

Third party challenges—an individual’s perspective

By Richard Buxton

This is not a rigorous study about third party rights under the planning system, but rather presents views (hopefully, some insight) about trials and tribulations involved in rocking the planning boat. Not on purpose, of course, but experience suggests that, left to its own devices, that boat would sail without real regard for the interests of others or the environment. For it is really the great ship of state, and carries landed and moneyed passengers oblivious other than to their own preferred destination. One is so often surprised how, despite cases alerting to the dangers of hitherto uncharted reefs, the ship sails blandly on.

In most cases it gets by. Its passage will be trouble free. Potential objectors will often be ignorant of the possibilities of challenge, apathetic or respectful about a decision of a planning authority, think of taking legal advice as a last resort, or (when they do so) act too late.

Sometimes, however, planning decisions are just too much for people to bear without protest. A spirit within is stirred to do something. The common denominator is a profound sense of injustice.

Who are these people, and how and why did they approach solicitors?

Third party challengers almost always have a grievance that goes beyond merely not wanting a development in their “back yard”. There is much respect for the established system: that landowners and developers have rights, and that councils or, eventually, the Secretary of State, are entrusted with making decisions that properly balance those interests against community interests.

The underlying complaint in most cases is that the balance has not been struck in the right way. Naturally, that could mean disagreement about where it should be struck, something entrusted to the decision maker. However the common complaint is that the council has not behaved properly. A councillor has had too much influence. Letters of objection have been ignored. Consultation has been inadequate. There has been no, or very limited, right to speak at a committee meeting (despite much more time being allowed to the applicant for permission and/or the council officer). Statutory consultees have been weak. Regardless of the local plan, the council will do all it can to get the development approved. The council is in awe of the developer and/or its advisers.

In practice these types of complaint are difficult to sustain in the courts. However, the principle “there is no smoke without fire” usually applies. In other words, the sense of outrage usually betrays something remiss at the legal level.

Third party objectors themselves come from all shades of life and income bracket. Amongst communities there is usually much apathy, even where one’s amenity and, in turn, potential house value, are threatened. Even if they are prepared to take an interest in these matters, they perceive councils as all-powerful, and are inclined to accept what is decided. They are sceptical of the prospects of doing anything, let alone taking action in court. In any event, people regard the court as quite beyond the reach of the ordinary person, usually having in mind newspaper reports of huge costs awards in high profile defamation cases.

However there is often at least one person who is so angry about a decision, and has sufficient time, that he or she is prepared to make the effort, and spend a little money, to see if something can be done. Such

persons may form, or already be part of, some sort of action group. A few, who usually stay as individuals, have a sense of perspective and appreciate that these types of contest can healthily be regarded as a Robin Hood-style affair.

It is remarkable how difficult it seems to be for people to find a way to take advice. Usually people find it by word-of-mouth (someone has heard of someone else who has had a planning problem) or the Environmental Law Foundation (ELF). It often turns out that the objectors have done a lot of casting around for help. This reflects the relative rarity of these types of challenges: the people concerned are likely only to face them once in a lifetime. This is a serious issue when it comes to delay in acting, and being cut off by a statutory appeal or judicial review time limit.

People can also find it hard to get information. Not all live within striking distance of the relevant local authority's offices. Nor can a local authority be blamed for a third party not knowing what to look for. However, as exemplified in *Lebus*,¹ local authorities need to be more careful about what matters go on their statutory register.² Third parties may find obtaining copies of material prohibitively expensive, and there are often alleged copyright or practical problems with obtaining copies of plans.

Procedural matters

Third party challenges are almost always³ procedurally brought by way of statutory appeal (in the case of decisions by or on behalf of the Secretary of State) or judicial review (in the case of local authority decisions). The procedures, and certainly the approach of the courts, are very similar, except that in the first case an immutable six week time limit applies, while in judicial review cases the time limit for taking proceedings is (probably) three months unless there is good reason why action should have been started sooner.⁴

The Administrative Court is efficient: "run of the mill" cases are dealt with in a matter of months and urgent cases can be dealt with extremely quickly.

