JOINT PLANNING LAW CONFERENCE

CHALLENGING DECISIONS - THE PARAMETERS

by

M Howard, QC, MP

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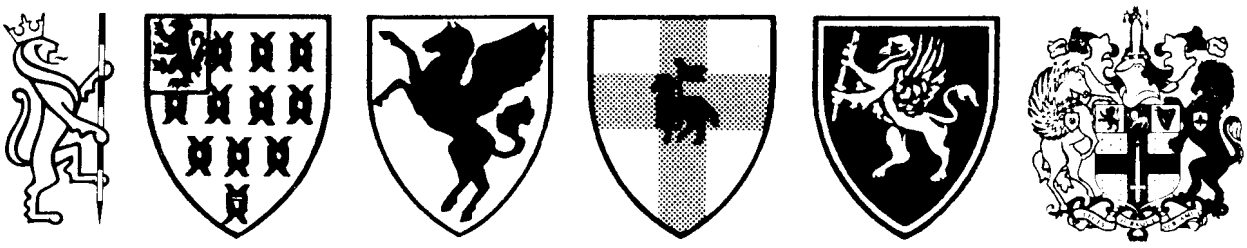

If the maxim 'He who begins should provoke' is not entirely familiar to those present this evening it is because I have not been able to trace any respectable lineage for the sound sentiment which it embodies, though that is an omission which I expect to be remedied before the end of the evening.

But it seems an appropriate guide to the task of presenting the opening contribution to this distinguished Conference.

It has always struck me as being a conference which is particularly ambitious and nowhere is the ambition more apparent than in the fact that the after-dinner speech on Friday evening is meant to provide a serious introduction to the subject of the Conference.

Hence the need to provoke, to try and fend off that post-prandial tendency to nod off with which we are all familiar.

And since it is my intention to provoke I have to start with a disclaimer. The remarks which I am about to make are remarks which I should probably not be allowed to make in the House of Commons. For the Parliamentary Private Secretary is a curious hybrid. He or she is not a Minister and, as I am constantly telling my suspicious constituents, is not paid for the menial tasks which go with the job. But the doctrine of collective responsibility applies so criticism of the Government is inhibited.

More importantly, as far as this evening is concerned, you are not allowed to give utterance on the subject for which your Master is ministerially responsible. Now the ministerial responsibility of the Solicitor-General whose P.P.S I am, is not especially clearly defined. But it is usually regarded, in a rather vague way, as having something to do with the law though neither the Attorney-General nor the Solicitor-General are ministers in the Lord Chancellor's Department.

So speeches on the law are out lest it be thought by some unsuspecting observer that the inane utterances to which you are giving vent are really the opinions of your Master.

Let me make it clear then that such views as I propose to express this evening are not those of the Solicitor-General or of any other Minister or of the Government but my own modest opinion for the little it is worth.

The subject for the Conference is 'Challenging Decisions'. It seems appropriate therefore to start with a word or two about the decision-making process. No human decision-making process is perfect for all human beings are fallible. Perfect justice may be attainable in the next world; it is not available in this. And although lawyers' endeavours on behalf of their clients are frequently so prolonged as to indicate how well they appreciate this eternal truth, their readiness to take the long view is not always shared by the client.

I would therefore suggest that the decision-making process with which we are concerned has three objectives - speed, certainty and justice.

As I have already mentioned perfect justice is unavailable. So are instantaneous speed and immediate and unalterable certainty.

It is possible therefore to predict with total confidence that all three objectives cannot be obtained simultaneously. In itself that should not arouse undue cause for concern.

But, disturbingly often under our system, none of these objectives are attained. And the time has surely come to ask ourselves some questions about the nature of the system.

Can we, for example, be proud of a system that tolerates the announcement in 1976 of a Government Department's decision, in principle, to construct a by-pass along a particular route and a final decision, after a 96 day public inquiry and a Select Committee of Parliament, to be delayed until the middle of 1985. I say 'final decision' but in doing so I may be premature for no 'challenge' as the term is likely to be used at this Conference has yet been made. The Courts have not been involved. All that has happened is that the statutory decision-making administrative machinery has ground deliberately through the various gears which were prescribed a generation or more ago, before the invention of syncro-mesh let alone automatic change.

