



Neutral Citation Number: [2025] EWCA Civ 1041

Case No: CA-2024-002382

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
MRS JUSTICE LIEVEN
[2024] EWHC 2024 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2025

Before :

LORD JUSTICE LEWIS
LADY JUSTICE FALK
and
LORD JUSTICE HOLGATE

Between :

The King (on the application of Smar Holdings Limited)

**Claimant/
Respondent**

- and -

Secretary of State for Environment, Food and Rural Affairs

**Defendant/
Appellant**

Zack Simons KC and Edward-Arash Abedian (instructed by **Government Legal
Department**) for the **Appellant**
Hugh Richards and Jessica Allen (instructed by **Jury O'Shea LLP**) for the **Respondent**

Hearing dates : 18 June 2025

Approved Judgment

This judgment was handed down remotely at 10.00am on 30 July 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Holgate :

Introduction

1. Section 9(1) of the Forestry Act 1967 (“FA 1967”) requires a person to obtain a felling licence from the Forestry Commissioners (now generally referred to as “the Commission”) for the felling of growing trees. By s.17(1) it is an offence for anyone to fell a tree without a felling licence required by s.9(1).
2. Section 9 contains a number of exclusions from that requirement. In particular, s.9(4)(d) provides that a felling licence is unnecessary for any felling which is “immediately required” for carrying out development authorised by a planning permission granted under the Town and County Planning Act 1990 (“TCPA 1990”). In *R (Arnold White Estates Limited) v Forestry Commission* [2022] EWCA Civ 1304; [2023] PTSR 242 the Court of Appeal stated at [65] that:

“Felling will be “immediately required” where the planning permission definitely requires it to be done if the development permitted is to proceed, and does not entail any further relevant approval having to be obtained from the local planning authority. This would include a grant of full planning permission or a grant of outline planning permission together with the subsequent approval of reserved matters in a “multi-stage development consent” process. It would exclude an outline planning permission without the necessary approval of reserved matters, which would be only the first stage in such a “multi-stage” process ...”

Generally, the approval of relevant details of layout, access, design of buildings and landscaping is necessary to identify which trees are required to be felled in order for the development to proceed. The parties agree that these principles correctly state the law.

3. Where it appears to the Commission that a person interested in land has committed an offence contrary to s.17(1), it may serve a notice under s.17A requiring him to restock the land with trees and to maintain them in accordance with good forestry for up to 10 years. Alternatively, the notice may require that person to stock with trees such other land as may be agreed between the Commission and himself. A “restocking notice” is sometimes referred to as a “RSN”.
4. By s.17B where a person objects to the restocking notice with which he has been served, he may bring an appeal to the Secretary of State. The Secretary of State must refer the matter to a reference committee (“the committee”) unless he considers the grounds of appeal to be frivolous. After giving the appellant an opportunity of appearing before them and carrying out any necessary site inspection (s.27(3)), the committee must make a report to the Secretary of State (s.17B(1)(b)). After considering that report, the Secretary of State must direct the Commission to withdraw the restocking notice or to notify the appellant that the notice shall have effect subject to such modifications as he or she shall direct (s.17B(2)).

5. By definition, a restocking notice cannot be served in relation to the felling of trees to which the exemption in s.9(4)(d) applied. But in circumstances where that exemption did not apply, and a restocking notice is served, the central issue in this case is whether the future prospect of the subject land being allocated for development in a local plan or granted planning permission for development, or the public interest in such development taking place, are relevant considerations in an appeal to the Secretary of State against that notice.
6. This appeal relates to one of three applications for judicial review against the determination of s.17B appeals by the Secretary of State. She upheld each of the restocking notices with no, or relatively minor, modifications. The applications were heard one after another by Lieven J. She gave a single judgment dealing with all three cases ([2024] EWHC 2034 (Admin); [2024] PTSR 1837). The judge dismissed the application for judicial review in *R (Wickford Development Company Limited) v Secretary of State for Environment, Food and Rural Affairs*. Wickford was granted permission to appeal against that order. Our judgments in that appeal were handed down on 10 July 2025 ([2025] EWCA Civ 882).
7. The two other judicial reviews, relating to entirely different sites and s.17B appeals, were brought by Witham Nelson Investments Limited (“WN”) and by Smar Holdings Limited (“Smar”). The judge allowed both applications for judicial review on certain grounds and quashed the Secretary of State’s decisions to uphold the restocking notices in each case. The judge’s conclusions in the Smar case relied substantially upon her reasoning in the WN case and so it is necessary for me to refer to the latter as well.

The statutory framework

Forestry Act 1967

8. The Commission was originally constituted under the Forestry Acts 1919 to 1947. Those statutes, along with the Forestry Act 1951, were repealed in the consolidation enacted by the FA 1967.
9. The Commission 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 an obligation to promote “the establishment and maintenance in England ... of adequate reserves of growing trees” (s.1(3)). Section 1(3A) provides that in discharging its functions under the Forestry Acts 1967 to 1979, the Commission shall:

“so far as may be consistent with the proper discharge of those functions, endeavour to achieve a reasonable balance between

—

(a) the development of afforestation, the management of forests, the production and supply of timber and

(b) the conservation and enhancement of natural beauty and the conservation of flora, fauna and geological or physiographical features of special interest.”

10. The Commission’s general duty was widened by the Forestry Act 1951 to include the promotion of the establishment and maintenance of adequate reserves of growing trees. This widening of the duty was accompanied by the introduction of a statutory licensing regime to regulate the felling of growing trees, along with the exemption in s.2(2)(h) of the 1951 Act for felling immediately required in order to carry out development authorised under the Town and Country Planning Act 1947. In *R (Grundy & Co) v Halton Division Magistrates’ Court* [2003] EWHC 272 (Admin); 1 PLR 89 the Divisional Court stated at [50] that the 1967 Act “is concerned with an issue of public concern, namely the preservation of the country’s natural heritage ...”.
11. The duty to establish and maintain adequate reserves of growing trees needs to be seen in a broader statutory context. Section 1 of the Climate Change Act 2008 was amended as a result of the UK’s ratification of the Paris Agreement. Section 1(1) now imposes a duty on the Secretary of State to ensure that the Net Zero Target is achieved by 2050.
12. Section 1(1) of the Environment Act 2021 (“the EA 2021”) empowers the Secretary of State to make regulations setting long-term targets in respect of any matter relating to the “natural environment” (as defined in s.44). By The Environmental Targets (Woodland and Trees Outside Woodland) (England) Regulations 2023 (SI 2023 No.90), which came into force on 30 January 2023, the Secretary of State set a target that by the end of 2050 at least 16.5% of all land in England is to be covered by “woodland and trees outside woodland”. The Secretary of State is under a duty to ensure that the target is met (s.5).
13. By s.8 of the EA 2021 the Secretary of State is also under a duty to prepare an “Environmental Improvement Plan” for significantly improving the natural environment in England. The current Plan is the “Environmental Improvement Plan 2023” published on 31 January 2023. It revises the initial Plan published on 11 January 2018 (“A green future: our 25 year plan to improve the environment”). The 2018 Plan had set a target to increase woodland cover to 12% of England by 2060. The 2023 Plan increased that target in line with the target in the 2023 Regulations. That increase represents about 250,000 ha of land, an area the size of Cheshire. The 2023 Plan states:

“Defra’s arms’ length bodies – and those across government – will also continue to play a crucial role in delivering the plan. This plan has been developed with support from experts in ... the Forestry Commission ...” (p.17)

“The target is key to achieving our Net Zero Strategy.” (p 35)

The 2023 Plan also sets an “interim target” (see ss.11 and 14 of the EA 2021) to increase woodland cover by about 34,000 ha by 2028.
14. The Commission’s Strategy 2023-28 “Thriving for the Future” explains the importance of woodland for *inter alia* bio-diversity and reducing levels of carbon in

the atmosphere by capturing and storing carbon. This concept of carbon sinks is intrinsic to the definition of net zero in Art.4(1) of the Paris Agreement. The Strategy also reiterates the target for tree cover in the 2023 Regulations and the requirement to plant 34,000 ha of new tree cover by 2028 to support the country's plans for reaching net zero by 2050.

