Legal Update

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Introduction

There can be little doubt that the most gripping litigation since last we met in Oxford has been the titanic struggle between Cala Homes on the one hand and the Secretary of State on the other. At no time in my career have I experienced the excitement with which the first *Cala* decision by Sales J. was greeted (in my case by an Inspector at a CPO inquiry), followed by the repeated requests by clients from both the public and the private sector for advice along the lines of "what do we do now" following the second *Cala* litigation.

Whether one was rooting for Eric Pickles or Peter Village QC in the struggle, and given the near obsessive interest in the progress of the Localism Bill, it is all too easy to forget that far more has been happening since September 2010.

This paper has been structured to draw attention to what the author considers to be amongst the more important cases[1] that have been reported over that period, but in doing so the paper seeks to draw out themes which can be discerned from the pronouncements of the Courts.

For the non-lawyer[2] it is, however, worth drawing attention to a few cautions, before delving into a detailed exposition of a large number of cases.

First, when considering the way in which a case is decided it is important to distinguish between what part of a judgment is part of the Court's essential reasoning (the ratio descedendi) and which parts are observations which, whilst authoritative, are not essential for the determination of the case and therefore not binding (obiter dicta).[3]

Secondly, whilst the principle is rarely articulated there is an underlying policy of benevolent construction when the Administrative Court scrutinises the decisions of local planning authorities ("LPAs") or Inspectors. In effect merely raising an intellectually persuasive argument is not going to be enough—there is a need to point to something which has gone seriously wrong in the decision making. Thus very often when reading cases one has to bear carefully in mind the context within which the Court's comments are being made—i.e. in the context of either the finding of such a "knock out blow" or of rejecting an intellectually plausible argument.

Thirdly, very often determinations of the Court are heavily fact sensitive and it is often sensible, particularly when engaged in an exercise of this nature, to be slow to make generalised observations gleaned from a case whose outcome may be heavily influenced by the factual context within which the decision is taken.[4]

Fourthly, those cases which come to Court only present a partial window on the very many issues that a practitioner has to be alive to in order to ensure that up to date advice is given. That is not a point about making sure that one keeps up to date in an environment where nationally important guidance is now promulgated from sources as diverse as the budget, "Dear Chief Planning Officers Letters", and what the Minister for Decentralisation may have told the latest Select Committee. Rather it is to draw attention to

[1] With the cut off date of the end of July 2011.

[2] Whilst this paper has been written as a legal update it has consciously sought not to be an academic legal text and it is hoped by the author to be accessible to all of the professions engaged in the planning system.

[3] I doubt that I am alone as a practitioner having to patiently explain to a client that just because a Judge has said something does not mean that is binding upon a subsequent decision maker.

[4] It is also perhaps worth pointing out that the doctrine of precendent (Stare Decisis) does not apply to the facts of a case.

the fact that the cases which tend to be litigated represent only a small part of the spectrum of issues that a planning practitioner will provide advice upon, and usually highly unusual and unrepresentative cases at that.

Finally, one point which is worthy of note, particularly for a provincial practitioner, is the number of interesting and important cases in the Administrative Court which are being heard outside of the capitals of London and Cardiff. Thus one can say from a position of pride that the Court Service and legal profession have already embraced the "Localism agenda" with the regionalisation of the Administrative Court.

However, for reasons that are not entirely clear—the dissemination of approved judgments in my experience seems to be slower from provincial Administrative Court decisions than those based in London. Accordingly the final word of caution is therefore that when researching a point—be aware that it may already have been determined in Manchester.

Notable Legislation

Traditionally the Legal Update paper at the Oxford Conference deals solely with case law. However, it seems incomplete not to mention that Parliament has not been idle in the field of planning law over the last year.

Thus this year has seen the advent of the Localism Bill, which is dealt with by other speakers, which will not only introduce a number of important changes to our already complex system, but which has already raised the expectations of those seeking local power considerably, resulting in a pleasant upturn in work as councillors feel ever more empowered to make locally based decisions.

It has also seen the first act of consolidation of secondary legislation for a number of years in this field, by the introduction of the Town and Country Planning (Development Management Procedure) (England) Order 2010 (SI 2010/2184) which has introduced few changes but which has forced the profession to ditch the term "development control" from its lexicon and replace it with the far friendlier "development management". Indeed since many of the recent pronouncements from Government now speak about "local plans"[5] then one must assume that we are in for yet another change in the parlour game of "what shall we call our development plan this week". At least "local plan" has some currency in the wider population unlike the sea of acronyms that the 2004 reforms introduced into the profession.

Other notable legislation includes the Flood and Water Management Act 2010, which received Royal Assent in April 2010. Amongst other measures two are of particular interest to the planning systems. The Act, defines "lead local flood authorities" (Unitary Authorities or County Councils) and imposes upon them a duty to implement a local flood risk management strategy. The authorities must keep a register of "features" which are likely to have a significant effect on flood risk in their area. The register is to include information about ownership and state of repair etc. For those interested in drainage law it is probably the most exciting development in legislation in 200 years since the early Public Health Acts. For the rest of us—it is probably enough to know that it makes this area of the law far more straightforward when we eventually have to look something up.

Following designation, a person may not alter, remove or replace a designated structure or feature without the consent of the responsible authority (normally the Environment Agency or the lead local flood authority). Since floods are, by their nature, relatively extreme events, it is therefore entirely possible that seemingly innocuous structures or landscape features may attain considerable significance, and now protection, in the context of flood risk management.

[5] See for example the draft statement on the presumption in favour of sustainable development.

Secondly there is now to be a separate approval process for drainage systems before construction works which affect drainage commence. That system of approval transcends the requirement to secure planning permission. However, an approved drainage system *must* then be adopted by the approving authority. In discharging their responsibility the approving authority must promote sustainable drainage.

Other notable legislation includes the Energy Act 2010 which facilitates carbon capture technologies. As well as the Equality Act 2010 which imposes a duty upon a public body in the discharge of its functions to have regard to the s.1(1) duty to treat persons equally irrespective of any individual characteristics.

As for notable secondary legislation, aside from the Development Management Order the "stand out" change is the Building and Approved Inspectors (Amendment) Regulations 2010 (S.I. 2010/719) (explained in Circular 03/2010) which imposes substantially more onerous thermal insulation obligations upon developers. For the last year developers have been able to take advantage of the transitional arrangements, however as of October 2011, the provisions will bite without relief.

Finally, we now have the consolidation of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (SI 2011/1824) which brings into a single document the various piecemeal amendments that have taken place to their 1999 predecessor. I personally think that bets ought to be taken as to how long it will be before they are declared not to have properly transposed the parent Directive into domestic law.

There have of course been many other changes in the legislative planning framework over the last year (especially if you happen to practice in Northern Ireland), however the remainder of this paper will concentrate upon case law.

European Issues

Demolition

Save Britain's Heritage v SOS [2011] EWCA 334

Facts

In the summer of 2009 I acted for Lancaster CC in a thoroughly surreal call-in inquiry (back in the days when we held call-in inquiries!). The proposal involved a massive retail-led redevelopment of the centre of Lancaster. The proposed development was opposed by both English Heritage and Save Britain's Heritage on the grounds that it would have an adverse effect upon a conservation area, the setting of listed buildings as well as resulting in the loss of unlisted buildings close to, but outside the designated conservation area, particularly those associated with the Mitchell's Brewery site. The inquiry was odd because the Applicant for permission decided that they didn't wish to attend the inquiry to defend the resolution to approve and, despite having undertaken most of the detailed discussions with the English Heritage and the local highway authority etc, they concluded that they wished to allow the local planning authority to defend its own decision. Ultimately the application was refused by the Secretary of State.

The point of interest, however, related to the Brewery buildings. Applications to list the buildings had been made and rejected twice in the past and the buildings lay outside of the conservation area which was acknowledged to be long overdue for review. Accordingly, following the closure of the inquiry the owners decided that it was in their interests to demolish the buildings. English Heritage sought to encourage the Council to serve a building preservation notice but declined to indemnify the Council were any compensation obligation to arise. The Applicant's formally indicated to the Council that they wished to demolish one of the buildings and sought a view as to whether or not prior notification was required.

A raft of points were raised in the subsequent application for judicial review of the decision of the Council that prior notification under the demolition directive was not required (the Town and Country Planning (Demolition- Description of Buildings) Direction 1995. More interestingly was the concurrent claim against the Secretary of State that because demolition of a building could take place without the requirement for screening (as to whether it was "EIA development") that there had been a failure to transpose the relevant EU Directive, since demolition could comprise an urban development project. It sought declarations that: the Town and Country Planning (Demolition-Description of Buildings) Direction 1995 paragraphs 2(1)(a)–(d) was unlawful; that demolition of buildings was in principle capable of constituting a project falling within Annex II to Directive 85/337; and that therefore Lancaster had unlawfully reached a decision allowing for the demolition of a redundant brewery without a screening opinion under the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999.

On the facts of the case the point became academic when the building was, in fact, listed[6] and regrettably, at that point, my clients decided that there was no further need for my involvement in the case. Nonetheless the case proceeded as a battle between Save and the Secretary of State as to whether demolition could amount to an urban project for the purposes of the Directive.

Decision

Before the Administrative Court in Manchester, the claim failed. However, shortly before the case came before the Court of Appeal, a judgment was issued in a very similar case involving infraction proceedings against the Irish Republic for failing to transpose the same Directive in relation to demolition. The claim succeeded (*European Commission v Ireland* (C-50/09) Unreported March 3, 2011 ECJ) and therefore Save's job in the Court of Appeal became significantly more straightforward.

