Heroes and Villains—Challenge and Protest in Planning: What's a Developer To Do?

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Why is development so difficult?

The planning system does not operate in a vacuum. It is not a board game whereby the players will necessarily always abide by the outcome. As planning, and planning law, practitioners, we focus so much of our day-to-day attention on the minutiae of the process, and on the constantly-changing rule book (and we grew up as "playing by the rules" people). We too often neglect the question of whether the process is sufficiently resilient from attack by those who fear, and therefore seek deliberately to delay, its outcome by way of challenge in the courts or by more direct action in the form of civil disobedience.

The present Coalition Government, faced with a desperate need for additional housing, for economic growth and for improvements to our energy and transport infrastructure, has sought to assist developers in clearing the "planning permission" hurdle. For example, it has:

- increased the types of development that do not require planning permission;
- eased procedural requirements;
- eased policy requirements; and
- accelerated planning appeal procedures.

But changes to planning policy and to specific procedures will not necessarily unlock development if it can be thwarted by other means.

This paper takes a wider perspective in relation to controversial planning projects in particular and considers the following:

- why the prevalence and intensity of protest appears to have increased;
- the implications of changes to the judicial review process in relation to planning matters;
- how the courts are dealing with civil disobedience in planning matters;
- ideas for ensuring a more resilient planning system; and
- how to reduce the risks of delay to particular projects.

Why the prevalence and intensity of protest appears to have increased

In previous generations, large scale development has been achieved largely without recourse to the courts and without direct action on the part of objectors, for example:

- the post-war new towns programme;
- large-scale provision of council housing and associated clearance programmes; and
- airports, roads and railway lines.

That is not to say that development was always popular, that campaigns were not vigorously mounted in relation to particular issues (for example, Sir John Betjeman's campaign against the demolition of the Euston Arch, including a deputation to the then Prime Minister, Harold Macmillan, and a television appeal; or the local reaction to the then planning minister, Lewis Silkin's, support of Stevenage new town[1]). But

[*] With assistance from Chloe Man, King & Wood Mallesons SJ Berwin although all errors, omissions, views and prejudices are mine alone.

[1] Arriving by train at Stevenage for a meeting with protesters he found that the platform signs for the station had been changed to "Silkingrad". See also the subsequent unsuccessful judicial review: *Franklin v Minister of Town and Country Planning* [1948] A.C. 87.

the final decision was usually, indeed, final. This social compact between the state and its citizens appears to have weakened more recently.

Let's keep the UK planning system in context. Citizens' relationship with governments on all issues, in this country and internationally, is changing. We are not necessarily against development nor are we "NIMBY" (an unpleasant and disparaging word). Indeed a recent survey[2] suggests that opposition to new homes may have in fact reduced from 2010 to 2013.

People may be less likely to accept an unpalatable planning decision than in previous generations. But the same is true in relation to issues such as:

- badger culling, game hunting and other animal rights issues;
- climate change and other environmental issues;
- concerns over globalisation (another, less cuddly, localism movement); and
- tax and public spending issues (e.g. the Occupy movement).

We have reduced faith in democracy and officialdom. It is not just on the football pitch that the referee's whistle may not be the end of the matter.

Via social media, we can readily show our frustrations and organise ourselves, quickly establishing a strong presence, strength in numbers and political influence, sharing data and knowledge.[3] Whilst there will always be a role for the old-fashioned demonstration with placards[4], has the traditional planning system yet caught up with the consequence of thousands of objections able to be generated on-line by use of SurveyMonkey and equivalent free software? How much detail does the objector need to provide for his or her objection to be registered and dealt with individually, and to what extent is the sheer quantity of objections received to a particular proposal a material planning (as opposed to a political) consideration? How are decision-makers and developers alike to cope with the occasional personalisation of campaigns? Some will recall the effigy of Secretary of State, Nicholas Ridley, that was burned by objectors following his announcement, that he was minded to grant planning permission for Consortium Developments' proposed development of 4,800 homes at Foxley Wood in Hampshire in 1986 (subsequently overturned by his successor, Chris Patten). It is so much easier these days for objectors to turn up the heat on individuals via Twitter and Facebook from the comfort of their smartphone, often under a pseudonym.

We have a more campaigning traditional press, prepared to play our concerns and prejudices back at us.[5]

We live in a less hierarchical, more "rights-based" society, with a perception that there will be remedies available in relation to almost anything, and that European law and the European Convention on Human Rights[6] will always be there to ride to the rescue.

We have access to information legislation, enticing us to look under every stone for the "smoking gun", the incriminating email or unwise comment that may found an objection or challenge.

[2] Public attitudes to new house building: *Findings from the British Social Attitudes Survey 2013*, Department of Communities and Local Government, July 26, 2014.

[3] For example campaign groups and/or web resources such as Tescopoly, Frack Off, Plane Stupid, HS2 Action Alliance and Long Live Southbank.

[4] For a recent colourful example courtesy of the Save Smithfield campaign see *http://www.cathedralgroup.com/homepage-blog/youd-have-to-be-gaga-to-tear-down-smithfield/*. [Accessed October 13, 2014.]

[5] e.g. *Daily Telegraph*'s "Hands off Our Land" campaign.

[6] The favourite bête noire of the *Daily Mail*: "… a body meant to defend democratic rights against Nazism and Stalinism has become a menace to democracy, trampling on once-sovereign peoples. We saw this vividly when Strasbourg overruled the emphatic will of Parliament and the public to retain Britain's historic ban on votes for prisoners. We saw it again in judgments endangering the innocent by preventing the deportation of foreign criminals and terrorists. Other arbitrary rulings, ordering huge compensation for paedophiles, drug-abusers and even the traitor, George Blake, defy every instinct for justice. But then what can we expect from a court that draws ill-qualified judges from such countries as Liechtenstein, San Marino, Monaco and Andorra, whose combined population is smaller than the London borough of Islington? One of the Tories' most popular election pledges, hastily shelved under pressure from the Lib Dems, was to scrap Tony Blair's Human Rights Act, which imposes Strasbourg's caprices on our courts, and replace it with a British Bill of Rights. The 60th anniversary should be a moment to revive that promise. For until we clip Strasbourg's wings, we cannot begin to restore sovereignty and true justice to the nation that liberated Europe from the tyranny of arbitrary law." ("After 60 years, bring back Britain's rights" Daily Mail comment piece, September 3, 2013). A copy of the Convention can be found at *www.echr.coe.int/Documents/Convention_ENG.pdf*. [Accessed October 13, 2014.]

There is a natural equal and opposite reaction to the Government's support for particular forms of development, whether it be housing, shale gas or high speed rail.

The rule of law rightly requires that the public should be able to hold the state, and public bodies, to account for transgressing the law or judge-made criteria of acceptable conduct (e.g. rationality, lack of bias, lack of lawful consultation). However, the boundary lines between acceptable and unacceptable conduct are not easy to discern in the red mist of fury over an unwelcome development on one's doorstep. Judicial review has grown from an exceptional remedy of last resort to the predictable next step for a determined objector looking to frustrate or delay a development.[7]

Any Government needs to ensure that those concerned about the legality of public bodies' actions can seek judicial review, whilst ensuring that the process is not so elongated that there is a perverse incentive for objectors to bring challenges simply to seek to delay or frustrate development. But try to speed up the process and the risk is that people's concerns that they are being shut out are accentuated; difficult isn't it? The difficulty for government is to get the balance right.[8]

It is tempting for politicians to single the planning system out for special treatment and to look for the special lever that will deliver consensus and the right development in the right places. We see the emphasis move from time to time onto a particular lever, whatever it may be, for example, on pre-application engagement with communities, neighbourhood planning[9] or financial inducements.[10] The reality is more complex: these factors may help but the resistance to development, developers and change often runs more deeply.

The implications of changes to the judicial review process in relation to planning matters

The requirement that public bodies must abide by the rule of law has always been a fundamental part of our (unwritten) constitution, namely that no public body (including the Government itself) can act outside the powers which have been given to it, directly or indirectly, by Parliament, or in a way that is irrational or unfair (i.e. infringing basic judge-made principles such as avoiding pre-determination or bias). As a matter of legal principle, there is nothing new about the concept of judicial review.

Whilst prior to 1977 applications to the High Court to challenge the decisions of public bodies could be made, the enactment of Order 53 of the Rules of the Supreme Court that year[11] effectively created what we see as the modern form of judicial review, with cases involving administrative law directed to the Queen's Bench Division of the High Court.

