Planning Law Update

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Introduction

It is not possible or practical in a short paper of this kind to address all of the legal changes and developments which have occurred in the sphere of planning law over the past 12 months. However, the purpose of this paper is to identify those areas of practical significance where there have been recent case law developments which are of interest to the planning practitioner. At the end of the paper there are a number of recent cases dealing with common themes occurring within a development control context and reinforcing common law development control principles. I propose however in the substance of the paper to deal with two areas of planning practice in which the courts have recently undertaken further development of the law. One of these areas is the familiar friend of environment impact assessment. The other and the first area which I propose to cover is one which has been relatively neglected up until some very significant recent case law, and that is the law relating to consultation.

Consultation

The law relating to consultation has an important practical bearing on planning for a number of reasons. Not only is it an area in which there have been a number of recent cases seeking to develop the law, but consultation and public involvement are clearly a high priority for the government. Involvement in consultation exercises is now a staple of the life of the public lawyer. It is of particular significance in a planning context because of the emphasis in the current White Paper on the significance of consultation, for instance in relation to the development of major infrastructure projects. It is not the purpose of this paper to delve into major infrastructure projects, as they are being covered by others. However, the purpose of this section of the paper is to hopefully provide some insight into the legal context and structure against which the consultation promised by the White Paper will have to be conducted.

Prior to embarking on the detailed exposition of the law and the cases, it is important to bear in mind that this area of the law is, as will become apparent, extremely fact sensitive. Whilst, therefore, I propose to set out the structure and content of the legal principles, the outcome of any particular case will, as we shall see, depend critically upon the factual matrix within which it arises.

Turning to the principles, the law is essentially based on two key questions. The first is: When does a duty to consult arise? The second is: What is the legal requirement when a duty to consult has arisen? It makes sense to deal with the questions in that order.

The existence of a duty to consult

A duty to consult can arise for a number of reasons. The first is because there is a statutory requirement to consult about a particular decision or issue. That was the context of the recent case of *R. (on the application of Parents for Legal Action) v Northumberland CC*, the details of which we shall turn to below.

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A duty to consult can also arise from the application of the principles related to legitimate expectation. In *R. (on the application of Abdi) v Secretary of State for the Home Department* [2005] EWCA Civ 163 at para.68, Laws L.J. expressed the point as follows:

> ''Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so.''

That passage featured in the recent case of *R. (on the application of Tinn) v Secretary of State for Transport* [2006] EWHC 193. This action case concerned the construction of a bypass for Huntingdon and, more particularly, the route which such a bypass was to take. Relying on the principles pertaining to legitimate expectation, the claimant asserted that on the basis of the material which had been published by the Department there was a legitimate expectation that there would be a consultation in relation to the alternative routes which were proposed for the bypass. Whilst there was no dispute but that the doctrine of legitimate expectation could give rise to a requirement for consultation, on the facts of the particular case the court was unpersuaded that there was a legitimate expectation that there would be a consultation exercise upon the alternative alignments of the proposed new road. This was notwithstanding the reference in technical reports suggesting that the precise alignment would be the subject of further consultation and an announcement from the Secretary of State in respect of the scheme that ''the next step for the scheme is for the Highways Agency to have a public consultation leading to the announcement of a preferred route'', the court concluded that none of this material gave rise to a legitimate expectation that the Secretary of State would consult on more than one route, or that the preferred route would be consulted upon in every last detail. On that basis the application was unsuccessful.

This legal approach was adopted in the very important recent case which has led to the decision to feature this aspect of the law in this paper, namely *R. (on the application of Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311. This case concerned the consultation exercise which had been undertaken in relation to a White Paper on the future energy production in the UK, and in particular the possible development and use of new nuclear power plants. Whilst those acting on behalf of the Secretary of State did not contest that the consultation exercise was justiciable, they reserved their position to argue the point in the context of any appeal. In that light, Sullivan J. chose to examine the point and, reliant on the case of *Abdi*, concluded that, given the government's representation that the decision in respect of the principle of use of nuclear power stations would be given ''the fullest public consultation'', he was satisfied that a promise had been made that consultation would occur. He went on, however, to give that legal principle an important additional twist associated with international obligation.

He noted at para.47 of his Judgment the fact that the UK is a signatory to the Aarhus Convention. Article 7 of the Convention provides in its final sentence:

> ''To the extent appropriate, each party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.''