The Court of Appeal followed the Irish judgment despite a spirited rear guard action by the Secretary of State. The Court held that the Directive had to be interpreted in a "purposive" way. Thus, if works were capable of having significant effects on the environment, then the definition of "project" in art.1(2) of the Directive should, if possible, be construed so as to include, rather than exclude, such works. Applying that approach to the first limb of the definition in art.1(2), then demolition works fell within the general term "the execution of other schemes". The effect was therefore that the Town and Country Planning (Demolition of Description of Buildings) Direction 1995 which takes demolition (other than dwelling houses) outside the scope of "development" was declared to be unlawful.

The effect of the judgment is of considerable significance, in the past demolition in very many cases escaped the scrutiny of the planning system altogether, whereas now there is a need to "screen" any significant demolition to determine whether it comprises "EIA development", if it does then there will be need to consider the effect before a "development consent" can be granted.

In practical terms that means that if one is dealing with a project which involves any significant demolition then a screening opinion is needed from the LPA and if that is positive (i.e. an Environmental Statement is required) then an application for planning permission is needed. That would include circumstances where overall the demolition comprises a small element in a development (e.g. demolition of a barn to create an access).

[6] March 2010, after a report by Inspectors that the Brewery as a whole did not warrant listing, but that the Malthouse at its centre did. Since the Malthouse is at the core of the complex it amounts to a de facto protection of the whole, as it effectively scuppers any redevelopment of the buildings.

The Aftermath

The same campaigning organisation was not slow to recognise that this issue provided it with a significant weapon in its fight to hamper the demolition of buildings which it perceived to be of importance but which local planning authorities wished to allow to be redeveloped.

The demolition of significant numbers of late Victorian and Edwardian housing in areas of perceived housing market failure has understandably generated controversy as part of the Housing Market Renewal Initiative ("HMRI") which was dear to the heart of the last Government. In 2010 Gateshead MBC indicated its intention to demolish 118 houses as part of the HMRI. Mindful of the Lancaster case an injunction was sought and granted. In November 2010 Ouseley J., discharged that injunction (*Save Britain's Heritage v Gateshead* [2010] EWHC 2919), following not dissimilar reasoning to Pelling J. at first instance in the Lancaster case.

However, following the Court of Appeal decision the High Court were once again asked to rule that the demolition was unlawful. By the time that the matter came before the High Court 38 of the homes were still standing. The Secretary of State agreed to the quashing of the decision (taken by the previous Government) to revoke the screening directions that he had initially issued that the demolitions comprised EIA development. However, the Council declined to settle the case in the light of Save Lancaster but instead demolished the remaining homes. Following a contested hearing, Mr Justice Collins declared that the demolition had been unlawful.

…of Bats and Buses

R. (on the application of Morge) v Hampshire CC [2011] UKSC 2

Facts

As a student at University in the mid 1980s I had the dubious privilege of listening to lecturer after lecturer who were signed up members of the Lord Denning fan club, which I have always assumed to be the provisional wing of the Tufty Club. Lord Denning's trademark was to give his judgments in short snappy sentences which summarised the totality of the factual background in a few choice words. That same trait appears to now afflict the Court of Appeal, for this case was wonderfully summed up by Ward LJ. as involving: "bats, badgers, Beeching and busways".

Less prosaically the factual circumstances are that Mrs Morge sought to challenge the decision of Hampshire CC to grant planning permission for a new guided busway along the track of a disused railway—which was presumably closed by Mr Beeching.

Along the line of the busway, somewhat inevitably were a number of trees, the minority of which were habituated by bats, a European protected species. The line of the busway itself was used by the bats for foraging. Accordingly both the construction of the busway and its operation could, it was argued, potentially impact on the foraging habitat.

The central allegation in the case was the extent to which in granting planning permission, Hampshire CC had failed to comply with art.of the EU Habitats Directive[7], art.12(1)(b) of which provides that:

> "Member states take all requisite measures to establish a strict protection for the [protected species] in their natural range, prohibiting … (b) deliberate disturbance of the species particularly during periods of breeding, rearing, hibernation and migration …"

[7] Council Directive 92/43/EEC on the Conservation of natural habitats and of wild fauna and flora

Held

As a practitioner there are a number of cases which stand out as helping one's task in persuading one's clients that the law is not altogether crackers. This is one such case. The Supreme Court held that art.12 concerned "species" and not habitats and concerned disturbance to "species" and not individual "specimens of species".

Thus in judging whether there is disturbance to species, there is no general approach that ought to be taken, rather the circumstances must be considered on a case-by-case and species-by-species basis.

The Supreme Court, however, overturned the approach of the Court of Appeal, and concluded that disturbance under art.12 is not limited to examination of impact on the "conservation status of the species at population level". Had the position remained unaltered then challenges to the Administrative Court alleging impacts upon a protected species would themselves have become increasingly rare and endangered. Fortunately for the legal profession the Supreme Court chose to provide something of a fudge which still leaves arguments open in each case. However, the landscape for such challenges in the future has now become much more hostile.

Thus the Supreme Court concluded that a disturbance under art.(1)(B) could arise where impact was greater than "de minimis" but not as great as would adversely affect the "conservation of the species at population level". The effect is therefore to create a debateable middle ground to be determined on a case-by-case basis.

The conclusions of the majority of the Supreme Court, is that a planning authority may lawfully grant planning permission except where it has determined:

(i) that the proposed development would be likely to offend art.(1); and
(ii) that it would not be likely to be licensed by Natural England.

Discussion

The decision of the Court of Appeal in *Morge* provided real optimism that what LPAs most craved was being provided—i.e. certainty. That is to say the provision of an easily applied test which would not be breached save in the most exceptional of circumstances and which would prevent those opposed to a development for ecologically unrelated reasons from raising this issue as an excuse to derail an otherwise acceptable development.

The decision of the Supreme Court provides a greater scope for argument, but nonetheless still provides materially less scope than previously existed. To that extent, therefore, it is to be welcomed.

Screening Opinions

Curiously this has been an area of considerable litigation over the last year. In addition to the *Save Britain's Heritage* litigation there have been a number of other cases which have explored the process by which a screening opinion is or is not determined. All of the following cases are fact specific, but all demonstrate that a request for screening opinion is not a mere formality, but requires both careful consideration and a reasoned response.

R. (on the application of Friends of Basildon Golf Course) v Basildon DC [2010] EWCA Civ 1432

Amongst the more curious bedfellows of the last 20 years have been the developers of golf courses and the waste management industry. In an ideal (or perhaps rational) world it would be the waste industry that would provide the materials to allow the dreams of the golf course designer to materialise. In fact all too often it has been the waste industry that has viewed permission to reform the landscape of large area of open countryside as an opportunity to deposit large quantities of inert waste without having the

inconvenience of paying landfill tax, and to then contend that the result is a golf course. One of the author's career highlights was to advise upon a footpath obstruction case and walk 10m above the line of a footpath on the site of an embryonic "golf course" west of Chester alongside a part buried electricity pylon.

In the instant case proposals for the golf course involved substantial landform changes which were proposed to be achieved by the imaginative expedient of the importation of inert waste for "construction and landscaping".

A screening opinion was sought but held to be grossly inadequate. First, it was based upon a substantial misapprehension as to the amount of inert waste which was proposed to be imported; and secondly, the LPA had failed to ensure that it had adequate information on ecological impacts before giving a screening opinion.

In allowing the appeal Pill LJ. Observed:

> "What is clear is that the decision taken in a screening opinion must be carefully and conscientiously considered and it must be based on information which is sufficient."

In this case the Court concluded that there was an unexplained aversion on the part of the LPA to finding that an EIA was needed, which Pill LJ. characterised as a "psychological barrier". Which was presumably intended to be as damning as it sounds! Thus he observed:

> "it may not always be in the interests of the parties or the public if a tough stance against requiring an EIA is readily adopted."

With hindsight the LPA plainly erred in its stance, and the case is heavily fact specific. However, it does illustrate (consistent with the author's experience) the seeming reluctance on the part of many case officers to decide that development is indeed EIA development.

R. (on the application of Cooperative Group Limited) v Northumberland CC [2010] EWHC 373 (Admin)

This case involved a proposal for substantial retail and residential development. At the outset the developers sought a negative screening opinion. That elicited a very short letter which stated development "unlikely to give rise to significant environmental impact … issues of traffic, ecology, noise … will be fully addressed in the planning application".

Unsurprisingly the Court held that the information provided was tantamount to an assertion that there would not be any significant environmental effects and that the studies to demonstrate this would be provided in due course. A clear case where the cart had been put well before the horse.

That approach was held to be contrary to *R. (on the application of Lebus) v South Cambridgeshire DC* [2003] Env. L.R. 17, which requires that a LPA has to engage meaningfully with the issue of whether or not there is significant environmental impact, which requires a proper engagement with the issues.[8]

Mageean v Secretary of State for Communities and Local Government [2010] EWHC 2652 (Admin)

It is to be hoped that the factual context of this case is unlikely to ever be repeated. A screening opinion was sought and a negative opinion issued six years before an Inspector granted planning permission. In the meantime a world heritage site was designated and one of the issues was the effect upon the WHS. Incredibly no-one then thought fit to reconsider whether that original opinion remained valid.