Another change has undoubtedly been the increase in regulation; an explosion of rule-making. The more rules, the greater the opportunity for objectors to argue that there have been infringements, and the more so when rules are unclear, or constantly changing and where the consequence of even a minor infringement may be to send the developer down a long snake, back to an earlier stage of the decision-making process. The current Government has attempted to address this "red tape challenge" with limited success, but at least it has removed some of the legal "tripping hazards" introduced in recent years, such as the requirement for a planning permission to summarise the reasons for grant, prescriptive

[7] Which objector may be as likely to be a commercial competitor as a local resident, notwithstanding the comment by Auld L.J. in *R. (on the application of Noble Organisation) v Thanet DC* [2005] EWCA Civ 782: "I add a note of dissatisfaction at the way the availability of judicial review can be exploited—some might say abused—as a commercial weapon by potential rival developers to frustrate and delay their competitors' approved developments, rather than for any demonstrated concern about potential environmental or other planning harm" (SJ Berwin acted for the claimant).

[8] Depeche Mode, 1983.

[9] "[I]f we can enable communities to find their own way of overcoming the tensions between development and conservation, local people can become proponents rather than opponents of appropriate economic growth." (*Open Source Planning*, Conservative Party, February 2010).

[10] See references to a proposed "framework of incentives for development" in the Conservative Party's "Open Source Planning" paper (2010), encouraging developers to "speed up the planning process by reaching voluntary agreements to compensate nearby householders for the impact of the development on their amenity, in return for their support" and more recent reported comments by Deputy Prime Minister Nick Clegg. ("Nick Clegg: pay residents to accept new Garden Cities", Daily Telegraph, August 3, 2014.)

[11] Following recommendations by the Law Commission in its report *Remedies in Administrative Law* (1976) Law Com No.73.

requirements about the detail to be provided with outline applications and (in some cases) the requirement for design and access statements. Section 1 of the Localism Act 2011, authorities' so-called general power of competence, has had rather less effect.

A further change has been the layering on top of our domestic common law system of sometimes poorly fitting sets of international requirements, notably EU Directives, the European Convention on Human Rights[12] and the Aarhus Convention.[13]

The uncertainty that has been caused, and potential tensions in relation to Parliamentary sovereignty, came to the fore in the recent HS2 Supreme Court ruling.[14] Two of the Supreme Court justices in that case have since gone further in their comments in papers delivered this summer. Lady Hale concluded her paper[15] to the Constitutional and Administrative Law Association Conference 2014 as follows:

> "The judgments in HS2 raise the issue that it does not follow from *Factortame* that the 1972 Act necessarily requires our courts to give primacy to EU law over all domestic law, regardless of its constitutional importance. And litigants (or more importantly litigators) have been reminded that they should look first to the common law to protect their fundamental rights: radical suggestions have been made about the power of judicial review to protect them. Whether this trend is developing as a response to the rising tide of anti-European sentiment among parliamentarians, the press and the public, whether it is putting down a marker for what might happen if the 1998 Act were repealed, whether it is a reflection of distinctive judicial philosophies of the judges who are at the forefront of this development, or whether it is simple irritation that our proud traditions of UK constitutionalism seemed to have been forgotten, I leave it to you and to the academics to decide."

Lord Neuberger followed an equivalent theme in a paper delivered at the Supreme Court of Victoria, Melbourne:[16]

> "… the development of pan-European law after centuries, indeed millennia, of separate development and frequent wars, and with different political and legal traditions, and different historical experiences and different traditions, was never going to be easy."

A further change has been the "mission creep" that we have experienced regarding the wider societal issues with which our planning system must grapple, from climate change[17] to race equality[18] to crime prevention,[19] and the physical and social infrastructure which it is encouraged to secure by way of s.106

[12] To which all 47 members of the Council of Europe are parties. See above.

[13] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters adopted on June 25, 1998 in the Danish city of Aarhus (see *http://ec.europa.eu/environment/aarhus/* [Accessed October 13, 2014]) to which 46 Member States of the United Nations Economic Commission for Europe and the EU itself are parties, embodying within Europe principle 10 of the Rio Declaration: "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

[14] *R. (on the application of HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3 (King & Wood Mallesons acted for HS2 Action Alliance).

[15] "UK constitutionalism on the march?" July 14, 2014 at *http://www.supremecourt.uk/docs/speech-140712.pdf* [Accessed October 13, 2014].

[16] "The role of judges in human rights jurisprudence: a comparison of the Australian and UK experience" August 8, 2014 at *http://www.supremecourt.uk/docs/speech-140808.pdf*. [Accessed October 13, 2014.]

[17] *National Planning Policy Framework* (DCLG, March 2012), para.93.

[18] For an example of a planning permission quashed on the basis of non-compliance by the local planning authority with the requirements of race equality legislation see *R. (on the application of Harris) v Haringey LBC* [2010] EWCA Civ 703.

[19] For an example of a police authority challenging by way of judicial review a planning permission, on the basis that it considered that s.106 contributions towards additional police equipment and facilities were inadequate, see *R. (on the application of Police and Crime Commissioner for Leicestershire) v Blaby DC* [2014] EWHC 1719 (Admin) (King & Wood Mallesons SJ Berwin acted for the interested parties, whose permission was under challenge).

agreement,[20] much of which was previously the responsibility of the public sector, paid for us directly by taxes, from affordable housing to schools.

All of these changes have contributed to where we are now: in a planning system where there can be no certainty at all that a planning permission can be relied upon until the deadline for judicial review has safely passed or, if a claim is made, until that claim is finally disposed of.

Until the Coalition Government's procedural changes we have continued to operate under the basic judicial review regime that was introduced in 1977, rather than under a system that reflects modern social reality.

There have long been calls for judicial review reform.[21] Unlike any previous administration, this Government has finally grasped the nettle, recognising that an efficient judicial review system is an inherent part of a functioning planning system. It has both made various changes and proposed further reform, seeking to reduce delays in what the Lord Chancellor has described as a saturated judicial review system, full of unmeritorious and frivolous claims.[22] The Government's figures have described an increase in judicial review applications from 4,500 in 1998 to 12,400 in 2012, of which only one in six were granted consent to proceed beyond the permission stage[23] and of these around five per cent reached a final hearing.[24] But caution is needed. Planning-related cases only account for approximately two per cent of judicial review applications as a whole and around a third of planning-related claims were given permission to proceed.

Nevertheless, planning judicial review claims have historically been relatively slow to resolve, with the amount of time taken averaging 370 days in 2011.[25] The Government's reforms aim to filter out "weak, frivolous and unmeritorious claims at an early stage, while ensuring that arguable claims proceed to a conclusion without delay".

The Lord Chancellor's Written Ministerial Statement on November 19, 2012[26] was overshadowed in the media by a rather incendiary speech on the same day by the Prime Minister to the CBI[27] which talked of judicial review being "a massive growth industry in Britain today" and of the country being "in the economic equivalent of war today—and we need the same spirit. We need to forget about crossing every 't' and dotting every 'i' and we need to throw everything we've got at winning this global race".

The Lord Chancellor this year himself spoke plainly in an article in the *Daily Telegraph*:[28]

> "[We are in a] society that is too legalistic, and where the system can be, and is exploited inappropriately by pressure groups with a political point to make, and a minority of lawyers who make money out of creating opportunities to attack government, Parliament and the decisions they make.
>
> Taking legal action via judicial review has become a must-use tool for pressure group lobbyists. Rushing to court can serve as a delaying tactic. It can serve as a public relations tool to get more media coverage. It can even bring crucial projects to a juddering halt on a technicality.
>
> I've seen lawyers launching legal action on a technicality to try to delay a change to legal fees that will bring down insurance costs for motorists, purely to try to stave off the day when their businesses

[20] Being careful of course not to open up the risk of challenge by taking into account a planning obligation failing the tests in reg.122 of the Community Infrastructure Regulations 2010—a recent addition to potential claimants' armoury of "tripping up" points.

[21] e.g. Committee of the JUSTICE, All Souls Review of Administrative Law, "Administrative Justice: some necessary reforms" (1988); Lord Woolf's "Protection of the Public—A New Challenge"; and the Law Commission's "Administrative Law: Judicial Review and Statutory Appeals" (1994).

[22] See *https://consult.justice.gov.uk/digital-communications/judicial-review-reform/results/govt-response-judicial-review-proposals-for-reform-april-2013.pdf*. [Accessed October 13, 2014.]