15. Section 8A of the FA 1967 imposes a general duty on the Secretary of State in performing his functions under the Act to have regard to the national interest in maintaining and expanding the forestry resources of England.
16. Part II of the FA 1967 contains powers to control the felling of trees. Section 9(1) imposes a requirement to obtain a felling licence for the felling of growing trees, subject to the exclusions in s.9(2) to (4):

“(1) A felling licence granted by the Commissioners 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 8 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.

(3) Subsection (1) above does not apply to the felling by any person of trees on land in his occupation or occupied by a tenant of his—

- (a) where the trees have a diameter not exceeding 10 centimetres and the felling is carried out in order to improve the growth of other trees; or
- (b) where the following conditions are satisfied, that is to say—
 - (i) the aggregate cubic content of the trees which are felled by that person without a licence (exclusive of trees to whose felling subsection (1) above does not apply) does not exceed 5 cubic metres in any quarter; and
 - (ii) the aggregate cubic content of the trees so felled which are sold by that person whether before or after the felling (exclusive as aforesaid) does not exceed 2 cubic

metres in any quarter, or such larger quantity as the Commissioners may in a particular case allow.

(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.”

17. Section 10 provides for an application for a felling licence to be made to the Commission by a person having an estate or interest in land sufficient to enable him to fell the trees growing there. Section 10(2) provides:

“(2) Subject to the provisions of this Act (and, in particular, to their duty to take advice under section 37(3)), the appropriate forestry authority may on any such application grant the licence, or grant it subject to conditions, or refuse it, but shall grant it unconditionally except in a case where it appears to them to be expedient to do otherwise—

- (a) in the interests of good forestry or agriculture or of the amenities of the district;
- (b) for the purpose of complying with their duty of promoting the establishment and maintenance of adequate reserves of growing trees; or ...”

18. Section 12 deals with the attachment of conditions to a felling licence. Section 12(1) provides:

“(1) The conditions which may under section 10(2) or 10(2)(a) or (b) above be attached to a felling licence are such as the appropriate forestry authority, after consultation with the applicant for the licence, determine to be expedient for securing
—

- (a) the restocking or stocking with trees of the land on which the felling is to take place, or of such other land as may be agreed between the appropriate forestry authority and the applicant; and
 - (b) the maintenance of those trees in accordance with the rules and practice of good forestry for a period not exceeding ten years.”
- 19. Section 15 deals with the interface between the felling licence regime and the scheme in Chapter 1 of Part VIII of the TCPA 1990 dealing with tree preservation orders (“TPOs”). The Commission may refer an application for a felling licence to the relevant local planning authority, to be dealt with by the latter under the TCPA 1990. Alternatively, where a local planning authority maintains its objection to a proposal by the Commission to grant a felling licence, the application for that licence must be referred to the Secretary of State to be dealt with under the TCPA 1990.
- 20. By section 16 of the FA 1967 a person aggrieved by a decision of the Commission to refuse a felling licence or to grant it subject to conditions, may apply to the Secretary of State for that decision to be reviewed. The Secretary of State will refer the matter to a committee who will report back to him. The Secretary of State must then issue a decision confirming, reversing or modifying the decision of the Commission.
- 21. Section 17 imposes a criminal sanction for the felling of a tree without any required felling 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.”
- 22. Section 17A confers on the Commission a power to serve a restocking notice after unauthorised felling. Originally, this power was only exercisable where a person was convicted of an offence under s.17. But in 2006 s.17A was amended so that it need only appear to the Commission that a person to be served with a notice has committed an offence under s.17.
- 23. Section 17A now provides:

“(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

(c) 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 appropriate forestry authority 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.

(4) This section shall not apply in relation to trees to which a tree preservation order relates or in relation to trees the felling of which took place before the date of coming into force of the Forestry Act 1986.”

24. Section 17B provides a right of appeal to the Secretary of State against a 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.”

25. Section 17C provides for the enforcement of restocking notices by applying the provisions in s.24 for the service of a compliance notice and the accompanying right of appeal against such a notice (s.25). It does so as if s.24 referred first to a restocking notice instead of a felling licence and second to the person on whom that notice was served instead of an applicant for a felling licence.

26. Section 24 provides so far as is material:

“(1) The provisions of this section shall apply if—

(a) any works required to be carried out in accordance with conditions of a felling licence are not so carried out; or

(b) any felling directions given by the appropriate forestry authority are not complied with.

(2) The appropriate forestry authority may give to the person responsible a notice requiring such steps as may be specified therein to be taken within such time (not being less than the prescribed period after the notice has become operative) as may be so specified for remedying the default; and for purposes of this subsection, “the person responsible” is—

(a) in the case of non-compliance with conditions of a felling licence, the person specified in subsection (2A); and

(b) in the case of non-compliance with felling directions, the owner of the trees.

(2A) The person referred to in subsection (2)(a) is—

(a) where the licence relates to land in England or Wales—

(i) the applicant for the licence, if on the date the notice is served he has such estate or interest in the land as is referred to in section 10(1) of this Act; or

(ii) in any other case, the owner of the land.

...

(3) If after the expiration of the time specified in the notice any steps required by the notice have not been taken, the appropriate forestry authority may, subject to the following section, enter on the land and take those steps

(4) Without prejudice to the powers of the appropriate forestry authority under the foregoing subsection, a person who without reasonable excuse fails to take any steps required by a notice given to him under this section shall be guilty of an offence and be liable on summary conviction to a fine not exceeding level 5 on the standard scale; and proceedings in respect of such an offence may be instituted within six months of 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.”

27. Section 25 provides a right of appeal against a s.24 notice:

“(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.

(2) A notice under section 24 shall be inoperative until the expiration of the prescribed period for the purposes of subsection (1) above and, where a request to the Minister under that subsection is made, until the conclusion of any proceedings under this section in pursuance of the request.

(3) Where such a request is made by a person receiving a notice under section 24, the Minister shall, unless he is of opinion that the grounds for the request are frivolous, refer the matter accordingly to a committee so appointed.

(4) The committee to whom a matter is referred under this section, after complying with section 27(3), shall make a report on the reference to the Minister and who shall, after considering the report, confirm or cancel the notice to which the reference relates.”

28. The constitution of, and process to be followed by, a committee dealing with *inter alia* an appeal under s.16, 17B or s.25 is addressed by s.27, which provides so far as is material:

“(1) References in sections 16, 17B, 20, 21, 25, 26A, 26B and 26C of this Act to a committee appointed in accordance with this section are to a committee consisting of—

- (a) a chairman appointed by the Minister in relation to cases where the trees are, or the land is, in England or Wales; and
- (b) two other members selected by the Minister from a panel of persons appointed by him, after such consultation as is provided for below, for the conservancy in which the trees are growing: But this is subject to subsections (1A) and (1B).

(1A) The members of a committee appointed in relation to a case concerning trees or land in England shall not include any Forestry Commissioner or employee of the Commissioners.

(1B) The members of a committee appointed in relation to a case concerning trees or land in Wales shall not include any member or employee of the Natural Resources Body for Wales.

(2) The consultation required by subsection (1)(b) above is to be with—

- (a) the regional advisory committee for the said conservancy; and
- (b) organisations appearing to the Minister to represent the interests of owners of woodlands and timber merchants respectively; and
- (c) organisations concerned with the study and promotion of forestry.

(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.

For purposes of this subsection “the person concerned with the subject-matter of the reference” is the person at whose request the reference was made, except that in the case of a reference by the Minister of a notice under section 21 it is the person by whom the notice was given.

(4) ...”

Planning legislation

- 29. A decision-maker determining an application for planning permission must have regard to *inter alia* the provisions of the statutory development plan (s.70(2) of the TCPA 1990) and that determination must be made in accordance with the plan, unless material considerations indicate otherwise (s.38(6) of the Planning and Compulsory Purchase Act 2004 – “PCPA 2004”).
- 30. Each local planning authority must prepare development plan documents which identify its strategic priorities for the development and use of land in its area and its policies for addressing those priorities. In doing so, the authority must have regard to national policies and advice contained in guidance issued by the Secretary of State for Housing, Communities and Local Government (s.19 of the PCPA 2004). The Secretary of State’s National Planning Policy Framework (“NPPF”) requires authorities *inter alia* to include policies in their plans for meeting the assessed needs for housing and other forms of development (see para. 20), subject to other planning considerations.
- 31. The procedure for the preparation and adoption of development plan documents is contained in the PCPA 2004 and The Town and Country Planning (Local Planning) (England) Regulations 2012 (SI 2012 No. 767). I give a brief summary. During the preparation of a local plan the authority must consult on a draft and take into account the representations received (reg.18). At the next stage the authority must prepare a

further draft of the plan to be submitted to the Secretary of State for examination by an independent Inspector (s.20 of PCPA 2004). That submission version of the draft plan must be published so that the public may make representations which are forwarded to the Secretary of State for consideration during the examination process held in public (regs. 19-20 and 22-24). The Inspector sends a report to the authority on the examination of the plan together with his or her recommendations on whether or not the plan may be adopted and if so subject to modifications. The authority may adopt the plan but only in accordance with those recommendations (ss. 20 and 23).

