

The King (on the application of Wickford Development Company Limited) v Secretary of State for Environment, Food and Rural Affairs



No Substantial Judicial Treatment

Court

Court of Appeal (Civil Division)

Judgment Date

10 July 2025

Case No: CA-2024-001889

Court of Appeal (Civil Division)

[2025] EWCA Civ 882, 2025 WL 01899943

Before: Lord Justice Lewis Lady Justice Falk and Lord Justice Holgate

Date: 10 July 2025

ON APPEAL FROM THE HIGH COURT

KING'S BENCH DIVISION

ADMINISTRATIVE COURT

THE HONOURABLE MRS JUSTICE LIEVEN DBE

[\[2024\] EWHC 2034 \(Admin\)](#)

Hearing date: 17 June 2025

Representation

Robin Green (instructed by Holmes & Hills LLP) for the Appellant.

Heather Sargent and Charles Bishop (instructed by the Government Legal Department) for the Respondent.

Approved Judgment

Lord Justice Lewis:

Introduction

1. This appeal concerns the consideration by the respondent, the Secretary of State for Environment, Food and Rural Affairs, of an objection to a restocking notice served on the appellant, Wickford Development Company Limited ("Wickford") under [section 17A of the Forestry Act 1967 \("the 1967 Act"\)](#) requiring the appellant to restock land with trees.

2. In summary, a licence is required to fell trees save in specified circumstances. It is a criminal offence to fell trees without a licence. Where it appears to the Forestry Commissioners ("the Commissioners") that a person has committed an offence, they may serve a restocking notice on the person requiring the person to restock the land with trees. If the person objects to the notice he may appeal to the Minister. The objection is referred to a reference committee which reports to the Minister, who will then decide whether to uphold the restocking notice.

3. In the present case, the Commissioners served a restocking notice on Wickford as it appeared to them that Wickford had felled trees on land to the south of Newton Hall in Dunmow without a licence. Wickford objected on the grounds that it was an abuse of power to serve a restocking notice in circumstances where a prosecution for an offence had been discontinued and the time for taking further criminal proceedings had expired. The matter was referred to a reference committee who reported to the Minister. Its report to the Minister said that the legal issue of whether a restocking notice could be served following the discontinuance of a prosecution was beyond the remit of the committee. It considered and rejected an objection which alleged that the number of trees that Wickford had to plant was disproportionate. The Minister upheld the restocking notice.

4. Wickford sought judicial review of the Minister's decision on three grounds, only two of which are material to this appeal. First it said that the respondent had failed to address the issue of whether service of the restocking notice was an abuse of power or, alternatively, if she had, she had failed to give adequate reasons for dismissing that objection. Secondly, it said that the Minister had failed properly to address the objection that a requirement to restock the land with 242 trees when only nine trees had been felled was disproportionate.

5. Lieven J. ("the judge") dismissed the claim. On the first issue, the judge accepted that either the Minister had not dealt with the objection relating to the abuse of process or, if she had, she had failed to give adequate reasons for her decision not to uphold that objection on that ground. The judge held, however, that she would not grant a remedy to quash the restocking notice. She was satisfied that the abuse of process argument was wrong and she would have refused a remedy pursuant to [section 31\(2A\) of the Senior Courts Act 1981 \("the 1981 Act"\)](#) as it was highly likely that the outcome for Wickford would not have been substantially different if the conduct complained of had not occurred. On the second issue, the judge found that the use by the Commissioners of standard restocking practice in determining the number of trees that should be planted was a lawful exercise of judgment.

6. Wickford appeals on two grounds which can be summarised as follows:

Ground 1

The judge erred in denying the appellant a remedy pursuant to [section 31\(2A\) of the 1981 Act](#) . The judge was wrong to find that the appellant's first objection to the restocking notice was principally a legal one which was to be resolved by applying public law principles relevant to proceedings in the High Court.

Ground 2.

The judge erred in failing to determine whether there must be, and was, a reasonable relationship between the number of trees felled by the appellant and the requirement for restocking under the restocking notice.

The Legal Framework

7. The Commissioners are a body comprised of a chairman and up to ten members. It was continued in existence by the [1967 Act](#). The Commissioners are charged with the general duty of "promoting the interests of forestry, the development of afforestation and the production and supply of timber and other forest products" (see [section 1 of the 1967 Act](#)).

8. [Part III of the 1967 Act](#) deals with restrictions on felling. [Section 9](#) requires a licence from the Commissioners for the felling of trees and provides, so far as material that:

"(1) A felling licence granted by the Commissioners shall be required for the felling of growing trees, except in a case whereby or under the following provisions of this Part of [this Act](#) this subsection is expressed not to apply."

9. Applications for a felling licence may be made by the person having "such an estate or interest in the land on which the trees are growing as enables him, with or without the consent of any other person to fell the trees" (see [section 10 of the 1967 Act](#)).