[8] In *R. (on the application of Lebus) V South Cambridgeshire DC* [2002] EWHC 2009 Admin, Sullivan J. extended the reasoning in Berkeley to a case where (unlike Berkeley) an authority had considered whether a development was EIA development but had failed to record its decision in writing. Although there were other legal errors involved, the overarching flaw was a "complete failure" to appreciate that the screening opinion "had to be carried out and recorded and made publicly available in a formal manner in accordance with the [1999] Regulations". There had been "simply no written statement of [the relevant officer's] opinion as to whether this development is EIA development". This amounted to "a complete failure to comply with the requirements of Regulation 7" and was "not simply a case where there has been a screening opinion, and whether due to some inadvertence there has been a failure to place it on the register in accordance with Regulation 20". Rather, "the Council has simply failed to recognise that screening decisions cannot be taken informally" (§§52–53).

One of the grounds of challenge was that the Inspector ought to have remitted the matter back to the Secretary of State to consider whether or not the negative screening opinion remained valid, given the changed circumstances.

The Court held that a screening opinion continues indefinitely unless subsequently cancelled or varied by the Secretary of State. Thus there was an obligation upon the Inspector to refer a negative screening opinion back to the Secretary of State if there is a change in circumstances which "could" rather than "would" lead to a different decision being taken on the screening opinion.

The Court held that such a change of circumstances had occurred in this case, and that the matter ought to have been referred back for a fresh opinion.

More surprisingly, in this case the Inspector had concluded that there was no effect upon the WHS as part of his decision. However, the planning permission was quashed on the basis of failure to reconsider or even request reconsideration of the screening opinion. The issue of a development consent and a screening opinion were considered to be two different procedures and the illegality of one affected the legality of the other.

Wye Valley Action Group v Herefordshire CC [2011] EWCA Civ 20[9]

An application for planning permission was made which proposed the rotation of polytunnels within an existing agricultural unit. The site of the proposal was within an Area of Outstanding Natural Beauty and close to other designated landscape and cultural areas.

A negative screening opinion was issued to the effect that the proposal was not a "project for the use of uncultivated land or semi-natural areas for intensive agriculture" and therefore was not within Sch.2 of the EIA Regulations;

A challenge to the grant of permission was then made on grounds of failure to properly apply the EIA Regulations. The challenge was successful before the High Court, but then came before the Court of Appeal.

The Court of Appeal held that in the light of the case of *R. (on the application of Goodman) v Lewisham LBC* [2003] EWCA Civ 140, screening was a two stage test:

(i) the LPA has to decide whether or not development fell within Sch.1 or 2 of the EIA Regulations. That determination is an issue of law over which the Court will intervene; it is not a matter for a *Wednesbury* assessment;

(ii) if the project is potentially within the ambit of those developments to which the Regulations have application then it is necessary to determine whether the development gives rise to significant environmental effects—that decision is only challengeable on rationality grounds.

Thus on the first issue the Court will only intervene where the interpretation as to the meaning of the class of development is wrong in law. The Court of Appeal noted that the descriptions in Sch.2 are imprecise and are capable of a range of interpretations in particular circumstances. Provided that the LPA understood the meaning of the description and that its application of meaning to a set of facts was 'reasonable', then the decision would be unimpeachable.

In this case the Court found that the LPA had understood the meaning of the term "semi-natural" and had properly applied it to: (a) the application site itself rather than the wider area; and (b) to the facts, namely, managed farmland already in due arable/turf production. The grant of permission was accordingly upheld.

[9] See Also: *R. (on the application of Warley) (Claimant) v Wealden DC (Defendant) and Wadhurst Tennis Club (Interested Party)* [2011] EWHC 2083 (Admin)

Discussion

It is rare indeed that one finds the subtitle "common sense" within a judgment, and yet in the case of *R. (on the application of Ardagh Glass Ltd) v Chester CC* [2010] EWCA Civ 172, that is precisely how Sullivan L.J. prefixes his discussion about whether or not one could in principle have retrospective consent for what might otherwise be EIA development. Whilst Sullivan L.J. would never use such injudicious language in the Ardagh Glass case one, can almost feel him wishing to say "don't be daft" in response to the intellectually respectable submissions of counsel which he concluded flew in the face of "common sense".

Such implicit exasperation has never been too far from Sullivan L.J.'s judicial pen. In an oft quoted passage in the case of *R. (on the application of Blewett) v Derbyshire CC* [2004] Env. L.R. 29, at [41] Sullivan J. (as he then was) articulated what many practitioners in the field had been longing to hear:

> "In an imperfect world it is an unrealistic counsel of perfection to expect that an applicant's environmental statement will always contain the 'full information' about the environmental impact of a project. The Regulations are not based upon such an unrealistic expectation. They recognise that an environmental statement may well be deficient, and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting 'environmental information' provides the local planning authority with as full a picture as possible. There will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations…but they are likely to be few and far between."

The recent series of cases involving screening opinions seems to the author to be a continuation of the Court's 'common sense' approach to the whole issue of claims based upon alleged deficiencies in EIA procedure. Thus in some instances there will be an error sufficiently gross that will warrant the conclusions of illegality (e.g. the *Wye Valley* and the *Northumberland* cases), but in most cases the Court will apply its usual benevolent eye to the approach of a LPA.

Development Plans

The Old System—the Cala Saga

If you have practiced in the field of planning in England in the last year and not considered the ramifications of *Cala (No.1)* and *Cala (No.2)* before reading this paper then it may be time to dust off your professional indemnity insurance. Both cases have been widely discussed and both established fairly straightforward principles. In essence in *Cala (No.1)* the decision of the Secretary of State to revoke Regional Spatial Strategies ("RSS") was held to be unlawful (so RSS has not been revoked) and in *Cala (No.2)* it was held to be a potentially material consideration that the Secretary of State intends to revoke RSS (though weight will be for the decision maker).

The subtext is that the approach of the Coalition Government to this "flagship" issue has been little short of a debacle, which has left decision makers in an absurdly unnecessary quandary—see for example the observations of the Core Strategy Inspector at the Central Lancashire Examination in Public in July 2011.

In a little more detail, there have been two cases on the issue of the policy of the Government to revoke RSS. The first, *R. (on the application of Cala Homes (South) Ltd) v Secretary of State for Communities and Local Government* [2010] EWHC 2866 (Admin) quashed the decision of the Secretary of State to

"revoke" RS; and the second, *R. (on the application of Cala Homes (South) Ltd) v Secretary of State for Communities and Local Government* [2011] EWCA Civ 639, upheld the guidance of the Secretary of State that proposed abolition of RS through Localism Bill is a material consideration in planning decisions.

The issue of RSS revocation was first raised as the formal policy of the Conservative Party in August 2009, when Caroline Spelman MP, Shadow Secretary of State for CLG issued a statement indicating that RSS and regional planning generally would be abolished together with Regional Planning Boards and Regional Leaders' Boards.

In early 2010, prior to the General Election the Tories published Open Source Planning which indicated that Labour policy was anti-democratic and had not delivered. The Infrastructure Planning Commission in particular was singled out for approbation because decisions about major infrastructure were taken out of the hands of elected politicians. It is telling that the document does not mention the word "localism". It is also interesting to note that the term 'Open Source' was consciously taken from computer programming and means a programming code for which intellectual property rights have not been asserted and which is open to all programmers to use. The presumed analogy being that the planning system ought not to be a tool solely for learned and articulate professionals but for everyone.

The Executive Summary of Open Source Planning observed the problem with the current system:

> "… our present planning system is almost wholly negative and adversarial. It creates bureaucratic barriers rather than enabling communities to formulate a positive vision of their future development. Many local politicians and council officers have tried to make the current system work, but as power over planning has been taken away by Labour from locally elected representatives and given to bureaucrats in Whitehall and in regional government, so the mistrust of the planning system has grown along with an increase in protest and in the use of judicial review. It has not just been the planning system which has been a victim of this. Tragically, the very idea that development can benefit a community has also become a casualty."

The aim of the Tory's reforms was said to be:

> "The creation of an Open Source planning system means that local people in each neighbourhood … will be able to specify what kind of development and use of land they want to see in their area. This will lead to a fundamental and long overdue rebalancing of power, away from the centre and back into the hands of local people. Whole layers of bureaucracy, delay and centralised micro-management will disappear as planning shifts away from being an issue principally for insiders" to one where communities take the lead in shaping their own surroundings."

The Open Source Planning 'Green Paper' was unequivocally endorsed in the Coalition's grand policy statement: "Our Programme for Government", with the vision statement:

> "The Government believes that it is time for a fundamental shift of power from Westminster to people. We will promote decentralisation and democratic engagement, and we will end the era of top-down government by giving new powers to local councils, communities, neighbourhoods and individuals."

More particularly the Programme stated that the intentions were:

- devolution of power to implement Open Source Planning;
- abolish regional planning;
- prevent garden grabbing;
- Abolish the IPC and replace it with a fast track consents structure for major infrastructure;
- publish and present to Parliament a simple and consolidated national planning framework; and

- maintain green belts, Sites of Special Scientific Interest and similar environmental protection policy.

Again no mention of Localism.

The Government amended PPS3 almost immediately to remove the minimum densities that John Prescott introduced a decade ago, as well as amending the approach to the development of existing curtilages:

> "§41 … There is no presumption that land that is previously-developed is necessarily suitable for housing development nor that the whole of the curtilage should be developed."

The re-issued PPS3 mirrored its predecessor in all other respects however. Including the guidance on the requirement of maintaining a five-year supply of housing land. What it did not do was to alter in any way the guidance that RSS was the first port of call when assessing housing land requirement. Had someone in DCLG decided to add a paragraph to the effect that until the legislation was formally amended that weight should be given to the intention of Government to abolish RSS and that the fixing of housing requirements in RSS was to be treated as "out of date", one suspects that the whole debacle could have been avoided.