The factual background to the Smar case

32. Smar is the freehold owner of land at Keynsham Garden Centre, Hicks Gate, Keysham, Bristol. Between February and March 2019 Smar felled trees on the land without a felling licence. They felled 8 field maples and 17 poplars, amounting to nearly 54 m³ of timber. This greatly exceeded the exemption from licence control of the felling of 5 m³ in any quarter (s.9(3) of the FA 1967). The felled land amounted to an area of about 2 ha.
33. On 9 March 2020 the Commission served a restocking notice under s.17A requiring the planting of whips before 30 June 2021 at a density of at least 1,100 trees per hectare, or 2,233 trees. Paragraphs 4 and 5 of the schedule to the notice required the trees to be maintained in accordance with good forestry practice for a period of 10 years from planting and the replacement of any trees which fail or die or are lost during that period.
34. On 5 May 2020 Smar appealed against the restocking notice to the Secretary of State under s.17B. It contended *inter alia* that the notice would undermine the intention of Bristol City Council to include the land as part of a strategic allocation of a larger area of land for a residential neighbourhood with 750 new homes in the Bristol Local Plan Review: Draft Policies and Development Allocations (Consultation draft March 2019). The draft Plan indicated that this would also require the removal of the development site from the Green Belt. Smar pointed out that even if the felled area were to form part of the development plan allocation and planning permission were to be granted, the effect of the restocking notice was that the development could not be carried out for the 10 year period while the maintenance requirements of paras.4 and 5 of the schedule to the notice remained in force. Smar added that it would not be “in the wider public interest” to blight the development potential of the land as part of “a possible strategic urban extension by inappropriate tree protection”. The “interests of amenity” would best be served by “considering the future of the land in the planning context, rather than simply requiring the land to be restocked without considering possible alternative uses in the public interest”.
35. Smar contended that the site should be allowed to regenerate naturally (rather than be replanted with whips and maintained) while the future of the site is determined through the planning process. In the alternative, the requirement for replanting should be met on a different area of land.
36. The Commission took the stance that the felled area should be restocked, given that there was no apparent reason why it could not be restocked and there was no

silvicultural reason for not doing so. In their representations to the committee dated 17 May 2023 the Commission pointed out that when the City Council became aware of the unlicensed felling, they made an “Area Tree Preservation Order” under the TCPA 1990 to protect the remaining trees on the site, notwithstanding the proposed allocation in the draft local plan. They also referred to the targets in the Environmental Improvement Plan published in 2018 for the planting of additional woodland (see [13] above) which assumed that “all current woodland is conserved”. In this context the Commission referred to the provisions in the Environment Bill, which became the Environment Act 2021, for the setting and achievement of environmental targets.

37. On 23 May 2023 Smar provided its written representations to the committee. It appears that the local plan process had gone no further than to produce in 2022 a second consultation draft plan. In an apparent attempt to avoid the effect of the Court of Appeal’s decision in *Arnold White* (see below), Smar now proposed that para. 4 of the restocking notice should be modified “in the public interest” so that the 10-year maintenance obligation would cease to apply in the following circumstances:

“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 the enactments replaced by that Act” at the beginning of that paragraph (This would reflect the position of s.9(4)(d) of the Act which would otherwise apply in the absence of a requirement on a RSN).”

38. The committee held a hearing and carried out a site visit on 2 June 2023. They produced a note of points made at the hearing. For example, the Commission reiterated that Government policy gives priority to tree-planting (and protection) in the context of combating climate change.
39. The committee produced their report to the Secretary of State. On “Issue 3 - Modifying the Restocking Notice to Accommodate Future Development” the committee said:

“11. The Reference Committee accepted that the land in question may be removed from the Green Belt and earmarked for development at a future date. The Reference Committee however agreed that this did not mean that the felling was exempt from the requirement for a felling licence.

12. The Reference Committee considered the Objector’s suggestion that the Restocking Notice should be modified to provide for the possibility of felling the restocked trees in the event that the area is removed from the Green Belt and planning permission is obtained to build houses in the area. The Reference Committee agreed that this was not appropriate as it undermined both the felling licence regime and planning regime with respect to lawful tree felling.

13. The Reference Committee considered the argument that the prospect of housing development on the land is in the public interest, but considered the maintenance of the felling licence regime and the replacement of lost canopy cover as also in the public interest. The Reference Committee agreed that their remit is not to establish which of these public interests should take precedence, but rather whether the Restocking Notice was a reasonable and proportionate action in response to an act of illegal felling.”

40. On “Issue 4 – Planting an Alternative Area” the committee said:

“14. The Reference Committee considered the issue of whether it would be appropriate to restock an alternative area to restore the loss incurred by the illegal felling.

15. The Reference Committee accepted that the restocked trees could be lawfully removed either through a felling licence or if specifically identified in a full planning permission after the 10 year maintenance period of the Restocking Notice expires. The Reference Committee also accepted that the area may become available for development before this expiration date. The Reference Committee did not, however, accept that this provided silvicultural justification that the area is ill suited to Restocking, agreeing that any such impediment would have to present an immediate obstacle to the prospect of tree planting.

16. The Reference Committee noted further that while an alternative area had been proposed, little to no evidence was provided that demonstrated the suitability and similarity of the alternative area to the area where the felling took place.”

41. In paras. 20 to 21 of their conclusions the committee said:

“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.”

42. By email dated 28 September 2023 the secretary to the committee sent a “submission” to the Minister acting on the defendant’s behalf accompanied by the committee’s report, the restocking notice, the initial objection by Smar, a record of the hearing and

a draft letter to Smar announcing the defendant's decision. The submission by the committee's secretary contained the following passages:

“4. **Recommendation:** That you accept the conclusions of the Reference Committee and direct that the Notice should stand subject only to providing a new compliance date, allowing the Objector a full planting season to undertake the required restocking.

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.

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.”

43. On 6 November 2023 the defendant accepted the recommendation. She did not produce a decision document with her own reasoning. Instead, on the following day the secretary to the committee wrote to the objector to announce that the defendant “has decided to uphold the notice based on the conclusions of the Reference Committee”. It would appear that the defendant adopted the reasoning of the committee in its report on the appeal without any alteration. Both parties presented their submissions to this court on that basis.

The factual background to the Witham Nelson case

44. WN bought a site with the intention of carrying out development. In December 2017 they obtained outline planning permission for the erection of 7 houses, subject to the approval of certain reserved matters. During 2019 trees were unlawfully felled on the site. On 29 May 2020 full planning permission was granted for 9 bungalows on the site. Preliminary works were carried out pursuant to that permission, so that it was implemented and ceased to be time-limited.
45. On 3 November 2020 the Commission served a s.17A notice on WN requiring the restocking of 330 trees on the site and their maintenance for 10 years. The hearing of WN's appeal took place on 26 June 2023.
46. In its report the committee discussed the implications of the developer having obtained a full planning permission (see [2024] PTSR at [62]-[64]). It was persuaded that it was “inevitable” that upon the expiry of the maintenance period any restocked trees would be removed by virtue of that permission and s.9(4)(d) of the FA 1967. It considered that to withdraw the restocking notice on this basis could set an unacceptable precedent whereby felling controls under planning legislation and the FA 1967 could be circumvented. A “nefarious actor” could fell trees without a licence, removing those trees from the consideration of a planning application, obtain full planning permission and then seek to defeat a restocking notice on an appeal. On the other hand, to uphold the restocking notice might appear to be more a temporary frustration of development than a restoration of woodland. However, the committee

decided that the appropriateness of a restocking notice should be determined by the circumstances and silvicultural status of the site at the time when the trees were felled rather than by future circumstances. On that basis, the committee considered that the service of the notice had been appropriate in this case.