10. [Section 17](#) provides that it is a criminal offence to fell a tree without a felling licence. It provides, so far as material, that:

17.— Penalty for felling without licence.

(1) Anyone who fells a tree without the authority of a felling licence, the case being one in which [section 9\(1\) of this Act](#) applies so as to require such a licence, shall be guilty of an offence and

(a) in relation to an offence committed in Wales, liable on summary conviction to a fine, or

(b) in relation to an offence committed in England, liable on summary conviction to a fine.

(2) Proceedings for an offence under this section may be instituted within six months from the first discovery of the offence by the person taking the proceedings, provided that no proceedings shall be instituted more than two years after the date of the offence.

11. From 1986, the Commissioners were given a power to serve a restocking notice where a person had been convicted of an offence under section 17 (see [section 17A of the 1967 Act](#) as inserted by the [Forestry Act 1986](#)). As originally enacted, that section provided so far as material that:

"(1) Where a person is convicted of an offence under [section 17 of this Act](#) and he is a person having, as regards the land on which the felling which gave rise to the conviction took place, such estate or interest as is mentioned in [section 10\(1\) of this Act](#), the Commissioners may serve on him a notice (in [this Act](#) referred to as a "*restocking notice*") requiring him –

(a) to restock or stock with trees the land or such other land as may be agreed between the Commissioners and him; and

(b) to maintain those trees in accordance with the rules and practice of good forestry for a period, not exceeding ten years, specified in the notice.

(2) A restocking notice shall be served within three months after the date of the conviction or the dismissal or withdrawal of any appeal against the conviction."

12. These provisions were amended by an order made by the Secretary of State, a draft of which was approved by each House of Parliament, pursuant to powers conferred by [section 1 of the Regulatory Reform Act 2001](#). The amended provisions removed the need for a person to have been convicted before a restocking notice was served and provided instead that it had to appear to the Commissioners that the person concerned had committed the offence. [Section 17A](#), as amended by Article 4(2) of the order (the [Regulatory Reform \(Forestry\) Order 2006](#), now provides as follows (the appropriate forestry authority in England being the Commissioners):

"17A.— Power of appropriate forestry authority to require restocking after unauthorised felling.

(1) The appropriate forestry authority may serve a notice under this section (a "*restocking notice*") on a person where—

(a) it appears to the appropriate forestry authority that he has committed an offence in England or Wales under [section 17 of this Act](#),

and he has such an estate or interest in the land in question as is mentioned in [section 10\(1\) of this Act](#).

(1A) A restocking notice is a notice requiring the person on whom it is served—

(a) to restock or stock with trees the land or such other land as may be agreed between the appropriate forestry authority and him; and

(b) to maintain those trees in accordance with the rules and practice of good forestry for a period, not exceeding ten years, specified in the notice.

(1B) A restocking notice served by the Commissioners is a local land charge; and for the purposes of the [Local Land Charges Act 1975](#) the Commissioners are the originating authority as respects the charge.

(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](#)."

13. There is provision for a person served with a restocking notice to appeal. He may serve a notice of objection, in the prescribed form, requesting the Minister to refer the matter to a committee appointed under [section 27 of the 1967 Act](#) (known as the reference committee). The reference committee is to make a report to the Minister who, after considering the report, may direct the Commissioners to withdraw the notice or may uphold the notice with or without modification. The relevant provisions are in [section 17B of the 1967 Act](#) which provides:

17B.— Appeal against restocking notice.

(1) A person on whom a restocking notice has been served who objects to the notice or to any condition contained therein may by notice served within the prescribed time and in the prescribed manner request the Minister where the restocking notice relates to land in England or Wales to refer the matter to a committee appointed in accordance with [section 27 of this Act](#); and—

(a) the Minister shall, unless he is of the opinion that the grounds of the request are frivolous, refer the matter accordingly; and

(b) the committee, after compliance with subsection (3) of that section, shall thereupon make a report to the Minister.

(2) The Minister may, after considering the committee's report, direct the appropriate forestry authority to withdraw the notice or to notify the objector that it shall have effect subject to such modification as the Minister shall direct."

14. The procedure is set out in [section 23 of the 1967 Act](#) which provides so far as material that:

"(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.

.....

(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) The Minister may pay to the members of a committee appointed by him under this section such remuneration as he may, with the consent of the Treasury as regards England, determine."

The Factual Background

The Felling of Trees

15. Wickford is the owner of land lying to the south west of Newton Hall, Dunmow. At some stage in about October or November 2017, trees were felled on land without a felling licence having been obtained under [section 9 of the 1967 Act](#). The evidence before this court as to the number of trees that were felled is limited. The likelihood is that it is either nine trees, as claimed by Wickford, or five individual trees and four groups of trees. The Commissioners were informed on 23 November 2017 that felling had occurred on the land.