[23] See *https://www.gov.uk/government/news/specialist-planning-court-proposed-to-boost-uk-business*. [Accessed October 13, 2014.]

[24] See *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/192246/jr-ad-hoc.pdf*. [Accessed October 13, 2014.]

[25] See *https://www.gov.uk/government/news/specialist-planning-court-proposed-to-boost-uk-business*. [Accessed October 13, 2014.]

[26] See *https://www.gov.uk/government/news/grayling-unclogging-the-courts-to-bring-swifter-justice*. [Accessed October 13, 2014.]

[27] See *http://www.telegraph.co.uk/finance/economics/9687688/David-Cameron-CBI-speech-in-full.html*. [Accessed October 13, 2014.]

[28] See *http://www.telegraph.co.uk/news/uknews/law-and-order/10777503/Chris-Grayling-We-must-stop-the-legal-aid-abusers-tarnishing-Britains-justice-system.html*. [Accessed October 13, 2014.]

would have to adapt. We've had court cases brought to delay important infrastructure projects that will create jobs and wealth for Britain—even companies seeking to undermine each other's businesses by taking legal action over planning decisions."

Politicians' language is perhaps inevitably overstated and betrays from time to time a soreness about being on the receiving end of challenges (such as HS2 Action Alliance's first proceedings[29] in relation to HS2) which are recognised by the parties and courts as raising arguable grounds of challenge. However, my direct experience is indeed of an increase in the use of judicial review in planning matters in recent years (indeed with some niche law firms specialising in such claims and dispelling for potential claimant clients any mystique around the process[30]) and (until recent reforms) of a system that was getting slower and disengaged from wider reforms of the planning system.

Changes to planning-related judicial review procedures

The first set of the two major changes came into effect on July 1, 2013. The Civil Procedure (Amendment No.4) Rules 2013[31] amended r.54 of the Civil Procedure Rules ("CPR"), making a number of procedural changes to the way judicial review claims are handled:

- The time limit for applying for judicial review of a planning decision has been reduced from three months to six weeks from when the grounds for making the claim first arose (i.e. most commonly after the grant of planning permission).
- Where the court refuses permission to proceed with a full judicial review at the initial permission stage as a result of the judge concluding that an application is "totally without merit", the claimant's right to make oral submissions for the reconsideration of his application is removed and the claimant may now only appeal to the Court of Appeal against the refusal on paper, and not by oral submission (therefore reducing the maximum number of stages for a claim at "permission" stage from four to two).
- The introduction of the "Planning Fast-track" system which identified planning-related applications at an early stage and appointed specialist planning judges to review cases. The Planning Fast-track aimed to get substantive hearings heard within three months of all evidence being submitted (or around four months from obtaining permission). This system has now been superseded by the introduction of a separate Planning Court.

The second of the two procedural-related reforms came into effect on April 6, 2014 under the Civil Procedure (Amendment No.3) Rules 2014.[32] Following on from the introduction of the Planning Fast-track, these amendments established a new Planning Court within the High Court. Judicial reviews relating to a wide range of planning matters (specified in CPR 54.21(2)(a)) are now automatically allocated to the court, which is a separate list under the supervision of a specialist Planning Liaison Judge (Lindblom J.). Although not all environmental cases are automatically listed at the Planning Court, the scope of environmental matters that fall under the remit of the court is extensive.[33] And under CPR 54.21(2)(a)(ix), the Planning Liaison Judge also has the discretion to grant permission for cases he deems appropriate to be heard by it. The procedural rules for the new Planning Court are set out in CPR 54.21–24 (Appendix A to this paper) and PD 54E (Appendix B to this paper).

[29] *R. (on the application of HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3.

[30] The renowned claimant firm Richard Buxton and Co has an admirably informative website at *http://www.richardbuxton.co.uk/v3.0/*. [Accessed October 13, 2014.]

[31] Civil Procedure (Amendment No.4) Rules 2013 (SI 2013/1412).

[32] Civil Procedure (Amendment No.3) Rules 2014 (SI 2014/610).

[33] CPR 54.21(2)(a)(vii)—EU environmental legislation and domestic transpositions, including assessments for development consents, habitats, waste and pollution control.

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The Planning Liaison Judge is able to categorise certain claims as "significant"[34] and fast-track the timetable for the case. The following maximum timescales apply for "significant" cases:

- applications for permission should be dealt with on the papers within three weeks of the deadline for filing the acknowledgement of service;
- oral renewals should be heard within one month of the application; and
- substantive hearings are to take place within ten weeks of the deadline for the defendant to submit its detailed grounds for contesting the claim (the deadline normally being five weeks after service of the order granting permission).

Implications of these reforms

The reduction in the time limit to six weeks for bringing judicial review claims is in my view extremely positive. It removes longstanding uncertainty, the subject of concerns expressed by the Court of Justice of the European Union[35] ("CJEU") about the application of the "promptness" requirement that overlaid the previous three months' time limit.

Given that most agreements relating to development between land owners, purchasers, developers and/or funders are expressed to be conditional on expiry of the judicial review period, it has also, at a stroke of the pen, accelerated many transactions and projects by six weeks. It has also brought non-statutory judicial review claims into line with the deadline for statutory challenges and the deadline for judicial review of development consent orders for nationally significant infrastructure projects under the Planning Act 2008.

It is said that less time is available for potential claimants to consider their legal position, instruct lawyers, secure funding and prepare a pre-action letter. But my experience is that, whatever the deadline, there is a rush just before that deadline. Pre-action letters rarely avoid the need for proceedings and in any event the potential grounds for a challenge usually arise from the committee resolution in relation to the particular application, often well before the planning permission is issued.

The removal of the right to an oral hearing to seek to persuade a judge to grant permission where the claim is certified on the papers as "totally without merit" is also a potentially significant change, although this will depend on how the Planning Court applies the statutory test. In *Harrier Developments Ltd v Fenland DC*,[36] the Planning Court rejected an application for judicial review made by Tesco's development partner, Harrier Developments, seeking to challenge the council's decision in January 2013 which granted planning permission to Sainsbury's for a proposed store in Whittlesey. Mitting J. ruled that the application was "totally without merit". Harrier Developments has now appealed on the papers to the Court of Appeal against the ruling.[37] The Court of Appeal in of *R. (on the application of Grace) v Secretary of State for the Home Department*[38] equated the meaning of "totally without merit" as simply meaning "bound to fail". The claimant argued that the phrase should be interpreted more narrowly: that a case should only be certified as "totally without merit" if it were so hopeless or misconceived that a civil restraint order[39] would

[34] PD 54E (3.2)—"significant" claims are those which relate to developments with significant economic impact, raise important points of law, generate significant public interest or those which, by virtue of the volume or nature of technical material, are best dealt with by judges with significant experience of handling such matters.

[35] *Uniplex (UK) Ltd v NHS Business Services Authority Ltd* (C-406/08) [2010] P.T.S.R. 1377; [2010] 2 C.M.L.R. 47.

[36] *Harrier Developments Ltd v Fenland DC* CO/1489/2014. Mitting J. wryly commented in the reasons for his order that "despite the length and erudition of the Grounds, there is nothing in them".

[37] See *http://www.wisbechstandard.co.uk/news/could_fresh_legal_challenge_be_the_straw_that_breaks_sainsbury_s_back_is_whittlesey_supermarket_now_in_doubt_1_3637026*. [Accessed October 13, 2014.]

[38] *R. (on the application of Grace) v Secretary of State for the Home Department* [2014] EWCA Civ 1091 CA (Civ Div) (Lord Dyson M.R., Maurice Kay L.J., Sullivan L.J.).

[39] A civil restraint order is an order issued to those who have had more than one court claim dismissed or struck out for being totally without merit. The order prevents that person from issuing further claims or making applications in some or all of the county courts in England and Wales and also in the High Court, without first getting permission of the judge named in the order. For an example of where even that protection was sought to be circumvented, by an individual issued with a civil restraint order bringing a claim by way of a corporate body established for that purpose see *R. (on*

be justified if a similar claim was repeated. The court rejected that submission, holding that the formulation "bound to fail" was both sufficiently clear for judges to follow it confidently and not so restrictive that claimants would still have access to the Court of Appeal following a refusal.