47. Nevertheless, the committee went on to say that the case before them was unusual because of the time which had elapsed, allowing the full permission to be implemented and rendering the site's future development inevitable at the end of the period for which the s.17A notice required the restocked trees to be maintained. The committee concluded that there were "mitigating circumstances". A modified notice would have to be served to exclude land which had been wrongly included in the original notice; the maintenance period of 10 years should run from the date of the original notice rather than the modified notice. This would result in a revised maintenance period of 6 years 6 months.
48. Because of the inevitability that any restocked trees on the felled land would be removed at the end of the maintenance period, the committee suggested that the defendant might conclude that planting on an alternative area would be preferable to restocking on the felled land, so as to secure the establishment of the trees in the longer term and associated benefits for biodiversity net gain and the protection of timber reserves.
49. Although the committee had said that both the Commission and WN be given the opportunity to consider this suggestion, the secretary to the committee raised it solely with the Commission. When the latter rejected the idea, the secretary told WN that the Secretary of State had decided that a revised restocking notice should be served with a maintenance period of 6 years 6 months from the date of the planting of the trees.

The grounds of challenge in the High Court

50. WN relied upon the following three grounds of challenge in the High Court:

Ground 1

The Secretary of State's decision was irrational given the committee's finding that the replanted trees would be removed after a shortened maintenance period.

Ground 2

The committee and the Secretary of State unlawfully remitted the issue of an alternative area of land for planting to the Commission without considering the matter for herself, including whether the restocking notice should be modified so as to refer to alternative land.

Ground 3

The Secretary of State and the committee failed to determine an issue of law, namely whether the legal effect of the grant of full planning permission was that the Commission had no power under s.17A of the FA 1961 to serve a restocking notice (see [62]).

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

Ground 1

The committee erred in law by stating that the planning regime would be undermined if the restocking notice were to be modified in the manner suggested by Smar.

Ground 2

When considering Smar's suggested modification to the restocking notice, the committee and the defendant erred in law by not taking into account the public interest in the development permitted, including the delivery of housing.

Ground 3

The committee and the defendant erred in law in requiring a "silvicultural justification" for them to be able to approve restocking on alternative land, and in excluding any other justification, in particular that advanced by Smar, namely the prospect of beneficial development taking place.

Ground 4

The process adopted was procedurally unfair in that the secretary to the committee, was an official of the Commission, not the Department. He was able to advance the Commission's case without Smar being able to participate.

52. Smar revealed the interdependency between their grounds 2 and 3 in the Statement of Facts and Grounds (paras.16 to 18). They submitted that at the heart of their case lies a tension between the planning system and the forestry licensing regime. If tree felling is required within the scope of s.9(4)(d) of the FA 1967 no felling licence is necessary. But where a restocking notice is in place, trees cannot be felled during the maintenance period of up to 10 years, even if felling is "immediately required" in order to carry out development under a planning permission. Smar submitted that its modification of para. 4 of the restocking notice would reduce that tension, with which the defendant would otherwise have to grapple if, for example, the site were to be allocated for housing in an adopted local plan. Ground 3 related to Smar's alternative suggestion for resolving that tension, namely to require the replanting to take place on alternative land. That was said to be justified by the public interest in the delivery of housing.

The judgment in the High Court

53. Lieven J said that there was a considerable overlap of issues between the cases, particularly between the claims brought by WN and Smar [6]. At the heart of those two cases was the relationship between the FA 1967 and the statutory planning regime. To a significant degree this turned on the Court of Appeal's analysis in *Arnold White* [153].
54. The judge rejected the submission for the Secretary of State that, based on *Arnold White*, the planning implications of a restocking notice are legally irrelevant in the determination of an appeal under s.17B unless a full planning permission had been obtained before the service of that notice [153]. *Arnold White* was concerned with a different part of the statutory scheme and a different contention, namely that a subsequent grant of full planning permission (or approval of reserved matters) exempts a landowner from complying with the restocking condition of a felling licence or the requirements of a s.24 notice to enforce that condition. That argument was rejected by the Court of Appeal [154]. It held that the planning regime does not

nullify the requirements of the FA 1967. There is no legislative hierarchy. The two statutory schemes are designed to operate together [155]. The concern in *Arnold White* was that a landowner or developer might be able to rely upon a planning permission to avoid the requirements of a felling licence, in particular a restocking requirement [156].

55. In the judge's view the Court of Appeal's reasoning did not deal with the less ambitious submission which WN and Smar advanced in the current claims, namely that the fact of a planning permission or an emerging development plan allocation are capable of being relevant considerations in the determination of an appeal against a restocking notice, including a contention that the notice should be amended so that replanting takes place on alternative land [157].

The claim by Witham Nelson

56. The judge said that grounds 1 and 2 in the WN case were closely related. That was because she saw the issues in the irrationality challenge in ground 1 as being linked to "the alternative land" argument the subject of ground 2. The judge said that the test for irrationality is high. Under ground 1 she accepted that the Secretary of State had been entitled to conclude that the potential for tree planting on the felled land to achieve 6.5 years' growth justified the service of a restocking notice, particularly in view of the precedent effect of allowing a licence holder to rely upon a subsequent planning permission to avoid compliance with a restocking condition [158].
57. The decision in WN's claim has not been appealed to this court and we have not heard any submissions from WN. But it appears to me that the judge was correct to reject the irrationality challenge in relation to the felled land for the reasons she gave in her judgment at [158], including her reference to the potential setting of an undesirable precedent, reflecting the policy of the FA 1967. That reasoning would appear to be consistent with the approach taken in *Arnold White* at [78]-[79] (see [91] below).
58. The judge then said that "the balance shifts decisively" once the potential for planting on alternative land was taken into account. Focusing on silvicultural issues and ignoring planning considerations, she said that there was plainly a greater benefit in stocking the alternative land suggested by WN where the trees could remain throughout their lives, as compared with the restocking of the felled land, where, on the committee's findings, it was inevitable that trees planted on the felled land would be removed after 6.5 years. Accordingly, it had been irrational for the Secretary of State not to have fully *considered* WN's proposal for planting trees on alternative land. Neither the committee nor the Secretary of State had *considered* whether that alternative land was unsuitable for stocking [159].
59. However, the judge then went further at [161] when she said that it was irrational for the possibility of the alternative land to be *rejected*, given that the stocking of that area would produce greater silvicultural benefits than the restocking of the felled land and that the precedent effect of allowing alternative land to be used was the only argument against that option [161]. She said that because of those greater silvicultural benefits, the precedent effect point could not rationally be a material consideration weighing against the use of the alternative land rather than the felled land for stocking. Furthermore, the felled area in this case was unsuitable for restocking because the trees planted would inevitably be removed after 6.5 years [163].

60. Although not a matter for decision in this appeal, it is appropriate that I indicate my reservations about the reasoning summarised in [59] above. It appears to me that each of the factors referred to by the judge involved matters of judgment for the decision-maker who would not, as a matter of rationality, be bound to come to only one view. Furthermore, even if the decision-maker were to conclude that the use of the alternative land for stocking would bring greater silvicultural benefits, it does not appear to me that that would render the precedent effect point legally irrelevant. The significance or weight to be attached to that factor would be a matter for the Secretary of State to evaluate, taking into account the policy of the FA 1967 that felling controls are intended to operate as a disincentive to landowners and others cutting down trees before obtaining full planning permission to develop land. In the light of the analysis in *Arnold White* e.g. at [78]-[79] (and see [91] below), I have difficulty in accepting the judge's conclusion that this part of the reasoning in the determination of WN's appeal was irrational. These are matters which the court would need to consider with the benefit of full argument if the point should fall to be decided in another case.
61. The judge then upheld ground 2 of the WN claim. The Secretary of State failed to consider the merits of restocking taking place on an alternative site. Instead, this matter was wrongly left to the Commission and their stance was wrongly allowed to be determinative [164].
62. The judge addressed "the specific issue raised in ground 3" at [168]. She said that the committee had been obliged to deal with the issue of law raised by the parties before them, or to refer it to be determined by the Secretary of State. The defendant failed to decide whether the grant of full planning permission rendered the subsequent service of the restocking notice unlawful (see *Wickford* at [43]-[45]). The judge's conclusion that that was a sufficient basis for upholding ground 3 is not consistent with the principle this court applied in *Wickford* at [46]. An error would need to be material before it would justify quashing a decision. Here, the legal argument which the Secretary of State failed to determine appears to be misconceived. The grant of a full planning permission *after* trees have been felled contrary to s.9 of the FA 1967 does not have the effect of negating the Commission's power to serve a restocking notice under s.17A. Neither s.9(4)(d) of the FA 1967, nor any other part of the Act, suggests otherwise. The defendant's error in failing to decide this point therefore appears to have been immaterial, as it could not have affected the outcome of the s.17B appeal. On that basis, it would not have justified the grant of a quashing order in the High Court.
63. The judge also dealt with ground 3 on a wider basis, which she considered to be closely related to grounds 1 and 2 of the claim by Smar [166]-[167]. She held that the broad public interest in the delivery of development could be a material consideration in the exercise of the powers relating to restocking notices. It is not a mandatory consideration in every case, but it is a matter which the Commission and, on appeal, the committee and the Secretary of State *may* take into account. No doubt the judge had in mind the analysis in the Supreme Court of material considerations in *R (Friends of the Earth Limited) v Secretary of State for Transport* [2020] UKSC 52; [2021] PTSR 190 at [116]-[121]. She went on to conclude that the "public interest" point was necessarily relevant in WN's case, given the committee's findings about the inevitability of the trees being removed and therefore "the limited silvicultural purpose of simply delaying development" [166]. This part of the judge's reasoning