In the light of the international obligations which the UK government was under, the judge concluded that it would be difficult to see, given the importance of the decision being taken, how it could be consistent with the government's international obligations under the Aarhus Convention to offer anything other than a promise of ''the fullest public consultation''. In that context, therefore, he concluded not only that there was a legitimate expectation but also that it would have been

inconsistent with those international obligations, given the significance of the decision, for it not to have been the subject of full public consultation.

The fourth and final way in which a duty can arise is when it is assumed by the relevant public body. Irrespective of whether or not there is any statutory or international obligation, or whether any legitimate expectation has been raised, once a public body has decided that it is going to undertake consultation then that consultation must be undertaken properly, consistent with the principles which will be set out below in response to the second pertinent question. These principles were recently reinforced in the case of *R. (on the application of Niazi) v Secretary of State for the Home Department* [2007] EWCA Civ 1495

The legal requirements of consultation

The second issue which arises is: What is it necessary to do in order to have a lawful public consultation? What are the legal requirements of consultation?

There have been a number of cases over the years which have sought to address the requirements of consultation. These were essentially distilled by the Court of Appeal in the case of *R. v North and East Devon Health Authority Ex p. Coughlan* [2001] Q.B. 213, in which at para.108 Lord Woolf M.R. stated as follows:

> "108 It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken."

Thus, the first consideration in relation to the undertaking of a lawful consultation exercise is that it must be undertaken at a time when the proposals are still at their formative stage. This of course has significant implications for what is commonly undertaken in the public sphere, namely a staged consultation at which, during the course of the process, various options are eliminated. If that is to be the approach, the experience of recent cases demonstrates that it is a consultation technique which requires careful management if it is to survive scrutiny.

In the case of *Sadar v Watford BC* [2006] EWHC 1590, a challenge by way of Judicial Review was launched against a decision by a local authority to delimit the licences for hackney carriages within the borough. Under Section 16 of the Transport Act 1985, the local authority had power to limit the number of hackney carriage licences only if it was satisfied that there was significant demand for such services which was unmet. The members met on September 5 and decided, as the judge found, that they were going to delimit the number of hackney carriage licences. They then embarked on a consultation procedure prior to a report back to them on October 20 to resolve to end limits on the number of hackney carriage vehicle licences. The contention on behalf of the claimants was that a decision in principle had been reached on September 5 and that therefore the subsequent consultation exercise leading to the decision on October 20 was a futile exercise, as that was never going to influence the decision of principle which had been reached. On the facts of that case, following the principles set out in *Coughlan*, the judge concluded that in fact the claimants were correct and that once the decision in principle to delimit had been taken on September 5 the

consultation exercise which occurred afterwards was unlawful since it was an empty gesture. The decision in principle had been made to delimit the number of licences, and thus nothing which emerged from that subsequent consultation exercise would be able to disturb that previous decision.

In a similar vein, although in a different statutory context, is the recent case of *R. (on the application of Parents for Legal Action Ltd) v Northumberland CC* [2006] EWHC 1081. This was a case concerning a reorganisation sponsored by a local education authority seeking to adopt a two-tier system of schooling in place of the prevailing three-tier system. The LEA adopted a staged consultation process, starting from a consultation related to whether or not in principle a two-tier system ought to be adopted. At the third stage of the consultation, it having been decided to adopt the two-tier system, there was then a consultation about the potential role of individual schools and school partnerships in delivering the two-tier system. A challenge was launched on the basis that the third stage of the consultation was unlawful based upon the fact that it was solely on the assumption that the two-tier system would be adopted. It failed to embrace a consideration of whether or not individual schools might have a role to play in a potential three-tier model.

It is important to appreciate that this case arose in the context of a particular statutory duty to consult created by ss.28 and 29 of the School Standards and Framework Act 1998. As Munby J. noted, these statutory sections create a mandatory requirement, by use of the word "shall", in respect of the requirement for consultation. The effect of this statutory framework led the judge to conclude as follows:

> "33 In substance I agree with Ms White [counsel for the claimants]. I repeat my analysis of the consultation process. Stages 0 and 1 of the consultation process involve county wide consultation on the general principle of whether or not to adopt a two tier model. There was no consultation on the implications for specific school partnerships, let alone specific schools. Stage 2 of the consultation process does focus on specific school partnerships and specific schools but is confined to consideration of different two tier models. In other words, and this as it seems to me is the crucial point, *at no stage during the consultation process has there been any consultation on whether or not specific school partnerships, let alone specific schools, should adopt a two tier model*."