The Criminal Proceedings

16. In May 2018, the Crown Prosecution Service charged Wickford with an offence contrary to [section 17 of the 1967 Act](#) in that it had felled trees between 21 and 22 November 2017. Wickford was requisitioned to appear before the magistrates' court on 26 June 2018. It pleaded not guilty. A hearing was listed but adjourned. Eventually, on 3 March 2020, the Crown Prosecution Service served a notice discontinuing the criminal proceedings. The reasons for that are not clear. On one reading, there was difficulty in proving the exact dates when the unlawful felling occurred. On another, there may have been difficulties in securing the attendance of a witness. There had been a suggestion that a felling licence was not required as the land where the trees were growing was a garden but that is not the case. After 22 November 2019, it was no longer possible to bring proceedings charging Wickford with unlawful felling (alleging, for example, that the felling took place on different dates) as [section 17](#) provides that proceedings may not be brought more than two years after the date of the offence.

The Restocking Notice

17. The Commissioners were satisfied, however, that an offence of unlawful felling had occurred notwithstanding the absence of a successful prosecution resulting in a conviction. They served a restocking notice dated 25 June 2020 on Wickford. That required Wickford to restock an area of land (identified in an attached map) with 1,100 stems per hectare which equated to 242 trees and to maintain the trees for a period of ten years.

The Notice of Objection

18. Wickford objected and served a notice of objection using the prescribed form. In light of the grounds of appeal, it is necessary to set out ground 1 in full:

"(1) Until [section 17A of the Forestry Act 1967](#) was amended by the Regulatory Reform (Forestry Order) 2006, it was not possible for the Forestry Commissioners to serve a restocking notice until the person said to be responsible had been convicted of an offence under [section 17](#). The 2006 Order amended [section 17A](#) to allow a restocking notice to be served where it appears to the Forestry Commissioners that a person has committed an offence under [section 17](#). However, it remains the statutory intention that an offence under [section 17](#) must have actually been committed before a restocking notice can be served: see paras 42 and 52 of the House of Commons

Regulatory Reform Committee report on the [Proposal for the Regulatory Reform \(Forestry\) Order 2006](#) published on 5 December 2005. In the present case, by a written charge and requisition sent on 21 May 2018, I was charged by the CPS on behalf of the Commissioners with the following offence: "Wickford Development Company Ltd between 21/11/2017 and 22/11/2017, at land to the south of Newton Hall, near Great Dunmow, Essex, was responsible for the felling of trees at the aforementioned land, without the authority of a licence issued by the Forestry Commission under [section 9\(1\) of the Forestry Act 1967](#) , contrary to [section 17\(1\) of the Forestry Act](#) , as amended." On 3 March 2020 a notice of discontinuance was served by the CPS ending the prosecution. By virtue of [section 17\(2\) of the Forestry Act 1967](#) no further proceedings in respect of this alleged offence may be brought. In these circumstances, where a prosecution brought on behalf of the Commissioners to determine a person's guilt has failed and no further prosecution may be brought in respect of the alleged offence which the Commissioners have in their contemplation, it is an unlawful abuse of the power in [section 17A](#) to serve a restocking notice;"

19. The other ground of objection material to this appeal was ground 3 which was that the notice required the planting of 242 trees which "greatly exceeds the number of trees that were on the site in 2017 and in requiring this number of trees to be planted the notice is grossly disproportionate".

The Written Submissions

20. The objection was referred to a reference committee. Counsel for Wickford made written submissions to the reference committee. They described ground 1 of the notice of objection in the following terms:

"(1) it is an abuse of the power in [section 17A of the Forestry Act 1967](#) to serve a restocking notice in circumstances where (a) a prosecution has been brought and discontinued and (b) no further prosecution could be brought in respect of the alleged offence in the notice."

21. The written submissions set out the history of the criminal proceedings. It set out the statutory provisions governing felling licences, prosecutions and restocking notices. The submissions were to the effect that the reasons underlying the change were to be found in three paragraphs of the report of the Regulatory Reform Committee of the House of Commons which considered the proposed draft order to substitute a new [section 17A](#) . Wickford's written submissions set out paragraphs 42, 52 and 56 of the report. Those paragraphs, together with paragraphs 54 and 57 of the report (which are material to Wickford's argument) read as follows:

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

a remedial notice). However, we consider that no reasonable right or freedom would be lost, given the proposal maintains a right of appeal against a restocking notice where the service of that notice or its terms might be in some way unfair.

.....

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

.....

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

.....

56. We therefore asked the Commissioners to explain how they proposed in practice to determine whether a person had committed the relevant offence under the [1967 Act](#). In their response, the Commissioners said that it was intended that appropriately qualified members of their staff should visit the site of any alleged unlawful felling to investigate the allegation, and that they would both examine evidence on site and interview any witness or other people present who might be in a position to offer relevant information. Following such a visit, a report and recommendations would be prepared which would ultimately pass to the Director of Forestry for either England or Wales (as appropriate) to consider. In each case, the Director would decide whether i) no action should be taken; ii) a restocking notice should be issued and/or; iii) the person responsible for the felling should be prosecuted. We consider this process should be adequately robust to arrive at an informed decision, provided the investigations in individual cases are carried out with sufficient care; we also consider it is appropriate that the decision about whether to issue the notice should be taken at this senior level.