And, yet more controversially, does it bring credit on our system that changes in the administration of the social security system should be struck down by the High Court on the last day of term with Parliament and the Court of Appeal in recess and no opportunity available to use either to respond to the Court's decision?

Of course that example invites the retort that Parliament and Government should have got it right in the first place and should have meticulously observed the prescribed procedures. And so of course they should.

But should we not be operating a system which recognises and provides for the fallibility of the human decision-maker and enables errors to be put right without bringing the whole administrative machine to a halt?

And, the last of these not entirely rhetorical questions which seem to have taken over the introduction of my theme, do we give sufficient weight to the fact that the decisions, the challenge to which we are to spend the next days discussing, are, all of them, taken by democratic bodies or bodies appointed by others who have been democratically elected?

For we do, after all, live in a democracy. And every decision taken by a democratically-elected body forms part of the tapestry of decisions which forms its record and on which judgement is passed by its electorate.

Moreover political considerations, or policy considerations to accord them their ritual fig-leaf of constitutional respectability, play a major part in so many decisions even when a public inquiry has taken over two years and meticulously anaylsed all the available evidence.

Yet do we not all too often pretend that we are engaged in an entirely judicial enterprise the success or failure of which is to be regarded as an entirely forensic matter? And is this not why it is conducted at a leisurely pace in a framework of procedural luxury with an abundance of opportunity for challenge?

How do these random and erratic observations apply to the process with which we are all familiar?

Let me begin with the most familiar - the challenge to the decision of the local planning authority.

It will normally be by way of an appeal to the Secretary of State, though in a clear case it may be advisable to go straight to the Courts. Since, however, an appeal to the Secretary of State gives the appellant the opportunity of biting two rather different

varieties of cherry - attacking both the legal validity and the factual merits of the decisions - together with a second bite of one and possibly both on a subsequent appeal to the High Court he will usually be advised to appeal to the Secretary of State in the first instance.

But are these remedies effective in providing an adequate remedy for those who are aggrieved by the decision of the local planning authority and, let us never forget, for the interest in the community at large in good decision making?

Well, on the whole perhaps the answer is a cautious and rather reluctant affirmative while lamenting the extent to which speed and certainty are sacrificed, in consequence, to a search for absolute justice which is likely to be illusory.

What improvements could be introduced?

Let me mention first that which will be least welcome to members of my own profession. Since the written representations procedure generally provides a simpler, quicker and less expensive method of challenge than the public inquiry attention should be paid to the possibility of increasing its efficiency and increasing further its popularity - 86% of all appeals in 1984 were dealt with in this way.

It is therefore a matter for congratulation that the Government are proposing to introduce statutory powers to enforce time

limits in the case of planning appeals dealt with in accordance with this procedure.

So far as the inquiry system is concerned something really must be done about the ridiculous state of affairs which permits an appellant to turn up at an inquiry with a series of hundred-page proofs which are produced by witnesses in sequence rather in the manner of designers at the Paris Collections leaving the advocate for the local planning authority to cross-examine on sight. While I yield to few in my affection for the great traditions of our historical past this lingering remant of trial by combat should no longer have any place in our planning system. Proofs should be exchanged in advance and a modicum of commonsense reintroduced into the system.

Equally local planning authorities should be much more forthcoming in their reasons for refusal putting aside the brief and uninformative one-liners which are often more appropriate to the music-hall than to the serious determination of planning policy.

And there are still too many frivolous refusals. I know of only one way to discourage these - a much greater readiness on the part of the Secretary of State to award costs. If it can be done in no other way - and this may be the case - then serious consideration should be given to the introduction of the ordinary

rule in civil litigation - that costs should simply follow the event so that the winner, literally, takes all.

I have another worry. Is the Secretary of State's policy being applied with sufficient throughness and consistency? Circular 22 of 1980 was intended to change things. So is Circular 14 of 1985. Will inspectors be more ready to accept this with the later Circular than they were with the earlier one?

And if not should not the Secretary of State delegate fewer decisions to inspectors and reserve more to himself?

These are all measures which could improve the effectiveness of the system and ensure that the Secretary of State's policy was universally applied - that, after all, being the fundamental rationale of the appeal process.

And one final topic before I leave the challenge to the decision of the local planning authority - a word of cautious advice against the reform which will be advocated so seductively by Peter Boydell - the extension of the right of appeal to those who are aggrieved by the local planning authority's decision to grant planning permission.