The Planning Fast-track and the equivalent approach now adopted by the Planning Court are also to be welcomed. The Government has claimed that the new Planning Court will see 400 cases a year settled more quickly.[40]

Anecdotally, a pattern has emerged in relation to case management directions since the Planning Court was established. The work has undoubtedly become more front-loaded for the parties, with the documents to be lodged including an agreed chronology, agreed narrative of relevant facts and an agreed list of issues. "Rolled-up" hearings, at which the consideration about whether to grant permission and the substantive hearing takes place at the same time, in order to avoid the risk of delay, also appear to be more common. The parties are also likely to find that short shrift is given to requests for further time, particularly on the basis of non-availability of particular counsel.[41]

The Court of Appeal and Supreme Court have not set themselves similar targets.

Changes to environmental judicial review costs regime

Since April 1, 2013, due to the enactment of the Civil Procedure (Amendment) Rules 2013, potential environmentally-related judicial review claimants have the option of additional protection against the risk of an unaffordable claim for costs against them if they bring a claim and lose, introduced by the Government to seek to satisfy the requirements of the Aarhus Convention.[42] The third pillar of the Convention requires that the process for access to environmental justice must "provide adequate and effective remedies … and be fair, equitable, timely and not prohibitively expensive". Until April 1, 2013, the standard costs position applied to environmental claims was that the unsuccessful party pays the costs of the successful party, subject to the court's discretion and assessment. A report by Sullivan L.J. on ensuring access to environmental justice[43] in 2008 concluded that the rules on costs in England and Wales inhibited implementation of the Convention. A wider review of the civil litigation costs regime, conducted by Jackson L.J.,[44] confirmed that costs were "prohibitively expensive" and that they were preventing ordinary members of the public from challenging decision in relation to environmental matters. In *Commission of the European Communities v Ireland*,[45] the CJEU held that procedural rules must be sufficiently certain in their operation to avoid prohibitive expense. The Irish courts' discretion, equivalent to that of the courts of England and Wales, not to order the unsuccessful party to pay the costs of the other party was not sufficient to comply with the Aarhus Convention. On February 13, 2014, the CJEU in *European Commission v United Kingdom*[46] ruled that the costs regime in the United Kingdom did not properly implement the requirement that access to justice in relation to environmental matters should not be prohibitively expensive.

Protective costs orders ("PCOs"), which cap a party's maximum exposure to an award of costs should they lose, have been available according to the "Corner House" principles,[47] although often arguments over whether a PCO should be granted have in themselves frequently prolonged proceedings significantly.[48]

the application of English and Heritage Organisation) v Kensington and Chelsea RLBC [2008] EWCA Civ 91 (SJ Berwin acted for the interested party whose permission was under threat).

[40] See *https://www.gov.uk/government/news/new-planning-court-gets-go-ahead-to-support-uk-growth*. [Accessed October 13, 2014.]

[41] *London and Henley (Middle Brook Street) Ltd v Secretary of State for Communities, Local Government and the Regions* [2013] EWHC 4207 (Admin).

[42] The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. See above.

[43] *Ensuring Access to Environmental Justice in England and Wales* (May 2008).

[44] *Review of Civil Litigation Costs: Final Report* December 2009.

[45] *Commission of the European Communities v Ireland* (C-427/07) [2009] E.C.R. I-6277.

[46] *European Commission v United Kingdom* (C-530/11) [2014] 3 W.L.R. 853.

[47] *R. (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192.

[48] *R. (on the application of Garner) v Elmbridge BC* [2010] EWCA Civ 1006.

In relation to judicial review proceedings at first instance, the following mutual cost-capping is now available for "Aarhus Convention claims" (i.e. cases relating to environmental matters), as set out in the new CPR 45.41 to 45.55 and PD 45 paras 5.1 and 5.2:

- If the claimant ultimately loses the proceedings and is an individual (and not bringing the claim as or on behalf of a "business or other legal person") his or her maximum cost liability is £5,000. In all other cases (e.g. commercial entities, non-profit organisations, public bodies), the claimant's maximum liability is £10,000. These caps apply regardless of the claimant's actual financial position.
- If the claimant ultimately wins the proceedings, the defendant's maximum liability is £35,000.

CPR 45.41(2) defines an Aarhus Convention claim as meaning:

> "a claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of the [Aarhus Convention], including a claim which proceeds on the basis that the decision, act or omission, or part of it, is so subject."

The Implementation Guide[49] indicates that the definition of "environmentally-related" should be "as broad in scope as possible", directing us to art.2(3) of the Convention which simply refers, without further definition, to "environmental matters".

Venn v Secretary of State for Communities and Local Government[50] was a Town and Country Planning 1990 s.288 statutory challenge in November 2013, where the claimant submitted that the loss of green space in the garden of a Victorian terrace in London raised environmental matters falling under the Aarhus Convention. Lang J. recognised that there was no application of CPR 45.41 to s.288 challenges but held that the challenge did fall within the remit of the Aarhus Convention, and that the approach in *R. (on the application of Garner) v Elmbridge BC*[51] should be applied to interpret UK law in line with the Convention. As the case raised "environmental matters", the judge made an order limiting the claimant's costs exposure to £3,500. An appeal is due to be heard in October 2014.

CPR 45.41 does not apply to appeals to the Court of Appeal and beyond to the Supreme Court. At each appellate stage a PCO needs to be sought.

I venture to suggest that aspects of the automatic cost capping regime may warrant review. Can it be right that the financial means of a claimant is always irrelevant? A wealthy claimant (whether an individual or corporate) may well be better funded than the body being challenged. Furthermore, the rules by implication include local authorities within their ambit when they bring proceedings as claimant. Again, is this "gold plating" of the requirements of the Convention? Lastly, the lack of clarity about the definition of "environmental matters" is unhelpful.

Changes to legal aid

The Lord Chancellor introduced the Civil Legal Aid (Remuneration) (Amendment) (No.3) Regulations 2014[52] to combat the spread of "legal-aid abusers".[53] The Regulations have been in force since April 22, 2014 and have been put in place to restrict legal aid to only those applicants who have been granted permission by the court to proceed with the application. Where the case concludes prior to a court decision, legal aid is at the discretion of the Lord Chancellor.

[49] *Implementation Guide of Aarhus Convention* (2013).
[50] *Venn v Secretary of State for Communities and Local Government* [2013] EWHC 3546 (Admin).
[51] *R. (on the application of Garner) v Elmbridge BC* [2010] EWCA Civ 1006.
[52] Civil Legal Aid (Remuneration) (Amendment) (No.3) Regulations 2014 (SI 2014/607).
[53] See *http://www.telegraph.co.uk/news/uknews/law-and-order/10777503/Chris-Grayling-We-must-stop-the-legal-aid-abusers-tarnishing-Britains-justice-system.html* [Accessed October 13, 2014].

Previously, work on a judicial review case could qualify for legal aid whether or not the court gave permission for the claimant to proceed to a substantive hearing. The amendments have undoubtedly shifted the burden of risk for pre-permission work to solicitors and advocates. Reports by the Joint Committee on Human Rights ("JCHR") and the House of Lords Secondary Legislation Committee[54] have recommended that the Government annul the Regulations and reintroduce the measures as amendments to the Criminal Justice and Courts Bill, in order to allow full Parliamentary scrutiny. On May 7, 2014, the House of Lords held a debate on the motion of Lord Pannick QC to "regret" the Regulations.[55]

However, legally-aided judicial reviews of planning decisions have historically been a real problem for those who are seeking to rely on the decision being challenged. There is a perception on the part of developers, and no doubt local authorities, that decisions on whether to grant legal aid have been made behind closed doors. Whilst representations about why a proposed claim is unarguable can be made, the reasoning for decisions on whether to award legal aid is not made available. Once a potential claimant has legal aid, he or she is able to proceed largely with impunity from any adverse costs rulings and the usual checks and balances in the system have been lost.

There have also been increases in court fees, and the fee payable on a full hearing is now payable when an application for permission is turned down on the papers and renewed in front of a judge.

