Legal Update

Richard Drabble Q.C.

Introduction

1. The purpose of this paper is to outline at least some of the main case-law developments that have taken place over the last 12 months or so. As such, it is difficult to give it a unifying theme. Case-law developments are always in part a response to legislative and policy change; in part a continuation and further development of earlier case-law; and, in part, accident—responses to questions posed by people who in practice needed an answer badly enough to pay for it.

2. I start, however, with an area where there have been consistent developments in each of these speeches given by my predecessors over the last few years—European Union law. Because of its basic nature, case-law contributes a lot as national systems come to terms with the requirements of often skeletal Directives; and as the European Court of Justice (''ECJ'') explains those Directives.

Environmental impact assessment

3. Almost inevitably, the first area I need to discuss is the law on environmental impact assessment. (''EIA''). There have been important developments.

4. First, the ECJ in *Barker* (Case C-290/03) has confirmed the fears (or hopes) of those who thought about the earlier decision in *Wells* (C-201/02; [2004] E.C.R. I-723). It confirms that where an error has led to an outline planning permission being given without thought to whether EIA was needed, the error *must* be rectified before the final approval of reserved matters. The logic is that the EU meaning of ''development consent'' encompasses both stages of a two-stage consent such as the outline procedure in UK national law; so that if a need for EIA emerges before the development is fully authorised, that need must be met.

5. In parallel with the decision in *Barker,* the ECJ has ruled in infraction proceedings (*Commission v UK*; Case C-508/03) that the UK regulations on EIA did not correctly transpose Directive 85/837 as amended. This straightforward ruling that the problem has its origins in inadequate transposition is probably a good thing in the interests of legal certainty, since the regulations will presumably have to spell out the consequences of a lack of EIA at the outline stage. One of the aspects of *Wells* that is not at all clear is to what extent the national authorities are obliged to revoke existing outline permissions when breach of the EIA requirements is later discovered. Proper transposition should enable this problem to be addressed. Interim advice given by the Department for Communities and Local Government (''DCLG'') to Chief Planning Officers on June 30, 2006 appears to accept the need for new regulations but is silent as to their scope. The reason that the advice is described as ''interim'' is said to be that the House of Lords still has to consider the ECJ judgment.

6. Despite the apparent finality of the position following these judgments, there remains a sense of unease about the *Wells* and *Barker* litigation. Neither decision is a decision of the full court, and the reasoning in both is brief. From first principles there remains a powerful argument to the effect that the original EIA regulations did correctly transpose the Directive because:

(i) the obligation to assess and tie the outline planning permission, by condition, to that which had been assessed (as spelt out in *Tew* [2000] Env. L.R. 1 and *Milne* [2001] Env.

[2006] J.P.L., DECEMBER © SWEET & MAXWELL AND CONTRIBUTORS

L.R. 22), did ensure, as the Directive required, that if lawful procedures were followed no development consent could be issued without EIA in appropriate cases.

(ii) The classic formulation of the obligation on Member States to rectify errors of law is that they must provide an effective remedy at least as good as that provided for breach of equivalent domestic provisions. On the face of it, judicial review proceedings brought within three months of the grant of the outline would meet this requirement; and neither *Wells* nor *Barker* adequately explain why this is not so.

7. The next decision of the ECJ that needs a mention is that of the Court in infraction proceedings concerning certificates of lawful development (Case C-98/04). Here, the Commission had alleged that the system of granting certificates under s.191 of the Town and Country Planning Act 1990 where a development was immune from enforcement because the time limit for enforcement had expired failed adequately to transpose the EIA Directive. The alleged reason was that the certificate rendered lawful development that had been carried out without an EIA even though EIA would have been required if an application for planning permission had been made. In other words, the argument was that the s.191 procedure illegitimately bypassed EIA requirements.