Similarly it would have been open to the Secretary of State to exercise the power that he purported to exercise in July 2010 in the Local Democracy, Economic Development and Construction Act 2009 s.79(6) to amend RSSs by removing housing figures following a brief strategic environmental appraisal. A not dissimilar approach was used in PPS3 which, when it was introduced in December 2007, had a crude transitional arrangement that part of the policy would not come into force until the following April

As it was Mr Pickles chose instead to issue a statement on July 6, 2010 which purported to exercise power to "revoke" RSS having previously issued a statement on May 27, 2010 which said that the intention of Government to revoke RSS was to be treated as a material consideration in planning decisions. Presumably at the time there was thought in DCLG that a distinction could be drawn between a power to "revoke" and actual "abolition", because the July statement stated:

> "The *abolition* of Regional Strategies *will require legislation* in the "Localism Bill" which we are introducing this session. However, given the clear coalition commitment, it is important to avoid a period of uncertainty over planning policy, until the legislation is enacted. *So I am revoking Regional Strategies today* in order to give clarity to builders, developers and planners."

Sales J.'s judgment in the Administrative Court is a model of concise reasoning, and gives two reasons why he considers that the Secretary of State's decision to "revoke RSS" was unlawful. Given his conclusions on the first reason, then the second reason is probably to be treated as obiter dicta, however it was this that seemingly has prevented Government from simply exercising the power to amend RSS and to revise at the sweep of the Ministerial pen by removing housing figures from RSS, the day after Sales J.'s decision.

The first reason of Sales J. was that the power in the Local Democracy, Economic Development and Construction Act 2009 s.79(6) to amend RS,[10] did not extend to withdrawing the entire RS in every region, when the Act itself stated expressly that there shall be an RS for each Region. Such an approach would subvert the clear intention of Parliament, and was therefore beyond the more limited powers devolved to the Secretary of State.

[10] RS and RSS are used in this section inter-changeably even though they are not. RSS—"Regional Spatial Strategy"—is the term which pre-dates RS—"Regional Strategy". The former being established under the 2004 Planning And Compulsory Purchase Act, the latter comprising an amalgam of RSS and the Regional Economic Strategy under the 2009 Act with an elevated role for the Regional Development Agencies. In fact no "RS" was ever created other than by a process of rebranding, and the purported revocation related to what had been referred to as RSS by all up to that point.

The second reason was that if there was a requirement as a matter of European Law to produce a Strategic Environmental Appraisal ("SEA") for the preparation of plans, including strategic plans, then it was illogical that there should not also be such an appraisal for the withdrawal of an entire tier of the development plan system.

The first reason of the court has the clear ring of logic to it. The second somewhat jars with those of us who have experienced some SEA's as little more than a glorified "box ticking exercise"—read by few, understood by fewer and valued by none. It is however clear authority for the proposition that if a Development Plan Document ("DPD") has been adopted then it is not open to a LPA, without more ado to simply withdraw that DPD, say if there has been a change in the regime of political control. Rather a formal process of appraisal must in future inform such a decision.

The effect of the Court's decision has been that RSS has been resurrected as part of the development plan. Or rather because the original decision to revoke RSS was never lawful, then RSS has never in fact ceased to be part of the development plan. As a matter of law (s.38(6) of the Planning and Compulsory Purchase Act 2004) a decision *must* have regard to the content of RSS in determining planning applications, so mindful, no doubt of the clear statements of intention of Government, in response to the Court's decision, on 10th November DCLG issued the following statement:

> "Whilst respecting the court's decision *this ruling changes very little*.
>
> … On 27 May 2010, the Government wrote to local planning authorities and to the Planning Inspectorate informing them of the Coalition Government's intention to rapidly abolish regional strategies and setting out its expectation that the letter should be taken into account as a material planning consideration in any decisions they were currently taking. That advice still stands."[11]

The whole motivation for Cala to bring the action was in order to change the policy context within which a planning appeal in Winchester was due to be considered. So a statement by DCLG that nothing much has changed the day after the decision was presumably not a welcome one. Accordingly a challenge was then launched against the issue of that letter as policy. The challenge was in effect based upon the contention that in issuing such policy the Executive was seeking to subvert the intention of Parliament which had not yet been expressed on the proposed revocation of RSS, as well as to deliberately seek to "go behind" the decision of Sales J. in *Cala No.1*.

In the pre-Christmas revelry of 2010 proceedings in *Cala No.2* were issued and an interim injunction sought and obtained preventing the reliance upon the November statement. Lindblom J.'s judgment[12] in due course was as masterly as Sales J. in *Cala No.1*, but there must be some doubt as to whether an interim injunction was warranted, not least because Cala's planning appeal was not at the time imminent. Thus on December 16, 2010 the injunction was discharged, for reasons given in a detailed judgment.

In dismissing the application for judicial review shortly afterwards,[13] Lindblom J. held on February 7, 2011 that the November 10, 2010 letter was not unlawful. He considered that it was axiomatic that a decision maker could take account of Government policy, both in its final form as well as in draft, and that a direct analogy could be made between that approach and taking account of the draft legislative programme of Government. Indeed in many instances it might be entirely prudent to do so.

One such circumstance which the author argued before the Administrative Court in the Hinds case (see below) was where a DPD was in preparation but not yet adopted, but was not likely to be adopted until after the Localism Bill had been enacted and brought into force. That may not now be the case following the decision of the Court of Appeal.

[11] Emphasis Added.
[12] *Cala Homes (South) Ltd V Secretary Of State For Communities and Local Government* [2010] EWHC 3278 (Admin) [*Cala No.1 1/2*]
[13] *Cala Homes (South) Ltd V Secretary Of State For Communities & Local Government* [2011] EWHC 97 (Admin) [*Cala No.2*]

In the Court of Appeal Sullivan J., giving the lead judgment robustly endorsed the approach of Lindblom J. that it was both lawful, and in some instances prudent for a decision maker to take account of the intention of Government in the Localism Bill. Much was made of the fact that the advice of Government was not that the intention to revoke had to be taken into account but rather that it 'may' be in circumstances to be decided by the decision maker.

Sullivan J. did not think that those circumstances would be frequent where the policies of RSS would have a determinative role, but would be confined to cases involving large housing sites where the principal policy judgment was RSS. The experience of the author is that at a time when Government is strongly pushing housing development that such instances are far from infrequent.

Unhelpfully Sullivan J. seemed at one point in his judgment to advise that a DPD could not even be prepared if it was materially at variance with RSS. Whilst s.38(5) of the 2004 Act requires general conformity between a DPD and RSS at the point of adoption, it remains unclear to the author what the legal impediment is to the preparation of a DPD, which consciously relied upon the forthcoming revocation of RSS*provided* that it was not actually adopted until after the Localism Bill was enacted and brought into force. Those comments were obiter however and it remains to be seen whether the Court will take the same view once it has to grapple with the issue directly.[14]

The most ironic part of *Cala No.2*, is that Cala appear to have actually succeeded in its intention even if it lost in law. The November letter under challenge it will be recalled contended that "this changes very little", in fact those Secretary of State decisions which came out following the decision at first instance in *Cala No.2*, were consistent that "limited weight" should be given to the intention to revoke RSS, which is presumably the exact policy context that Cala would have wished to secure when it embarked on this entire saga last summer.

The aftermath

R. (on the application of Hinds) v Blackpool and Kensington Developments [2011] EWHC 591 (Admin)

Of course whilst the *Cala* saga has taken place other development control decisions have been taking place, and LPA's have been endeavouring to deal with the consequences of the above litigation.

The point is well illustrated by the case of *R. (on the application of Hinds) v Blackpool and Kensington Developments* [2011] EWHC 591 (Admin).

Facts

In March 2010 Mrs Hinds took exception to a resolution to grant planning permission to over 500 homes on Marton Moss near Blackpool. Marton Moss is one of the few areas of Blackpool which is undeveloped and it benefits from a protective policy in the Local Plan. However, the absence of a five-year land supply caused the officer reporting to committee back in March to conclude that any such protection was outweighed by the benefits of the contribution to housing land supply. The committee resolved to approve the application subject to referral to the Secretary of State as well as the entering into of a planning obligation.

However it was not until the middle of July that the s.106 obligation was finalised and the decision issued. Back in March 2010, the housing land requirement was based upon RSS figures. Once the May 27 letter was issued by DCLG, Mrs Hinds' solicitors wrote to the LPA asking that the matter be reconsidered; and once the July letter purporting to revoke RSS was issued Mrs Hinds wrote with even more force requesting that the matter be immediately remitted back to committee on the basis of a clear change in circumstances

[14] The recent experience of the Central Lancashire Core Strategy illustrates the point beautifully.

The request was based on the case of *R. (on the application of Kides) v South Cambridgeshire DC* [2002] EWCA (Civ) 1370. Since the request was rejected proceedings were ultimately issued in September 2010 on the basis of a failure to remit the matter back to committee given a clear change in circumstances.

Once the decision in *Cala Homes (No.1)* had been issued, in November, together with the indication that there would be no appeal, the prospects of success for Blackpool considerably brightened, and a request was made to the Claimant to withdraw the proceedings. The Claimant however continued on the basis that the Secretary of State's intention to revoke RSS was a sufficient reason to have remitted the matter back to committee.

Held

The matter proceeded to a hearing, which took place post *Cala (No.2)*. An interesting aside is that the Claimant was lambasted by the Court for not amending her pleadings to take account of the fact that the case had markedly changed. Of more substance, however, is that Langstaff J. came to two strongly pragmatic conclusions which are of much wider effect.