Proposals for further judicial review reform

The Criminal Justice and Courts Bill ("the Bill") had its second reading in the House of Lords on June 30, 2014. Part 4 of the Bill contains a number of further proposed changes in relation to judicial review:

> Clause 70: a proposal to lower the threshold where a court can refuse judicial review relief on the basis that correcting the error would be "highly unlikely" to make any difference to the substantive decision of the body being reviewed. The current threshold where the court may exercise its discretion to refuse a remedy or permission to appeal is where it considers it "inevitable" that the result would be the same if reconsidered on the correct basis by the decision-making body. The proposal lowers the threshold and also removes discretion, requiring the court to refuse relief where the lower threshold is met. The proposals also encourage this issue to be considered at the permission rather than substantive hearing stage.
>
> Clauses 71 and 72: a proposal to require all judicial review claimants to disclose their financial circumstances (including, in the case of any body corporate that is unable to demonstrate that it is likely to have financial resources available to meet liabilities in relation to the claim, information about its members and their ability to provide financial support), and the likelihood that a third party may be able to fund the claim, to allow the court to assess costs. The court would not grant permission to proceed unless all resources are disclosed.
>
> Clause 73: a proposed presumption that interveners in judicial review cases will pay their own costs and any costs incurred by any other party because of their intervention. The court already has the power under Supreme Courts Act 1981 s.51 to make an award of costs against a person who is not a party to the claim but this amendment would establish a presumption.
>
> Clauses 74–76: the proposed introduction of a more restrictive framework for cost capping orders. Save in cases raising environmental issues within the meaning of the Aarhus Convention, the Government proposes to codify the Corner House regime to restrict any PCOs to applicants (not interveners) and only after permission is granted.
>
> Clause 77: a proposed "permission" stage for statutory challenges.

[54] Thirty-seventh Report of Session 2013–2014, *Civil Legal Aid (Remuneration)(Amendment) (No.3) Regulations 2014*, HL Paper 157; Thirteenth Report of Session 2013–2014, *The implications for access to justice of the Government's proposals to reform judicial review*, HL Paper 174/HC 868 ("the JCHR Report").

[55] See *http://www.publications.parliament.uk/pa/ld201314/ldhansrd/text/140507-0002.htm#140507102001180*. [Accessed October 13, 2014.]

Clause 78: proposed standardisation of how the six-week deadline is to be calculated for the purposes of different types of proceedings (again, finally the nettle has been grasped so that the deadline starts the day after the relevant decision, meaning that proceedings to quash a decision taken on a Wednesday must be commenced on or before the Wednesday six weeks later—fewer sleepless nights for claimants' lawyers).

The Bill follows a consultation paper, *Judicial Review: proposals for further reform*[56] and related consultation which ran from September 6 to November 1, 2013. A Government fact sheet[57] accompanying the Bill sets out a number of examples of the types of delays to development projects that the proposals aim to prevent:

"• The expansion of Bristol airport which was delayed by around 36 weeks at considerable cost to the developer and the local economy;
- a £38m retail development in East London, due to create 500 jobs, which was delayed by 15 months;
- a development of 360 dwellings in Carmarthenshire which was delayed by around 18 months by an unsuccessful judicial review; and
- a supermarket development in Skelton which was challenged by a rival store, delaying the development by around six months. The challenge was found to be totally without merit."

The document also refers to the example of the judicial review[58] against the Secretary of State's decision to grant a licence to exhume the remains of Richard III, to illustrate the need for a more restrictive cost capping system. The limited company claimant, the Plantagenet Alliance, formed for the purpose of bringing the litigation, was granted a PCO. Despite winning the case on all grounds, the Ministry of Justice estimated its own unrecoverable costs at over £90,000 (not including the costs of other defendants).

The Government has abandoned a proposal to change the rules on "standing" which would have made it more difficult for those with less than a "direct interest" to apply for judicial review, the current test being that a person must have "sufficient interest" to bring a claim, which has been interpreted relatively broadly by the courts. It has also abandoned a proposal to prevent local authorities from challenging decisions under the Planning Act 2008 in relation to nationally significant infrastructure projects.

A number of the provisions that are still being taken forward in the Bill will have a material effect on the practical use of judicial review in relation to planning matters:

The proposed lowering, by way of cl.70, of the threshold for exercising discretion not to quash a decision, to where the error was "highly unlikely" to have made a difference to the outcome, echoes the Prime Minister's exhortation that we should forget about crossing every "t" and dotting every "i". Plainly, the application of the test will be routinely the subject of legal argument, as the reality is that many judicial review claims are brought in relation to argued technical errors and omissions on the part of the authority that probably were not (although it is usually difficult to be sure) central to its decision-making.

The proposed requirements in cll.71 and 72 for disclosure of claimants' financial circumstances and of any likely providers of financial support, together with the "lifting of the corporate veil" in relation to corporate claimants that cannot demonstrate that they have sufficient financial resources to meet potential costs liabilities, sits uncomfortably with the requirements of the Aarhus Convention. This proposal may well discourage claims that are not likely to attract automatic Aarhus Convention costs capping protection, in that it would bring to an end the common practice of potential individual claimants establishing a vehicle, usually a company limited by guarantee, for the purposes of pursuing the litigation in order to provide protection against individual cost liability and in some cases an element of anonymity. Fund

[56] See *https://consult.justice.gov.uk/digital-communications/judicial-review*. [Accessed October 13, 2014.]
[57] *Criminal Justice and Courts Bill Fact Sheet: Reform of Judicial Review* (updated June 27, 2014 on Gov.UK).
[58] *R. (on the application of Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662.

raising and campaign membership in connection with potential claims may also become more difficult if potential funders risk exposure to an award of costs. I do have a concern that this will lead to an increase in litigants in person and/or disparate individual poorly funded claimants, neither of which leads to efficient consideration of the material legal issues.

How courts are dealing with civil disobedience in planning matters

Thankfully, civil disobedience (by which I mean unlawful behaviour as a means of protest against a project or policy, rather than lawful protest) is still relatively rare in relation to planning matters. However, we have seen examples, particularly of trespass and obstruction in relation to environmental issues, with such sagas as:

- The 1990s road protests, in relation to, for example, the A30 in Devon (where a Daniel Hooper briefly gained celebrity status as "Swampy" for spending a week in a complex series of tunnels under its route) and the Newbury bypass (over 800 arrests and £55m spent on police and security services).
- Recent protests in relation to shale gas exploration proposals at Barton Moss, Salford and at Balcombe in Sussex.[59]
- The occupation by Greenpeace activists of the chimney stack at Kingsnorth in 2007 as part of protests against E.ON's proposals for a coal-fired power station.[60]
- Various protests about airport expansion, including the Camp for Climate Action[61] and Grow Heathrow[62] occupations at Heathrow, and breaches of security fences at Stansted[63] and other airports.

More widely we have seen the growth of the Occupy movement and other anti-capitalist groupings, giving rise to a number of politically-charged cases, including orders for possession secured against protesters and/or injunctions to prevent unlawful acts.[64] When is civil disobedience justified in response to the threat of development? Indeed, is it ever justified? I suspect that we all have differing personal moral standpoints. My own is that there is no room for civil disobedience in a properly functioning democracy, but that it is vital that the system can be said, in as objective a way as possible, to be fair in order to remove any justification not to follow the rule of law. The sense that civil disobedience can only be justified where there is a democratic deficit in the processes which have led to the subject matter of the protest is supported in an interesting paper by Daniel Markovits in the *Yale Law Journal*.[65]

There is a danger in extending, to every proposal that may be unpopular to some faction or other, the principles set out by Henry David Thoreau,[66] which assert that individuals have a duty not to allow governments to overrule their conscience—voting is not enough—and that they are themselves the agents of injustice if they do nothing. Thoreau's attention was on the evils of slavery and on the US war with

[59] In Balcombe, the protesters were charged under the Public Order Act 1986, mainly under s.14, which allows police to impose conditions on protestors. The police in this case designated protest areas on the road outside the entrance to Cuadrilla's site, to which the protestors did not abide. However, the protesters were acquitted owing to the fact that it was not made clear to them that there were designated areas so they could not have knowingly failed to comply with the conditions to stay within them. Caroline Lucas MP, and four others charged with breaching the police order was cleared of all charges with the District Judge questioning the legality of the conditions issued under the 1986 Act. Several protesters at Barton Moss were charged under ss.4 and 5 of the 1986 Act for "causing distress to council workers".

[60] Six Greenpeace protesters were arrested for breaking in, climbing the station's chimney stack, painting the word "Gordon" on the chimney and causing an estimated £30,000 of damage. They were acquitted in a 2008 Crown Court hearing. See *http://www.theguardian.com/environment/2008/sep/10/activists.carbonemissions*. [Accessed October 13, 2014.]

[61] See *http://news.bbc.co.uk/1/hi/uk/6943084.stm*. [Accessed October 13, 2014.]

[62] See *http://www.bbc.co.uk/news/uk-england-london-28759853*. [Accessed October 13, 2014.]

[63] See *http://www.planestupid.com/blogs/2008/12/9/why-we-shut-stansted-airport* .[Accessed October 13, 2014.]