involved essentially the same issues as her decision on Smar's claim the subject of the Secretary of State's appeal. Although WN's claim is not before this court, I would note that the judge's reasoning on ground 3 of that claim at [153]-[154], [157] and [166]-[167] is not consistent with the analysis of the legislation which I adopt at [94]-[115] below.

64. The Secretary of State did not appeal against the judge's order on the WN claim. Mr Simons KC told us that the Secretary of State accepted that there was no basis for challenging at least one ground on which her determination of WN's appeal had been quashed. It seems to me that the judge's decision to uphold ground 2, namely that the alternative of stocking other land should have been considered by the Secretary of State, was not open to criticism and so the determination of the s.17B appeal was rightly quashed.

The claim by Smar

65. The judge upheld ground 1 of the claim. She held that the Secretary of State reached an irrational conclusion, namely that it would be inappropriate to modify the restocking notice in the manner suggested by Smar (see [37] above) because that would undermine the planning regime. Under Smar's proposal the maintenance requirement in the restocking notice would remain effective unless and until a full planning permission (or approval of reserved matters) is granted. So it would not undermine the requirement of the notice to restock in advance of any such permission and it would not pre-empt the planning process [169-170].
66. The judge said that, applying s.31(2A) of the Senior Courts Act 1981, she would not have been willing to quash the defendant's decision on ground 1 alone, as the committee's reference to the planning regime had been "something of a throwaway line" which was not central to their reasoning.
67. However, the judge concluded in [172] that the defendant's error under ground 1 was compounded by errors under grounds 2 and 3, which she dealt with together:

"Ground 2 is effectively the same as Witham Nelson's ground 3. 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."

68. Under ground 2 Smar argued that in relation to its suggested modification of the restocking notice, the defendant had failed to take into account the public interest in the delivery of the housing development for which planning permission has been granted. Ground 3 related to Smar's alternative contention that the notice be amended

to require the restocking to take place on a different area without development potential. Paragraph [172] addressed both alternatives. The judge decided that the defendant erred in law by failing to consider both of them on their merits, taking into account the public benefit in the delivery of housing, and not purely silvicultural factors.

69. At [174] the judge said that although she had concerns about the role played by the secretary to the committee in the decision-making process, she did not think it necessary to determine ground 4.

The appeal to the Court of Appeal

70. The Secretary of State's ground of appeal reads:

“That the learned Judge was wrong to hold that “*the broad public interest in delivering development*” under the town and country planning regime can, and sometimes must, be taken into account in decisions about enforcement under the forestry regime.”

As explained above, this issue goes to both grounds 2 and 3 in the High Court, or as the judge put it at [153], the heart of Smar's claim.

71. Mr. Simons submitted that the judge's conclusions on grounds 2 and 3 depended on three premises:
- (1) There is a general public interest in the delivery of new housing development;
 - (2) Assuming (1) to be correct, the FA 1967 permits that interest to be taken into account in, for example, an appeal against a restocking notice;
 - (3) Assuming (2) to be correct, that factor was obviously material in this case, such that the defendant was legally obliged to take it into account. It was irrational not to have done so.

Mr. Hugh Richards for Smar did not disagree with that analysis.

72. Mr Simons went on to submit that each of those premises was incorrect. As to the first, he said that there is no general public interest in promoting the delivery of housing, as opposed to other forms of development or protecting land from development. The release of the subject site for housing depends upon it being removed from the Green Belt in the local plan process, which is only justifiable in exceptional circumstances (NPPF paras.145-148). Such issues remain to be considered. When the defendant determined the appeal against the restocking notice, the draft local plan was at a relatively early stage. Although that notice had been served in March 2020, by the time of the hearing before the committee in June 2023, the local plan had not progressed beyond a second version of a reg.18 consultation draft. The plan had not been submitted to the Secretary of State for examination. It remained at an early stage in the process towards adoption. Even now, the examination is still under way.

73. On the second premise, Mr. Simons submitted that the planning system is one of several statutory schemes that control development. Such schemes separately fulfil differing statutory purposes. No one regime has primacy over the others, save and in so far as Parliament has so provided through legislation. The TCPA 1990 is concerned with all aspects of land use planning. The purposes of the FA 1967 and the relevant considerations for s.17A notices and appeals are set out in the legislation. They do not include a public interest in the carrying out of development. That matter falls within the planning regime and, in any event, should not be assumed in advance of a determination under that scheme.
74. On the third premise, the threshold for a finding of irrationality is high and was not reached in the circumstances of this case.
75. Mr. Richards submitted on behalf of Smar that the judge's reasoning was correct. He also relied upon a Respondent's Notice which seeks to uphold her decision on an additional ground, namely ground 4 in the Statement of Facts and Grounds.

Discussion

R (Arnold White Estates Limited) v Forestry Commission

76. In June 2016 outline planning permission was granted for a mixed use development on a site near Newton Abbot, subject to a condition requiring the subsequent approval of the layout, scale and appearance of buildings and landscaping [23].
77. In October 2018 the Commission granted to the developer, Arnold White, a felling licence for the clear felling of 10.4 ha of land and the thinning of trees on a further 13.47 ha of land. The licence required the felled land to be restocked at a specified density and the new planting to be maintained for 10 years [26].
78. Between November 2018 and February 2019, and before obtaining approval of reserved matters under the outline planning permission, the developer felled trees pursuant to the felling licence. However, it did not comply with the restocking condition [28].
79. On 28 July 2020 the Commission served a s.24 notice on the developer requiring it to comply with the restocking condition by 28 October 2021. No appeal was brought against the notice [29]-[30].
80. In September 2020 a full planning permission was granted for an access road to the site and sustainable drainage systems. The development areas overlapped parts of the site in which felling had taken place. The planning officer's report on the planning application said that there were no arboricultural objections to the proposed development as the majority of the site had already been clear felled [32].
81. The Commission's position was that Parliament had not legislated for a grant of planning permission to override either the provisions of a felling licence, including a restocking condition, or a s.24 notice to enforce that condition [35].
82. The developer brought a claim for judicial review seeking declarations that the restocking condition did not preclude the carrying out of development under the permission, that it would be unlawful to enforce compliance with the condition, and

that the Commission had the power to withdraw the restocking condition and the s.24 notice. They also sought an order requiring the Commission to withdraw the condition and that notice [43].