57. Various statistics relating to the operation of the current enforcement mechanisms are given in the Regulatory Impact Assessment at pp 50 and 51 of the explanatory statement. These indicate that, in England and Wales in 2003/4, 215 cases of alleged illegal felling were reported and 76 were fully investigated, of which 15 finally went to court. 14 of these 15 court actions resulted in a successful prosecution. It is noted on page 51 of the explanatory statement that 'The [Forestry Commissioners] would have liked to pursue a larger proportion of those investigated ... but did not on the advice of Defra Legal'. This appeared to us to indicate that there are more instances of alleged illegal felling in which the Commissioners would like to enforce re-stocking than cases in which the Commissioners believe a successful prosecution could be achieved. The implication seemed to be that, should the Commissioners be given the powers which they propose, they would use that power to enforce restocking in instances where at present the need to prove the relevant offence in court or demonstrate a public interest in prosecuting would make this impossible. It is not clear to what extent any increase in the use of the power could arise from a lower standard of proof or simply a lower cost of taking action under the administrative procedure compared with that currently through the courts."

22. Detailed submissions were then made on what was referred to as objection 1. The submissions noted that the CPS had concluded that there was no realistic prospect of proving an offence. It noted that the effect of the time limit in [section 17\(2\) of the 1967 Act](#) meant that any prosecution could not be brought more than two years after the offence had been committed (and that time limit had now passed). The submissions said that the Commissioners appeared to believe that a restocking notice could be served long after the time limit for bringing proceedings had expired and that this "cannot have been what Parliament (or the Forestry Commissioners) intended when [section 17A](#) was amended in 2006". This section of the written submissions concluded by saying that:

"26. For these reasons it is submitted that the service of the restocking notice was unlawful or at least so unfair as to amount to an abuse of the power in [section 17A](#) ."

23. In relation to the objection that the notice was disproportionate, paragraphs 38 and 39 of the written submissions said:

"38. Given that the trigger for a restocking notice is the commission of an offence under [section 17](#) , it is submitted that the purpose of the notice is plainly to remedy the harm caused by the offence. There must, therefore, be a reasonable relationship between the alleged offence and the steps required by a restocking notice.

39. The woodland management plan commissioned by Wickford stated that In June 2017 there were 27 individual trees and 4 pioneer tree groups on the site. The restocking notice requires that 242 trees be planted on the site. Even if it were shown that Wickford had cleared the site of trees (which it had not) the requirement in condition 1 of the schedule to the notice would be grossly disproportionate and unfair."

24. The Commissioners submitted two written documents; one was described as principal submissions and the other as a rebuttal submission. They submitted that the fact that the CPS had discontinued the criminal proceedings did not prevent the Commissioners from serving a restocking notice where, as here, it appeared to them that an offence had been committed. They submitted that any question of whether the notice had been served unlawfully was better dealt with by way of judicial review and that such matters were outside the competence of the reference committee. In relation to ground 3, the Commissioners submitted that [section 17A](#) provided power to require the person to restock, not replace, the trees lost. It submitted that:

"Rather, the word 'restock' is used, which indicates that the felled area, in this case a woodland, is to be stocked sufficiently with trees in order to replicate that which was lost.

A woodland is much more than the number of stems present within it, and is largely constituted by its canopy cover. On a 1 for 1 replacement basis, it would take a lifetime to replace that which was lost. Moreover, natural processes will inevitably claim the lives of some of the trees restocked, and therefore it is appropriate that more are planted than are intended to be in place 50 – 150 years from now. Clearly this interpretation would render the [restocking notice] entirely ineffectual.

Restocking densities are selected based on the long-term aims of restoring the woodland. The minimum industry standard for restocking broadleaved woodlands is 1,100 stems/stools per hectare (sph). Using this guideline 1,100 sph in the 0.22ha compartment equates to 242 trees.

To meet this stocking density, the [Forestry Commission] accepts the planting of whips. A whip is a young tree seedling that resembles a stick – standing at around 30-40 centimetres tall and with a diameter less than the thickness of a pencil. These seedlings are accepted as replanting by the FC, and would have met the terms of the notice."