Smashing of course for the lawyers and the other professions involved. But devastating in terms of the speed and certainty of the decision making process. And far less necessary than may at first sight appear to be the case in terms of the achievement of

justice.

For the lack of symmetry between the absence of a remedy when permission is granted and the right of appeal against refusal accurately reflects the difference which really underlies the true situation.

The ordinary citizen is prevented by common law from using his land in such a way as to annoy his neighbour. Subject to that inhibition he should, in the absence of special statutory restrictions, be free to do what he likes with his own land.

The planning system involves a series of such statutory restrictions and it is only right therefore that the individuals who are disadvantaged as a consequence should have a right of appeal.

These considerations do not apply in the case of the neighbour aggrieved by the grant of planning permission.

And the democratic system works in a significantly different way as between the two cases.

Very often the applicant for planning permission is not local. Even when he is, the immediate benefit is likely to have much less political clout, in a situation of any signficant controversy, than those who regard themselves as adversely affected.

There is unlikely to be much political push from those who will live in the houses to be built or who will work in the industrial units to be put up. But neighbouring residents will be lobbying councillors and the Member of Parliament and such is the nature of the current political battlefield that this will almost always represent a very considerable political force.

It takes a quite exceptionally stong-minded councillor to argue the wider public interest with his electors. And he may well find himself an ex-councillor in double-quick time for his pains.

One of the underlying reasons, I would therefore suggest, for the appeal system is to give the Secretary of State the opportunity to ensure that adequate weight is given to the national, as opposed to the local, interest in these decisions.

And, not invariably, but certainly more often than not, the local pressure will be to refuse permission whereas the national interest will require that it should be granted.

Peter will of course have answers to all these difficulties when he comes to present his paper but I certainly view his propoasl with very considerable misgivings.

So much then for the appeal to the Secretary of State against the decision of the local planning authority. What of the appeal

to the Courts?

The Town and County Planning Act provides its tailor-made route in planning cases while judicial review has a much wider scope.

It is easy to exaggerate the differences between the two.

The principle on which the Court will intervene under section 245 of the Town and County Planning Act were summarised by Lord Denning as long ago as 1965:-

'Under this section it seems to me that the court can interfere with the Minister's decision if he has acted on no evidence; or if he has come to a conclusion to which on the evidence he could not reasonably come; or if he has given a wrong interpretation to the words of the statute; or if he has taken into consideration matters which he ought not to have taken into account, or vice versa. It is identical with the position when the Court has power to interfere with the decision of a lower tribunal which has erred in point of law' (ASHRIDGE INVESTMENTS LTD v MINISTER OF HOUSING AND LOCAL GOVERNMENT |1965|,1WLR 1320, 1326)

This categorisation does not seem, at any rate to me, to be very significantly different from the categorisation by Lord Diplock in the COUNCIL OF CIVIL SERVICE UNIONS v MINISTER FOR THE CIVIL SERVICE |1984| 3WLR, 1174 which was itself summarized by Lord Justice Mustill in the more recent case of R v THE SECRETARY OF STATE FOR THE ENVIRONMENT Ex parte THE GREATER LONDON COUNCIL in

the following terms:-

'The first is "illegality": where the decision maker does not correctly understand and give effect to the law that regulates his decision-making power. The second is "irrationality": what is now often called "Wednesbury unreasonableness", where the decision is so absurd, so outrageous, that no reasonable man could have arrived at it. The third is where there is "procedural impropriety", under which title may be placed various different types of error in the procedures by which the decision is reached.'

The principles therefore are reasonably clear, and well established. Yet few, I suspect would share the opinion of the sub-editor of the Financial Times who headlined a recent article by Justinian on the subject with the words:

'"Growth industry" limited by appeal courts.'

A more accurate characterisation would be the recent judicial utterance which referred to the 'free growth of this developing area of the law.'

What should our attitude be towards this freely growing, fast developing fruit?

I suggest, diffidently, because we are treading here on dangerous territory, that caution is appropriate.

I suspect, for example, that the layman would find it somewhat difficult to understand that the courts, at different levels, could differ with each other on 'irrationality' resulting in a wide spread of judicial opinion as to whether a decision was so absurd or outrageous that no reasonable man could have arrived at it and yet set aside a decision of a Secretary of State or other body because a majority of the House of Lords took the view that his decision did indeed fall into that category.

