Legal Update

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Introduction

I have tried to set out below a thematic review of the principle cases of the year. In truth there are not very many headline cases, which raise new and exciting points of law. I have tried to keep to cases which have some wider significance and do not simply repeat well established legal principles. So this paper does not purport to cover every planning case in the last 12 months.

The layout of the paper is to move from high level issues, i.e. Strategic Environmental Assessment ("SEA") through domestic law on material considerations and on to enforcement cases. I cover village green cases at the end.

Strategic Environmental Assessment

Scope of the requirement for SEA

Under reg.5 of the SEA Regulations 2004, SEA is required if it is " a plan or programme" prepared for town and country planning or land use and which sets the framework for future development consent of projects listed in the Annex.

Walton v Scottish Ministers[1]

For me this is clearly the most important planning case of the year, as it amounts to a long overdue rowing back from the principles set out in *Berkeley v Secretary of State for the Environment*,[2] as to relief in EU based challenges.

The decision under challenge was to build a new bypass for Aberdeen, known as the Fastlink. There had been previous schemes, and the Fastlink was a modification of these earlier proposals. The applicant argued that Fastlink was a modification to a plan or programme and as such fell within the SEA Directive, the requirements of which had not been complied with.

The Supreme Court rejected the appeal and the case is very important for the comments of Lords Carnwath and Reed as to the proper approach to SEA (and by analogy) environmental impact assessment ("EIA"). The ratio of the case is that:

(a) The modification of a specific project was covered by EIA and that the decision of the Scottish Ministers did not alter the framework for future development and as such SEA was not involved.

(b) There was no common law duty to hold an inquiry into the applicant's objections.

However, the real importance of the case lies in the obiter comments, particularly in respect of the House of Lords decision in *Berkeley* and how the Courts should approach issues of relief arising in cases of non-compliance with requirements arising out of EU law.

The Supreme Court found that Mr. Walton was a person aggrieved, even though he did not live in the immediate locality. He was not a "mere busybody". However, the level of the claimant's "interest" in the decision was relevant to the court's exercise of discretion as to relief (Lord Reed [95]).

[1] [2013] P.T.S.R. 51.
[2] [2001] A.C. 603.

(a) On remedy Lord Carnwath undertook a detailed analysis of the case law on common law and statutory challenge. He considered *Berkeley* and said that care was needed in applying it "in other statutory contexts and other factual circumstances" [127]. He emphasised that in *Berkeley* there was no "countervailing prejudice to public or private interests to weigh against the breach of the Directive" [131].

(b) He then said at [139]:

> "Where the court is satisfied that the applicant has been able in practice to enjoy the rights conferred by the European legislation, and where a procedural challenge would fail under domestic law because the breach has caused no substantial prejudice, I see nothing in principle or authority to require the courts to adopt a different approach merely because the procedural requirement arises from a European rather than a domestic source."

Lord Carnwath's judgment was supported by all the other members of the SC. On the face of it this is a hugely important decision because it will no longer be possible for claimants' lawyers to argue that any marginal non-compliance with an EU requirement should lead to a decision being quashed, and the court has no discretion. In practice I am not sure how often courts mechanistically applied the *Berkeley* dictum in any event. But it certainly strengthens the hand of defendants seeking to uphold decisions in the light of procedural defects.

Wakil v Hammersmith and Fulham LBC[3]

A challenge to the adoption of a Supplementary Planning Document ("SPD") setting out the proposed redevelopment of part of the Goldhawk Road, Hammersmith. One of the grounds was that the SPD did set the framework for future development consents in the area and therefore should have been subject to SEA. Wilkie J. found it did set such a framework. Although that did not necessarily mean an EA was required, the Council had failed to consider whether or not it was likely to have significant environmental effects and therefore had not properly addressed its mind to whether SEA was required.

R. (on the application of Buckinghamshire CC) v Secretary of State for Transport[4] *(the "HS2 case")*

I intend to say relatively little about this case given that it is being heard in the Supreme Court in October. The issue on SEA was whether the Government's decision to proceed with HS2 (referred to in the judgement as the Decisions and Next Steps Command Paper ("DNS")) was a plan or programme required by administrative provisions which "set the framework for future development consent". The case turned on whether or not the DNS set the framework, given that the Government's decision was to seek development consent for HS2 through a hybrid bill (i.e. a Government backed Bill but which impacted on specific private interests).