8. The complaint failed, because the Court took the view that the certificate was simply a logical consequence of the existence of time-limits for enforcement. It (the certificate) did no more than state in formal terms what was true independently of the certificate—namely that the development was immune from enforcement even though it did not have a ''development consent''. The Court observed:

> ''The Commission has not put forward any complaints concerning the actual existence of time-limits for the taking of enforcement action against development which does not comply with the applicable rules, although the introduction of LDC's is by its very nature inseparable from the position laying down such rules of limitation. Pursuant to s191 of the TCPA, an LDC is issued, in particular, when no enforcement action may then be taken against the uses or operations concerned, whether because they do not involve development or require planning permission or because the time for enforcement action has expired.
>
> Consequently, the present action for failure to fulfil obligations, since it puts before the Court only one aspect of a legal mechanism composed of two inseparable parts, does not satisfy the requirements of coherence and precision referred to above [for infraction proceedings].''

9. That passage leaves open at least the possibility that a complaint based on the time-limits themselves, rather than the s.191 procedure, would succeed. The Advocate General's opinion had emphatically supported the Commission's argument. If in subsequent proceedings the ECJ were to rule on the basis expressly accepted by the Advocate General, to the effect that the passage of time cannot legitimise a breach of the EIA Directive, there would be considerable consequences. It may be that the terms of the judgment of the Court itself reduces this risk, and shows that members of the Court were unhappy with the reasoning of the Advocate General (''AG''), but the inevitable uncertainty will be unwelcome to many.

The habitats directive and regulations.

10. The impact of the Habitats Regulations, and the consequent need to adopt a very strict procedure in relation to development which might have an adverse impact on the integrity of a protected site—in particular a Special Protection Area (''SPA''). under the Birds Directive—has become

apparent to more planners than might have been expected because of the proximity of major housing growth areas to SPA's in the South East. It is beyond the scope of this talk to give any help as to the way forward in this complex area. I simply record two important case-law developments within, roughly, the 12 month time-frame.

11. The first is the decision of Ouseley J. in *Humber Sea Terminal Ltd v Secretary of State for Transport and ABP Ltd* [2006] J.P.L. 221. This addressed the vexed question of how the decision of the ECJ in *Commission v France* [2000] C-374/98 (known as *Basses Corbieres*) was to be applied in a UK context. In *Basses Corbieres*, the French Government had failed (at the date when transposition of the Birds Directive was required) to include within a Special Protection Area an obviously important site. The site had still not been included at the time of the relevant application for development. The ECJ held that in those circumstances the French authorities could not apply the weaker (though still very strong) test for allowing development to proceed created by the application to the Birds Directive of Art.6 of the Habitats Directive, but instead had to apply the approach of the un-amended Birds Directive. The fundamental reasoning was that:

> ''Articles 6(2) to (4) of the Habitats Directive do not apply to areas which have not been classified as SPA's but which should have been so classified.''

12. The importance of Ouseley J.'s judgment is that it makes clear that this concept, of an area ''which should have been so classified'' necessarily involved an allegation of breach of community law. If the Member State concerned had been lawfully attempting to implement the Directive and no breach of community law was or could be alleged, the concept did not apply. Accordingly, if what had happened was that the ecological value of the site had changed or emerged over time; was being assessed by the appropriate national authorities; and in the meantime the precautionary approach of Planning Policy Guidance (''PPG'') 9 was being applied, there was no breach of community law and the principle in *Basses Corbieres* did not apply. Since Humber Sea Terminal, on the facts, did not allege a breach of community law, their complaint was bound to fail. On the facts, the UK authorities had been reacting appropriately to emerging ecological evidence and the precautionary approach taken by PPG9 ensured that the objectives of community law were delivered.

13. This result must surely be welcomed. It would have been highly ironic if the precautionary approach to candidate sites taken by the UK had had the effect of bringing the *Basses Corbieres* doctrine into play. This would have been the case if the identification of a site as a potential SPA in accordance with PPG9 because of new ecological evidence was itself sufficient to demonstrate that the site ''should have been'' classified as an SPA.

14. The other Habitats Directive case that needs to be mentioned, and which will indeed have an impact in relation to the major housing growth areas I mentioned earlier, is another infraction case—*Commission v UK* (Case C-6/04). The issue in this case was whether it was necessary to consider the need for an ''appropriate assessment'', in the formal sense meant by Art.6 of the Habitats Directive, when making a development plan (or, now, LDF or LDD) which might impact on an EU protected area. The relevant part of Art.6 reads:

> ''Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's nature conservation objectives.''