The Civil Procedure Rules introduced in 2000 by the Woolf reforms have tended to make the processes simpler and less risky for third parties (and others). For example, the ability simply to sign a witness statement with a statement of truth, rather than having to find an independent solicitor out of the office to swear an affidavit before, makes life hugely easier in practice. The claim forms are simple and straightforward. One is now usually safe from an adverse costs claim at a permission hearing which one's opponents choose to attend.⁵ However there is authority that someone unsuccessfully seeking permission to apply for judicial review may seek costs in relation to filing the acknowledgement of service and summary grounds of defence.⁶

There is, of course, room for improvement. The statutory appeal rules still need updating: for example one is always required to serve the local authority as a defendant, even though they will very often not

¹ *Infra*.

² *i.e.*, as required by the General Development Procedure Order 1995, Art. 25; see also Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999, reg. 20.

³ Examples of rare exceptions are *R. v. S/S Environment, ex p. Plymouth City Airport* (Dyson J., 3.2.00, Court of Appeal [2001] EWCA Civ 144) where the third party challenger, affected by helicopter noise, intervened successfully to prevent the Secretary of State conceding a case brought by the applicant airport; and *Biggin Hill Airport Ltd v. LB Bromley* (Nicholas Strauss Q.C., 21.11.00) where residents sought to intervene in a dispute about the terms of a lease on human rights grounds.

⁴ See *Burkett, infra*.

⁵ CPR, 54 PD 8.6.

⁶ *Leach v. Commissioner for Local Administration* [2001] EWHC Admin 455. For criticism of this decision, which leaves claimants with an unknown exposure, see McCracken and Jones "Leach and permission costs" [2002] JR 4. Even though the exposure should be relatively small, the problem is that it is unknown, uncertain.

wish to participate, but not the “really” interested party.⁷ There can be confusion when the Court refuses permission to apply for judicial review on some grounds, but grants permission on others, and the claimant wishes to pursue a refused ground. The Court inexplicably requires two sets of papers to be submitted with applications, when one set would surely do, and which is tough on photocopying expenses (and trees). Judges will often consider permission applications at long hearings, and go into all the issues, usually when there is dispute about whether the application should be refused on time grounds. This is inefficient given that the test for granting permission is arguability, and prejudices third parties with limited funds. But in the main the system works tolerably well.

The impact of the Human Rights Act 1998 is still being tested. The House of Lords in *Alconbury*⁸ did not answer all that it might have, particularly in relation to third party rights in the planning process. The courts have tended to take a conservative line, as exemplified in *Friends Provident*,⁹ *Cummings*¹⁰ and *Adlard*.¹¹ The House of Lords appears to have recognised the problem and has given leave to appeal in *Runa Begum*,¹² where similar issues are raised, albeit in a different context. The impact of developments on property values also awaits consideration in the light of Article 1 of Protocol 1 to the European Convention on Human Rights. Planning authorities tend not to regard it as a material planning issue.

Environmental impact assessment (EIA) and other complaints

Understandably, lay people do not immediately realise that the law is only of help if there has been an error in the way a decision has been taken, rather than in the merits of the decision itself. Similarly they cannot be expected to know what legal flaws may exist in the procedure. Fortunately, a sense of injustice (see above), can usually translate into a legal flaw.

A very common error is the failure to have proper regard to the requirements of the rules on environmental impact assessment (EIA). Although supposed to be a relatively rare intrusion into the normal planning process, EIA often falls to be considered in third party challenge cases. One supposes this is because matters of concern other than to the landowner or developer are by definition ones that affect the environment. It is right to say that the courts do not necessarily agree with this thesis, as evidenced in *Malster* where it was held by Sullivan J., and in effect confirmed, though with more hesitation, by the Court of Appeal, that the effects of a football stadium on an individual’s house did not fall within the ambit of EIA.¹³

In *Walton*, residents were concerned about a proposed new access road to the local brewery going across water meadows in Bury St Edmunds. Hooper J. decided that the Council’s approach to EIA was wrong.¹⁴ The decision was eventually retaken, with EIA, and the determined Council saw it through. Many were disappointed. However it was appreciated that at least the decision had been taken lawfully, and with better safeguarding provisions than previously.¹⁵

⁷ RSC, 94.2(2)(d).