The judge, having noted that there was no objection in principle to having a staged process of consultation and regarding it as one long consultation process, went on to record what he regarded as being the Council's error in the following way:

> "35 The defendant's error was in treating that decision as precluding any public discussion during stage 2 of the consultation process of anything other than two tier models. Given what had gone before and given, in particular, that down to 19th April 2005 there had been no consultation on the implications for specific school partnerships, let alone specific schools, of the defendant's proposals, the vice here lies in the fact that the decision of 19th April 2005 has been understood as confining the subsequent stage 2 consultations in relation to specific school partnerships and specific schools to consideration of different two tier models, when what is now required as part of a stage 2 consultation, given that this opportunity was not afforded earlier as part of the stage 0 and 1 consultations, is meaningful consultation, for example, on whether Southlands Middle School and Brockwell Middle School should be part of a two tier system or remain as part of a three tier system."

Thus, it can be seen that, whilst a staged consultation period can be perfectly appropriate, as it was in *R. (on the application of Medway Council) v Secretary of State for Transport* [2003] J.B.C. 583, it is

important to appreciate that, particularly in a statutory context requiring mandatory consultation, staged consultation can carry the danger of closing the decision-makers' minds to how the detail required at a later stage of consultation might be effectively precluded by decisions which have been taken during earlier stages. These cases reinforce the need for careful design of the consultation process so as to ensure that all of the potential permutations which are being considered as part of the decision-making process are open to comment from the participating public.

The second ingredient of a lawful consultation is the provision of sufficient reasons and material to enable an intelligent consideration of the proposals and therefore a proper informed response. This aspect of consultation has been the subject of two important recent cases. The first of those is, again, the decision of Sullivan J. in *Greenpeace*. Having concluded, as we have noted above, that the consultation in respect of the White Paper was justiciable, he then went on to consider whether or not there had been a failing in respect of this requirement. Within what was obviously very extensive material before the court, he focused upon two aspects of the material in relation to this requirement.

The first was with respect to the question of economics, which was clearly an important consideration in respect of the consultation. He concluded on the basis of the material that there was inadequate material within the White Paper to enable a proper public consultation exercise to occur. In doing so he distinguished between the case in hand and *R. (on the application of London Borough of Wandsworth) v Secretary of State for Transport* [2005] EWHC 20. That challenge, which failed, was based upon the Secretary of State taking into account new technical material in the form of additional analysis of passenger forecasts after the White Paper had been published. Sullivan J. distinguished that case, firstly, on the basis of its particular facts, noting that in that case there was a ''truly immense'' amount of material which was provided along with the White Paper itself. By contrast, in the *Greenpeace* case, it appears that the evidence amounted to two pages. He also distinguished it on the facts on the basis that the Airports White Paper was clear that it was determining the issue of need, and that the statement of principle in relation to need was contained in the White Paper itself. By contrast, in the *Greenpeace* case, the statement of principle had preceded the White Paper. As such, therefore, there was a danger that it would escape the opportunity for the public to debate the need issue, in accordance with a proper and fair process of consultation.

In addition to being dissatisfied in relation to the material in respect of economic considerations, Sullivan J. was concerned about the material which had been provided in support of the issue related to waste. Without dwelling at length upon the facts, in essence the White Paper relied upon a response from the Committee on Radioactive Waste Management, which was represented in the White Paper as being that they had confirmed that waste from a new build programme could technically be accommodated by options for waste disposal that that body was considering. He concluded that, whilst that statement was true, it was true only so far as it went. In fact, the substantive version of the CORWM's response was, as summarised by the judge, that there was a technical solution, *but*. In the light of the ''yes but'' answer being represented in the material as ''yes'', the judge concluded that the consultation material was ''seriously misleading''. On that basis, he was equally dissatisfied about the lawfulness of the material upon which the consultation was based.

