to condition 10 of ESEL's original planning permission, which prevented the use of power driven machinery before 6.00am and after 10.00pm and imposed a total ban on work at the plant on Sundays and Bank holidays. Prospective purchasers argued that this would not be possible if the waste plant was to be used for the

purposes of generating electricity 24 hours a day and for 7 days a week. An application was made to alter condition 10 under s.73 of the 1990 Act. The matter was dealt with by Development Control Sub-Committee who had to consider two questions; firstly, whether the process of generating power from waste material required planning permission, secondly, whether noise emissions from the machinery would have adverse affects on local residents. The Committee was assisted by the planning officer who recommended planning permission be granted and that there was no material change of use of the waste plant. Furthermore, he stated that noise levels be controlled at night through a noise attenuation scheme.

No further action was taken by ELES and Reprotech Pebsham Ltd eventually purchased the waste plant. The County Council withdrew the application to amend condition 10 by ELES since no further development on the electricity generation issue remained as far as they were concerned. Very little happened over the next five or six years and Reprotech eventually decided to use the waste plant for generating electricity and decided to apply for planning permission under the 1990 Act. When they established that the local residents objected to this use of the waste plant, they proceeded to rely on the representation of the planning officer made in 1991 that, *inter alia* , no planning permission was required and this was a determination under s.64 of the 1990 Act. Furthermore, they argued that the determination by the Development Control Sub Committee constituted a determination under s.64 of the 1990 Act.

The Decision of the House of Lords

The House of Lords rejected the argument that the decision of the Development Control Sub-Committee of 1991 constituted a determination under s.64 so that no planning permission was required for the generation of electricity. In doing so, the House of Lords attempted to put an end to the application of the estoppel doctrine in planning cases. Lord Hoffmann giving the leading opinion, firstly attempted to explain the nature of a planning determination under the 1990 Act. His Lordship explained that a determination for planning permission under ss.191 and 192 of the 1990 Act was not a matter simply between the applicant and the planning authority in ***Cov. L.J. 81*** which they are free to agree on whatever procedure they agree. In his Lordship's words '...it is a also a matter which concerns the general public interest and which requires other planning authorities, the Secretary of State on behalf of the national interest and the public itself to participate.'7 A determination under ss.191 and 192 of the 1990 Act is made in response to an application that provides the planning authority with the details relating to the existing use of the land and how the applicant intends to use that land. The application is entered onto a public register, which is intended to give the public an opportunity to make representations to the planning authority. The district authority is then allowed to make its own representations. The Secretary of State is given the opportunity to consider the application in his own capacity. Seen in this way, a determination under the 1990 Act is more than just a matter between a private individual and the planning authority. In this respect, Lord Hoffmann commented that it would be unhelpful to introduce the private law concept of estoppel into planning law. His Lordship referred to the words of Lord Scarman, who in an earlier case commented that '...estoppels bind individuals on the ground that it would be unconscionable for them to deny what they have represented or agreed. But these concepts of private law should not be extended into the public law of planning control, which binds everyone.'8

Lord Mackay was also at pains to dismiss the role of estoppel in planning law; in particular that public law was required to stand on its own feet without interference from private law concepts. His Lordship commented that '...where public authorities are fulfilling statutory duties or exercising statutory discretions, the public interest in their activities and the effect on members of the public who are not parties to the particular process which the authority is conducting requires the law to differentiate clearly between such activities and those in which interests only of those directly must be considered.'9

Estoppel and Public/Planning Law

Until the decision in the present case there had already been concerns over the proper role of the estoppel principle in public law. Its intervention in the public law context seems to have taken place at a time when the public law principles of abuse of power and legitimate expectations were relatively underdeveloped. In that context estoppel provided a means by which individuals could prevent public authorities going back on representations made by their officials. In an early case concerning a decision given by the Minister of Pensions to a serving army officer that his disability was attributable to military service, which the Minister then later decided it was not, Denning J explained the role of estoppel in such cases thus:10 '...if a government department in its dealings with a subject takes it upon itself to assume authority upon a matter with which he is concerned, he is entitled to rely upon it having the authority which it assumes. He does not know and cannot be expected to know, the limits of its authority.'11 This principle was, however, rejected by the House of Lords in *Howell* ***Cov. L.J. 82*** v. *Falmouth Boat Construction Co,*12 which concerned a decision given by a licensing officer that work could be carried out on certain vessels even though a written licence was needed to do so. Thus, it has been accepted that the estoppel principle was primarily rejected because it allowed 'officials to play fast and loose with legal rules, whether relating to criminal law or to the limits of a public authority's powers, duties or jurisdiction.'13