[64] e.g. *City of London Corporation v Samede* [2012] EWCA Civ 160 (St Paul's churchyard) and *Sun Street Properties v Persons Unknown* [2011] EWCA 1672 (UBS premises).

[65] Daniel Markovits,"Democratic Disobedience" (2005) 114 Yale L.J. 1897.

[66] Henry David Thoreau, *Resistance to Civil Government* (1849).

Mexico. His thinking was followed by Mahatma Ghandi and by Martin Luther King. It seems to me to be quite a leap for the "Frack Off" group to equate their objections to shale gas exploration and production as an equivalent cause to "universal suffrage, Indian independence, US Civil Rights …".[67]

After all, many people have strongly held views about shale gas.[68] But they also have strongly held views about:

- the green belt;
- large housing schemes;
- historic buildings;
- airports;
- supermarket chains;[69]
- coffee chains;
- traveller sites;
- large road and rail projects;
- waste water projects;
- tidal power; and
- power stations, whether nuclear, gas or coal or indeed generating energy from waste.

In each of these instances, people have held increasingly cynical views about the validity of the administrative process that arrives at the relevant policy or project authorisation and the behaviour of the relevant promoters. They are also increasingly cynical about the scientific, economic or technical justification relied upon as the basis for such decisions: there is equivalent mistrust of "technocracy" as there is of democracy.

How on earth do we ensure that life doesn't simply grind to a halt?!

The practical solution may often be to ensure that protest can take place in a way which does not cause undue disruption or damage whilst maintaining appropriate security, in consultation with the police, to prevent real harm being caused to people, property and/or business activity.

In exceptional cases, legal remedies are available and are there to be used, whether an injunction where there is the substantial risk that damage will be caused by unlawful activity or an order for possession where unlawful trespass has already occurred.

Care is needed. Resorting to law will often play into objectors' hands, giving an opportunity for the underlying issues to be given further publicity, for protestors to be portrayed as being picked upon and for the detailed terms of any order to be resisted (for example, in the way that it seeks to define the categories of individuals and/or groups affected, the extent of land to be the subject of the order and/or the range of activities to be restrained), all of which no doubt BAA experienced in relation to the injunction it obtained in 2008 seeking to prevent unlawful protest to the proposed expansion of Heathrow Airport.[70]

However, there is now a growing and increasingly clear body of case law, excellently summarised in papers by David Forsdick QC,[71] Katherine Holland QC and Melissa Thompson[72] on the circumstances in which the courts will afford protection and the procedural steps to be taken. The papers together consider in detail, with practical guidance:

[67] See *http://frack-off.org.uk/civil-disobedience-will-be-outcome-of-dash-for-gas/*. [Accessed October 13, 2014.]

[68] The majority in fact in favour according to a recent survey undertaken by Populus for industry group UK Onshore Oil and Gas at *http://www.bbc.co.uk/news/business-28735128*. [Accessed October 13, 2014.]

[69] The 2011 Stokes Croft disturbances in Bristol, apparently triggered by objections to a proposed Tesco store, being a particularly unpleasant and extreme example at *http://www.bbc.co.uk/news/uk-england-bristol-13234890*. [Accessed October 13, 2014.]

[70] See *http://www.independent.co.uk/news/uk/crime/baa-wins-right-to-block-heathrow-protest-460493.html*. [Accessed October 13, 2014.]

[71] David Forsdick, "Protest, Trespassers and Human Rights—the Aftermath of St Paul's and the Occupy protests: looking at the approach to possession actions involving protest groups on public and private land" (2012) at *http://www.landmarkchambers.co.uk/userfiles/documents/resources/DF-Protest.pdf* .[Accessed October 13, 2014.]

[72] "Restraining Persons Unknown" *Estates Gazette*, June 22, 2013 at *http://www.landmarkchambers.co.uk/userfiles/documents/resources/KH_Restraining_Persons_Unknown_EG0613.pdf*. [Accessed October 13, 2014.]

- the *Samede*[73] and *Sun Street "Occupy"* cases referred to earlier;
- the proceedings in 2012 to clear Parliament Square of encamped protesters;[74]
- the injunction obtained by the Olympic Delivery Authority against protesters to enable the construction of the construction of a basketball facility for use during the 2012 Olympics;[75]
- the application of the European Convention on Human Rights, particularly art.6 (the right to a fair hearing), art. 10 (the right to freedom of expression) and art.11 (the right to peaceful assembly).

Ensuring a more resilient planning system

It is important that the planning system is swift and efficient in its operation. But also it is also important to minimise the number of instances where decisions are challenged in the courts because they are not accepted as a "fair" outcome (often because the process and the operation of policy is not at all understood), or where frustrations with the process lead to civil disobedience.

It is important that the system is seen as fair, judged by as objective standards as possible. So what are the useful standards to judge it against?

European environmental legislation

The Strategic Environmental Assessment Directive provides a useful framework for judging the processes by which "plans and programmes" are arrived at. Reasonable alternatives to policies will have been considered before options are ruled out. Provided that authorities comply with the Directive's requirements, it is a useful guarantee for procedural rigour, however high-level the debate at the examination of plans may be. It may still be early days, but unfortunately our experience is that sustainability appraisals too often amount to weighty-looking reports, heavily tabulated, that fail to engage with the real issues in a way which is clear and meaningful - leading to a series of challenges.[76]

In relation to large projects, the Environmental Impact Assessment Directive[77] similarly provides an appropriate procedural framework for the assessment of likely significant effects on the environment.

Again, what sometimes brings the Environmental Impact Assessment Directive into disrepute is:

- the intimidating extent of written material prepared by risk-averse professionals to seek to safeguard against the risk of challenge; and
- the frequency with which alleged non-compliance with the Directive is used as a basis for challenge by objectors of unwelcome development proposals.

Neither of these issues will be resolved by the latest amendments to the Directive[78] which are due to be incorporated into national legislation by May 16, 2017. DCLG, however, recognises the concerns which have been expressed and is consulting[79] on a proposed raising of the EIA screening threshold for "urban estate projects" and "industrial estate development" on non-sensitive sites from 0.5ha to 5ha:

[73] See above. Factors taken into account by the Court of Appeal: "the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the protesters, the duration of the protest, the degree to which the protesters occupy the land and the extent of the actual interference the protest causes the rights of others including the property rights of the owners of the land and the rights of any member of the public."

[74] *Mayor of London v Hall* [2010] EWCA Civ 817.

[75] *Olympic Delivery Authority v Persons Unknown* [2012] EWHC 1012 (Ch).

[76] e.g. *Save Historic Newmarket Ltd v Forest Heath DC* [2010] EWHC 3268 (Admin); *Heard v Broadland DC* [2012] EWHC 344 (Admin).

[77] Directive 85/337 on the assessment of the effects of certain public and private projects on the environment [1985] OJ L175/40.

[78] Directive 2014/52 amending Directive 2011/92 on the assessment of the effects of certain public and private projects on the environment [2014] OJ L124/1.

[79] *Technical Consultation on Planning* (DCLG, July 31, 2014), s.5.

> "While it is important that local planning authorities meet their legal obligations, we believe that concern about the risk of legal challenge has led some local planning authorities to require environmental impact assessment for projects which are not likely to give rise to significant effects. Additionally, some developers undertake assessments voluntarily to avoid the risk of a legal challenge or seek confirmation from the Secretary of State that an assessment is not required. It also appears to be the case that developers are carrying out increasingly large and overly complex environmental assessments."

European Convention on Human Rights ("ECHR")[80]

Article 6(1) of the ECHR provides that in:

> "the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publically but the Press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the Court in special circumstances where publicity would prejudice the interests of justice."

Article 8 of the ECHR states as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country for the prevention of disorder or crime, for the protection of health or morals, or for the protection or the rights and freedoms of others."

The ECHR has been directly enforceable in the United Kingdom since October 2002 as a result of the Human Rights Act 1998.

The extent to which the UK planning system is compatible with art.6(1) was considered by the House of Lords in *Alconbury*.[81] The House of Lords held that art.6(1) applies in principle to planning decisions. Their Lordships' speeches referred to the existence of procedural safeguards in the administrative procedure, including that of a quasi judicial hearing before an inspector, but did not express views on what safeguards were necessary. So it is difficult to know the extent to which safeguards in the current system (which has itself changed materially since *Alconbury*) can be removed without giving rise to art.6(1) concerns.