⁸ [2001] 2 W.L.R. 1389.

⁹ *Friends Provident Life Office v. S/S Environment* 44 E.G. 147.

¹⁰ *Cummings v. S/S ETR LTL* January 17, 2002.

¹¹ [2002] EWCA Civ 735.

¹² *Runa Begum v. LB Tower Hamlets* [2002] EWCA Civ 239.

¹³ *Malster v. Ipswich Borough Council* [2001] EWHC Admin 2001, HC; [2001] EWCA Civ 1715, CA

¹⁴ *R. v. St Edmundsbury Council, ex p. Walton* [1999] Env. L.R. 878.

¹⁵ In passing, one comments that the final outcome in this case might well have been different had the rules on descriptions of “alternatives” in relation to EIA required consideration of alternatives that are not necessarily within the convenient contemplation of the developer. In this particular case, that could have meant accepting that there had been a fundamental change in the nature of the business so that the bottling and distribution intended at the water meadow site should simply take place elsewhere, such as on an industrial estate with easy trunk road access. The issue of alternatives that may suit the environment but not necessarily the developer is a difficult one.

In *Shirley*, residents objected to relocation of Canterbury College to a large green-field site. The purported EIA had not been advertised and local people were oblivious to it. They felt that they had not been treated fairly at the public inquiry. It seemed obvious that the defects in the EIA process were genuine defects that made a real difference to their effective participation.¹⁶

Bell involved a similar failure by a combination of powerful developer and intent council to relocate a printing works in Suffolk to a green-field site. Judicial review on the basis of EIA was not only successful,¹⁷ but the works were successfully redeveloped where they were, in town.

A dispute about *Lands End Aerodrome* involved a public inquiry over putting hard runways down over a magnificent expanse of Cornish grass. The mitigation measure was that they would be painted green. After it was pointed out, the Government Office for the South West agreed that there was a need for EIA; the public inquiry was adjourned—and the proposal went away.

Developers sometimes seek help to ensure that an environmental statement for a proposed development does contain all the right information, and generally is done in the right way, so as to satisfy the community. Whether or not the particular proposal goes through is a matter for the local decision-maker. However enlightened developers can consider that a maximum amount of quality information will reassure the community about a project that it genuinely believes is unlikely to do environmental harm.

All these cases show either that a better decision was ultimately taken, or, at the very least, that the community were (or in the last case, are likely to be) much more accepting of it. British people are prepared to tolerate adversity, but not when they perceive the law to be flouted. Despite the weight of the planning legislation, EIA has done a great deal to bring the rule of real law to the planning system.

EIA is not, of course, the only route to attacking unlawful decisions. For example, *Young* involved the failure of a Council to consider properly the implications of English Heritage’s policy on enabling development.¹⁸ *Wilkinson* involved multiple failures by the Council in consideration of a planning application to remove a restrictive condition.¹⁹ The claimants in both cases were good examples of individuals doing something about what they saw as cases of councils behaving in an unacceptable way.

How do matters fare in court?

It is one thing to sympathise with someone concerned about a decision, and advise that the decision was arguably unlawful. It is quite another to do more than cling to a hope that a judge will be persuaded that one has right on one’s side.

There has, however, been an important shift in the courts’ approach. There has been a move towards certainty and away from discretion. Two cases in particular have helped towards that end.

In *Berkeley*, the House of Lords held that there was little discretion even in domestic law not to quash if a decision had not been made lawfully.²⁰ In European cases that discretion was virtually non-existent. That case again involved lack of EIA, which the defendant Secretary of State alleged was there in all but name. However, aside from what Lord Hoffmann characterised as a “paperchase” to work out the

¹⁶ Following a procedural dispute about the timing of service of the claim form, the Secretary of State’s decision was quashed by order of Turner J.: *Shirley v. Secretary of State for the Environment and others*, February 19, 2002.