83. The matter came before this court as an appeal against the refusal of the High Court to grant permission to apply for judicial review on two bases: first, the application was brought too late and second, all of the grounds of challenge were unarguable. Sir Keith Lindblom SPT, with whom the other members of the court agreed, upheld the High Court's decision that the claim was brought too late [46]-[58]. He said that it was therefore unnecessary for the court to address the remaining ground of appeal, namely whether the Commission had acted unlawfully in maintaining the s.24 notice. But, as the matter had been fully argued, he decided to deal with it [59].
84. Although the analysis by the Senior President of Tribunals of the statutory scheme and the effect of the s.24 notice was *obiter*, for the purposes of deciding this appeal, I agree with and adopt that analysis as set out below.
85. In *Arnold White* the developer did not challenge the felling licence or the s.24 notice [60]. But it argued that the subsequent grant of full planning permission overrode the requirements of the restocking condition in the licence, which it was the purpose of the s.24 notice to enforce. There was no justification for delaying development for 10 years where outline permission had been granted with approval of reserved matters to follow, given that a full grant of permission would enjoy the exemption in s.9(4)(d). The narrow, statutory grounds of appeal against a s.24 notice do not include changes of circumstance after the grant of a felling licence, such as the evolution of a development project from outline permission to approval of reserved matters or to a full permission. The appellant submitted that both the restocking condition in the licence and the s.24 notice had to yield to the principle underlying s.9(4)(d) of the FA 1967 [61].
86. The court rejected these submissions. Parliament provided in the FA 1967 for the interrelationship between the planning and forestry regimes where it saw the need to do so; see s.9(4)(d) and s.15. Section 9(4)(d) relates to a full planning permission, or to an outline permission together with an approval of reserved matters, from which it can be determined which, if any, trees are immediately required to be felled for the development authorised to proceed. Because the developer had obtained only an outline planning permission, it had needed to rely upon the felling licence for the removal of the trees. At that stage, the exemption in s.9(4)(d) was not engaged [65]-[66].
87. The court held that where a full permission (or reserved matters approval) is granted subsequent to the felling of trees pursuant to a licence, s.9(4)(d) does not apply to that felled area, and does not affect the operation of either a restocking condition in the licence or a s.24 notice for enforcing that condition. The subsequent permission does not override either the condition or the requirements of that notice [67]. The Court of Appeal reached that conclusion for the following reasons:
 - (1) In a carefully constructed and self-contained scheme for the felling of trees, Parliament has explicitly legislated to the extent that it considered necessary to determine the relationship between the separate planning and forestry

licensing regimes in cases where both are engaged by a proposal for development [68];

- (2) Parliament did not provide in the FA 1967 or in planning legislation that the licensing regime would be disapplied, or conditions on a licence or corresponding requirements in a s.24 notice annulled, by a later grant of planning permission, which would have engaged s.9(4)(d) had it been in place before the felling licence was applied for and acted on. This cannot be read into the legislation. So significant a change to the statutory felling scheme, which would negate the earlier lawful issue of a licence with restocking conditions, would have required explicit provision to be made [69];
- (3) The fact that in granting the outline permission the LPA took into account proposed tree felling, and required approval of details before felling could proceed, could not affect the operation of the FA 1967 or the restocking conditions in the felling licence [70];
- (4) Likewise the fact that it had been the owner's intention throughout to develop the land did not affect the operation of the FA 1967. A developer can choose to wait until it obtains a full permission (or approval of reserved matters) before carrying out any felling with the benefit of the exemption in s.9(4)(d), or it can choose to fell trees pursuant to a felling licence before obtaining those approvals, in which case s.9(4)(d) provides no exemption from compliance with the conditions of the licence requiring restocking and maintenance.[70].

88. Sir Keith Lindblom said this at [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.”

89. The court held that in issuing the s.24 notice in that case, the Commission must have concluded that it would not be consistent with good forestry for Arnold White, having had the benefit of carrying out felling in accordance with the licence, to avoid the burden of the restocking condition in that licence. The decision to issue the s.24 notice accorded with the Commission’s statutory purpose in s.1 of the FA 1967 [72]. It would not be absurd if the enforcement of the restocking condition in the licence rendered it difficult or impossible for a subsequent planning permission to be implemented. That was not a quirk of the relationship between the two statutory schemes, but was the result of the particular sequence chosen by the developer, in particular the carrying out of felling before it might be able to rely upon the exemption in s.9(4)(d) [73].
90. The court recognised that where a landowner or developer fells trees pursuant to a licence before applying for planning permission for a proposed development, the planning authority, when determining the merits of the application, may take into account the fact that those trees no longer exist, as they did in that case. However, that felling was only licensed on the basis of a condition requiring restocking. Furthermore, one reason why the court rejected the developer’s argument that s.9(4)(d) applied retrospectively to the felling of the trees so as to nullify a restocking condition in the s.10 licence and the requirements of the s.24 notice, was that this would compromise the effective regulation of tree felling by both the forestry and planning regimes [74]. In other words, the underlying principle is that in the determination of a planning application, tree felling, whether licensed or not, should not pre-empt the merits of preserving those trees or their replacements required by a restocking condition or a s.17A notice.
91. The court went on to reject Arnold White’s submission that the Commission had an implied power to withdraw a s.24 notice. But even if there was such a power, the court also rejected the submission that it would be irrational for the Commission to refuse to withdraw a notice enforcing a restocking condition, because, upon the expiration of the maintenance period in the felling licence, the developer would be able to remove trees planted to comply with that condition, relying upon a subsequent grant of planning permission and the exemption in s.9(4)(d) [78]-[79].
92. This led on to the court’s consideration of the nature of the Commission’s discretion in the use of its enforcement powers in Part II of the FA 1967 [82]-[85]. The court saw s.24 as forming part of a tightly composed group of provisions, which operate coherently to control felling. In every case, it is for the Commission, as a matter of its own discretion, to consider how it will be best for it to proceed, having regard to the interests of good forestry. It will consider whether, for example, it is expedient and necessary to take enforcement action. Having begun that process, which may include the service of a s.17A notice or a s.24 notice, the Commission is not obliged to continue with it. If there is an appeal against a notice it will consider whether it should contest that appeal and on what basis. It is also for the Commission to decide whether or not to pursue enforcement to a prosecution. In some cases the Commission may consider that to be unnecessary, or that it should not devote further resources to

enforcement action, viewed again in the interests of good forestry. For example, it may be satisfied that the requirements of a notice under s.17A or s.24 have substantially been met on the site itself or made good by the planting of trees on other land nearby, or are likely to be met through compliance with the requirements of planning conditions or an obligation under s.106 of the TCPA 1990.

93. Thus, the Commission may take into account a change of circumstance on the ground or in the planning history of the site, including a planning permission or approval of reserved matters which has in fact been granted since the enforcement process was begun. However, I would emphasise the following points on the use of discretion in the exercise of enforcement powers in Part II of the FA 1967. First, the Commission *may*, not must, decide whether to take into account such matters and, if so, how much weight to give them. Second, they may only take those matters into account in so far as that is compatible with their duties and powers under the FA 1967. In other respects the planning merits of a development granted planning permission are irrelevant, the subject to which I turn in the next section of this judgment.

Grounds 2 and 3 of the Smar judicial review – are planning considerations relevant to the determination of a planning application also relevant to the exercise of felling licence control?

94. Although Smar presented the main issue under grounds 2 and 3 as being whether the public interest in the delivery of housing is a relevant consideration in an appeal against a restocking notice, their argument, if accepted, would have a much wider effect. Generally, the recognition of such a public interest or benefit depends upon whether a decision has been made to release a site for a particular form of development, whether by a grant of planning permission or an allocation in an adopted local plan. Such a decision will have weighed up the various planning considerations, for and against a proposal, in order to decide whether the land may be developed for that purpose. Smar's case therefore assumes that planning considerations or merits generally are relevant in the exercise of felling control under Part II of the FA 1967.
95. I therefore agree with the judge that the relationship between the FA 1967 and the planning regime lies at the heart of Smar's claim [153]. However, I disagree with her suggestion at [154] that ss.17A-17C belong to a different part of the statutory scheme to the felling licence and enforcement provisions considered in *Arnold White*.
96. Part II of the FA 1967, comprising ss.9 to 36, is entitled "Power to Control Felling of Trees". The core provisions of this part of the legislation were introduced as a single code by the Forestry Act 1951. Sections 17A-17C were embedded in Part II of the FA 1967 by the Forestry Act 1986, the long title of which reads:

"An Act to empower the Forestry Commissioners to require the restocking of land with trees after unauthorised felling."

97. Sections 17A-17C were inserted at the end of the group of sections beginning with s.9 headed "Restriction of felling". The requirements in s.17A(1A) for restocking and maintenance reflect similar requirements which may be imposed as a condition on a felling licence by virtue of s.12. As originally enacted, a conviction under s.17 for the felling of a tree without a licence required by s.9 was a pre-requisite for the service of

a notice under s.17A. As amended, it is only necessary for it to appear to the Commission that an offence under s.17 has been committed before a restocking notice may be served. Section 17A provides the Commission with a tool for securing the restocking of felled land (or the stocking of alternative land) in addition, or as an alternative, to prosecution for an offence under s.17.