15. Accordingly the issue for the ECJ was whether a development plan was a ''plan'' for the purposes of this text. It held that it was. Once again, the reasoning is terse. The UK government had in the course of the ECJ proceedings conceded that a development plan fell within the phrase ''plan or project'', but maintained that as the plan did not itself permit the development it could not have a significant effect on the SPA. As planning permission was required whatever the development plan said, and as the Habitats Regulations did require appropriate assessment in the circumstances spelt out in Art.6, the objectives of community law were delivered. The Court rejected this argument, referring in particular to what was, at the time of the infraction complaint, s.54A of Town and Country Planning Act 1990. The entire reasoning of the Court is set out in paras 55 and 56, which read:

> ''As the Commission has rightly pointed out, section 54A. . ..., which requires applications for planning permission to be determined in the light of the relevant land use plans, necessarily means that those plans may have a considerable influence on development decisions and, as a result, on the sites concerned.
>
> It thus follows from the foregoing that, as a result of the failure to make land use plans subject to appropriate assessment of their implications for SACs, Article 6(3) and 6(4) of the Habitats Directive has not been transposed sufficiently clearly and precisely into United Kingdom law and, therefore, the action brought by the Commission must be held to be well founded in this regard.''

Discretion and EU law

16. My final comments on the EU dimension are concerned with the topic of discretion—that is to say, the appropriate approach of the UK court when it has to decide whether to grant or withhold a remedy where a breach of EU law has been demonstrated.

17. As is well known, the House of Lords in *Berkeley v Secretary of State* [2001] 2 A.C. 603 adopted a restrictive approach to this, quashing the planning permission that had been granted without any consideration of whether EIA was appropriate and rejecting the Secretary of State's argument that relief should be refused in the exercise of discretion since all the environmental information that would have been part of an EIA had in any event found its way into the public domain through the planning process.

18. There have been some signs recently that there may be limits to the *Berkeley* approach. *Berkeley* was an extreme case: there had been no EIA at all with the result that a mandatory step required by the EIA Directive was completely missing. As Carnwath L.J. pointed out in *Bown v Secretary of State* [2003] 2 P. & C.R. 7, by the time the case reached the House of Lords the developer was not represented and no argument was put as to whether the public interest in proceeding with the development should be given weight—at that stage, the ''project''—the particular planning permission for redevelopment of the Fulham stadium—had been abandoned. It is clear from Carnwath L.J.'s judgment, which was endorsed by Phillips M.R. and Tuckey L.J., that there is a feeling amongst some members of the Court of Appeal that the apparent rigours of the *Berkeley* approach may need to be diluted, particularly where an EU challenge to a major project is made late in the process. Carnwath L.J. said (in paras 46 and 47):

> ''In that case, a planning permission (for redevelopment of the Fulham football ground) had been granted without an environmental assessment as required under European law. The Court of Appeal, in the exercise of its discretion, refused to quash the decision, because on the facts

an environmental assessment would have made no difference. The House of Lords allowed the appeal and quashed the permission. It was held that, in the absence of at least substantial compliance, the court should not exercise its discretion to validate retrospectively a breach of the Directive, even if satisfied that the result would have been the same. Mr McCracken relies in particular on Lord Bingham's comments on the narrowness of the court's discretion, in the Community context, to refuse a remedy where a breach of community law is established (p 608C-G). He suggests that to rule out a challenge to the effect of the 1994 PPG9 would be subject to the same objection.

This is not a suitable case to consider in detail the implications of that decision. There was no issue there about delay in bringing proceedings. Certainly, it gives no support for a challenge more than eight years after the decision complained of. We would add one comment. The speeches need to be read in context. Lord Bingham emphasised the very narrow basis on which the case was argued in the House (p 607F-608A). The developer was not represented in the House, and there was no reference to any evidence of actual prejudice to his or any other interests. Care is needed in applying the principles there decided to other circumstances, such as cases where as here there is clear evidence of a pressing public need for the scheme which is under attack.''