The hearing before the reference committee

25. There was a hearing before the reference committee. The notes record that counsel for Wickford submitted that it was "wrong to serve a restocking notice when proceedings for prosecution had been discontinued and could no longer be brought". Counsel's detailed oral submissions on that issue are recorded. On proportionality, counsel is recorded as submitting that the requirement to restock with 242 trees, as a replacement for the nine felled trees, was "over the top". The notes record that the representative of the Commissioners said that standard planting requirements for trees was 10,000 stems per hectare and the Commissioners were requesting roughly 1/10th of that at 1,100. That would cost approximately £500. The chair of the reference committee asked for clarification, noting that the trees would be "whips" not mature trees, and asking why 242 were appropriate when nine trees had been felled. The response from the Commissioners is noted as being that:

"...the stems of trees are mostly valued for their timber, while the canopy provided by trees provides more value in terms of habitat and amenity... one for one replacement does not restore canopy cover within a reasonable timeframe and practicality dictates that Forest Services require a higher stocking density... 1,100 stems per hectare is used when considering restocking conditions for felling licences..."

The Reference Committee Report and the Minister's Decision

26. The reference committee made a written report to the Minister. Paragraph 1 dealt with ground 1 of the objection and said:

"1. The Reference Committee agreed that the legal issue raised by the Objector, namely that the serving of the Restocking Notice followed a discontinued prosecution, was beyond the remit of the Committee to conclude upon. The Reference Committee noted further that the Objector accepted this, and that the Objector's intention in raising it was for the sake of exhausting available processes for the sake of justifying Judicial Review as a remedy of last resort."

27. The report then dealt with other grounds of objection (not relevant to this appeal). It dealt with the objection on grounds of proportionality and its conclusion in the following terms:

"13. The Reference Committee agreed that the standard restocking practice of 1,100 stems per hectare was not unreasonable, and did not find the Objector's argument against the conditions in the notice to be justified on silvicultural grounds. The Reference Committee agreed that restoration of canopy cover to the site was likely to be achieved by following the conditions set out in the Restocking Notice, but noted that the removal of natural regeneration on the site for the sake of restocking would be ill-advised.

.....

Conclusions

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

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

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

28. The ministerial decision is contained in an e-mail from an official at the department to the secretary of the reference committee. It states that the Minister has "cleared the following cases" and a list of cases, including that of Wickford's, is shown.

The Judgment

29. The judgment records that counsel submitted that it was an abuse of the Commissioners' powers for them to serve a restocking notice given that a prosecution had been withdrawn and the time limit for bringing a prosecution had now expired. Counsel is recorded as accepting that he was not relying on the report of the Regulatory Reform Committee for the purposes of statutory interpretation as it was accepted that [section 17A of the Act](#) did not restrict the circumstances in which a restocking notice could be served. However, counsel relied on the report to establish that the serving of the restocking notice was an abuse of power. Counsel had submitted that, even if the assurance from the Commissioners to the regulatory committee were not a binding assurance, it was a material consideration. The Minister had not dealt with that argument and had not given reasons for her decision. The judge said this at paragraph 86 about the reference committee's report:

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

30. In relation to whether the Minister had considered the argument or failed to give reasons for her decision, the judge said this:

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

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

144. As such, this is a case which falls into Lord Carnwath JSC's analysis in [CPRE](#); if the minister either did not accept the [reference committee's] reasons or the [reference

committee] did not deal with an issue, then there was a duty on the minister to explain how she had dealt with it. I therefore find ground 1 made out."

31. The judge declined to grant a remedy for the following reasons:

"148. For these reasons I find for the claimant on ground 1 alone. Ms Sargent submits that in those circumstances I should not quash the decision by reason of [section 31\(2A\) of the Senior Courts Act 1981](#) because it is "highly likely" that the outcome would not have been "substantially different" if the error of law had not been made. The approach to this section was carefully explained in *R (Cava Bien Ltd) v Milton Keynes Council* [2022] RVR 37, para 52 . It is a high hurdle whereby the court conducts its own assessment. In my view, this case is somewhat easier than many to which to apply [section 31\(2A\)](#) , because the argument being put was principally a legal one, concerning what the [Commissioners] said to the Regulatory Reform Committee in 2006 and the legal relevance of that. It is not a case where the court has to step into policy or factual judgements to be made by the minister.

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

150. Mr Green relies upon *Spath Holme*, [2001] 2 AC 349, 392 as set out above. However, the assurance that the [Commissioners] gave to the Regulatory Reform Committee was by no means the type of categorical assurance that Lord Bingham was apparently referring to. There, terms of what was said were broad and general, rather than clear and specific. Further, and in any event, it is apparent from the extract set out at para 79 above that the Regulatory Reform Committee did not actually rely on any specific assurance that the [Commissioners] had said to them. The committee report makes clear that they accepted that [restocking notices] could be served even where there could be no prosecution. The safeguard that the Regulatory Reform Committee relied upon was that of the statutory appeal and their confidence that that process would protect the landowner from any unfairness.