The decision of the majority (the Master of the Rolls and Richards L.J.) was that it did not do so, because in order to set the framework the plan or programme had to have some *legal influence* over decision on development consent. Because Parliament is sovereign and is not obliged to comply with, or even in theory have regard to, the DNS in making its decision, the DNS has no such influence and therefore does not set the framework.

[3] [2012] J.P.L. 1334.
[4] [2013] EWCA.

In legal and perhaps constitutional terms this may be correct, in practical and real terms in my view it is not. A Government decision to support a project through a hybrid bill, which is by its nature a Government Bill, in reality has enormous influence over the decision of Parliament as whether to grant development consent. Indeed in real terms such Government support is likely to be decisive, unless there is a major Government revolt in Parliament. Further the majority decision in the Court of Appeal leaves a massive gap in the UK's approach to SEA because the most major projects, those which proceed by hybrid bill, find themselves outside the scope of SEA. This gap is not made up by EIA because EIA does not have to consider the main alternatives and does not do so at the same early stage as SEA. In reality on HS2 the main fight is about alternatives, and the need to properly consider these, whether at an early stage through SEA, or somehow in the Parliamentary process.

Sullivan L.J. dissented from the majority view, in a very trenchant judgment. He took a purposive approach, i.e. that the gap should be closed if it is possible to do so. He rejected the majority approach that a narrow view should be taken to setting the "framework". His view was that the key issue was whether the plan or programme is *in fact* capable of exerting a sufficient degree of influence over the development consent decision. He then found that there was cogent evidence that there is a real likelihood that the DNS will influence Parliament's decision on HS2. In part this is because the normal distinction between a developer and a decision maker does not occur in hybrid bills, where the Government has a dual role.

In the light of Sullivan L.J.'s dissent I find it difficult to see how it can be said that the issue is "acte clair", and for a court to justify not granting a reference. However, we will have to see what the Supreme Court have to say.

Nomarchiaki Aftodioikisi[5]

Challenge to measures relating to a project to partially divert a river in order to construct a number of dams. The 7th issue was whether such a project must be regarded as a plan or programme.

The Court of Justice of the EU held it was not a "plan or programme" as:

> "It is not evident that the project concerned constitutes a measure which defines criteria and detailed rules for the development of land and which subjects implementation of one or more projects to rules and procedures for scrutiny (see, to that effect, Case C-567/10 *Inter-Environnement Bruxelles and Others* [2012] ECR I-0000 at [30])."

The Advocate General said if a specific project required development consent—SEA would be unnecessary since it would be a project not a plan or programme

Adequacy of SEA

There has been a good deal of litigation around adequacy arguments on SEA, largely relying on Collins J's judgment last year in *Save Historic Newmarket v Forest Heath District Council*.[6]

Heard v Broadland DC[7]

Cogent Land LLP v Rochford DC[8]

This was a very fact-based challenged to the adoption by Rochford DC of its Core Strategy, on the grounds that it had not considered alternatives in accordance with the SEA Regulations. Singh J. rejected the application and two points emerge:

[5] Case C-43/10.
[6] [2011] EWHC 606 (Admin).
[7] [2012] Env. L.R. 23 (in context of Core Strategy).
[8] [2013] J.P.L. 170 (in context of Core Strategy).

a) The Court took a fairly robust approach, partially in reliance on the EIA cases such as *Blewett* and *Edwards*; and

b) It was, at least on the facts of that case, possible to remedy defects in the SEA process, at a later stage. This may be critical for many LPAs part way through their Core Strategy or the Development Plan Document (DPD) processes, and feeling vulnerable in the light of the *Forest Heath* decision.

Shadwell Estates Ltd v Breckland DC[9]

The claimant argued that the adoption of the Thetford Area Action Plan was in breach of SEA Regulations because it had not properly considered the environmental impact of the Plan on the stone curlews. The challenge appears to have rested entirely on a detailed factual critique of the LPA's approach to the impact on the stone curlews. Unsurprisingly Beatson J. was not persuaded. An important factor, which on the merits was probably fatal, was that Natural England supported the LPA's approach. This merely highlights the obvious truth that where the expert statutory consultee has a stance which does not support the argument being advanced, it will be exceptionally difficult to persuade any judge that the approach of the decision maker was wrong in law.