19. In a recent case, (*R. (on the application of Rockware Ltd) v Chester CC and Quinn Glass Ltd* [2006] EWCA Civ 99), the Court of Appeal suspended the effect of a quashing order to allow Quinn Glass to continue with and receive a decision on a new application for an IPPC (''Integrated Pollution Control'') permit, despite the fact that the IPPC permit that was allowed to remain in place temporarily had been granted in breach of community law (as the Court had held). Buxton L.J. explained:

''However Mr Gordon QC, for Rockware, sought to persuade us that our obligations under EU law prevented us from deferring the operation of the quashing order. He referred to *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603 and in particular the speeches at page 609 of Lord Bingham of Cornhill and page 616 of Lord Hoffmann. The issue in that case was whether a planning permission should be upheld, notwithstanding substantial non-compliance with the requirement of the environmental assessment Directive and the relevant national implementing Regulations. Their Lordships emphasised the narrowness of the court's discretion in such a case, referring inter alia to the duty laid on member states by article 10 of the EC Treaty and the obligation of national courts to ensure that Community rights are fully and effectively enforced. For those reasons they held that the planning permission had to be quashed.

In the present case, submitted Mr Gordon, the Directive requires members states to take the necessary measures to ensure that no new installation is operated ''without a permit issued in accordance with this Directive'', article 4, and the court would be acting in breach of its Community obligations by allowing the installation to continue to operate if the permit had been found not to have been issued in accordance with the Directive. Indeed, Mr Gordon did not shrink from the contention that HHJ Gilbart had been in breach of his Community obligations even by staying his order pending an appeal to this court.

I am prepared to proceed on the basis that Mr Gordon's submissions would have force if the court were contemplating a refusal of the quashing order altogether, so as to allow Quinn to operate the installation indefinitely despite the errors in the decision to grant the permit. That

> is far from this case. The court is concerned only with the deferment for a short period of the effect of the quashing order that it has upheld and where, as I have already said, the relevant objective of the Directive is substantially achieved by the expected completion within a matter of weeks of the installation of the secondary abatement plant.
>
> In those circumstances, the limited exercise of discretion that is contemplated as to the timing of relief cannot in my view be said to be incompatible with the court's obligations under Community law. The speeches in the House of Lords in Berkeley plainly did not exclude entirely and as a matter of principle any such limited exercise of this court's discretion provided the court proceeds, as this court does, with proper respect for its obligations under Community law.''

Thus, formally, the view flagged up by Carnwath L.J. remains open. At some stage the issue will need to be resolved.

Village greens—the oxford case

20. 2006 has seen another major step in the evolution of the law on the registration of village greens, first, with the decision of the House of Lords in the case of *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25 and, second, with the enactment of the Commons Act 2006.

21. The position that has evolved would, it might be thought, be startling to anyone involved in the enactment of the Commons Registration Act 1965 at the time. The combined effect of the decision of the House of Lords in *R. v Oxfordshire CC, Ex p. Sunningwell Parish Council* [2000] 1 A.C. 335; the amendment of s.22 of the 1965 Act by the Countryside and Rights of Way Act 2000; the decision in *Oxfordshire* itself, and the provisions of s.15 of the Commons Act 2006 has been to remove many of the obstacles to registration of land as a town or village green. Opinions will no doubt be divided between those who welcome this development and those who do not. Judicial opinion has obviously sharply divided; with Lord Scott making a powerful dissenting speech in *Oxfordshire* and with the policy approaches of Carnwath L.J. in the Court of Appeal in that case being radically different (and much more sceptical about the desirability of the process) from that of the majority in the Lords, particularly Lord Hoffmann.