First, he considered and approved the case of *R. (on the application of Dry) v West Oxfordshire DC and Taylor Wimpey* [2010] EWCA Civ 1143, in which at [16] Carnwarth L.J. observed that the guidance contained in *Kides* must be applied with common sense and with regard to the facts of the particular case. The tests set out in *Kides* and often cited by third parties to justify a reconsideration based upon trivial changes in circumstances were said to only refer to what one needs to do in order to be "cautious" and not to comprise a prescriptive set of hurdles.

Secondly he followed the remarks of Lord Hoffman in the case of *Tesco Stores v the Secretary of State for the Environment* [1995] 1 W.L.R. 759 and applied the test of whether or not a material consideration would have made a blind bit of difference to the judgment as to whether or not to remit the matter back to Court. At [32] he observed:

> "I adopt the definition of materiality stated by Jonathan Parker LJ. in Kides. I have two further observations, though, to make. First, for a court to take an objective view of materiality requires it to have regard to all the facts and circumstances, viewed broadly. Theoretical relevance to a planning decision may be excluded as insufficiently material (adopting a de minimis approach). This is not to confuse materiality and weight, but to recognise the true scope of materiality. Secondly, in argument Mr Hunter was constrained to accept that materiality has regard to practical effect. *A planning authority is not obliged to take account of considerations which objectively viewed would have no practical effect upon the decision as to land use to which it has to come*. Similar to the first point, this, too, does not confuse materiality and weight."

On that basis he concluded that the policy of promoting legislation in Parliament to revoke RSS would have had either no or a de minimis effect and therefore the officer was right not to remit the matter back to committee. Both conclusions are the subject of an active appeal to the Court of Appeal which is due to be heard late in September, however it is worth reflecting that but for the Secretary of State's propensity to write letters in the Spring and Summer of 2010 that this litigation simply would not have taken place.

The New

Of course all of the above relates to the approach to RSS, which presumably over the next 12 months will become a matter of supreme disinterest if the Localism Bill is in fact enacted and brought into force. What will continue to be of relevance however is the approach to other parts of the development plan.[15]

[15] Recent statements by Government refer repeatedly to "local plans". However the structure of the 2004 Act save for RSS seems likely to be with us for some little time to come.

The case of *Save Historic Newmarket v Forest Heath* [2011] EWHC 606 dealt with the need to consider alternatives in a draft Core Strategy.

Facts

The Forest Heath Core Strategy was adopted in May 2010 and included a major urban extension of 1,200 houses to the north east of Newmarket which was claimed by a local action group to be liable to adversely affect the horse racing industry by reason of traffic concerns.

The challenge was brought on two grounds, first, that there was a breach of the European Directive requiring a Strategic Environmental Assessment,[16] and secondly that some of the evidence base which was examined by the Inspector was not produced at a time when consultation was taking place upon the CS, thereby limiting meaningful consultation.

Whilst there had been an SEA, it was based upon a procedural history where the rejection of alternatives had taken place at a time when the proposal for an urban extension to the north east of the town was proposed at a very much smaller scale than was ultimately adopted in the Core Strategy.

Held

The second ground failed on the facts, however the first ground succeeded before the Court on the grounds that whilst there had been compliance with what I have described above as the procedural box ticking exercise that is often the experience of the SEA, in substance the rejection of alternatives was not articulated within the SEA, and in fact had been based upon a materially different disposition of land uses.

At [40] Collins J. held:

> "It was not possible for the consultees to know from it what were the reasons for rejecting any alternatives to the urban development where it was proposed or to know why the increase in the residential development made no difference. The previous reports did not properly give the necessary explanations and reasons and in any event were not sufficiently summarised nor were the relevant passages identified in the final report. There was thus a failure to comply with the requirements of the Directive and so relief must be given to the claimants."

The consequences of the case are obvious, but terrifying to those preparing a Core Strategy. Even after a hard-won case put before a Core Strategy Inspector, a LPA can still be "tripped up" unless the SEA has kept up with the formulation and adaptation of plans and policies.

Development Management and Procedure

A number of cases have raised issues relevant to development management decisions over the past year, both on a substantive and procedural basis.

Vague Conditions

Hulme v Secretary of State CLG [2011] EWCA Civ 638

[16] Directive in question is 2001/42/EC on the Assessment of the Effects of Certain Plans and Programmes on the Environment. This has been transposed into domestic law by the Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004/1633) ("The 2004 Regulations").

The facts of this case, described elsewhere as involving "windfarm wars" and the many issues argued before the Administrative Court could take up many pages, however the issue that is of importance for the purposes of this paper[17] relates to the narrow issue upon which the case found its way to the Court of Appeal—i.e. the interpretation of a vague condition.

On the face of it the Appellant had a reasonable point—a condition relating to noise had been imposed without any clear means by which its enforcement was to be achieved. The Court of Appeal rejected the challenge and took an "holistic" approach to the issue. Elias J. expounded the following principles when considering the construction of conditions:

> "13. …
>
> a) The conditions must be construed in the context of the decision letter as a whole
>
> b) The conditions should be interpreted benevolently and not narrowly or strictly: see *Carter Commercial Development Limited v Secretary of State for the Environment* [2002] EWHC 1200 (Admin) para 49, per Sullivan J, as he was.
>
> c) A condition will be void for uncertainty only 'if it can be given no meaning or no sensible or ascertainable meaning, and not merely because it is ambiguous or leads to absurd results' per Lord Denning in *Fawcett Properties v Buckingham County Council* [1961] AC 636. This seems to me to be an application of the benevolent construction principle.
>
> d) There is no room for an implied condition (although for reasons I discuss more fully below, the scope of this principle needs careful analysis). This principle was enunciated by Widgery LJ, as he then was, in Trustees of Walton on *Thames Charities v Walton and Weighbridge District Council* [1970] 21 PMCR 411 at 497, in the following terms:
>
> > 'I have never heard of an implied condition in a planning permission and I believe no such creature exists. Planning permission (inaudible) is not simply a matter of contract between the parties. There is no place, in my judgment, within the law relating to planning permission for an implied condition. Conditions should be expressed, they should be clear, they should be in the document containing the permission.'
>
> 14. Accordingly, whilst there must be a limit to the extent to which conditions should be rewritten to save them from invalidity, if they can be given a sensible and reasonable interpretation when read in context, they should be."

The case can rightly be thought of as support for the proposition that the Courts will bend over backwards to give effect to an otherwise vague condition, and that challenges which are intellectually plausible are not likely to find favour if they relate to the vagueness of conditions unless there is simply no way that the Court can give the condition meaning.

Conditions on a Dead Permission

Avon Estates v Welsh Ministers [2011] EWCA 533

[17] For the practitioner it is worth noting that the first instance decision is one of a number of windfarm cases where Frances Patterson QC, sitting as a deputy held that the possible existence of alternatives which would be better in land use terms would be an irrelevance in most cases where the proposal was otherwise acceptable on its own merits. That is to say, it does not matter that there may be a much better way of achieving the same objective provided that the proposal under consideration should be granted permission in its own right. For opponents of windfarm development this principle is viewed as being almost incomprehensible even if it is a well established principle of planning law. My personal view is that this is an area where the jurisprudence will become less dogmatic over time and the principle more nuanced.

At the start of the judgment of Sir David Keene, he states that this case involves the determination of a "novel point of law", namely can a restrictive condition, such as a limitation on occupancy, be enforced against once a temporary permission has expired.

Facts

Between 1964 and 1973 time-limited permissions were granted for a number of holiday bungalows on the Welsh Coast with occupancy limited to a proportion of the year.

The 42 bungalows were not removed at the expiration of the permission and it was conceded from the outset that their existence was immune from enforcement action. A test case application for a certificate of lawfulness contending that the bungalow in question had acquired a lawful use as a C3 dwelling house without restriction was made. An appeal against non-determination was made. The Inspector considered that whilst the buildings themselves were immune from enforcement action, the restrictive condition limiting occupancy had not been breached and that continued to have effect. That decision was upheld by Beatson J. at first instance and the matter was further appealed to the Court of Appeal.

Held

Despite the superficial logic of the Welsh Ministers' case that the occupancy condition had never been breached and that the term "expiry" did not find its way into the 1990 Act as a concept (i.e. an "expired consent"), the Appellant's simple argument won out. That is to say, it is wholly illogical to interpret the occupancy condition as ever having been intended to have a life beyond the point when the permission itself was intended to cease and restoration of the land was intended to take place.

Sir David Keene put the matter thus (at [28]):

> "I do regard it as very unlikely that the statutory scheme allows for what can be described as a permanent condition on a temporary permission, other than the time limit condition itself."

The effect is therefore that once a temporary permission has expired then, apart from the condition requiring the permission to end and land to be restored, that all other conditions cease to have effect.

Fairness and the Planning Appeal

Ashley v Secretary of state for communities and Local Government [2011] EWHC

Following the Planning Act 2008 s.196 which introduced s.319A into the 1990 Act, the Planning Inspectorate ("PINS") now has the power to determine the procedure by which an appeal is determined. Whilst there have been some teething problems about the manner in which that power is being exercised, there can be no doubt that there is a clear obligation upon the Secretary of State in whose name PINS acts to ensure that whatever mode of appeal is imposed that the appeal should be subject to the rules of fairness, even if that means going beyond the requirements of the legislative framework.

Facts

The case involved the proposed residential development (43 flats) of a parcel of land in Greenwich LBC which was strongly opposed by a local action group. Although there had been previous refusals on the site, the issue related to the form not the principle of redevelopment.

The matter came before PINS and was allocated to the written representations procedure. As part of the written representations the Appellant, Taylor Wimpey submitted a noise report. Following PINS published guidance in 01/09 that report was not copied to the third parties but was available from the LPA had the third parties chosen to request sight of the appeal documentation.