¹⁷ *R. v. Waveney District Council, ex p. Bell and others* [2001] Env. L.R. 465.

¹⁸ *Young v. Oxford City Council* [2001] EWHC Admin 905 permission refused at first instance by Ouseley J.; [2002] EWCA Civ 990 permission granted and appeal allowed by the Court of Appeal.

¹⁹ *Wilkinson v. Rossendale Borough Council* [2002] EWHC 1204.

²⁰ *Berkeley v. Secretary of State for the Environment* [2001] 2 A.C. 603.

information that an EIA might have provided, the community was in any event less in a position to make representations about the proposed development (of Fulham Football Ground) than they would have been had they had an environmental statement to work with. As in all lack-of-EIA cases, they were not only prejudiced for lack of easily accessible baseline information about the scheme, but also for lack of the publicity that attaches to EIA applications. In *Berkeley* the High Court²¹ had taken the view that EIA was in any event not required. The Court of Appeal²² regarded that as wrong, but felt able to exercise its discretion against Lady Berkeley as the objectives of the directive had been met and that an environmental statement would have made no difference to the decision. However the House of Lords struck a robust note for the rule of law to the effect that if there are procedures in place they are there for a purpose and must be adhered to.

Shirley, referred to above, was a typical example of local objectors trying to make sense of a public inquiry who would have been far better off had they known that EIA was involved and been able to participate against that backdrop. Yet it would have been an extremely dangerous case to fight in the face of potential costs claims from the developer,²³ without the confidence that, if illegality was found, the court would have to quash. Those implicit threats were eventually subject to critical judicial comment, but they were real enough at the time.

The second major area where discretion has been curbed in the interests of certainty relates to time limits for bringing judicial review proceedings. The decision of the House of Lords in *Burkett* is welcomed by local authorities, developers, and third parties alike.²⁴ Previous conflicting authorities and *dicta* tended to require proceedings to be lodged at the earliest possible stage (usually taken to be the date of the resolution of a planning committee to grant permission). The House of Lords has now ruled that, although one may challenge some earlier decision if one wants to, time runs from the date of the actual grant of permission. In the circumstances of the case (where proceedings had been issued before planning permission had been granted) there was no need to decide whether they had been issued promptly. The House of Lords however steered away from deciding what promptness meant, and whether, indeed, it infringed principles of certainty in European law. However, the House strongly suggested that it might indeed thus infringe, and that there would need to be good reason not to allow a challenge within the three month time limit.

Defendants have already tried hard to find holes in the *Burkett* approach. In *Young*, the Court of Appeal rejected, on the facts, claims that a claim brought just within three months was nevertheless not prompt.²⁵ It recognised the issue but, as Potter L.J. put it, the question whether to allow a claim brought within three months but not promptly would have to await decision in another factual matrix. In *Goodman* opponents tried, but unsuccessfully in that respect, to circumvent the three month time limit by claiming that the EIA screening opinion is a separate matter from planning permission and time for challenging it runs from the date of the screening decision rather than the grant of planning permission.²⁶

Similar unsuccessful attempts were made in *Lebus* but rejected by Sullivan J.²⁷ *Lebus*, which involved a series of decisions in relation to a planning application for an egg production unit, exemplified how

²¹ Tucker J., March 26, 1997, unreported.

²² [1998] 3 P.L.R. 39.

²³ Despite the comments below about costs not normally being awarded to developers, in the particular circumstances of the case the danger was a real one.

²⁴ *R. v. LB Hammersmith and Fulham, ex p. Burkett* [2002] 1 W.L.R. 1593

²⁵ *Young v. Oxford City Council* [2002] EWCA Civ 990.

²⁶ *Goodman v. LB Lewisham* [2002] EWHC Admin 1769.

²⁷ *Lebus and others v. South Cambridgeshire DC* (Sullivan J., August 27, 2002).

sensible it is for the law to allow challengers to wait until permission had been granted before taking legal proceedings. Much time was, in effect, wasted trying to deal with successive resolutions of the planning authority, and consequent disputes about the promptness of action taken.