Debate in the *Greenpeace* case in this context also focused upon the other important recent authority of *R. (on the application of Edwards) v Environment Agency* [2006] EWCA Civ 877. This was a decision of the Court of Appeal in relation to an application made to the Environment Agency by a cement works to be granted a permit for the burning of waste tyres. One of the grounds of challenge before the Court of Appeal was that during the course of the Environment Agency's consideration

of the application they became seized of internal reports which were relevant to the emission of dust from the stack which was involved in the new process. A process occurred whereby the Environment Agency commissioned its Air Quality Monitoring and Assessment Unit (AQMAU) to review information provided by the applicant and provide advice in respect of emissions from the main stack and low-level dust. The AQMAU required further data, which the Agency obtained from the applicant, and this led to two reports being furnished, neither of which was placed into the public domain. The Environment Agency did indicate to the public that they had undertaken a review of the applicant's data but did not indicate the nature or outcome of that review. A ground of challenge raised by the claimant was the failure of the Environment Agency to publish that material to the public so that it could provide them with a fully informed opportunity to comment on, in particular, concerns which the reports contained with respect to low-level dust.

The decision to deny the public access to these reports was defended by the Environment Agency on the basis of the House of Lords decision in *Bushell v Secretary of State for the Environment* [1981] A.C. 75, in which it was concluded by Lord Diplock in the leading speech that a decision maker was obliged to provide his reasons for a decision but was not obliged to disclose all of the advice, expert or otherwise, which he had received from within his department in the course of making up his mind. On that basis, it was contended that the AQMAU reports did not need to be placed in the public domain.

The Court of Appeal dismissed this argument, distinguishing *Bushell* and concluding that the principle it articulated had a narrower ambit than that which had been contended for. In particular, reliance was placed upon a passage of Lord Diplock's speech in which he indicated that fairness would also require objectors to be given sufficient information about the reasons relied upon by the decision maker so as to enable them to challenge the accuracy of any facts and the validity of any arguments on which the decision's reasons were based. Providing the leading judgment of the Court of Appeal, Auld L.J. concluded that the judge at first instance had been correct in characterising the failure to disclose this material as a breach of the common law requirements for consultation. He expressed his opinion as follows:

> "106 In short, the non-disclosure of the AQMAU reports left the public in ignorance, until the Agency's grant of the permit, of the only full information as to the extent of the low level emissions of dust and the only information at all on their possible impact on the environment. I agree with the Judge that such information was potentially material to the Agency's decision and to the members of the public who were seeking to influence it, and that failure by the Agency to disclose it at the time was a breach of its common law duty of fairness to disclose it."

For other reasons the court declined to exercise its discretion to grant relief in relation to that decision. Nevertheless, the importance of the principle re-emerges in paras 59 and onwards of Sullivan J.'s judgment in *Greenpeace*. Whilst he accepted that there were factual differences between the circumstances of that case and the *Edwards* case, nevertheless he concluded at para.61 of his judgment that that case made clear that there was an overriding requirement that any consultation must be fair, and that what is fair and what the requirements of fairness demand were that new material which has not been available during the consultation period should be made available to consultees so that they have an opportunity to deal with it before a decision is taken. The extent of that requirement would depend upon the particular circumstances of the case. Thus, the *Edwards* decision provided important background to the conclusions which Sullivan J. reached in

the *Greenpeace* case about the adequacy of the consultation exercise upon which the government had engaged.

These cases provide important illustrations and amplifications of the proper approach to the common law of consultation. It should also be pointed out that the final ingredients of a consultation process are equally important. That is to say that adequate time must be provided for the consultation to occur, and that the product of consultation should be taken carefully and faithfully into account in reaching whatever decision is ultimately arrived at.

Environmental Impact Assessment

Most of us will be aware that the case in the European Court of Justice of *Barker* left unfinished business in the House of Lords in relation to Reserved Matters applications and the need for Environmental Impact Assessments. Equally, many may have been concerned in relation to the correct approach to screening proposals for Environmental Impact Assessment following the decision of the Court of Appeal in *Gillespie*. Both of these issues have been the subject of further consideration in important recent cases.