151. Further, in my view, Mr Green's argument proves too much. The claimant was submitting to the [reference committee] that [a restocking notice] could not be served after the prosecution had been withdrawn, and at a time when no further prosecution could be brought, because of the statutory time limits. But those requirements do not appear in the statute, which plainly contemplates that a restocking notice] can be served when there has been no successful prosecution. The only statutory requirement is that it appears to the [Commissioners] that an offence has been committed. That is different as a matter of language from a requirement that no [restocking notice] would be served if no prosecution would succeed. Even if the [Commissioners] had made an unequivocal representation that no [restocking notice] would be served in those circumstances, it is hard to see how the [Commissioners] could be bound in perpetuity

not to rely on the statutory language and not to exercise its powers under the statute. If that was the intention of Parliament then it is reasonable to suppose that Parliament would have amended [section 17A](#) to place the restriction on a statutory footing.

152. Mr Green submits that the error was that the minister did not deal with the argument, rather than that it would necessarily have succeeded. However, in my view, for the reasons set out I think it is at least "highly likely" that the minister would have rejected the argument and upheld the [restocking notice] in any event. I therefore decline to quash the minister's decision on the basis of [section 31\(2A\) Senior Courts Act 1981](#) ."

The First Ground of Appeal – the Refusal of A Remedy

32. Mr Green, for Wickford, submitted that Wickford's objection was not simply or primarily as to the legality of Commissioners' decision but as to the fairness of it. He submitted that the Regulatory Reform Committee report recorded an assurance by the Commissioners as to when they would consider it inappropriate to serve a restocking notice. Serving the restocking notice in the present case did involve a departure from that assurance, or at the very least the minister should have had regard to the assurance. She did not do so. Further, Mr Green submitted that the judge was wrong to conclude that it was highly likely that the outcome for Wickford would not have been substantially different if the Minister had had regard to the assurance and to deny a remedy on that basis.

33. Ms Sargent, with Mr Bishop, for the Secretary of State, submitted that the objection did amount principally to a legal argument that it was an abuse of power to serve a restocking notice. There was no general argument advanced by Wickford that the service of the notice was unfair in a way that fell short of being unlawful. In those circumstances, the judge was correct to refuse a remedy for the reasons given.

Discussion and conclusion

34. The starting point is the nature of ground 1 of the objection made by Wickford. I am satisfied that the ground of objection was that there was a legal impediment or bar to the Commissioners exercising their power to serve a restocking notice when a prosecution had failed and the time limit for bringing further criminal proceedings had passed. The circumstances were said to be such that service of the restocking notice amounted to "an unlawful abuse of the power in [section 17A](#) " (see ground 1 of the objection) or to be "unlawful or at least so unfair as to amount to an abuse of power in [section 17A](#) " (see the written submissions). The unlawfulness, or abuse, was based on one of two arguments.

35. First, in the notice of objection itself, the unlawfulness was tied, at least in part, to what was said to be the intention underlying [section 17A of the 1967 Act](#) . That argument is misconceived. In fairness, Mr Green recognised before us, and the judge below, that the fact that a successful conviction had not been brought (and the time for bringing criminal proceedings had now passed) did not mean that the Commissioners had no legal power to serve a restocking notice. It is clear from the words of [section 17A](#) that the Commissioners have power to serve a notice "where it appears" to the Commissioners that a person has committed an offence. A successful conviction is not a necessary precondition to service of a restocking notice provided that it appears to the Commissioners that an offence has been committed. The language of [section 17A](#) is clear.

36. Furthermore, that interpretation is reflected in the history of the legislation. [Section 17A](#) as originally enacted did require there to have been a conviction before a restocking notice could be served. That provision was substituted with a different [section 17A](#) which removed the requirement for a conviction and substituted, instead, the requirement that it must appear to the Commissioners that an offence has been committed. There are obvious reasons for the change. It may, for example, not have been in the public interest to bring criminal

proceedings or there may be difficulties over evidence or establishing the dates on which unlawful felling took place. Provided that there was a lawful basis upon which it appeared to the Commissioners that, notwithstanding the absence of a conviction, an offence had been committed, the Commissioners had power to serve a restocking notice requiring the land to be restocked with trees.

37. The second basis upon which it was said that the exercise of the power to serve a restocking notice was unlawful, or so unfair as to amount to an abuse of power, was that it amounted to a departure from an assurance given by the Commissioners to the Regulatory Reform Committee. That, on any fair reading, is an argument that an assurance was given by the Commissioners and that the Commissioners resiled from, or breached, that assurance (without good reason) by serving a restocking notice. That is said to be unlawful because it amounts to an abuse of power or is so unfair as to be an abuse of power.

38. There are a number of difficulties with that argument. First, Wickford has not produced a copy of the assurances said to be made by the Commissioners. Rather, they are relying on the report of the Regulatory Reform Committee as an adequate record of what the assurances were. Second, (and assuming without deciding that the report of a committee of the House of Commons is admissible for establishing the existence of an assurance), the statements recorded to have been made by the Commissioners do not begin to amount to anything that could be said to be an assurance that a restocking notice would not be served in the circumstances of the present case (i.e., where there is no conviction, a prosecution was discontinued and the time limit for bringing a prosecution has passed).