The role of the Courts in EIA & Habitats challenges

Consideration of recent case law regarding the Court's role in assessing the adequacy of environmental assessment and the "precautionary principle".

Bowen-West v SSCLG[10]

This case concerned the complex issue of what is "the Project" for the purposes of EIA and what cumulative effects have to be taken into account. The application was for a permission to dispose of a relatively small quantum of low level nuclear waste on a site which already had permission for disposal of hazardous waste. However, the developers had made clear that they intended to apply to extend the landfill site to allow a very much larger quantum of LLW from 2016. The claimant argued that the Environmental Statement should have included assessment of the larger site as an "indirect, secondary or cumulative effect"; or alternatively that there was only one project and the whole proposal should have been assessed together. A major plank of the claimant's argument was that once permission was granted for even a small quantum of LLW the principle would be set, and effectively the developer would have a "foot in the door".

Fatally, for the claimant's case the Inspector had found that the current application was a stand alone project. The case could therefore be distinguished from *Brown v Carlisle Airport*,[11] where the Court of Appeal had found in reality there to be one project.

The Court of Appeal held that what amounted to the cumulative effects was a matter of fact and judgment, only amenable to J.R. on *Wednesbury* grounds, rather than being matters for the court. The Court did consider the "foot in the door" argument, i.e. once a small amount of LLW was permitted it would be more difficult to refuse the larger application, but rejected this argument, on the basis that the larger proposal would have to be fully assessed.

A similar issue arose at first instance in the HS2 case before Ouseley J., where it was argued that when the EIA of phase One of HS2 was assessed the cumulative effects of phase 2 (i.e. Birmingham to Leeds and Manchester) should also be assessed as in reality it was the Government's intention to proceed with

[9] [2013] EWHC 12 (Admin).
[10] [2012] EWCA Civ 321.
[11] [2010] EWCA Civ 523.

the entire project. The argument was rejected on the facts, and perhaps shows how very difficult it is in practice to persuade a court that it should look at the reality of the development being proposed, rather than the legal theory.

R. (on the application of Prideaux) v Buckinghamshire CC[12]

A challenge to the grant of planning permission at Calvert Landfill, for an Energy from Waste facility. The first ground concerned the Habitats Directive, and argued that the County Council had failed to apply the "no satisfactory alternative" test. The claimant's argument does seem to have involved trying to avoid the effect of the Supreme Court's decision in *Morge*, which left the primary responsibility of ensuring compliance with the Directive with Natural England rather than the LPA. Lindblom J. considered the officer's report in detail and found no error of law.

There was also consideration of para.118 of the National Planning Policy Framework, and the Judge found that the principles in this paragraph were not breached by the analysis in the officers' report.

Champion v North Norfolk DC[13]

The main issue was whether the LPA had erred in law in not seeking an appropriate assessment under the Habitats Directive. The case was about a proposed grain silo within 500m of the River Wensum Special Area for Conservation. The LPA got itself into a tangle because it decided not to require an appropriate assessment (thus apparently taking the view that there was no relevant risk) but at the same time imposed a requirement for testing water quality to ensure pollutants were not contaminating the river and a scheme for remediation in the event that they did (thus suggesting they thought there was a risk). The Judge held that the Council could not rationally adopt both positions at once, and therefore quashed the decision.

This is probably not an unusual position for an LPA to take, and the judgment emphasises the need for Councils to think consistently and rationally about its conclusions on matters such as risk.

Interpretation of planning policy after Tesco v Dundee

Unsurprisingly there has been considerable reliance over the last year on the Supreme Court decision in *Tesco v Dundee*[14] which makes the interpretation of planning policy primarily an issue for the court. Most of these cases turn entirely on their own facts, and simply apply the principles set out by the Supreme Court.

R. (on the application of TW Logistics) v Tendring DC[15]

Islington LBC v Secretary of State for Communities and Local Government[16]

Development Plan Documents and Supplementary Planning Documents

There are three cases on when an LPA adopts a planning document but the Court quashes it on the grounds it should have been adopted as a different kind of planning document and therefore the statutory procedure has not been followed.

[12] [2013] EWHC 1054 (Admin) (reviewing Morge and the question of "satisfactory alternatives").
[13] [2013] EWHC 1065 (Admin).
[14] [2012] UKSC 13.
[15] [2013] 2 P. & C.R. 9—application rejected.
[16] [2013] EWHC 2320—application allowed.