Following the decision of the European Court, the House of Lords reconvened to consider the case of *Barker* and provided their decision in December in *R. (on the application of Barker) v Bromley LBC* [2006] UKHL 52. The House of Lords decided, and effectively it was not opposed, that the claimant was entitled to a declaration that the 1988 Regulations failed to fully and properly implement the requirements of the Directive on environmental assessment. Having decided that the House of Lords in the leading speech of Lord Hope gave further consideration to the implications of the European Court judgment. From paras 22 and 23 it remains clear that. in order to grant outline planning permission in respect of environment impact development, it is necessary for a full and proper Environmental Impact Assessment to be carried out at the outline stage and aspects cannot be left for staged approval at a later date. In particular, at paras 23 and 24, he observed as follows:

> ''23 If sufficient information is given at the outset it ought to be possible for the authority to determine whether the EIA which is obtained at that stage will take account of all the potential environmental effects that are likely to follow as consideration of the application proceeds through the multi-stage process. Conditions designed to ensure that the project remains strictly within the scope of that assessment will minimise the risk that those effects will not be identifiable until the stage when approval is sought for reserved matters. In cases of that kind it will normally be possible for the competent authority to treat the EIA at the outline stage as sufficient for the purposes of granting a multi-stage consent for the development: R v Rochdale MBC ex parte Milne [2001] 81 P&CR 365 para 114 per Sullivan J.
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> 24 As the European Court said in paragraph 48 of its judgment, however, the competent authority may be obliged in some circumstances to carry out an EIA even after outline planning permission has been granted. This is because it is not possible to eliminate entirely the possibility that it will not become apparent until a later stage in the multi-stage consent process that the project is likely to have significant effects on the environment. In that event account will have to be taken of all the aspects of the project which have not yet been assessed or which have been identified for the first time as requiring an assessment. This may be because the need for an EIA was overlooked at the outline stage, or it may be because a detailed description of the proposal to the extent necessary to obtain approval of reserved matters is revealed that the development may have significant effects on the environment that were not anticipated earlier.

> In that event account will have to be taken of all the aspects of the project which are likely to have significant effects on the environment which have not yet been assessed or which have been identified for the first time as requiring an assessment. The flaw in the 1988 regulations was that they did not provide for an EIA at the reserved matters stage in any circumstances.''

It remains unclear as to whether or not there will be any further legislation. However, the decision of the court makes plain that the process still requires at the outset the fullest possible assessment of the environmental effects of a development which requires an EIA, and that conditions should be imposed in order to ensure that the environmental effects remain within the parameters circumscribed by the environmental assessment process. Furthermore, it is absolutely clear from para.24 that the requirement of EIA at a subsequent stage could only arise, as it were, by accident, and that it does not appear to be permissible to postpone to the Reserved Matters stage aspects of environmental impact which are unclear at the outline stage. Only in unforeseen circumstances is a Reserved Matters EIA appropriate. In the event of anything that can be foreseen, it ought to be addressed in the EIA prepared for the outline permission.

This case obviously has some relationship with the question of whether or not an EIA is required at all. This question arises in particular in the context of cases which fall within Sch.2 to the Regulations and in respect of which there is discretion as to whether or not an EIA is required. The extent to which conditions which might be imposed subsequently on a planning permission could inform the judgment of the decision maker in deciding whether or not to require an EIA was the subject matter of the Court of Appeal's deliberations in *Gillespie*.

These matters have been re-examined in the context of the recent case of *R. (on the application of Catt) v Brighton and Hove CC and Brighton and Hove Albion Football Club* [2007] EWCA Civ 298. The submission which was made by the claimant in *Catt* was that on a proper interpretation of the court's decision in *Gillespie* it was only appropriate to take account of ''plainly established and plainly uncontroversial'' remedial measures. These words are taken from a passage of the judgment of Laws L.J. in Gillespie at para.46, where he said as follows:

> ''Prospective remedial measures may have been put before him (the Secretary of State) whose nature, availability and effectiveness are already plainly established and plainly uncontroversial; though I should have thought there is little likelihood of such a state of affairs in relation to a development of any complexity. But if prospective remedial measures are not plainly established and not plainly uncontroversial, then as it seems to me the case calls for an EIA.''

In giving the leading judgment of the Court of Appeal, Pill L.J. referred back to the judgment which he had given in the case of *Gillespie*. He rejected the construction which had been placed upon the decision in *Gillespie* by the claimant, and refused to accept that any distinction could be drawn between plainly established and uncontroversial remedial measures which might be taken into account and others which were less certain which could not. He repeated his own observations in *Gillespie* that the Secretary of State was not required to put into separate compartments the development proposal and proposed remedial measures, or shut his eyes to any remedial measures which might be submitted as part of the planning proposal. At para.37 of his judgment he provided as follows:

> ''When forming a screening opinion, the council were not required to ignore either the conditions proposed to limit the scope of the development or the conditions providing for ameliorative or remedial measures. The consequences of providing the additional seating, and

> other changes, could not be predicted with certainty but, as Collins J noted, the council had extensive knowledge and experience, supported by surveys, of the impact of existing football league and cup matches upon the environment. Upon the basis of that and the studies into future impact, they were entitled to assess the likely impact of the additional capacity proposed in the context of the continuing ameliorative measures also proposed and to form the screening opinion they did.''