The House of Commons' Library note on Human Rights and Planning[82] comments:

> "had the Lords ruling gone the other way, the whole Town and Country planning system would have required reform, possibly by introducing a system of environmental courts, as in New Zealand, and allowing third party rights of appeal."

[80] See above.

[81] *R. v Secretary of State for the Environment, Transport and the Regions Ex p. Holding & Barnes Plc, Alconbury Developments Ltd and Legal & General Assurance Society Ltd* [2001] UK HL 23. See also *Lough v Secretary of State and Bankside Development Ltd* [2004] EWCA Civ 905.

[82] Standard note SN/SC/1295, June 21, 2010.

Aarhus Convention

The UNECE Convention on Access to Information, Public Participation in decision-making and Access to Justice in Environmental Matters, commonly referred to as the Aarhus Convention, came into force on October 30, 2001.[83] It has three "pillars", or sets of principles, about the procedures that signatory states should adopt in relation to environmental matters. It will be seen that each of the pillars relates to a fundamental aspect of our planning system:

> Pillar One: The right of everyone to receive environmental information that is held by public authorities ("access to environmental information"). This can include information on the state of the environment, but also on policies or measures taken, or on the state of human health and safety where this can be affected by the state of the environment. Applicants are entitled to obtain this information within one month of the request and without having to say why they require it. In addition, public authorities are obliged to actively disseminate environmental information in their possession. This is given domestic effect by way of the Environmental Information Regulations 2004.[84]
> Pillar Two: The right to participate in environmental decision-making. Arrangements are to be made by public authorities to enable the public and environmental non-governmental organisations affected to comment on, for example, proposals for projects affecting the environment, or plans and programmes relating to the environment. These comments are to be taken into due account in decision-making and information to be provided on the final decisions and the reasons for it ("public participation in environmental decision-making").
> Pillar Three: The right to review procedures to challenge public decisions that have been made without respecting the two aforementioned rights or environmental law in general ("access to justice").

The UK Government is required to produce a National Implementation Report every three years, setting out the procedures and mechanisms in place to enable use of the Convention in the United Kingdom, providing examples of the practical steps being taken to implement its requirements. The latest draft[85] represents a useful and relatively detailed assessment by the UK Government on how its administrative and legislative arrangements comply with the requirements of the Convention.

Complaints about Government breaches of the Convention can be made to the Aarhus Convention Compliance Committee, which makes non-binding recommendations to full "Meetings of the Parties" i.e. meetings of representatives of the signatory states.

We need to be wary of attempts to remove these important safety nets, although no doubt European environmental law directives will attract few "yes" votes in any referendum in relation to our continued membership of the European Union, and reference has earlier been made to widespread misconceptions about the role of the ECHR.[86] We also seem to have growing "European law skepticism" at the highest level of our judiciary demonstrated by the forthright comments in the "further observations" at paras 158–211 of the HS2 Action Alliance Supreme Court ruling[87] recently alluded to and elaborated upon by Lady Hale and Lord Neuberger.[88]

There has been recent political debate over whether there should be a British Bill of Rights,[89] but care will be needed to ensure that it is seen as having the rigour that comes with ultimate recourse to justice in Europe, whether in Luxembourg in relation to the Court of Justice of the European Community, in

[83] See above.
[84] Environmental Information Regulations 2004 (SI 2004/3391).
[85] See *http://www.unece.org/fileadmin/DAM/env/pp/NIR_2014/NIR_2014_UK_eng_trc.docx*. [Accessed October 13, 2014.]
[86] Coalition programme for Government, May 2010: "We will establish a commission to investigate the creation of a British Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in British law, and protects and extends British liberties. We will seek to promote a better understanding of the true scope of these obligations and liberties."
[87] *R. (on the application of HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3.
[88] *R. (on the application of HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3.
[89] House of Commons Select Committee on Political and Constitutional Reform: "A new Magna Carta?", July 10, 2014.

Strasbourg in relation to the European Court of Human Rights, or in Geneva in relation to the Aarhus Convention Compliance Committee.

Does the system still comply with the ECHR? In my view none of the changes to the planning system since *Alconbury* would lead to a different ruling, certainly not with the presently constituted Supreme Court. But we should not be complacent. For example:

- It is vital that the Planning Inspectorate retains its independent and impartial role. We should be vigilant against any suggested watering down of the appeal process—for example, any suggestion that local planning authorities should provide an independent review process in relation to domestic planning matters, or any limitations on the right to appeal along the lines of those that were trailed in Open Source Planning.[90]
- Government should resist the temptation to further streamline the planning process when the root cause of delay is often politics, or lack of proper resources or guidance. (However, perhaps conversely, we as a profession should be more prepared to consider proposals that may genuinely lead to improvements with an open mind.)
- Government should also be particularly careful in arriving at bespoke administrative processes for its "grands projets". Where the state is the enthusiastic promoter and supporter it can be difficult to ensure independence of decision-making and a sufficiently robust testing of policy. We have seen the political fall-out from perceived shortcomings in the mechanisms adopted for bringing forward, for example, the ill- fated "super-casinos" competitive shortlisting process pursuant to the Gambling Act 2005; the eco-towns competitive shortlisting process, and, some would say, the consultation carried out in relation to elements of the HS2 rail project. At least the Government accepted that the eco-towns process would be subject to the rigours of the Strategic Environmental Assessment Directive, even if serious questions had to be asked about the flawed methodology for arriving at the preferred sites and the lack of clarity about the "planning" advantage that would be gained.

How to reduce the risk of delay to particular projects

No matter how potentially controversial a project, there are basic practical measures that can be taken to reduce the risk of successful legal challenge. The most fundamental is straightforward engagement with the public and interest groups whilst the scheme is at a formative stage when views can be taken into account.

If concerns arise from particular interest groups, they need to be understood and tackled head on. It may be that concessions or further discussions are required or it may be that the concerns need to be acknowledged as understandable but put in the wider planning context.

Ignore social media at your peril. It is a vital tool, both for understanding, in real time, how issues are playing out and for communicating in a direct and unmediated way.

I do not think it is special pleading to suggest that a legal audit of the planning application package should be carried out given the risks of delay through non-validation at application or appeal stage, or of legal challenge, if the legal and procedural requirements are not adhered to in relation to the application package, including environmental and design and access statements. I say it is not special pleading because this should not be an opportunity for legal advisers to spend hours proof-reading long sets of Environmental Statement technical appendices; the focus must be on correcting inaccuracies, omissions (such as the potential need for an EIA screening opinion) or internal inconsistency in the application package that may lead to legal attack.

[90] Conservative Party, February 2010.

Without impinging in any way on planning officers' role in reaching professional conclusions, there should be greater encouragement for a draft of the committee report to be shared with the applicant for a sense check in relation to applications of any complexity. For example, if the development is likely to affect the setting of a listed building or the character and appearance of a conservation area, have the relevant statutory tests been applied?[91]

There needs to be a clear understanding between the applicant, the authority and third parties about what correspondence and documentation should be regarded as exempt from disclosure under the Freedom of Information Act 2000 and Environmental Information Regulations 2004, particularly in relation to viability appraisal. The Information Tribunal's decision[92] in relation to the Heygate Estate development in Southwark retains some doubt regarding which aspects of an assessment should be regarded as properly commercially confidential and which elements should be disclosed. It may be that more detailed Government guidance is needed, given the frequency with which arguments are arising in the context of planning applications and inquiries over what information should be disclosed and what is properly confidential, and the frequency with which related issues are relied upon by claimants as a further ground for judicial review.

We all should remember that the risks of challenge can be greater when you have a keenly supportive decision-maker; that is where corners get cut.

Care is needed in relation to the s.106 agreement and planning conditions to ensure that they fall within the parameters of the resolution to approve and that they generally are lawful. Authorities frequently have to be reminded that art.36 of the Town and Country Planning (Development Management Procedure) (England) Order 2010[93] requires that any "proposed" planning obligation or s.278 agreement be placed on the planning register; another "tripping hazard".[94]

More generally, developers are not served well by the failures of Government and local planning authorities to provide a supportive, consistent and positive policy backdrop, without mixed messages and agendas that can be seen as contradictory. Public expectations were certainly not well managed in relation to the Government's localism agenda.

As we approach another general election, wouldn't it be refreshing if politicians' intentions to promote or support development were more clearly flagged in manifestos so there is real democratic mandate for development and a discussion about "where" and "how" rather than "whether"?