98. The controls on felling, including the power to serve a s.17A notice, are exercisable by the Commission, which is subject to the general duty in s.1 of the FA 1967. The Commission is to promote the interests of forestry, the development of afforestation, and the production and supply of timber and other forest products and “*in that behalf* shall have the powers and duties conferred or imposed on them by this Act”. That general duty was widened by s.1 of the Forestry Act 1951, at the same time as the introduction of the felling licence regime, to include “promoting the establishment and maintenance of adequate reserves of growing trees” (s.1(3) of the FA 1967). That additional duty includes the role of forests and woodland as carbon sinks for addressing climate change and the Net Zero Target ([11]-[14] above).
99. The Secretary of State and his Ministers also have a general duty in the performance of their functions to have regard to “the national interest in *maintaining and expanding* the forestry resources of England ...” (s.8A of the FA 1967 with emphasis added).
100. The general duties of the Commission suffuse the controls on felling in Part II of the FA 1967. For example, under s.10 a licence to fell is to be granted unconditionally except where it is expedient to impose conditions in the interest of good forestry, agriculture or the amenities of the district, or for complying with the Commission’s duty to promote the establishment and maintenance of adequate resources of growing trees (s.10(2)(a) and (b)). Those provisions also govern the imposition of conditions under s.12 on a felling licence for restocking (or stocking) and maintenance of trees (see s.12(1)). Similarly, in considering whether to issue a restocking notice, the Commission must have regard to *inter alia* the interests of good forestry, agriculture and the amenities of the district and their duty to promote the establishment and maintenance of adequate reserves of growing trees (s.17A(3)).
101. A person aggrieved by a decision of the Commission to refuse a felling licence or to impose conditions may seek a review under s.16. A person on whom a restocking notice has been served may appeal against the notice under s.17B. If the Commission serves a s.24 notice for failing to comply with a felling licence or a restocking notice, the person concerned may appeal against the s.24 notice to the Secretary of State on the limited grounds afforded by s.25(1). Whichever route is followed leads to the independent consideration of the decision in question by a committee under s.27. Section 27(3)(c) requires that committee to have regard to any information given to them by the Commission about the performance of the conservancy in which the trees are growing “of their duty of promoting the establishment and maintenance of adequate reserves of growing trees”.
102. Plainly, the statutory focus of the felling controls in Part II of the FA 1967, including s.17A, are the Commission’s forestry duties in s.1 and the provisions requiring forestry and associated considerations to be taken into account (e.g. s.10(2) and s.17A(3)). The FA 1967 contains nothing to suggest that planning considerations for development control decisions are relevant to the exercise of any functions under Part

II, in particular s.17A. Indeed, Parliament chose to refer in s.10(2) and s.17A(3) to “the amenities of the district”, to which the provision and maintenance of woodland may be relevant, but not to planning considerations in general.

103. By contrast s.70(2) of the TCPA 1990 provides that the local planning authority shall have regard to the statutory development plan and to any other material planning considerations. A material, or relevant, planning consideration refers to any consideration to do with the character of the use of land (*R (Wright) v Forest of Dean District Council* [2019] UKSC 53; [2019] 1 WLR 6562). This concept is very broad. A decision on whether to grant planning permission generally turns on a planning authority’s weighing and balancing of a wide range of planning considerations for and against the proposal. Although those considerations may include arboricultural, forestry and associated factors, the ambit of planning control is broader than the felling control exercisable by the Commission, the committee and the Secretary of State under the FA 1967.
104. It is significant that the Commission’s powers to control felling operate in the context of *duties to promote* certain forestry objectives, including the establishment and maintenance of adequate reserves of growing trees. The legislation does not qualify those duties by reference to other considerations, such as factors relevant to the determination of planning applications, or a public interest in the delivery of development. There is therefore no real legal space for planning considerations to be weighed within a statutory framework which imposes unqualified obligations on the Commission to promote the forestry objectives laid down by Parliament.
105. Although the committee and the Secretary of State are not subject to the same duties in s.1 of the FA 1967 as the Commission, their function is sometimes described as that of “review” (s.16). Even where a right of appeal is conferred, the FA 1967 does not suggest that the committee or the Secretary of State may have regard to a broader range of considerations than the authority from which the appeal is brought.
106. As was stated in *Arnold White*, planning and felling control are separate but co-ordinated statutory regimes. Parliament has defined the points of interaction between the schemes, s.9(4)(d) and s.15. It is not suggested that there are any other points at which the two regimes interact.
107. In *Arnold White* this court made it clear that a developer or landowner who wishes to rely upon s.9(4)(d) must wait until he obtains a full grant of planning permission necessitating the removal of trees, if he is to fell them without a licence under s.10. If, however, he wishes to fell trees before a full planning permission is granted, he must obtain a felling licence (unless another exemption applies) and comply with any restocking and maintenance conditions imposed in the licence. There is no absurdity if the enforcement of those conditions should make it difficult or impossible for a subsequent planning permission (detailed or otherwise) to be implemented. Any consequential delay to implementation of a development project is simply the consequence of the developer having chosen to follow that particular sequence of actions (*Arnold White* at [71]-[73]).
108. The policy of the FA 1967 is clear. The exemption from felling control in s.9(4)(d) only applies if a detailed planning consent is obtained beforehand, because it is that type of consent which will enable the trees needing to be removed to be identified.

Even so, the developer must be able to show that the removal of any particular tree is “immediately required for the purposes of carrying out” the development. That formulation is compatible with the Commission’s duties in s.1 of the FA 1967.

109. Where a developer chooses not to obtain a full planning permission, but fells trees pursuant to a felling licence, the FA 1967 enables the Commission to insist upon compliance with restocking and maintenance conditions of the licence (*Arnold White*), having regard to its statutory duties in s.1. If and when a full planning permission is subsequently obtained, the potential delay to the carrying out of development operates as a clear disincentive to a developer to “jump the gun” by felling trees the removal of which is not justified at that stage, at least not for development purposes. By contrast, felling after the grant of a full planning permission need not cause any material delay to that project. It will normally be possible in advance of that permission to identify the trees to be removed and to make appropriate arrangements for that work to be carried out after the permission is granted so as not to hold up the project.
110. The FA 1967 does not treat any differently a landowner or developer who fells trees in breach of s.9 and has only an outline permission or no permission at all. Indeed, there is no good reason for the legislation to put such a party in any better position compared to a developer who, as in *Arnold White*, relies upon a licence to fell trees subject to a restocking condition, before obtaining a full planning permission. That would remove the disincentive in the statutory scheme against the precipitate removal of trees.
111. Thus, the Commission can serve a restocking notice under s.17A without waiting to see whether the developer can obtain a relevant, full planning permission. The Commission can also require replanting to be maintained for up to 10 years without being concerned with the planning merits of a development for which a detailed planning consent may, or may not, be granted in the future, or with whether a maintenance period should be reduced because a developer anticipates the grant of such a consent. It may turn out that a full permission cannot be obtained, or that any consent which is obtained is not capable of being implemented, whether fully or at all, for one reason or another. Even something which appears at one stage to be a future inevitability may not in fact occur.
112. I conclude that planning considerations which fall outside the objectives and factors expressly mentioned in the FA 1967, such as the overall merits of a proposed development or a public interest in its delivery, are irrelevant to the exercise of the power to serve a restocking notice and the ambit of any appeal against such a notice. Such considerations are also irrelevant to decisions on the length of any maintenance period or the issue of whether stocking should take place on alternative land. The focus of s.17A is simply to achieve the restocking of the land from which trees have been removed unlawfully. Only forestry and associated considerations are relevant, whether the land chosen for the replanting is the felled land or an alternative site.
113. There is one further indicator in the legislation which reinforces these conclusions. Section 27 of the FA 1967 provides that the committee is to comprise a chairperson appointed by the Secretary of State and two other members from a panel of persons appointed by him “for the conservancy in which the trees are growing”. By s.35 a “conservancy” means any area designated by the Commission as a conservancy for

the purposes of performing their functions. The Secretary of State must consult on the appointment of such members with the regional advisory committee for that conservancy, and organisations representing the interests of owners of woodland and timber merchants or concerned with the study and promotion of forestry (s.27(1)(b) and (2)). By s.37(1) the Commission is obliged to maintain a regional advisory committee for each conservancy to advise them on the performance of their functions under s.1(3) (the promotion of adequate reserves of growing trees) and Part II of the FA 1967. Thus, the composition of the committee for reporting on appeals to the Secretary of State reflects the statutory focus on forestry not planning considerations.