It appears from this, therefore, that the Court of Appeal, in examining the discretion provided in respect of Sch.2 projects, are unwilling to provide any rules or criteria against which that discretion should be exercised and, in particular, consideration given to the opportunity to impose conditions. It remains, therefore, a broad discretion in which even uncertain remedial measures may be taken into account in determining whether or not an EIA is required. Obviously, the breadth of the discretion which the court has confirmed is afforded to the decision maker makes it far more difficult to demonstrate that there has been any error of law in concluding that an EIA is not required.

The breadth of the potential projects which may require Environmental Assessment was reinforced by the recent decision in *R. (on the application of Tree and Wildlife Action Committee Ltd) v Forestry Commissioners* [2007] EWHC 1623. In that case it was determined that when considering a proposal for deforestation for a particular end use then the whole project including the proposed end use had to be taken into account in determining whether an assessment was required. Thus both the loss of the trees and the proposed football pitches were they were to be felled to facilitate had to be considered together within the screening process.

Development control issues

Having grappled with the recently established legal principles relating to consultation and scaled the heights of Environmental Impact Assessment, by way of concluding this update I propose simply to draw attention to a number of recent cases bearing upon common law principles related to aspects of development control.

Previous inspectors' decisions

It has long been held to be the case that a previous inspector's decision is a material consideration, and one which is particularly pertinent if it relates to the same site and a similar proposal. This principle was recently reinforced by the Court of Appeal in the case of *Dunster Properties v Secretary of State,* February 28, 2007. In that case, in the first appeal in respect of the property, which was at Glebe Place in London, there had been an objection raised by the local planning authority to a first-floor extension to the property. This objection was rejected by the inspector, who nevertheless went on to reject the appeal for other reasons. The appellants sought to address those other reasons and resubmitted, and the proposal was again refused on the basis that there should be no first-floor extension. There followed an appeal, and in the second appeal the inspector dismissed the appeal on the basis that the first-floor extension was objectionable. The legal challenge was based, as such challenges commonly are, on the absence of any reasoning in the second inspector's decision to explain why he had taken such a radically different view from the first inspector. The Court of Appeal was satisfied that such reasons were required and, in particular, drew attention to a civil litigation authority, *Flannery v Halifax Estate Agencies Ltd* [2000] 1 W.L.R. 377, and concluded in his judgment as follows:

> ''22 It seems to me that a factor which is relevant to the duty to give reasons in planning decision is the point which emerges more clearly in cases such as *Flannery* than in the planning cases, that the requirement to give reasons concentrates the mind and if fulfilled is likely to lead to a more soundly based decision (see Henry LJ) in *Flannery* at page 301). This particular reasoning does not seem to me to be foreign to the policy about adequacy of reasons in a planning context, although Lord Bridge made it clear in *Save Britain's Heritage* at page 168 that it is always for the party challenging a decision to show that the statement of reasons is such as to raise a substantial doubt whether the decision was reached on relevant grounds and was otherwise properly reached. Merely to show doubt in the reasoning is not enough. At page 176 at H he spoke of the requirement to give reasons as a 'salutary safeguard' to show that the decision was based on relevant and rational grounds and that any applicable statutory criteria had been observed. If, as the judge accepted by his wish to have been able to remit the case for further reasons, the reader cannot tell why Mr Mead (the second inspector) disagreed with Mr Sergeant (the first inspector) on the principle then the salutary safeguard has not performed its intended function.''

This passage was quoted very shortly afterwards in a very similar case of *Oxford CC v Secretary of State for Communities and Local Government and One Folly Bridge Ltd* [2007] EWHC 769 as, again, support for the importance of a subsequent inspector to give clear and intelligible reasons for departing from an earlier inspector's decision if that was to be done.