22. The principal development concerns the requirements for registering a town or village green on the basis of twenty years user for lawful sports or pastimes by local inhabitants. Looking simply at the 1965 Act and the contemporary parliamentary material, there was to my mind a powerful argument for saying that it was never intended that greens could acquire a status capable of registration by reference to user taking place after commencement. True it is that s.13 provided for land to be registered as a green, and the register to be amended accordingly, where land ''becomes common land or a town or village green''; but, as Carnwath L.J. observed in *Oxfordshire* that provision could have been explained ''by the long established statutory provisions for the substitution of replacement greens under Inclosure Acts or compulsory purchase law.'' It was his view that there was no need to infer an intention to create a new category of modern greens established merely by use; and he pointed out that in 1975, all three members of the Court of Appeal in the *New Windsor* case ([1975] Ch 380) thought it natural to read the 20 year provision as referring to 20 years ''before the passing of the Act''. (para.52).

23. But such a view had, long before the Oxfordshire litigation itself, become impossible. In *Sunningwell* the House of Lords accepted that the possibility of a green becoming such on the basis

of new user was accepted without question, and taken as one of the reasons for the provision for amendment of the register in s.13. The 2000 amendment implicitly accepted this approach.

24. Before coming to the *Oxfordshire* decision itself, it is convenient to consider the effect of the 2000 amendment with which it was directly concerned. It provided a fresh definition of what had become known as ''class c'' greens:

> ''Land falls within this subsection if it is land on which for not less than twenty years a significant number of the inhabitants of any locality; or of any neighbourhood within any locality, have indulged in lawful sports and pastimes as of right, and either - (a) continue to do so; or (b) have ceased to do for not more than such period as may be prescribed, or determined in accordance with prescribed provisions.''

No regulations were made to give effect to (b).

25. Accordingly, by the time the amendment was in place, both *Sunningwell* and the amendment had entrenched the concept of a modern village green; the requirement that the use be as of right had been explained as being met objectively, not by reference to any subjective state of mind by those who were using the land; and the need for a connection with a locality had taken the statutory form set out in the amendment.

26. In the *Oxfordshire* litigation, two of the issues that were raised were the definition of the 20 year period; and whether registration under the 1965 Act itself conferred rights on the inhabitants; and, if so, what rights. As it transpired, the dissent of Lord Scott was concerned with a yet more fundamental issue, to which I shall turn in a moment.

27. On the first of the above issues, the Court of appeal had held that the user had to continue up to registration. The Court was aware that this would mean that the landowner, alerted by the application for registration, could effectively defeat the application by taking steps to end the user as of right. The Court was plainly motivated by surprise at the overall direction of travel taken since 1965. Carnwath L.J. observed at para.94:

> ''I agree that a consequence of my interpretation is that the owner may be able to take action to bring the qualifying use to an end, and that this is likely to substantially limit the opportunities for registration. . .However, I do not accept that this reading is so obviously unreasonable or contrary to the legislative intention that it must be rejected. As I have said, the history of the 1965 Act gives no support for a broad interpretation of the provisions for new greens. Indeed, a restrictive view can help to provide an answer to possible human rights objections. If the landowner fails to assert his rights, then it may be legitimate to infer that the land has been dedicated or abandoned to recreational use. . ..Parliament gave the Secretary of State the power to limit the landowner's option by prescribing a different time limit.''

28. He went on to observe that as the power to fix a time period by a regulation made by the Secretary of State had not been used, he saw no reason to supply a different and earlier date than the date of registration.

29. This approach to the first issue was firmly rejected by the House of Lords. Lord Hoffmann agreed with Sullivan J. in an earlier case (*Cheltenham Builders* [2004] J.P.L. 975) that the construction would ''make nonsense of the Act''. He described the approach as an ''attempt to re-fight the battle of Sunningwell Green''. Accordingly, the 20 year period meant 20 years before the date of registration.

30. Lord Hoffmann, and the rest of the majority of the House, also supplied an answer to the question of whether registration created rights. The answer was yes. As he put it (para.50):

> ''In my view, the rational construction of s10 is that land registered as a town or village green can be used generally for sports and pastimes. It seems to me that Parliament must have thought that if the land had to be kept available for one form of recreation, it would not matter a great deal whether it was used for others as well. This would be in accordance with the common law, under which proof of a custom to play one kind of game gave rise to a right to use the land for other games: see the Sunningwell case at 357 A-C.''