As Sedley L.J. put it in his permission decision on *Kides*, the *Burkett* decision has introduced a “new chapter on time bars in public law”.²⁸ It has (or anyway soon will—the attitude of the courts in *Young*, *Goodman*, and *Lebus* suggest death-throes) resulted in the end of a tiresome industry of arguments about time limits. They added expense, uncertainty, and (often) great inequity both for third party challengers and for developers. They took up a lot of court time. No one will mourn the passing of the era of arguments about time rather than substance.

The influence of Europe

EIA emanates from the European Union,²⁹ so obviously many cases would not, of themselves, have happened without Europe there. However, principles more directly expressed in European law, such as certainty and effectiveness, must have had an influence. This rings true in the *Berkeley* and *Burkett* judgments.³⁰ In *Shirley*, Turner J. decided that the UK's European obligations overrode a short delay in serving a claim form and evidence upon the defendants and third parties.³¹ But the courts still seem unenthusiastic. The first-instance decision in *Huddleston* accommodated a government position seeking to avoid EIA in relation to old mining permissions,³² when the House of Lords had already decided in *Brown* and *Cartwright* that EIA was required in such circumstances.³³

Similarly in *Homer*, the issue relates to the issue of authorisation for projects controlled by the Environment Agency, not involving a material change of use,³⁴ but where there may be significant environmental effects. There is a clear *lacuna* in the implementation of the EIA directive. The High Court has chosen to refer the matter to the European Court of Justice for a preliminary ruling. It is surprising that the High Court is not prepared to grapple with the issue itself. The reference prolongs a serious environmental problem in the locality of the cement works in question.

In *Barker*, despite signals from the European Commission that EIA may be appropriate, indeed required, at the reserved matters stage of the planning permission process, the High Court³⁵ and Court of Appeal³⁶ arguably did not address what Europe requires in a teleological way. (At the time of writing, a petition for leave is pending with the House of Lords.) The London CPRE's pursuit of the need for EIA in relation to the *White City* development was roundly rejected by the courts.³⁷ It is ironical that in relation to the underlying issue in all three cases, the European Commission has sent reasoned opinions to the UK Government.³⁸

Moses related to a major extension of the runway at East Midlands Airport. The misery of residents of Kegworth was to be made even worse. EIA had not been carried out. While there may have been

²⁸ *Kides v. South Cambridgeshire DC* [2002] EWCA Civ 926.

²⁹ Directive 85/337/EEC as amended by Directive 97/11/EC.

³⁰ *Supra*.

³¹ *Supra*.

³² *R. v. Durham County Council, ex p. Huddleston* [2000] Env. L.R. 463 (Richards J.). Reversed in the Court of Appeal: [2000] Env. L.R. 488.

³³ *R. v. North Yorkshire County Council, ex p. Brown and Cartwright* [2000] 1 A.C. 297

³⁴ And thus bringing in the planning system and enabling the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999.

³⁵ [2001] Env. L.R. 1.

³⁶ [2001] EWCA Civ 1766.

³⁷ See *infra*.

³⁸ European Commission Press Releases of August 1, 2001 and July 19, 2002.

respectable reasons for rejecting the claim on the basis of time limitation, the courts did not address the important substantive issues before considering whether extension of time was justified in all the circumstances. The Court of Appeal decided that the claim was simply out of time and the application for permission was refused.³⁹ It also did not consider that the effect of EIA would not necessarily have been to prejudice an already-nearly-built runway extension, but rather to consider appropriate controls on its use. Although the Court of Appeal disagreed with the approach, the High Court avoided both the question of time and substantive EIA issues altogether, and rejected the claim on the basis of standing.⁴⁰

Marson is a similarly sorry tale involving the courts, including the House of Lords,⁴¹ rejecting an application for permission to apply for judicial review of the Secretary of State’s failure to give reasons for not requiring EIA of a project. The implication is that the courts regarded the proposition that reasons were required as unarguable. In the light of ECJ authority on reasons,⁴² it is hard to conceive how this can have been *unarguable*. Yet Mr Marson could get no further, his prospective rights to EIA were denied—and he ended up paying costs to the Secretary of State.