Held

Robin Purchas QC, sitting as a deputy High Court Judge reaffirmed the seminal decision of Sullivan J. in *Jory v Secretary of State* (2003) 1 P.L.R. 54, that merely discharging the precise scope of the relevant procedural rules may not be sufficient to demonstrate that the rules of natural justice and fairness had been discharged.

The judge confirmed that the same principles also applied to an appeal heard by way of written representations, and observed at §66 that whilst Parliament had laid down the rules for such an appeal that did not mean that the rules should be exercised in a way which gave rise to an unfair or disproportionate result.

On the facts of the case—the Judge held that notification of the opportunity to inspect documents at the LPA's offices was sufficient to discharge the duty of fairness, not least because that was the precise procedure adverted to in PINS 01/2009.

More interesting to those involved in disputes about the mode of procedure with PINS is the Judge's reasoning in concluding that a fair procedure had been arrived at. The contention of the Claimant was that the production of expert evidence rendered an examination of it essential. At §75 the Judge observed:

> "While expert evidence was submitted in the form of the report, that in itself would not require a change of view as to the appropriate procedure, *unless for example, its content became controversial, requiring examination."*

On the facts of that case the conclusion was that there was no such warrant, however in others, for example where there are competing views of say highways officers, there plainly will be a justification for an examination and presumably on the Judge's logic (albeit obiter) written representations would not be the appropriate procedure.

Rights of Entry

Payne v Secretary of State for Communities and Local Government [2010] EWHC 3528 (Admin)

Ms Payne lives at No.17 Llanvair Drive, South Ascot, Berkshire and proposed the reconstruction of her house, which was refused by the LPA. A subsequent appeal against that decision was dismissed on appeal. Accordingly Ms Payne challenged the matter further by way of s.288.

The essence of the challenge was that at the hearing the Inspector indicated that he wished to conduct a site visit (which would be a "live" part of the hearing), and inquired whether Ms Payne would be willing to allow one of the principal objectors, her next door neighbours at No.15 to enter her property. Ms Payne was in a longstanding, though unconnected boundary dispute with Mr and Mrs Catania, as a result of which she refused her consent.

There was a factual dispute as to exactly what was agreed upon. However, the Inspector, in fact, entered No.15, having previously closed the hearing, but refused to enter No.17 despite being invited to do so.

Burton J. came to the surprising conclusion (§21) that whilst an inspection of sorts had taken place that the Inspector had not "adjourned the hearing" to the site as required by the rules governing a hearing where an accompanied site visit is requested. He considered it to be analogous to the sort of procedural irregularity which had occurred in *Chichester v First Secretary of State* [2006] EWHC 1876 where no site visit had taken place at all. He also rejected the suggestion that the alleged unfairness would not have made a difference on the facts.

Discussion

Both of the above two cases are highly fact specific, but both demonstrate shortcomings where the wrong choice of mode of hearing is selected. Had the appeal in *Ashley* been dealt with by a hearing then the third parties would not have felt aggrieved by the fact that the determinative factor at the appeal was an issue which they had not been aware of (having not visited the Council offices!). In the Payne case, had the Inspector determined that the hearing should be "converted" into an appeal then the sort of inspection which actually took place would have been uncontroversial.

Reasons

R. (on the application of Siraj) v Kirklees MBC [2010] EWCA Civ 1286

Facts

Planning permission was granted for what was determined to be inappropriate development in the green belt. Thus the officer's report set out the harm to green belt and very special circumstances which were concluded to outweigh that harm.

However, the summary reasons for the grant of planning permission only listed the very special circumstances and that the scheme was acceptable in terms of design and highway safety. An application was then made for judicial review on the basis of failure to give proper summary reasons.

Held

The application was dismissed at first instance and by the Court of Appeal. Sullivan L.J. concluded that the duty to give summary reasons does not require "a full account of the local planning authority's decision making process". Rather, when considering adequacy of reasons regard must be had to all of the surrounding circumstances.

Endorsing a line of authorities starting with *R. (on the application of Tratt) v Horsham DC* [2007] EWHC 1485 Admin, the Court held that there was a difference to be drawn between a case where there had been a decision contrary to the recommendation of officers, where more detail might reasonably be required and one where a recommendation was followed. In the case of the latter Sullivan L.J. observed:

> "a member of the public with an interest in challenging the lawfulness of the planning permission will … be able to ascertain from the officer's report whether in granting permission members correctly interpreted the local policies and took all relevant matters into account and disregarded irrelevant matters".

A similar approach was taken in by Waksman J. in *Derwent Holdings Ltd v Trafford BC* [2011] EWHC 491 (Admin).

Material Considerations

Revocation and the Materiality of Financial Considerations

Health and Safety Executive v Wolverhampton CC [2010] EWCA Civ 892

This case was decided before September 2010, and therefore marginally breaches the injunction for this talk to be an "update"' since the last conference. However, it is useful to briefly consider this case to set the scene for what follows.

The case involved a declined request by the HSE to a LPA to revoke a consent where the HSE did not consider that it had been properly consulted and where had it been then it would have strongly opposed the grant of planning permission. The LPA's concerns turned in part upon the vast financial consequences of a compensation order had such a revocation been upheld, as a result of which it declined to revoke. The HSE based upon the previous authority of *Alnwick DC v Secretary of State* [1999] 79 P. & C.R. 130 argued that such concerns were an immaterial consideration.

Held

The Court expressly declined to follow Alnwick and concluded that the obligation to pay compensation was material to a decision whether to revoke a planning permission. Sullivan LJ. held that "it must be inferred that Parliament expected that a LPA would have regard to its liability to pay compensation under one part of the Act when deciding whether or not to exercise power under another part of the Act".

However the Court held that the desire to avoid paying compensation should not be the "sole factor" in deciding not to revoke a permission and that the LPA should set out clearly "why it is expedient for that sum not to be paid in circumstances in which modification or revocation might otherwise be appropriate".

Pill L.J. disagreed and held that a planning decision should be made on planning grounds and that it would be "unfair" to landowners were the power of revocation to be influenced by the availability of public finances.

The interesting point for current affairs is that even the majority of the Court determined the appeal on the basis that wider financial considerations to the public purse were material to a decision to revoke but not to a determination under s.70 as to whether to grant permission. It is presumably that realisation that has motivated the Government to seek to amend the Localism Bill to enable the "financial benefits of the New Homes Bonus" to be taken into account in a planning decision. Interesting, because it means that that December 2010 letter from Mr Quartermain which argued that the existence of New Homes Bonus was a material consideration now must be of dubious validity. At all events the matter is due to be heard by the Supreme Court in February 2012.

Health Objectives

R. (on the application of Copeland) v Tower Hamlets LBC [2010] EWHC 1845 (Admin)

In a spectacular demonstration of just how broadly drawn material considerations might now be, this case involved the quashing of a planning permission for a fast food takeaway close to a school.

It was held that proximity to a secondary school which had just adopted a "Jamie Oliver style" healthy eating programme was a material consideration in the determination of a proposal for change of use of premises from a convenience store to fast food outlet.

Whilst morally the decision is unimpeachable, it is difficult to understand how the social programme of a school renders an otherwise acceptable land use unacceptable. Thus, if the school served a staple diet of chips and pizzas should it really be the case that the decision would be different?

Racial Considerations

R. (on the application of Harris) v Haringey LBC [2010] EWCA Civ 703

This was another case which illustrates how widely cast material considerations should be. In this case Pill L.J. held that the duty to have regard to racial considerations under s.71(1) of the Race Relations Act 2000 was engaged by planning considerations such that "due regard" had to be had to racial considerations. That is to say, the need to eliminate unlawful racial discrimination; the need to promote equality of opportunity between different racial groups; and the need to promote good relations between racial groups.

Judicial Review & Statutory Challenge

Delay

R. (on the application of Buglife) v Medway Council [2011] EWHC 746

This is one of those rare cases where the father of young children is able to remember the name of a case involving the Invertebrate Conservation Trust because it sounds so close to a case involving Pixar and the Disney Corporation.

The facts of this case are of less relevance than the principle which it establishes. This was a case where proceedings were issued just within three months of the decision, but where the Respondents all contended that there had been operative delay in the issue such that permission ought to be refused.

The matter came before H.H.J. Thornton on an oral permission hearing, at which Buglife contended that it was entitled to rely upon the full three-month period by analogy with the case of *Uniplex (UK) Ltd v NHS Business* [2010] EUECJ C-406/08, January 28, 2010.

That case involved a decision relating to the Public Contracts Regulations 2006, which had been made to give effect in domestic law to the Procurement Directive 89/665. The 2006 Regulations, provide that proceedings arising out of the Directive and the Regulations must be brought "… promptly and in any event within three months from the date when grounds for bringing the claim first arose". The case involved a successful challenge to the lawfulness of the requirement for proceedings to be brought promptly because the provision infringed the requirement of Community law that limitation periods should be sufficiently precise, clear and foreseeable to enable individuals to ascertain their rights and obligations.

Self evidently the similar provision which restricts an application for judicial review has a hurdle of promptitude, however it was argued by the LPA in that case that a distinction was to be drawn between the Uniplex case which involved a direct application of EU law and a domestic claim for judicial review. H.H.J. Thornton had little difficulty in rejecting that distinction:

> "63. I cannot accept the limitation of the *Uniplex* decision contended for by Medway and NGPH. The decision applied general and core principles of Community Law which are applicable to all directives. The requirement of certainty and the application of that requirement to limitation periods imposed on those seeking to enforce their rights arising under the directive in a national court has general application to such enforcement proceedings arising out of any directive."