31. The end result, confirmed with less than enthusiasm by Lord Rogers (see para.115) and Lord Walker (para.128), was that registration as a village green is possible on the basis of 20 years user before application; that registration confers on local inhabitants the right to use for sports and pastimes generally; and that the rights of the owner to use his land is limited to users compatible with the rights of inhabitants. Lords Walker and Rogers were attracted by the terms of Lord Scott's dissent, but felt it impossible to agree with it in the light of the recent legislative history. They were comforted by the fact that legislation was at the time before Parliament, so that there was a ready opportunity to reverse the result if it was not acceptable to Parliament. As we know, that opportunity was not taken.

32. Lord Scott's dissent was on a fundamental basis, not canvassed in argument in the Lords. It related to the nature of a ''town or village green'', in the sense of the nature of the physical characteristics of the site. He thought the reference was to something like the traditional picture of a village green. He thought that the Parliamentary intention in 1965 could not have been to enable rights to be created for all sports over land on which inhabitants enjoyed by custom *any* right, however limited. As he put it in paras 76 and 77:

> ''It follows that, in my opinion, that, pre the 1965 Act, the fact that a piece of land was subject to a customary right of recreation would not, by itself, have sufficed to allow the land to be described for legal purposes as a town or village green, eg for the purposes of the Victorian statutes. Something more would have been needed. There is. . ..no authority on the point but I am unable to accept that a purposive construction of the expression ''town or village green'' in the Victorian statutes would have led to 160 acre Stockbridge Common Down, or a mountainside down which people skied in winter snow, or a dense wood in which people wandered to pick bluebells or search for mushrooms or for other dalliance, being so categorised.
>
> In my opinion, the 'something more' would have been a quality in the land in question that would have accorded with the normal understanding of the nature of a town or village green, namely, an area of land, consisting mainly of grass, either in or in reasonable proximity to a town or village and suitable for use by the local inhabitants for normal recreational activities.''

33. My personal view is that Lord Scott's dissent has great force; but once again, like the meaning of the phrase ''as of right'', legislative history has overtaken it. The view of Lord Hoffmann, reluctantly endorsed by the majority, has prevailed.

34. Is this the end of the debate? I venture a short comment to the effect that the answer may be no. In *Oxfordshire* an argument was advanced based on Art.1, Protocol 1 of the European Convention on Human Rights; the argument being (by analogy with *Pye* [2005] 3 E.G.L.R. 1), to the effect that when a ''green'' was registered in this kind of circumstance there was a ''deprivation'' of property

that could not be justified. On the facts, the argument might have been perceived as difficult, since the landowner was a local authority which by definition could not be a ''victim'' capable of complaining directly of a breach of the Human Rights Act.

35. In a case where a private landowner effectively loses all rights to use his property except in a way which is consistent with local recreational use (and in particular loses all hope or development value) there may be an argument that this does anount to a control of the ''use'' of property that cannot be justified. The possibility is brushed aside in a single paragraph by Lord Hoffmann (para.59). He simply assumes that preservation of open space is in itself a sufficient justification. But is this so? The system of registration of village greens, as it now stands, is highly anomalous. There are wide powers to control development, and to preserve the availability of existing open space use, in the planning system. Local authorities have compulsory purchase powers. It is against this background that the control of use without compensation where the landowner inadvertently sleeps on his rights needs to be justified. It is at least possible that the ECtHR in Strasbourg will at some stage have the last say.

Interpretation of policies—who decides?

36. This section of the speech concentrates on the issue of whether it is for the court or the decision-maker to decide on the true interpretation of planning policies. The most recent talk I heard on this topic before writing this part of the paper expressed the view that it was now well settled that it was for the decision-maker, not the Courts, to determine the correct interpretation of policy, citing decisions such as *R v Derbyshire CC, Ex p. Woods* [1997] J.P.L. 958.