The port car park that was once Lappel Bank on the Isle of Sheppey is a monument to unfortunate approaches by the domestic courts to European matters. In the first round of litigation in 1990, the decision by Simon Brown J. (as he was) in 1990⁴³ would have been different in the light of subsequent authority in *Kraaijveld*, *Berkeley*, and *Burkett*. The claim would have been in time, the question of whether EIA was required or not was not discretionary, and there would have been no discretion about refusing relief. In the second round of litigation, which related to the remaining half of the bank and started in 1993, the RSPB took the view (and probably would not have embarked on the legal process otherwise) that the law about whether economic considerations could be taken into account in the selection of Special Protection Areas for birds under the Birds Directive⁴⁴ had in effect already been decided by the European Court of Justice.⁴⁵ In the Court of Appeal, Hoffmann L.J., as he then was, agreed.⁴⁶ Yet the majority decided otherwise, the RSPB were unable to give an undertaking in damages to secure an injunction pending a reference to the ECJ from the House of Lords, and by the time its position had been endorsed there (in forthright terms),⁴⁷ the mudflat had been reclaimed and cars parked.

Costs

One’s own costs seldom come between progressing a case and not. Ways can usually be found of budgeting and raising money. The availability of conditional fees helps. Insurance (though more importantly in relation to liability for the other side’s costs) is sometimes obtainable, though the case must be good and the premium is always hefty. The attraction of insurance if it is obtainable is that the premium is now generally recoverable from the paying party as part of the costs of the litigation.

Legal aid can often be crucial—not so much in relation to own solicitors’ costs, or even counsel’s fees, but in providing costs protection. Undoubtedly the biggest problem with costs is the “black hole” of

³⁹ *R. v. North West Leicestershire DC, ex p. Moses* [2000] Env. L.R. 443

⁴⁰ Scott Baker J., September 14, 1999.

⁴¹ There was a window of opportunity in late 1999 to argue that judicial review applications could be renewed to the House of Lords. The Appeals Committee did not give reasons for their decision but made it clear that the petition was rejected for merits rather than jurisdictional reasons: *R. v. S/S Environment, ex p. Marson*, March 23, 1998, Jowitt J., HC; [1998] Env. L.R. 761, CA

⁴² For example, *Sodemare v. Regione Lombardia* Case C-7-/95; *UNECTEF v. Heylens and others* [1987] E.C.R. 4097

⁴³ *R. v. Swale BC, ex p. RSPB* [1990] 1 P.L.R. 6.

⁴⁴ Directive 79/409/EEC.

⁴⁵ In the *Leybucht Dykes* [1991] E.C.R. 883 and *Santona Marshes* [1993] E.C.R. 4221 cases.

⁴⁶ CA, August 18, 1994.

⁴⁷ Case C-44/95; July 11, 1996.

liability to the other side's costs if you fail. Fortunately, the Treasury Solicitor and local authority costs tend to be manageable. There was concern in *Berkeley* when the High Court ordered two sets of costs.⁴⁸ However, the Court of Appeal put that to rights, making it clear that the decision in *Bolton*⁴⁹ meant that a developer must have a separate legal interest to expect costs.⁵⁰

One cannot be entirely sure, however. In the *White City* case, developers were awarded a second set of costs at a permission hearing (which the Court of its own motion had adjourned on paper to a hearing) on the basis that there had been a "half-hearted" attempt to adjourn the hearing (to await relevant decisions of the House of Lords) and on the rationale that "those who live by the sword must also perish by it" (*per* Ward L.J.).⁵¹ The costs award was particularly devastating because those payable to the developer came to nearly six times those incurred by the local planning authority.

At an earlier stage of the *White City* litigation, a pre-emptive costs order had been sought (*i.e.* expressly to limit the exposure of the claimants to a fixed sum). The court rejected that application.⁵² The criteria for making such orders as set out in the *Child Poverty Action Group* case⁵³ are unfairly and unrealistically strict. They leave private citizens with far too great exposure and thus effectively restrict access to justice.