In relation to housing development, the arguments over need and affordability are there but so often trumped by more local concerns. It is important that groups such as Shelter and Priced Out continue to make the case for housing. But, alongside that, is there more for the house building industry to do? Wouldn't it be great if people aspired to live in, or near, house builders' brands, echoing the halo effect of a Waitrose or M&S or the brand values of a Volvo or Mini Cooper?

Perhaps developers of major schemes might be tempted to take heed of Nick Clegg's recent comments in the context of new garden cities, and look for mechanisms for compensating, on an ex gratia basis, those who consider that the value of their properties will be affected by development—looking to examples in relation to recent airport and rail proposals. This could include a range of discretionary compensation options to be considered, including:

- express purchase: a proposal for a streamlined system of purchasing owner-occupied properties that are within a defined area of influence;

[91] The pitfalls of getting it wrong are amply illustrated by *Barnwell Manor Wind Energy Ltd v East Northamptonshire DC* [2014] EWCA Civ 137 and *R. (on the application of Forge Field Society) v Sevenoaks DC* [2014] EWHC 1895 (Admin).

[92] See *http://www.informationtribunal.gov.uk/DBFiles/Decision/i1279/London%20Borough%20of%20Southwark%20EA.2013.0162%20%2809.05.14%29.pdf*. [Accessed October 13, 2014.]

[93] Town and Country Planning (Development Management Procedure) (England) Order 2010 (SI 2010/2184).

[94] Raised as a further ground of challenge and rejected by Foskett J. in *R. (on the application of Police and Crime Commissioner for Leicestershire) v Blaby DC* [2014] EWHC 1719 (Admin).

- a voluntary purchase scheme;
- a property bond scheme guaranteeing that any losses in value of properties over a defined period due to the scheme will be made good; and
- a long-term hardship scheme for those blighted by the prospect of the scheme.

Or will this simply give rise to fresh complaints that permissions are being bought, and reduce the money available for more formal contributions and mitigation by way of s.106?

Finally, we could do more to make the system, and the language that we use, understandable. The acronyms of the 2004 Act recede into the past but we too often talk and write in lifeless technocrat code. Is part of the fear of development, in fact, simply fear of the unknown?

Appendix A

II Planning Court

General

CPR 54.21

(1) This Section applies to Planning Court claims.

(2) (2) In this Section, "Planning Court claim" means a judicial review or statutory challenge which—

  (a) involves any of the following matters—

    (i) planning permission, other development consents, the enforcement of planning control and the enforcement of other statutory schemes;

    (ii) applications under the Transport and Works Act 1992;

    (iii) wayleaves;

    (iv) highways and other rights of way;

    (v) compulsory purchase orders;

    (vi) village greens;

    (vii) European Union environmental legislation and domestic transpositions, including assessments for development consents, habitats, waste and pollution control;

    (viii) national, regional or other planning policy documents, statutory or otherwise; or

    (ix) any other matter the judge appointed under rule 54.22(2) considers appropriate; and

  (b) has been issued or transferred to the Planning Court.

(Part 30 (Transfer) applies to transfers to and from the Planning Court.)

Specialist list

54.22 (1) The Planning Court claims form a specialist list.

(2) A judge nominated by the President of the Queen's Bench Division will be in charge of the Planning Court specialist list and will be known as the Planning Liaison Judge.

(3) The President of the Queen's Bench Division will be responsible for the nomination of specialist planning judges to deal with Planning Court claims which are significant

within the meaning of Practice Direction 54E, and of other judges to deal with other Planning Court claims.

Application of the Civil Procedure Rules

54.23 These Rules and their practice directions will apply to Planning Court claims unless this section or a practice direction provides otherwise.

Further provision about Planning Court claims

54.24 Practice Direction 54E makes further provision about Planning Court claims, in particular about the timescales for determining such claims.

Appendix B

Practice Direction 54E—Planning Court Claims

General

1.1 This Practice Direction applies to Planning Court claims.

How to start a Planning Court claim

2.1 Planning Court claims must be issued or lodged in the Administrative Court Office of the High Court in accordance with Practice Direction 54D.

2.2 The form must be marked the "Planning Court".

Categorisation of Planning Court claims

3.1 Planning Court claims may be categorised as "significant" by the Planning Liaison Judge.

3.2 Significant Planning Court claims include claims which—

(a) relate to commercial, residential, or other developments which have significant economic impact either at a local level or beyond their immediate locality;

(b) raise important points of law;

(c) generate significant public interest; or

(d) by virtue of the volume or nature of technical material, are best dealt with by judges with significant experience of handling such matters.

3.3 A party wishing to make representations in respect of the categorisation of a Planning Court claim must do so in writing, on issuing the claim or lodging an acknowledgment of service as appropriate.

3.4 The target timescales for the hearing of significant (as defined by paragraph 3.2) Planning Court claims, which the parties should prepare to meet, are as follows, subject to the overriding objective of the interests of justice—

(a) applications for permission to apply for judicial review are to be determined within three weeks of the expiry of the time limit for filing of the acknowledgment of service;

(b) oral renewals of applications for permission to apply for judicial review are to be heard within one month of receipt of request for renewal;

(c) applications for permission under section 289 of the Town and Country Planning Act 1990 are to be determined within one month of issue;

(d) substantive statutory applications, including applications under section 288 of the Town and Country Planning Act 1990, are to be heard within six months of issue; and

(e) judicial reviews are to be heard within ten weeks of the expiry of the period for the submission of detailed grounds by the defendant or any other party as provided in Rule 54.14.

3.5 The Planning Court may make case management directions, including a direction to any party intending to contest the claim to file and serve a summary of his grounds for doing so.

3.6 Notwithstanding the categorisation under paragraph 3.1 of a Planning Court claim as significant or otherwise, the Planning Liaison Judge may direct the expedition of any Planning Court claim if he considers it to necessary to deal with the case justly.

Appendix C

VII Costs Limits in Aarhus Convention Claims

Scope and interpretation

45.41 (1) This Section provides for the costs which are to be recoverable between the parties in Aarhus Convention claims.

(2) In this Section, "Aarhus Convention claim" means a claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998, including a claim which proceeds on the basis that the decision, act or omission, or part of it, is so subject.

(Rule 52.9A makes provision in relation to costs of an appeal.)

Opting out

45.42 Rules 45.43 to 45.44 do not apply where the claimant—

(a) has not stated in the claim form that the claim is an Aarhus Convention claim; or

(b) has stated in the claim form that—

(i) the claim is not an Aarhus Convention claim, or

(ii) although the claim is an Aarhus Convention claim, the claimant does not wish those rules to apply.

Limit on costs recoverable from a party in an Aarhus Convention claim

45.43 (1) Subject to rule 45.44, a party to an Aarhus Convention claim may not be ordered to pay costs exceeding the amount prescribed in Practice Direction 45.

(2) Practice Direction 45 may prescribe a different amount for the purpose of paragraph (1) according to the nature of the claimant.

Challenging whether the claim is an Aarhus Convention claim

45.44 (1) If the claimant has stated in the claim form that the claim is an Aarhus Convention claim, rule 45.43 will apply unless—
(a) the defendant has in the acknowledgment of service filed in accordance with rule 54.8—
(i) denied that the claim is an Aarhus Convention claim; and
(ii) set out the defendant's grounds for such denial; and
(b) the court has determined that the claim is not an Aarhus Convention claim.
(2) Where the defendant argues that the claim is not an Aarhus Convention claim, the court will determine that issue at the earliest opportunity.
(3) In any proceedings to determine whether the claim is an Aarhus Convention claim—
(a) if the court holds that the claim is not an Aarhus Convention claim, it will normally make no order for costs in relation to those proceedings;
(b) if the court holds that the claim is an Aarhus Convention claim, it will normally order the defendant to pay the claimant's costs of those proceedings on the indemnity basis, and that order may be enforced notwithstanding that this would increase the costs payable by the defendant beyond the amount prescribed in Practice Direction 45.

Appendix D

Orders to limit the recoverable costs of an appeal

52.9A (1) In any proceedings in which costs recovery is normally limited or excluded at first instance, an appeal court may make an order that the recoverable costs of an appeal will be limited to the extent which the court specifies.
(2) In making such an order the court will have regard to—
(a) the means of both parties;
(b) all the circumstances of the case; and
(c) the need to facilitate access to justice.
(3) If the appeal raises an issue of principle or practice upon which substantial sums may turn, it may not be appropriate to make an order under paragraph (1).
(4) An application for such an order must be made as soon as practicable and will be determined without a hearing unless the court orders otherwise.