37. That orthodoxy probably should be taken as entrenched in today's circumstances. But planners and planning lawyers would do well to bear in mind that to public lawyers working in other fields the relative freedom given to the decision-maker to interpret policy would come as something of a surprise. In the immigration field, for example, there is a lot of pressure from practitioners and to some extent the courts to ensure that the courts retain what one commentator has described as ''the commanding heights of the vocabulary''. One can understand that in the rather different practical circumstances of immigration, where the number of individual decisions is measured in the hundreds of thousands, an even greater need exists than is present in planning to ensure consistency of decision-making amongst very large numbers of primary decision-makers.

38. However, the gap between the approaches in different areas of law may be smaller than appears at first sight. In a case which took place before my time horizon (*R. (on the application of Cranage Parish Council) v Secretary of State* [2004] EWHC 2949 (Admin) Davies J., after some initial hesitation, followed the orthodox approach. However, he issued the following salutary warning (para.50):

> ''All the same, I would, speaking for myself, sound a note of caution. The courts must be wary of an approach whereby decision makers can live in the planning world of Humpty Dumpty, making a particular planning policy mean whatever the decision maker decides that it should mean. I make the following observations.
>
> (1) First, it is plain that *Ex p. Woods* does not sanction such an approach. As Brooke L.J. makes clear, the court will need to assess, as a preliminary matter, whether the interpretation propounded by the decision maker is one that the words used are in law properly capable of bearing.
> (2) Second, and following on from that, if, in any particular planning case, one meaning is, on any viewpoint, highly probable but a counter meaning is advanced on behalf of

> the decision maker which can at best justify no epithet better than ''tenuous'', that, I apprehend, is not likely in the ordinary case to avail the decision maker; and in such a context the parties should not be surprised if the courts choose to adopt a robust approach. As stated by Mr George Bartlett Q.C. (sitting as a deputy judge of the High Court) in *Virgin Cinema Properties Ltd v Secretary of State for the Environment* [1998] P.L.C.R. 1 at p.8, there may be instances, on a point of interpretation in a relevant planning context, where the ambit of reasonableness is narrow or even nil.
>
> (3) Third, there may be instances where, even if the words of the policy taken on their own prima facie support the interpretation of the decision maker, consideration of the purpose and underlying objective of the policy in question may show that such linguistic interpretation simply will not accurately represent the true policy: see *Patter and Harris v Secretary of State for Environment, Transport and the Regions* [2000] 79 P. & C.R. 214 as an example of that.
>
> (4) Fourth, decision makers will of course need to bear in mind that the adoption of a particular interpretation of a policy in a development plan in a particular case will make it difficult, at all events in the absence of convincing explanation, for them to adopt a different interpretation in another case without attracting a challenge on the ground of arbitrariness or collateral purpose or the like.''

39. There is obviously a good deal of force in this warning. Put shortly, the legal fact that it is for the decision-maker to interpret policy cannot be a licence for a different interpretation to be selected to suit the decision-maker's ambitions in each individual case.

40. It also seems to me that some of the apparent difference of approach might arise from a distinctly old-fashioned stress on the range of judgment as to what is ''reasonable'' conferred by the *Wednesbury* doctrine. Treasury Counsel used regularly to describe the range as extraordinarily wide—to be ''unreasonable'' the Secretary of State must have ''taken leave of his senses'' and so on. But these wide references are no longer appropriate. As Lord Cooke has pointed out, there should be no need for the double reference in the formulation in *Wednesbury* itself—''so unreasonable that no reasonable authority. . .''. So the issue should be a simple one: is the planning authority's interpretation of policy ''reasonable''.

41. Firmly within my time-scale, the issues of ''who interprets policy'' and the scope of a common scheme of delegation came together in *R. (on the application of Springhall) v Richmond on Thames LBC* [2006] J.P.L. 970. In that case, a power to make a delegated decision was expressed in the following terms:

> ''applications are in accordance with any supplementary planning guidance and third parties expressing a view do not indicate a wish to address the Planning Committee.''