114. The main principles in the above analysis may be summarised as follows:

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

115. It follows that the judge should not have upheld grounds 2 and 3 of Smar's claim for judicial review because the defendant did not take into account the planning merits of the housing development and its delivery. Those matters were irrelevant to the determination of the appeal under s.17B of the FA 1967. This is dispositive of the Secretary of State's single ground of appeal. However, there are additional issues which the court should address.

The defendant's exercise of discretion in this case

116. In *Arnold White* the Court of Appeal accepted that there is a discretion as to how enforcement under Part II of the FA 1967 is to be pursued, in which a decision-maker may take into account *inter alia* changes in circumstance, including an *actual* grant of planning permission, and the making good of the loss of trees on an alternative site (*Arnold White* at [82]-[85] and see [92] above).

117. In its appeal to the Secretary of State, Smar contended that first, the maintenance requirement in the s.17A notice should be modified to accommodate a future grant of planning permission (see [37] above); and second, the restocking notice should be amended so as to require planting on an alternative area of land instead of the felled land. It follows from the analysis of the legislation set out above that the first point was irrelevant to the determination of the s.17B appeal, but the second matter was capable of being relevant.

118. In any event, the committee and the Secretary of State declined to accept Smar's case on both points for reasons which cannot be impugned.
119. In para. 12 of its report the committee concluded that the modification suggested by Smar was inappropriate because it undermined the felling licensing regime. Neither Smar nor the judge criticised that conclusion.
120. However, the committee and the Secretary of State also concluded that Smar's proposed modification of para. 4 of the restocking notice would undermine the planning regime. I should say straight away that there is no tension between that conclusion and the principle stated in [112] above. The committee and the Secretary of State only referred to the undermining of the planning system in the context of the protection of trees, which is entirely consistent with the statutory purposes and ambit of the FA 1967.
121. Smar challenged that conclusion of the committee and the Secretary of State on the basis that its proposed modification would not affect the restocking and maintenance requirements in the s.17A notice unless and until a full planning permission is granted. Under ground 1 the judge accepted Smar's contention. She decided that it had been irrational to conclude that the modification would undermine the planning regime. However, the judge refused to quash the decision on ground 1 alone because she regarded the finding in question as "something of a throwaway line" and not central to the reasoning. Instead, she regarded ground 1 as compounded by the errors under grounds 2 and 3 (see [172]). I have explained why the claim should not have succeeded in relation to grounds 2 and 3, but was the judge wrong to make a finding of irrationality under ground 1? The point is of some importance for the future operation of the felling licence regime.
122. One problem with Smar's argument is that it assumes that the decision-making process under the planning system completely disregards both the trees which have been felled (whether lawfully or unlawfully) and any restocking requirements. As I have explained at [90] above, that is incorrect. Consequently, a decision-maker could properly say that Smar's proposed modification of the s.17A notice, disapplying the requirement to maintain the restocked trees should a full planning permission be granted before the end of the 10-year maintenance period, would undermine effective regulation of the felling of trees by the planning regime as well as by the forestry regime. The conclusions of the committee and the Secretary of State are consistent with *Arnold White*. In cases of this kind there is a legitimate concern that the felling of trees before the determination of a detailed planning application, will or may pre-empt or distort the planning authority's assessment of the merits of conserving those trees, whether trees removed with many years growth or restocked young whips. Both the Commission and planning authorities may take a long-term view of the conservation of trees.
123. It follows that I disagree with the judge's reasons at [169]-[170] for deciding under ground 1 that the conclusion of the committee and the defendant on the undermining of the planning regime was irrational. Ground 1 of the claim for judicial review should have been rejected.
124. I would add two further reasons as to why the modification proposed by Smar was unsound. First, the modification would automatically terminate the requirement in the

s.17A notice for the restocked trees to be maintained whenever a full permission happens to be granted, irrespective of the actual circumstances at that future point in time. In other words, the condition would improperly interfere with the ability of the Commission to exercise its judgment as to what approach to enforcement would be in the best interests of forestry at that stage. Second, the modification implies that it has been decided under the forestry regime that the merits of conserving the replanted trees may be left to be dealt with by the planning regime. But there is no hierarchy as between these two regimes (save as provided for in s.15 of the FA 1967). The merits of protecting the replanted trees is plainly a matter to be addressed under the FA 1967. In addition, it would be open to the Commission to make representations to a local planning authority determining any future planning application on the felled land as to why the trees should be protected from development.

125. In relation to ground 3 in the High Court, the committee stated at para.16 that while Smar had proposed an alternative area of land for stocking, little or no evidence had been submitted to show its suitability and similarity to the felled area for replanting. That conclusion cannot be impugned. It was therefore a sufficient basis upon which the committee was entitled to reject the alternative land argument. Accordingly, ground 3 could not succeed.
126. In addition I note that in the last sentence of para. 15 of its report, the committee also rejected Smar's case that restocking should take place on an alternative site on the basis that the felled land was unsuitable for restocking. They indicated that the potential for housing development did not represent an "immediate obstacle to the prospect of tree planting". Plainly, they had in mind s.9(4)(d) along with the uncertainty of any development potential on the felled land, a point which the Commission had advanced. Smar's case was simply based upon a proposed allocation in a reg.18 draft of an emerging local plan, which remained to go through the reg.19 stage, independent examination and final consideration by the authority. A final allocation of the site would depend upon an alteration of Green Belt boundaries. Smar was some way away from being able to obtain a full planning permission for housing development on the site. They had "jumped the gun" when they felled the trees. No criticism can be made of the committee and the Secretary of State for rejecting Smar's alternative land case on this additional basis, although there was no legal requirement for them to go that far.

Respondent's notice - ground 4 of Smar's claim

127. In its Respondent's Notice Smar contended that the judge's decision should be upheld on the basis set out in ground 4 of the claim.
128. Section 27(1A) of the FA 1967 provides that the members of a committee appointed to deal with a case dealing with trees or land in England may not include a Forestry Commissioner or an employee of the Commission. The object is to maintain the independence of the committee from the Commission. The practice of a Forestry Commission official acting as the secretary to the Commission, although not raised before us, is a matter which may require consideration for the future.
129. Ground 4 is concerned with the way in which the Secretary of State was briefed on the taking of the decision on the appeal in this case. It is perfectly normal for a Minister to receive a submission or briefing from officials in his or her department to

assist in the making of a decision. A submission may summarise material, present documents and provide advice (see e.g. *R (Save Stonehenge World Heritage Site) v Secretary of State for Transport* [2024] EWCA Civ 1227; [2025] PTSR 726).

130. However, the briefing referred to in [42] above was not prepared by a departmental official. Instead, the author was an official of the Forestry Commission, serving as the secretary to the committee. But the Secretary of State was required to determine an appeal brought by Smar against a s.17A notice served by the Commission. Both the Commission and Smar were parties to the dispute before the committee and the Secretary of State. Further, it was the role of the committee to report on matters: not for its secretary to express views on the merits after the committee had issued its report.
131. It was plainly inappropriate for one of the Commission's officials, who had acted as secretary to the committee, to be submitting to the decision-maker briefing material which included statements as to why the report of the committee should be accepted and the appeal dismissed (see the advice in paras. 4, 11 and 17 at [42] above).
132. However, it is common ground that the court should not intervene unless this error has caused substantial prejudice to Smar. There is no such thing as a technical breach of natural justice (*George v Secretary of State for the Environment* (1977) LGR 689).
133. As matters stand there is no dispute that Smar unlawfully felled trees contrary to s.9 of the FA 1967 and the power to serve a restocking notice was engaged. The outstanding issues relate to the terms of the maintenance period and the use of an alternative site for stocking. Both of those complaints depend on the premise that the overall planning merits of the development, in this case housing (including the public interest in the delivery of that development) are relevant considerations. They are not. Accordingly, the inappropriate briefing of the Secretary of State did not vitiate her decision on the s.17B appeal. I would reject ground 4.

Conclusion

134. I would allow the Secretary of State's appeal and dismiss the Respondent's Notice.

Lady Justice Falk

135. I agree.

Lord Justice Lewis

136. I also agree.