Although the general application of estoppel in public law had been clearly rejected, it did have some role to play in the context of planning law. In this context, informal assurances given by planning officers were, it was argued, binding when individuals had relied on them. The clearest example of this was *Lever Finance Ltd* v. *Westminster Council,*14 where the Court of Appeal held that a decision by the planning officer that no further planning permission was necessary for minor alteration to developmental work was binding on the Council. However, even in the context of planning law, the courts began to take a very cautious approach to the application of estoppel in planning matters. Thus, in *Western Fish Products Ltd* v. *Penwith District Council*15 the Court of Appeal had to consider whether written communication between a planning officer and the plaintiff to the effect that the latter had existing use rights in respect of property and that planning permission would be granted, was binding on the council. In this case, the plaintiff's argument was based on proprietary estoppel, which unlike promissory estoppel acts as a sword as well as a shield.16 The plaintiff's argument was that because they had been led to believe that they had rights of use over the property and that they were told that no planning permission was required, they not only expected the rights of use in the land but also that no planning permission was necessary. The Court of Appeal rejected this line of argument. In the first place, there could be no grounds for invoking proprietary estoppel because the plaintiff's had not suffered any detriment simply because they had not incurred any expenditure on the land.17 Secondly, it was only the Council who could determine whether planning permission was necessary, and while it could delegate its power to the planning officer, there had to be something over and above the officer's position which justified the applicant in believing that the officer would bind the Council. The effect of this decision was that statements by planning officers would only bind the council if they related to procedural matters or where the claimant could prove that the planning officer had specific delegated authority from the planning committee to make such decision.

Conclusion

It is submitted that the decision in *East Sussex* has firmly put an end to the role of estoppel in planning cases where developers attempt to rely on representations made by planning officers and authorities to the effect that no planning permission will be required for developmental or other work. Thus, it seems unlikely that in the future ***Cov. L.J. 83*** there will be a 'back door' entry available to developers who attempt to rely on such representations without recourse to the proper statutory procedures required for proper planning permission. The decision is to be welcomed for a number of reasons. In the first place, the decision introduces an element of certainty by ensuring that correct procedures are followed, which otherwise would not be if estoppel allowed those very procedures to be bypassed. Secondly, as Lord Hoffmann explained, estoppel, which is essentially a private law concept, is not an appropriate concept in public/planning law. In such a context the

courts are required not only to balance the interests of private individuals and public authorities but the interests of the public at large as well. The estoppel principle fails to take into account the requirement of a public authority to consider the interests of the public at large, which after all it is expected to promote.

Although estoppel will not operate in the same fashion in planning cases like *East Sussex,* there still remains the question of how the law can deal with those situations where an applicant or developer feels there has been some unfairness in the way that a planning officer or other official person has acted in an informal procedure. It appears that the matter will now have to be resolved by reference to legitimate expectations rather than estoppel. Under the doctrine of legitimate expectations, individuals may argue that it is unfair and an abuse of power for official to go back on promises and representations that have been made to them. Thus, it is now possible, in appropriate cases, for an individual to receive a substantive (as opposed to a purely procedural) benefit as a result of a promise or previous practice of a public authority, which it would be unfair of the authority to go back on.18 However, that doctrine is restricted by the rule that allows the authority to break the promise where it would be clearly in the public interest to do so.19 In addition, the doctrine cannot be used to bestow on an authority a power that it does not have in the first place.20 Thus, although the concepts of estoppel and legitimate expectations are similar in nature, their scope and application are rather different. Consequently, Lord Hoffmann noted that the estoppel and legitimate expectations is 'no more than an analogy because remedies against public authorities also have to take into account the interests of the general public…'21 This means that in the planning cases considered in this note, the public interest may override the unfairness caused to the individual who relies on representations made by planning officers.

Sukhninder Panesar is a Senior Lecturer in Law, Coventry University.

Steve Foster is a Principal Lecturer in Law, Coventry University

Cov. L.J. 2002, 7(2), 79-83

1.

In *O'Reilly v Mackman* [1983] AC 237, Lord Diplock stated that the distinction between public and private law was something of a latecomer into English law, but nevertheless required for the protection of public authorities and the public.

2.

See for example the decision in *Hazell v Hammersmith and Fulham LBC* [1992] 2AC 1, where the House of Lords held that a local authority could not enter into an interest rate swap agreement, even though the agreement would have been perfectly valid had they been a private body.

3.

[2002] 4 All ER 68.

4.

[2001] 1 PLR 12.

5.

[2000] Env LR 381.

6.

This section having been repealed and replaced by ss.191 and 192 of the 1990 Act.

7.

[2002] 4 All ER 58 at 65.

8.

Newbury DC v. Secretary of State for the Environmen;, Newbury DC v. International Synthetic Rubber Co Ltd [1980] 1 All ER 731 at 752.

9.

[2002] 4 All ER 58 at 60.

10.

Robertson v. *Minister of Pensions* [1949] 1 KB 227.

11.

Ibid. at 232.

12.

[1951] AC 837.

13.

Bradley and Ewing, *Constitutional and Administrative Law* 13th ed. (Longman 2002), at page 726.

14.

[1971] 1 QB 222.

15.

[1981] 2 All ER 204.

16.

Ramsden v. *Dyson* (1866) LR 1 HL 129.

17.

A successful proprietary estoppel claim requires the claimant to establish that the defendant made a representation and that the plaintiff relied on that representation by suffering some detriment, see *Taylors Fashions Ltd* v. *Liverpool Victoria Trustees Co Ltd* [1982] QB 133.

18.

See *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213.

19.

See, for example the decision of the Court of Appeal in *R v Secretary of State for the Home Department, ex parte Hargreaves* [1997] 1 All ER 397.

20.

In these cases, therefore, the decision would have had to have been a lawful exercise of the public body's discretion.

21.

[2002] 4 All ER 58 at 66.