42. The importance of the case derives from the fact that the planning proposal in question could have been viewed in two ways. It was for the demolition of a building of townscape merit within a conservation area. The relevant Supplementary Planning Guidance (''SPG'') allowed for such a demolition if conservation of the building was not ''possible''. On the facts, conservation would in one sense have been possible, but only at greater expense and with a less satisfactory result. The Chief Executive held that the demolition had the support of the SPG (as opposed to being a justified departure from it) and himself granted permission. The Court of Appeal held that he was right to do so. Importantly, they held that the issue of whether the proposal was consistent with the SPG was

exactly the same issue as to whether it fell within the scope of the delegated powers. Any suggestion (which in argument was based on the earlier decision in *R. (on the application of Carlton-Conway) v Harrow LBC* [2002] EWCA Civ 927 that there was a lower threshold for the latter was wrong.

Bias

43. During the year, a developing line of cases involving a strict approach to the issues of bias in planning decisions was continued, with the decision of Lindsay J. in *Condron v National Assembly of Wales* [2005] EWHC 3007 (Admin). He quashed a decision of the National Assembly to grant planning permission on the grounds of apparent bias. The apparent bias arose from a conversation between an objector and a member of the Planning Decision Committee which is reported in these terms in the judgment:

> "When I first approached him I spoke in English and I asked him whether I could have a word about the scheme. He asked me whether I was from Merthyr Tydfil and I replied that I was. He did not appear that interested in talking to me. I asked whether he would be willing to continue the conversation in Welsh and he then became more responsive.
>
> It was a reasonably brief conversation but during this I explained that he had two little boys and asked him whether he would be concerned about the proposal being developed close to their school. He agreed that it was a concern but concluded in English, that he was "going to go with the Inspector's Report."

44. To this observer, the decision appears harsh. Earlier cases on bias in a local authority context are full of comments to the effect that one would positively expect local politicians to approach a development project with *some* preconceptions; in a very real sense that is their job. What mattered was whether their mind was completely closed. Predetermination was a difficult thing to prove, as the decision by Sedley J. in *R. v Secretary of State, Ex p. Kirkstall Valley Campaign Ltd* [1996] 3 All E.R. 304 demonstrated. On the approach of Sedley J., there was a difference between proving bias on the grounds of, say, a financial interest in the outcome, and bias in the sense of predetermination. In the former, it was only necessary to prove an appearance of bias in the sense then required by *R. v Gough* [1993] A.C. 646, the then leading authority. In the latter, it was necessary to prove a closed mind.

45. That distinction seems to have disappeared in the decisions in *Cranage* and the earlier decision of Richards J. in *Georgiou v Enfield LBC* [2004] L.G.R. 497. In *Georgiou,* Richards J. thought that the reformulation of the apparent bias test in *Porter and Magill* [2002] 2 A.C. 357 rendered obsolete the old approach exemplified by *Kirkstall Valley*. But it is difficult to see why this should be the case. The change from the test for apparent bias in *R. v Gough* to that in *Porter* is a highly nuanced change (necessary to bring domestic law into line with the Strasbourg cases on Art.6). It does not justify abandoning the basis approach that one cannot—and should not—expect the same degree of impartiality (in the sense of an absence of predisposition) on the part of elected decision-makers making policy decisions as one does from judges.

Conclusion

46. In this paper, I have sought to concentrate on some of the case-law developments which are likely to continue to shape the development of the law in years to come. The implications of the EIA Directives and the Habitats Directive will continue to be worked out. I doubt that the saga of

village greens has yet been concluded. The present law on bias in administrative planning decisions does not seem to me to be satisfactory.

47. There have of course been other cases. Practitioners should be aware of the decision of the Court of Appeal in *Swale v First Secretary of State v Lee* [2005] EWCA Civ 1568 on the application of the time-limit for enforcement where there is an allegation that a building has been in continuous residential use for the limitation period. The decision of Sullivan J on the required characteristics for designation as a National Park was important on its facts. And there have been a long line of cases concerning use of land by gypsies, Article 8 of the Convention; injunctions and self help remedies and the like. These cases would easily merit a paper in their own right. But I hope that that the cases I have discussed will illuminate some of the issues with which we will all have to grapple in the next 12 months.