Other environmental controls

The recent case of *Hopkins Developments Ltd v Secretary of State and North Wiltshire DC* [2006] EWHC 2823 reinvestigated the relationship between the planning regime of control and other measures to control environmental pollution. The proposal which had gone to appeal in this case was one for the erection of a concrete plant and industrial unit. The appellants relied, both before the inspector and in the High Court, upon the control of that process not simply by conditions within the planning system but also through the regulation provided by the Pollution Prevention and Control Act 1999. That legislation required, by virtue of the Pollution Prevention and Control Regulations 2000 made under the 1999 Act, that the plant would have a permit, and that in deciding whether or not to grant the permit or impose conditions upon it the regulator was required to have regard to ensuring that all appropriate preventative measures were taken against pollution, pollution having been defined as emissions which might be harmful to human health or the quality of the environment, or which might cause offence to any human senses, result in damage to material property or impair or interfere with amenities and other legitimate uses of the environment. On the basis of that comprehensive definition, the claimants contended that it was unlawful and irrational for the inspector to have concluded that, notwithstanding that control, there would still be an adverse impact upon residential amenity. The judge, George Bartlett Q.C.., rejected that argument and, whilst he accepted that the decision maker in the planning regime could and should have regard to the opportunity to control a process under other legislation, nevertheless it was still open to the decision maker in the planning regime to conclude, notwithstanding these pollution control regimes, that the use of land proposed was inappropriate. He dealt with the argument as follows:

> ''15 . . . It is dependent on the underlying assumption that, in relation to the likely impact of pollutants to which the 2000 regulations apply, primary importance must be accorded to the judgment of the regulator above that of the planning authority. I can see no basis for such an assumption, and it does not appear to me that the passage from paragraph 10 of PPS23 that I

have quoted above provides support for it. It would effectively mean that, unless it was clear to the planning authority that the plant could never achieve a permit (cf Gateshead per Glidewell LJ at 359), the potential impact of pollutants could never enter into its consideration of whether planning permission should be granted. The thrust of paragraph 12 was that planning authorities should focus on the impacts rather than the control of emissions, not that they must subordinate their judgement on the impacts to those of the pollution control authority.''

The meaning of development and poly tunnels

In the recent case of *Hall Hunter Partnership v Secretary of State and Waverley BC* the court was called upon to consider the conclusions which had been reached by an inspector in relation to the erection of poly tunnels and whether or not they amounted to development within the scope of s.57 of the 1990 Act. Following the authority of *Skerrits of Nottingham v Secretary of State* [2000] 2 P.L.R. 102, the court concluded that, given the nature of the poly tunnels in terms of their size, degree of physical attachment and permanence, which were all matters of fact and degree, the inspector had been quite entitled to determine that the poly tunnels which were being used for the cultivation of crops were development which required planning consent. Furthermore, the court went on to conclude that there was no basis for finding that they were permitted development within Pt 4 of Sch.2 to the GPDO as a temporary building. This case will no doubt have significant implications for rural districts in relation to modern agricultural practices.

The imposition of conditions

In the recent case of *R. (on the application of Technoprint Plc) v Leeds CC*, March 7, 2007, an application for judicial review was granted in relation to a planning consent which had been given by the local planning authority retrospectively for the retention of industrial filters on a paint manufacturing works. The essential difficulty with the council's position was that the filters had been fitted without the benefit of planning permission and were then giving rise to complaints in relation to noise. The applicant for planning permission indicated that he was prepared to take noise attenuation measures and, on that basis, the members indicated that planning permission should be granted subject to condition as to operating hours and noise attenuation measures. The challenge arose because there were no details at all in respect of what noise attenuation might be proposed or whether or not they would be effective. On the basis of a complete lack of evidence as to how the noise from the filters was to be attenuated, the judge concluded that the decision of the local authority was irrational and perverse. Thus, this authority reinforces the need not simply for the condition to satisfy the well known tests set out in the Circular but also for there to be evidence to justify the fact that the impact on amenity that the conditions are designed to ameliorate will be satisfactorily addressed by them.

Conclusions

There may be areas of the law in which from year to year little happens since it proceeds on the basis of well understood principles which have endured from time immemorial. This could hardly be said of planning and environmental law, the refinements and iterations of which are for ever evolving and leading in some cases to greater technicality and complexity. Clearly, with the growing awareness and anxiety of the general public in respect of environmental matters, we can expect to continue to live in interesting times so far as the development of planning law is concerned.