R. (on the application of RWE Npower Renewables v Milton Keynes BC [17]

Milton Keynes BC adopted a Supplementary Planning Document containing an emerging policy on wind turbines, dealing inter alia with separation distances from residential properties. RWE argued that the document should have been adopted as a Development Plan Document ("DPD"), therefore had not gone through the right procedures and should be quashed.

The judge found:

(1) Not every local development document had to be an SPD or a DPD for the purposes of the 2012 Regulations. If a document set out the local authority's policy on the development and use of land and was adopted under s.17(8) 2004 Act it was an LDD.
(2) However, to be an SPD it had to contain a statement regarding matters under regulation 5(1), but not be a document under regulation 5(2) as it would then be a DPD.
(3) Therefore, an LDD could be neither a SPD nor a DPD.
(4) On the facts of the case the local authoriity's decision that the policy did not conflict with the adopted development plan was irrational and the emerging policy was in breach of reg.8(3) and should be quashed.

Wakil

See above on the Goldhawk Road "SPD"—this part of the case was whether the document was in law an SPD or a DPD. Wilkie J. held that the purpose of the document was to identify Shepherds Bush market as an area of significant change and therefore it was an Area Action Plan and should have been adopted under the procedure for a DPD. The decision to adopt was therefore unlawful.

R. (on the application of Houghton Parish Council) v Huntingdonshire DC[18]

This case concerned the 2004 Regulations, but remains relevant because of the similarity with the 2012 Regulations. The PC objected to the adoption of a development framework by the District Council, on the grounds that it was a site allocation policy which should have been adopted as a DPD.

The Judge found:

(1) The document concerned "how" the area could be developed rather than a principled allocation of a specific site.
(2) The document did contain policies, was highly prescriptive and was more than a mere master plan and should have been produced as an LDD in compliance with s.17.
(3) The document was quashed because not to do so would have inevitably misled as to the status of the document.

The NPPF, Localism and housing

Recent cases concerning the practical application of the NPPF and the principle of localism specifically in the context of housing schemes. There are several more cases in the pipeline which are likely to be decided before the conference.[19]

[17] [2013] EWHC 751 (John Howell QC as Deputy H.C.J.).
[18] [2013] EWHC 1476 (Charles George QC as Deputy H.C.J.).
[19] *Wainhomes (South West) Holdings Ltd v Secretary of State for Communities and Local Government* [2013] EWHC 597 (Admin); *Tewkesbury BC v Secretary of State for Communities and Local Government* [2013] EWHC 286 (Admin); *Stratford on Avon DC v Secretary of State for Communities and Local Government* [2013] EWHC 2074 (Admin).

Enforcement/Material change of use

Hertfordshire CC v Secretary of State for Communities and Local Government[20]

This was an appeal from a judgment of Ouseley J. dismissing an appeal under s.289 TCPA 1990 against an Inspector's decision on an enforcement appeal. The Inspector had allowed appeals by Metal and Waste Recycling Ltd, finding that there had been no breach of planning control. The notices concerned an alleged change of use and operational development at a scrap metal yard in Hitchin. The site had the benefit of a 1972 planning permission for use as a scrap metal yard but it was alleged that the throughput had increased such that "the totality of the new use having a different nature and character from the former use" (see [4]).

Ouseley J. had found below that the question for the Inspector had been whether the impacts said to have arisen from the use of the site were caused by the increased throughput. The Council had framed their notices in that way such that the alleged change of use was said to have arisen through increased throughput. The Council could not later criticise the Inspector for taking such an approach. Ouseley J. held that in any event, the impacts said to have arisen did not amount to a change of use and were not largely related to the increased throughput. The Inspector was correct not to examine the impacts alone, but to consider whether the land was in fact being used differently.

The Court of Appeal upheld Ouseley J.'s judgment. It held that whilst a material change of use could arise from intensification, and that the materiality of a change of use could be assessed by reference to effects on other land (e.g. from vehicle movements), the Council had not been able to demonstrate that a change of use had arisen simply through the increased throughput of the site.