39. Mr Green relied upon a reference in paragraph 52 to the absence of an intention to issue a restocking notice in circumstances "where a conviction would presently be unlikely or impossible". But that sentence needs to be read as a whole. It is referring to a situation where "there is no intention that the standard of proof required before a restocking notice is issued will in practice be lessened". The approach of the Commissioners in this case does not involve any lessening of the standard of proof needed for it to appear that an offence has been committed. Further, the relevant section of the report (headed enforcement of restocking after the unlawful felling of trees) would need to be read in full (if it is admissible for this purpose) to ascertain the content and meaning of any assurances said to have been given. It is abundantly clear that the Commissioners understood that the proposed amendments to [section 17A](#) would enable them to serve a restocking notice where under the previous regime "the need to prove the offence in court or demonstrate a public interest in prosecution would make this impossible" (see paragraph 57 of the report).

40. There are other reasons why it is not possible to regard the statements said to be made by the Commissioners as amounting to an assurance. Such statements would need to be "clear, unambiguous and devoid of relevant qualification" (per Bingham LJ in *R v Inland Revenue Commissioners ex p. MFK Underwriting Agencies Ltd* [1990] 1 WLR 1545 at 1569); and see paragraph 106 of the judgment of the Supreme Court in *R (Friends of the Earth Ltd. and another) v Secretary of State for Transport* [2020] UKSC 52, [2021] PTSR 190. The general observations said to have been made by the Commissioners do not begin to amount to any such clear or unambiguous assurance as to when the Commissioners would, or would not, serve a restocking notice.

41. It is clear, therefore, that neither of the two bases for contending that the service of the restocking notice in the present case was unlawful are established. As a matter of law, the Commissioners had power to serve a restocking notice and doing so did not involve an unlawful departure from any assurance said to have been given many years earlier.

42. Mr Green submitted that there might well be instances of unfairness, short of unlawfulness or abuse of power, and the Minister should have considered that issue, and given reasons for her decision not to uphold the objection on that ground. First, that is not, on any reasonable or fair reading of the notice of objection, or even the written and oral submissions, what the objection was about. Secondly, the submission is still based on the assumption that it is somehow "unfair" for the Commissioners to have served a restocking notice and the Minister should prevent that by directing the Commissioners to withdraw the notice. But the only two matters that have been advanced to suggest any unfairness is the question of the proper interpretation of [section 17A](#) and the departure from assurances alleged to have been given. For the reasons given, those matters did not involve any unfairness. There was no objection made that service of the notice was unfair for any other reason nor has any form of unfairness, short of abuse of power, been identified.

43. The next question arises out of the way that the judge below dealt with the fact that the Minister either did not consider the objection or failed to give reasons for dismissing it. I agree that the reference committee and the Minister should have considered the objection that it was unlawful or an abuse of power for the Commissioners to have served a notice. A person served with a restocking notice has a right to make an objection to the notice or its conditions. The objection has to be referred to a reference committee (unless it is frivolous). That committee must make a report to the Minister. It is implicit that that report will deal with the objection made. Similarly, the Minister, having considered the report, must decide whether to direct that the notice be withdrawn or tell the objector that it shall have effect (with or without modification). It is implicit that the Minister will consider and deal with the objection. All that follows from the process established by [section 17B of the 1967 Act](#) .

44. In the present case, the reference committee did not deal with ground 1 of the objection and the question of whether service of the restocking notice was unlawful. The natural inference is that the Minister did not deal with it either. There is certainly nothing in the e-mail from the departmental official to indicate that the Minister had considered the objection and decided to dismiss it. Mr Sargent submitted that the fact that the Minister dismissed the objection must mean that the Minister considered it. That does not follow. The evidence is equally consistent with the Minister accepting the report of the reference committee that the objection was principally based on legal grounds and was a matter for the courts to deal with, not the reference committee or the Minister. There is no evidence that the Minister did consider this aspect of the objection.

45. The next question, however, is what is the effect of the failure of the reference committee and the Minister to consider this particular objection. The nature of the objection was primarily a legal one: that the Commissioners had no power to serve a restocking notice or that it was an abuse of power, and so was unlawful, to do so. The reference committee and the Minister could not reach a final conclusion on those issues as the scope of the powers of the Commissioners, and whether the exercise of power was unlawful, was a matter for the court to determine. If the Minister decided that it was not unlawful, the objector could still seek judicial review on the ground that the Minister had erred in reaching that conclusion. Similarly, if the Minister had upheld the objection because she considered that the service of the notice was unlawful, the Commissioners could have sought judicial review on the ground that the minister had erred. Whilst the Minister had to consider the objection, and reach a conclusion on it, her conclusion would ultimately be subject to a final ruling by the court on the question of lawfulness. To that extent, the situation is akin to a body or tribunal having to determine whether or not it had jurisdiction, or power, to deal with a matter. It may have to take a decision on that question (in order to decide whether to deal with the matter). The question of whether or not the body does have jurisdiction is, however, ultimately a matter of law for the courts.