The case itself dealt with consideration of EIA issues and therefore can properly be characterised as involving a judicial review based upon issues which are fundamentally rooted in Europe. However, the "direction of travel" is self evidently in the direction of the three-month period being treated as a true limitation period, in respect of which Buglife is an important milestone along that route.

Locus Standi

Ashton v Secretary of State for Communities and Local Government [2010] EWCA Civ 600

This case involved an individual who had decided to allow a community organisation to object to a proposed development. When the decision was adverse Mr Ashton sought to bring proceedings against the Secretary of State as a "person aggrieved". Pill L.J. rejected his contention that he was a person aggrieved and dismissed the appeal. In so doing he helpfully laid out general guidelines as to how the Courts would henceforth treat that qualifying pre-condition to bringing such proceedings:

- In principle wide access to court ought to be provided under s.288.
- Usually participation in the planning process is required.
- The nature and weight of the particular interest is relevant.
- "Interest" is to be understood as an objective concept—feeling aggrieved is not to be equated with actually being aggrieved.
- A contrived interest which has been acquired solely for the purposes of establishing standing under s.288 may be considered to be insufficient by the Courts.
- The requirement for participation and the requisite interest may very well be interrelated such that it may not be possible to assess the extent of a person's interest if they have not participated in the planning process.
- There is a clear public interest in implementing approved development projects without delay which may be of relevance.

Enforcement

Past Enforcement as a prelude for an Injunction

Davenport v Westminster CC [2011] EWCA 458

On January 13, 2010 an interim injunction was granted by Eady J. to restrain the use of No.33 Portland Place, London from being used for non-residential purposes without the express grant of planning permission.

Before Eady J. there was an argument as to whether an enforcement notice which had been issued back in 2006 in similar terms was a nullity on its face or not.

Having considered Sullivan L.J.'s obiter discussion in the case of *Broadland v Trott* [2011] EWCA Civ 301, about whether distinction between nullity and invalidity was still good law, Pill L.J. in this case observed that:

> "The issue is whether citation of and purported reliance in the enforcement notice on a condition which was no longer operative renders the enforcement notice a nullity. That can in my view be decided on a case by case basis by reference to the requirements of section 173 of the 1990 Act."

Pill L.J. held that whilst the notice in question had wrongly referenced the permission and the statutory history, that there could be no doubt as to what the breach of planning control actually was, nor with the requirements of the notice. Accordingly the enforcement notice could not be characterised as "so much waste paper" and therefore a nullity.

What is more than a little odd in that case is that the law report does not explain why anyone considered that it mattered. Whilst it is usually good practice for an enforcement notice to be in place before pursuing injunctive proceedings, there is no statutory requirement that any such proceedings have even been taken. Indeed even under the law which pertains to the use of s.222 of the Local Government Act 1972 as the power to secure injunctions (used prior to the enactment of s.187B), it made it quite clear that there was no need to demonstrate that an injunction was the last resort after all else had failed.

To that end it seems odd that the LPA did not also seek to argue the 'so what' point - namely why would it matter whether or not there was an enforcement notice in place, since such is not a precondition of the grant of an injunction in any event.

Nullity and Invalidity

Broadland v Trott [2011] EWCA Civ 301

Facts

Planning permission was granted for residential development subject to a pre-commencement condition for the submission and approval of a landscaping scheme. No landscape scheme was ever approved but the development went ahead anyway. An enforcement notice was issued and became effective with a requirement that a landscaped area should be made available for the enjoyment of residents.

A landscape area was provided but was not made available for use. Accordingly the LPA sought an injunction on the strength of the enforcement notice to require land to be made available. At first instance the injunction was granted, a decision which was then appealed to the CA.

Held

The Court of Appeal refused to continue the injunction. The principal reason for the decision was that there was no requirement within any planning condition to make the landscape area available to residents. Thus merely being in breach of an enforcement notice was not a sufficient reason to grant an injunction. Rather the Court also had to be satisfied that there was a breach of planning control.

The case is likely to be of much greater importance because (as noted above) Sullivan L.J. critically analysed whether the distinction derived from Miller-Mead between an invalid enforcement notice and a notice which is a nullity remains a sensible distinction. Whilst his comments are obiter, he noted that the position under modern jurisprudence was probably that, where a notice is claimed to be a nullity, then the appropriate procedure would be either to judicially review a decision to issue an enforcement notice or to launch a challenge under s.289 of the 1990 Act.

Selective Immunity

Secretary of State for Communities and Local Government v Welwyn and Hatfield BC [2011] UKSC 15

Facts

Mr. Beesley was granted planning permission to build a barn, but at an early stage decided that he wished to devise a scheme to enable him to use the building as a house.

The permission included a condition which limited the use of the building to the storage of hay, straw and agricultural products. The building was constructed externally in precise accordance with permission. However, internally it was fitted out as a fully functioning 4 bedroom house, and then occupied continuously for 4 years, without any enforcement action being taken.

Mr Beesley then made an application for a certificate of lawful use and development which was refused by the LPA but granted on appeal by an Inspector. A subsequent challenge by the LPA was dismissed in the Administrative Court at first instance and then by the Court of Appeal. However, the LPA's appeal was allowed by Supreme Court.

Held

Section 171B of the 1990 Act, provides for a four-year enforcement period for change of use to a single dwelling house. However, that applies only where there was a "change of use" but not where a dwelling house use was the first use of a building.

Because a building when constructed but before use commences does not have a "nil use", the use of a building does not fall to be considered on a day-by-day basis, but rather over the long term and, (apparently) by reference to the intention of the developer. Indeed the Court doubted the concept of "nil use" in principle.

The case in reality is a naked application of the age old common law rule that no man shall benefit from his own wrongdoing. Thus an individual who avoids enforcement by a deliberate conduct of misleading the LPA loses entitlement to immunity from enforcement. Startlingly the Court went so far as to say that because there had been "egregious" wrongdoing, rather than a lesser (though presumably reprehensible course of action), that it was prepared to disapply the four-year rule.

Expediency not to take Enforcement Action is Justiciable

Gazelle Properties Ltd v Bath and North East Somerset CC [2010] EWHC 3127 (Admin)

Facts

The former Fuller's Earthworks site, at Combe Hay, Bath lies in the green belt and close to an Area of Outstanding Natural Beauty ("AONB"). Historically it has been used for a wide variety of uses including waste recycling within use class B2. As a result of the aspirations of a developer who had purchased an option over the site, it was claimed that there was a wider variety of land uses on the site than the LPA were in due course willing to accept, albeit that there was initial correspondence from the LPA that the uses claimed may have taken place.

The LPA took advice from Tim Straker QC and Peter Towler, both of whom advised that it would be "wholly inappropriate" and "inexpedient" to take enforcement action in respect of the class B2 element of the use. Thereafter a report was presented to members seeking authority to serve an enforcement notice, following an adverse decision by the local government ombudsman on the failure to enforce against an unauthorised use.

Caught between a rock and a hard place the LPA then resolved to take enforcement proceedings. However a challenge was then made to the decision that it was expedient to issue an enforcement notice and on the basis that the report to committee had failed properly to set out the planning history including discussions and negotiations to resolve the future of the site.

Held

An initial point taken was whether or not the Court had jurisdiction to hear the claim. Lindblom J. undertook a comprehensive analysis of the structure of the 1990 Act to determine whether this issue was indeed justiciable. But concluded that the court did indeed have jurisdiction to entertain an application for judicial review of a decision by an LPA that it is "expedient" to take enforcement action, and that the preclusive provisions do not apply to such a claim.

That said Lindblom J.'s judgment should be viewed as a point of reference given that his view on jurisdiction was that in some circumstances the Court's jurisdiction would indeed be ousted and that it was only in 'residual cases' that an issue such as this would be justiciable by judicial review.

However, the Judge held that the failure of members to have regard to the extensive negotiations and discussions which had taken place over the future use of the site and in particular the point that those discussions had reached prior to the decision under challenge was material to the decision as to whether it was "expedient to take enforcement action". As a result the decision was quashed.

Planning Obligations

Unnecessary but Enforceable

R. (on the application of Millgate Developments Ltd) v Wokingham BC [2011] EWHC 6 (Admin)

Facts

This is one of those decisions where the author breathed a deep sigh of relief having advised shortly before on a very similar point. It is always amazing how much greater the focus of a lawyer is upon reading a case when the question "did I get it right" is at the forefront of his/her mind!

In this case a s.106 obligation was submitted at an appeal for 14 houses at a site in Berkshire. However, because the Inspector concluded that the contributions (off site leisure, library contributions etc) that it contained did not meet the test of necessity he attached little weight to the obligation, but nonetheless allowed the appeal.

Following correspondence in which the LPA, rather disingenuously described the Inspector's decision as ambiguous, it sought to enforce compliance with the s.106 obligation. Having won the argument before the Inspector the developer argued that to do so was unreasonable in light the of decision letter.

Held

The obligation was enforceable as a legal instrument and fell within the powers under s.106. Thus there was no ongoing duty on the part of the LPA to continue to review whether the decision continued to serve a useful planning purpose. H.H.J. Pearle, sitting as a Deputy High Court Judge observed:

> "I have no doubt but that the March undertaking is enforceable in law. It was an undertaking entered into voluntarily by the Claimant, and was conditional on two events only, namely the grant of planning permission, and the commencement of the development, both of which have now of course occurred."