This case emphasises the need to correctly frame enforcement notices especially where a material change of use is concerned. The Council sought to raise before the Court of Appeal further arguments in respect of the changes to the type of scrap handled and the different processes engaged. The Court's clear message was that the Council had made its bed in the way that the enforcement notice was originally drafted.

Moore v Secretary of State for Communities and Local Government[21]

In another case concerning enforcement action against a material change of use of the land, the Court of Appeal held that enforcement action had properly been taken against a change of use from a dwellinghouse to "commercial holiday accommodation". The appellant owned a large house which she rented out through a company for short-term holiday lets. It was held that whether the use of a dwelling for holiday lets amounted to a material change of use was a matter of fact and degree: it could not be said that such use would inevitably amount to a material change of use, nor that it inevitably would not. The Inspector had rightly considered the current use against the lawful use and had made an assessment as to whether the groups came together as "single households" (see [35]). The Court also rejected an argument that the description of the use as "commercial holiday accommodation" was too broad.

Dunsfold v Secretary of State for Communities and Local Government[22]

[20] [2013] J.P.L. 560.
[21] [2012] EWCA Civ 1202.
[22] [2013] EWHC 1878 (Admin).

Interpretation of conditions

Telford and Wrekin BC v Secretary of State for Communities and Local Government [23]

In this case Beatson L.J., sitting in the High Court, reviewed the authorities in respect of the interpretation of planning conditions. The relevant condition applied to a garden centre and stated:

> "prior to the garden centre hereby approved opening, details of the proposed types of products to be sold should be submitted to and agreed in writing by the local planning authority."

The question which arose was whether that condition restricted the use of the garden centre to the sale of products detailed to the authority, or whether a general retail use was lawful. An Inspector had granted a certificate for a general A1 retail use.

Beatson L.J. identified a degree of tension between the Court of Appeal's judgment in *Hulme v Secretary of State for Communities and Local Government*[24] and the judgment of Sullivan J. (as he then was) in *Sevenoaks DC v First Secretary of State*.[25] At [32] Beatson L.J. observed that:

> "The Sevenoaks case involved a condition that was considered clear and without ambiguity. Sullivan J emphasised the need for clarity and certainty on the face of the condition, in particular because a planning permission is a public document which is likely to affect third party rights and the wider public and on which they are entitled to rely, and because breach of a condition may ultimately have criminal consequences. Hulme's case appears to take a less strict approach in the context of words in a condition Elias LJ (at [31]) described as particularly opaque" imposed by an Inspector when allowing an appeal against the refusal of planning permission by the local planning authority. It was held that the opacity could be resolved by looking at the decision letter as well as the other provisions and conditions in the planning permission.""

At [33] Beatson L.J. gave the following summary of the authorities on the construction of a planning permission and the conditions on it:

> "(1) As a general rule a planning permission is to be construed within the four corners of the consent itself, i.e. including the conditions in it and the express reasons for those conditions unless another document is incorporated by reference or it is necessary to resolve an ambiguity in the permission or condition: *R v Ashford DC, ex p Shepway DC* [1998] PLCR 12 at 19 (Keene J); *Carter Commercial Developments v Secretary of State* [2002] EWCA Civ. 1994 at [13] and [27] (Buxton and Arden LJJ); *Sevenoaks DC v First Secretary of State* [2004] EWHC 771 (Admin) at [24] and [38] (Sullivan J); *R (Bleaklow Industries) v. Secretary of State for Communities and Local Government* [2009] EWCA Civ. 206 at [27] (Keene LJ); *R (Midcounties Co-operative Limited) v. Wyre Forest DC* [2010] EWCA Civ. 841 at [10] (Laws LJ).
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> (2) The reason for the strict approach to the use of extrinsic material is that a planning permission is a public document which runs with the land. Save where it is clear on its face that it does not purport to be complete and self-contained, it should be capable of being relied on by later landowners and members of the public reading it who may not have access to extrinsic material: *Slough Estates v Slough Borough Council* [1971] AC 958 at 962 (Lord Reid); *Carter Commercial Developments v Secretary of State* at [28] (Arden LJ); *R (Bleaklow Industries) v. Secretary of State for Communities and Local Government* [2009] EWCA

[23] [2013] J.P.L. 865.
[24] [2011] EWCA Civ 638.
[25] [2004] EWHC 771 (Admin).