And let me give just one other example of the kind of absurd situation in which we now find ourselves.

In the case of R v SECRETARY OF STATE FOR TRANSPORT Ex Parte THE GREATER LONDON COUNCIL which involved the levy imposed on the Greater London Council by the Secretary of State for Transport under section 49 of the London Regional Transport Act 1984 McNeill J held, as one of his grounds for quashing the levy, that the Greater London Council had a legitimate expectation of consultation before the levy was made.

The relevant section of the Act contained no requirement to consult on the part of the Secretary of State. Indeed during the course of the passage of the legislation through Parliament amendments had been proposed to insert such a requirement and had been defeated. Presumably this was not drawn to the

attention of the Judge on the well known principle that proceedings in Parliament cannot legitimately be used to construe the interpretation to be attached to the statute. I, for one, find it impossibly difficult to understand how an authority can be said to have a legitimate expectation of consultation when attempts to insert a specific and express requirement to consult have been rejected by Parliament.

We are, as I say, on dangerous ground. So let me conclude with a further quotation form Mustill L J 's judgement in the rate-capping case to which I have already referred:-

'We find it hard to envisage that the court would be willling to intervene where the error relates not to a question which admits of only one correct answer, such as a process of computation, but to an exercise in judgement, where the decision maker has to weigh up a series of conflicting considerations. We say this for three broad reasons.

First, because an enquiry into the decision maker's reasons will tend to lead, whatever efforts are made to prevent it, towards the adoption by the court of a fundamentally misconceived role, whereby the court substitutes itself for the decision maker and remakes the decision for him. It is axiomatic that judicial review does not involve any procedure in the nature of an appeal.

Secondly, because the court will, in many instances, be drawn

into a detailed consideration of matters which are, save on the very broad approach required by the Wednesbury test, altogether outside its province. No doubt the court can and must look at the ultimate answer. But the steps by which the answers are reached often involve the delicate balancing of considerations which are not susceptible to the formal reasoning appropriate to a court of law. The present case is a good example. The structure of the Rates Act is such that the Secretary of State is required to make judgements which are economic and, in the widest sense, political in character. Whilst always maintaining its duty to watch over the decision-making process the court must, we suggest, be careful not to be drawn thereby into fields which are the concern of those elected to office. The present case furnishes an example of this risk.

Finally there are good practical grounds why enquiries into the decision maker's reasoning can rarely be embarked on with profit. Here again the present case illustrates the point. The applicants began with certain specific allegations of procedural impropriety, coupled with assertions that the ultimate decisions were unreasonable in the Wednesbury sense. The latter prompted the Secretary of State to come forward with answers to the allegations and explanations, not necessarily complete, of how the decisions had been made. This is turn led to amendments in the GLC case to introduce criticisms of the decision-making process, the allegation of Wednesbury unreasonableness which had led to the production of the new material being subsequently abandoned. In turn, the Secretary of State responded with

answers to the latest criticisms, which produced more criticisms. As well as this, there were applications for discovery, occupying a total of four days. At a later stage, there arose the possibility of a further amendment, which if permitted would have led to the introduction of further evidence in rebuttal with the possibility of a renewed application for discovery. By the end of the hearing, there were numerous affidavits and affirmations, with copious exhibits. This material required meticulous exposition by counsel if it was to be properly understood. Meanwhile, the time for the fixing of the precept came and went, with those who had to take the decision still uncertain as to whether their powers were validly constrained by the Order. The consequences need no description. Whilst the present particular case may perhaps be an extreme example, there is a danger that if this kind of inquiry is to become widespread, there will be a real impediment to the proper conduct of government, using the word in its widest sense, with at the same time the danger that the important and salutory role of judicial review may thereby become discredited.'

Not all judges, I fear, would concur with these views. But I commend them to the Conference as an antidote to the enthusiasm for challenge which will, I suspect, be rife in New College over the next two days.

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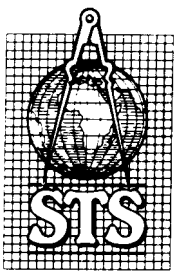

12 Great George Street, Parliament Square, London SW1P 3AD
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