So far as legal aid is concerned, there is understandably concern that less off individuals are used to fighting battles that others might in theory help with. The reality is that, without the costs protection that legal aid provides, many cases would not come to court. It is surely right that the points of law exposed by *Burkett*, *Barker*, and *Horner*, for example, are capable of being litigated. It is in the public interest. The points involved represent a greater interest than those of the personal interests of the litigants. It is wrong that individuals have to put their property at risk for that public service. Similarly, a case about redevelopment of the old market at Spitalfields, east London, never got to court. However it would not have got off the ground had it not been for legal aid. Yet the case exposed a planning permission for a huge development so obviously unlawful that the defendant local authority chose not to fight it. It is right that there be costs protection, although it is unfortunate and arbitrary that it only applies in publicly funded cases. Underwriting ones own costs, at least for some solicitors, is a secondary concern, and many barristers would say the same.

“Watch this space”

There are still cases awaiting final decisions. It will be interesting eventually to know the outcome of *Barker* (if the House of Lords takes it) about reserved matters; of *Horner* about the relationship between pollution control, planning, and EIA; *Adlard*⁵⁴ and related proceedings recently instituted in *Shannon*⁵⁵ in relation to third party participation in planning decisions; and even (though itself not in the planning field) *Hatton* in relation to government obligations towards Article 8 rights and provision of effective remedies.⁵⁶ Perhaps the balance will indeed eventually be drawn so that third party interests are properly protected.

⁴⁸ Tucker J., *supra*.

⁴⁹ *Bolton MBC v. Secretary of State for the Environment* [1995] 1 W.L.R. 1176.

⁵⁰ Unreported, December 2, 1998.

⁵¹ *R. v. LB Hammersmith and Fulham, ex p. Trustees of CPRE London Branch* (June 12, 2000, CA). Proceedings also reported at [2000] Env. L.R. 532 (permission), at 565 (High Court substantive); at 549 (renewed permission, CA).

⁵² October 26, 1999, Richards J. (unreported).

⁵³ Dyson J., February 6, 1998.

⁵⁴ *Adlard and others v. Secretary of State for the Environment Transport and Regions* [2002] EWHC Admin 7, HC; [2002] EWCA Civ 735, CA.

⁵⁵ *Shannon v. LB Hammersmith and Fulham*.

⁵⁶ Application 36022/97. Decision of the European Court of Human Rights, Third Section October 2, 2002 now referred to the Grand Chamber; hearing scheduled for November 13, 2002.

Proposals for reform

The Government's proposals for the planning system are unlikely to reduce dissatisfaction and perceptions of unfairness. Even if people are grateful for improved community participation in planning, they will still be stuck without a fundamental right of appeal against decisions that affect their or the community's interests. It is hard to understand how the Government can justify the right for applicants for planning permission to appeal, when third parties, often legitimately concerned about *their* property interests, or the interests of the environment, cannot. Arguments about inefficiency cannot overcome inequity. The proposed (and laudable) requirement to give reasons for granting planning permissions will go a long way to removing the likelihood of inappropriate challenges. People will understand why a planning authority has made a decision they disagree with, and, thus informed, will often be likely to accept it. But when such reasons do not add up, it must be more desirable to enable a third party right of appeal than have the matter go to litigation.

So on the one hand the right to reasons may well substantially reduce third party concerns about planning decisions, but the absence of third party rights of appeal will simply lead to litigation. Other countries manage it—why shouldn't this one? Increased consultation and reliance on plan-making is no substitute.

Conclusion

This paper is a broad brush, and deliberately does not go into the details of individual cases. It aims to show that the litigation playing field seems more level than it until recently was, with the courts (especially with the influence of House of Lords rulings) appreciating the interests of third parties. However progress is slow and third parties have to proceed on the basis that disappointments are to be expected. But at least one can fairly conclude that third party litigation has had a positive effect in improving procedural fairness. Fair and lawful decision-making leads to better decisions. That means better planning, which should be an uncontroversial aspiration.

The legal services commission has funding criteria to prevent abuse of the legal aid system where others are in practice in a position to contribute to costs.