Civ. 206 at [27]) (Keene LJ); *Barnett v Secretary of State* [2009] EWCA Civ 476 at [16] — [21] (Keene LJ, approving Sullivan J at first instance); *R (Midcounties Co-operative Limited) v. Wyre Forest DC* [2010] EWCA Civ. 841 at [10] (Laws LJ).

(3) It follows from (2) that in construing a planning permission:—

a. the question is not what the parties intended but what a reasonable reader would understand was permitted by the local planning authority, and

b. Conditions must be clearly and expressly imposed, so that they are plain for all to read.

As well as the cases cited at (2), see *Sevenoaks DC v First Secretary of State* [2004] EWHC 771 (Admin) at [38] and [45] (Sullivan J).

(4) Conditions should be interpreted benevolently and not narrowly or strictly (see *Carter Commercial Development Ltd v Secretary of State for the Environment* [2002] EWHC 1200 (Admin) at [49], per Sullivan J) and given a common-sense meaning: see *Northampton BC v First Secretary of State* [2005] EWHC 168 (Admin) at [22] (Sullivan J).

(5) A condition will be void for uncertainty only 'if it can be given no meaning or no sensible or ascertainable meaning, and not merely because it is ambiguous or leads to absurd results': *Fawcett Properties v Buckingham County Council* [1961] AC 636 , 678 per Lord Denning. In Hulme's case Elias LJ stated this was an application of the benevolent construction principle.

(6) If there is ambiguity in a condition it has to be resolved in a common sense way, having regard to the underlying planning purpose for it as evidenced by the reasons given for its imposition: *Sevenoaks DC v First Secretary of State* [2004] EWHC 771 (Admin) per Sullivan J at [38] accepting the submission at [34].

(7) There is no room for an implied condition in a planning permission. This principle was enunciated in *Trustees of Walton on Thames Charities v Walton and Weighbridge District Council* (1970) 21 P & C R 411 at 497 (Widgery LJ), in the following terms:

> 'I have never heard of an implied condition in a planning permission and I believe no such creature exists. Planning permission enures for the benefit of the land. It is not simply a matter of contract between the parties. There is no place, in my judgment, within the law relating to planning permission for an implied condition. Conditions should be express, they should be clear, they should be in the document containing the permission.'

This principle also precludes implying an obligation by way of an addition to an existing condition: *Sevenoaks DC v First Secretary of State* [2004] EWHC 771 (Admin) at [45] (Sullivan J)

(8) Where planning permission containing conditions has been granted in a decision by an Inspector allowing an appeal, and a condition is ambiguous, it is possible to construe it in the context of the decision letter as a whole: Hulme's case at [13(a)]. Doing this does not involve impermissible "implication" from an extrinsic source, but is best described as a question of "construction": Hulme's case at [37]. In Hulme's case, Elias LJ stated (at [37]) that even "if it can be described as an implied condition it is very different in nature from that envisaged in the Trustees of Walton case."

(9) In the context of what suffices to exclude the operation of the UCO :—

a. A grant of planning permission for a stated use is a grant of permission only for that use, but could not, in itself, be sufficient to exclude the operation of the UCO because if it did, the operation of the UCO would be curtailed in a way which could

not have been intended: *Dunoon Developments Ltd v Secretary of State for the Environment* [1992] JPL 936 at 107 (Sir Donald Nicholls V-C).

b. In general, to exclude the operation of the UCO , it is necessary for the local planning authority to do so by the imposition of a condition in unequivocal terms: *Carpet Décor (Guildford) Ltd v Secretary of State for the Environment* [1981] JPL 806 at 808 (Sir Douglas Frank QC)."

Having set out those propositions, and relying on propositions (3) and (9) in particular, Beatson L.J. held that the Inspector did not err in construing condition 19 (at [34]):

> "Condition 19, like the condition in the Sevenoaks case, was unambiguous. Accordingly (see [33(1)]) the condition is to be construed within the four corners of the consent, including the other conditions and the reasons for those conditions. What it expressly required was that details of the proposed types of product to be sold should be submitted to the Council before the garden centre opened. The condition itself did not contain a prohibition on selling goods other than those in the list submitted by Growing Enterprises. Its wording does not require it to be construed as including an implementation, an enforcement, or a prohibition clause."

See also *R. (on the application of Treagus) v Suffolk CC* on the severance of invalid planning conditions.