46. Against that background, the judge was correct not to quash the decision of the Minister. I would, however, express the reasoning differently. As the judge accepted, the service of the restocking notice was lawful. As the judge noted at paragraph 150, there was no breach of any relevant assurance and at paragraph 151, there was no breach of any statutory requirement. While the reference committee and the Minister should have dealt with the objection, it could not have been upheld as a matter of law. Any failure on the part of the Minister, or the reference committee, was not therefore material and could not affect the outcome of the appeal to the Minister.

47. That seems to me a preferable way of analysing the problem rather than resorting to [section 31\(2A\) of the 1981 Act](#) . Not all errors have to be analysed by reference to the terms of [section 31\(2A\)](#) . The first question is whether the error led to the decision being unlawful. Some errors are not material and do not, therefore, render a decision unlawful. That is, on analysis, the situation here. Secondly, the question may be whether a remedy should be refused as a matter of discretion in the light of recognised principles or whether the court must refuse a remedy because of [section 31\(2A\)](#) . In the present case, it was not necessary to consider the effect of [section 31\(2A\) of the 1981 Act](#) . I would, however, make the following observations. First, the judge relied upon the approach set out in *R (Cava Bien Ltd) v Milton Keynes Council* [2022] RVR 37 . Second, she understood that case as requiring the court to conduct its own assessment. That approach is wrong, as this Court ruled in *R (Bradbury) v Awdurdod Cenedlaethol Bannau Brycheiniog (Brecon Beacons National Park Authority)* [2025] EWCA Civ 489 at paragraphs 71 and 74 . As the Court indicated, reliance on the approach set out in *Cava Bien* would be likely to lead a court into error, as happened here (although, in fairness to the judge in the present case, she gave her decision before the Court of Appeal decision in *Bradbury* and at a time when it was common for courts to follow the decision in *Cava Bien*). For the future, the approach in *Cava Bien* should not be followed.

48. For those reasons, I would dismiss ground 1 of the appeal.

The Second Ground of Appeal - Proportionality

49. Mr Green submitted that the power conferred by [section 17A](#) to serve a restocking notice was intended to remediate the loss of trees caused by unlawful felling. He submitted that there should be a reasonable relationship between the requirements of the notice and the offence believed to have been committed, that is the number and location of trees unlawfully felled. He submitted that, in the present case, nine trees were felled and it was disproportionate to require 242 trees to be replanted.

50. Ms Sargent submitted that the issue had been addressed and the reference committee, and the Minister, were entitled to reach the conclusion that they did.

Discussion

51. The power to serve a restocking notice arises when trees are unlawfully felled on land. The Commissioners may serve a notice where it appears to them that an offence has been committed by a person and that person has an estate or interest in the land in question. That land is the land where the trees stood before they were unlawfully felled. The restocking notice in the present case identified the land in question (and there has never been any suggestion that that description is incorrect or inaccurate in any way).

52. A restocking notice is defined as a notice which requires the person "to restock or stock with trees" the land (or such other land as may be agreed) and to maintain those trees for period of up to ten years (see [section 17A\(1A\)](#)). The section does not require trees felled to be replaced. It requires land to be restocked or stocked. Whilst the trigger for the exercise of the power is, therefore, the fact that an offence appears to have been committed by the unlawful felling of trees, the purpose of issuing a restocking notice is to restock the land, not simply to replace the number of trees felled.

53. Against that background, the Minister was entitled to conclude that there was nothing objectionable in the Commissioners using the standard industry practice for determining the number of saplings or young trees to be planted, with a view to a sufficient number of mature trees surviving to replace the canopy of trees that had been removed by the unlawful felling. As the judge said at paragraph 147 of her judgment "the use of a standard restocking density when deciding the terms of the [restocking notice] is, in itself, rational and as a matter of judgment, well within their statutory discretion". I agree. I would dismiss ground 2.

Conclusions

54. For those reasons, I would dismiss this appeal. Ground 1 of the objection was, on analysis, a claim that it was unlawful to serve a restocking notice in circumstances where there had been no conviction, a prosecution had been withdrawn and the time limit for bringing a prosecution was passed. The objection was that the Commissioners did not, as a matter of law, have power to serve a notice in such circumstances, or that doing so involved resiling or departing from an earlier assurance. As a matter of law, those arguments were wrong. The service of the restocking notice was lawful and this ground of objection could not be sustained as a matter of law. While the reference committee and the Minister should have considered that ground of objection, the failure to do so was, ultimately, immaterial as this ground of objection would have failed as a matter of law. Further, the Minister was entitled to find that there was nothing objectionable in deciding the terms of the restocking notice by reference to the standard industry practice for determining stocking density.

Lady Justice Falk

55. I agree.

Lord Justice Holgate

56. I also agree.

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