The lesson to be learnt of course is that having won the argument then a fresh application without the s.106 could have been submitted provided that it was sufficiently different for the LPA not to be able to avoid registering it. The other expedient is that "dubious"' s.106 obligations which are put forward for "commercial" reasons at a planning appeal can have as their trigger not just the commencement of development, but the express conclusion on the part of the Inspector that they are "necessary". In the author's experience this latter approach is now regularly taken by a number of repeat Appellants (including those I advise (supra)!)

Unwarranted by Policy but Enforceable

R. (on the application of Renaissance Habitat Ltd) v West Berkshire DC [2011] EWHC 242 (Admin).

A similar result was found by the Administrative Court in another case though in slightly different circumstances. The obvious lesson for the practitioner and developer is that if a s.106 obligation is technically enforceable then it is actually enforceable by the LPA!

Facts

Renaissance are a small developer which operate within West Berkshire who secured planning consent for residential development subject to the entering into of a s.106 obligation to secure education and other "infrastructure" contributions based on a policy derived from Supplementary Planning Guidance ("SPG").

Subsequent to the grant of permission the SPG was revised and contributions adjusted downwards. Renaissance then failed to make contributions and the LPA started the process of enforcing the obligation. With a presumed sense of pique the developer then sought judicial review of that decision.

Held

It is tempting to simply write "tough" under the title "held", but that in effect was Ouseley J.'s conclusion. He decided that the requirements under the obligation were clear and had been triggered. It had been freely entered into and fell within the powers of the Act which was all that is required for enforcement.

The Court went on to observe that the proper route to challenge the on-going effect of s.106 is through s.106A or through negotiation. Changes in the policy basis for contributions do not in principle make enforcement unreasonable.

Reflecting the view of H.H.J. Pearle in Millgate Ouseley J. concluded that whether or not an obligation continues to fulfil a "useful planning purpose" is not a prerequisite to its enforcement. Indeed he noted that had an application been made under s.106A the Secretary of State's consideration would be whether it continues to serve *a* planning purpose, not *the same* planning purpose. The former would inevitably involve wide considerations.

This case is less stark than the Millgate case, not least because the SPG had been revised to take account of changes that had occurred over time, rather than because a different view in principle had been reached as to the appropriateness of the contributions.

Unnecessary but Lawful

Derwent Holdings Ltd v Trafford MBC and Tesco and Lancashire County Cricket Club [2011] EWCA Civ 832

Facts

When Churchill was asked to explain what he thought were the consequences of the French Revolution he famously answered that it was far too early to say. This is one of those cases where my own personal involvement robs me of any objectivity in describing it in other than avowedly biased terms; and like Churchill I shall expressly disavow any ability to draw conclusions.

The case involved a planning application by Tesco and Lancashire County Cricket Club to develop a parcel of land at Old Trafford which was owned by Trafford MBC for a large supermarket. The application also included major works to the Cricket Club, which would in part be funded by a parallel funding agreement between the Council and the Club. That agreement was in turn funded by the monies from the sale of the land by the Council to Tesco, to the sum of around £21M.

At the same time a rival developer sought permission to develop a supermarket close by on a site where it benefitted from a lawful development certificate for open A1 retail consent.

The two applications were heard on the same evening by the Council which made a series of extraordinary procedural errors, which are well documented in the first instance decision of Waksman J. Permission was granted to the joint application and refused for the other. The aggrieved developer accordingly sought judicial review of the decision to grant permission.

Held

A series of points were run before Waksman J. at first instance, who also decided to hear evidence on what had actually happened that evening. However the most important point was the issue of the status of an obligation entered into under s.106 of the 1990 Act as well as s.111 of the 1972 Local Government Act, the effect of which was to prevent the store opening until the contract to secure the works to the Cricket Club had been let.

That was of concern because the Council resolved to grant planning permission on the basis of a report which expressly considered that each part of the application was acceptable but also said that there was a need to require such a control.

That "necessity" for the obligation was also recorded in the planning obligation itself which recited the words of s.122 of the Community Infrastructure Levy Regulations. Accordingly the point was argued, with as much force as the author could muster, that the decision was internally inconsistent. Either the two parts stood on their own two merits and the link was unnecessary, or the link was necessary and the proposed superstore was not acceptable on its own merits, but both could not be correct.

On this central point both Waksman J. and a very strong Court of Appeal concluded that members could be assumed to have followed the views of the officer who considered that both parts of the application were fine and therefore the linkage was of little moment to the overall decision. Indeed in the Court of Appeal Carnwarth L.J. held that the requirements of the obligation were a matter of form and that no challenge was being made to the terms of the agreement itself. But even if there had been confusion on this point, then in effect "so what" because enabling development has a long and well recognised place in the planning world (see [16]–[19]). Notwithstanding that the Council expressly disavowed any suggestion that this was a case of enabling development and members did not decide the case on that basis.

The decision in effect decided that a planning obligation which was unnecessary, did not render the original decision which "required" it in order to make the decision "acceptable" unlawful.

At the end of submissions the author submitted to the Court that if this appeal was allowed then it in effect gave the green light to the development industry that there was a way to "buy" planning permission, i.e. by offering unnecessary goodies as part of a planning proposal even if they were legally irrelevant. It is for others to judge whether or not that is correct. However, I for one, am smarting that this case is not heading up to the Supreme Court!

Not Enforceable by Third Party

Milebush Properties Ltd v Tameside MBC [2011] EWCA Civ 270

Facts

Confusingly this case involves the enforceability of a s.106 obligation by Third Parties (Milebush), in respect of land in Hillingdon LBC, where the developer was Tameside MBC (or rather its pension fund). Thus the fact that Tameside appears as a party in the case tells one nothing about the geography of the locus!

Milebush own properties used for commercial and residential purposes in Hillingdon, close to a location where the LPA granted planning permission to Tameside to construct offices. The permission was subject to a s.106 obligation which required construction of a new service road to the rear of Milebush's properties and included a provision that Milebush should be given right of way over that service road.

Perhaps understandably Milebush contended that s.106 was enforceable at its site to require Tameside to provide it with a right to use the service road as an emergency exit. However, Tameside was prepared to only grant a more limited right over the road.

Milebush accordingly brought a private law claim for a declaration of the extent of the granted rights to which the LPA was not a party.

Held

The Court engaged in the substance of the dispute and held that the right envisaged was limited to servicing properties, and also recognised the wide ambit of declaratory relief.

However the wider importance of the case is that the Court held that because Milebush was not a party to the planning obligation, then private law proceedings were not appropriate (Moore-Bick L.J. dissenting). Rather the proper recourse was to seek a declaration in the context of a judicial review claim brought against the LPA.

Thus the Court of Appeal accepted that a non-party to an obligation might be entitled to take action for a declaration as to the interpretation of a s.106 obligation by the LPA but only through the judicial review route. As a matter of logic the same position must apply were a mandatory order is also sought.

Can I have my Money back please?

Hampshire CC v Beazer Homes Ltd [2010] EWHC 3095 (QB)

Facts

The short point in this case arose because the Developer sought to imply retrospectively a term into a planning obligation a clause to the effect that expenditure of sums for highway improvements provided for in the obligation should be "reasonable" and "proper". In the alternative it was argued that the monies paid under a s.106 gave rise to a trust.

Held

The Court would only intervene in respect of decisions by the LPA as to expenditure of monies where the LPA was unreasonable in the public law sense. Thus to imply terms claimed by the developer in this case would be to impose a wider duty on the LPA than its public law duties.

Rather the proper course of action would be to challenge a decision as to the expenditure of money by judicial review on normal public law principles. Swift J. held that a planning obligation is entered into in the public interest and is not a "private agreement" and no trust is created.

There is an obvious tension between the Renaissance and the Milebush cases on the one hand and this case on the other. The intellectual construct of this case is that a s.106 obligation is a creature of public and not private law and not enforceable as such. Had that been the approach certainly in the Renaissance case then one might reasonably have expected a rather different result. Had the purpose for the payment of monies failed completely in the Beazer case but had there been no provision for repayment then can it really be the case that there is no constructive trust that can be implied to secure repayment of monies, rather than requiring a developer to go through a farcical application under s.106A?

Miscellany

PPG2 and the materially larger dwelling

R. (on the application of Feather) v East Cheshire DC [2010] EWHC 1420

Facts

This case involved proposals to extend an already large house in green belt by the introduction of a large subterranean swimming pool. Officers advised members that since underground it was not relevant to the policy test in PPG2 as to whether the resulting house would be "materially larger" than the existing.

That decision was challenged by a neighbour, who was presumably not likely to be invited to any future pool parties.

Held

The words of PPG2 are to be given ordinary meaning and thus the proposed basement was relevant to the policy test as to whether the resultant building was materially larger. Self evidently a large basement would make the house larger in fact even though it would have no external manifestation and therefore the permission was quashed, applying the test in *R. (on the application of Heath & Hampstead Society) v Camden LBC* [2008] EWCA Civ 193.

At the end of his judgment Langstaff J. took the unusual course of action of making a number of "obiter" remarks directed at whether or not the LPA would have acted perversely had they concluded that the building was not materially larger. In the most gentle judicial language he gives a clear indication that they would not, and on a remission the LPA could rationally come to the conclusion that the building could be granted planning permission.

Overview

This has been an exceptionally busy year in terms of legal developments. Others will deal with the Localism Bill, and matters such as the proliferation of policy in Dear Chief Planner Letters, the consultation on the proposed Liberalisation of Change of Use, the effect of the policy of "Planning for Growth" March 2011 etc lie beyond the scope of this talk. However in a period of recession the Government are to be thanked for continuing the trend of "evolving" the planning system rendering the need to take good advice ever more important.