Material considerations

Delaney v Secretary of State for Communities and Local Goverment[26]

In *Delaney* the Court of Appeal considered the effect of a failure by a planning authority to discharge its statutory duty under s.225 of the Housing Act 2004 (taken with s.8 of the Housing Act 1985) to assess and meet the need for gypsy and traveller sites in its area. The appellant lived in a caravan on private land in the Green Belt. The Court of Appeal found that the failure in respect of s.225 formed a substantial topic before the Inspector. The Inspector took account of the breach and its consequences for the appellant. However, it was found that that breach did not outweigh other material considerations and in particular the impact on the Green Belt of granting planning permission.

R. (on the application of Watson) v Richmond upon Thames LBC[27]

This case concerned the consequences of failing to take into account a report which had been prepared by a panel which had been appointed by the Council to advise on the regeneration of Twickenham. Its remit included reporting on proposals for the train station: see [33]. Richards LJ found himself "very surprised" that the planning committee was told to disregard the report. However, he was not satisfied that the failure to take account of the report was a breach of the duty to have regard to material considerations:

(1) All the points of substance in the report were covered in the officer's report and conveyed to the committee.

(2) The report contained "nothing capable of affecting the committee's conclusion that the proposal accorded overall with the development plan" and nothing which, whilst raising questions as to viability was capable of affecting the assessment which had already been made on that issue.

[26] [2013] EWCA Civ 585.
[27] [2013] EWCA Civ 513.

(3) Whilst the views of the panel were "worthy of respect" it did not have the status of a statutory consultee.

The case is interesting because Richards L.J. expressly described this as not being a failure to take into account a material consideration. The question of whether the report would have made a difference was central to that reasoning, rather than just being a matter which went to relief: see [41].

Sentencing

R. v Rance (Piers)[28] *and R. v Johnson (John Phillip)*[29]

These cases reviewed the appropriate fines for demolition of buildings in conservation areas. The principles which the cases show:

- In setting the fine the defendant must be capable of paying the fine himself (i.e. not through other people). However the Court is entitled to find that claims of impecuniosity are unreliable (Rance);
- Regard should be had to the impact on neighbours (Johnson);
- If a future change in circumstances is anticipated but unclear, the fine can be revisited under section 85 of the Magistrates' Court Act 1980 (Johnson);
- Regard should be had to the benefit but the fine need not be set at a level which covers the entire potential benefit (Rance).
- In both cases the fines settled upon were £50,000, albeit in Johnson credit was given for an early guilty plea.

Village Greens

This is an area of such hideous complexity, specialist knowledge and judicial obscurity that it would require a paper all of its own. However there have been two cases this year in the Court of Appeal that relate closely to the functions of local authorities and other public bodies and may be of importance to some of you.

R. (on the application of Barkas) v North Yorkshire CC[30]

The land is held by a local authority under s.12 of the Housing Act 1985 and used as a recreation ground in connection with housing. The Inspector found that the land was used "by right" not "as of right".

Sullivan L.J. held that land was acquired by an express statutory power, which included the power to provide and maintain it as a recreation ground. Therefore the public had a right to use it for recreational purposes, pursuant to the local authority's statutory powers and it could not be registered as a village green under s.15 of the Commons Act 2006.

The case is important because it clarifies/expands the approach in *R. (on the application of Beresford) v Sunderland CC*[31], about when land held by public authorities for use for recreation can and cannot be registered as village greens.

The case is going to the Supreme Court in March 2014.

[28] [2012] EWCA Crim 2023.
[29] [2012] EWCA Crim 580.
[30] [2013] 1 W.L.R. 1521.
[31] [2004] 1 A.C. 221.

R. (on the application of Newhaven Port) v East Sussex CC[32]

The application was to register a tidal beach as a village green. The High Court (Ouseley J.) held that beach forming part of Newhaven Port could not be registered as a village green where it was reasonably foreseeable that registration would conflict with the Port Authority's statutory rights and powers and the land was held by the Port Authority in exercise of its statutory powers.

Court of Appeal allowed the appeal. The consequences of registering the beach for the future discharge of the Port Authority's statutory functions was not a proper ground to hold that the land was not capable of registration. Consequences of registration was not part of the statutory test.

Procedure

The crucial procedural change which has been introduced in the last year is that Civil Procedure (Amendment No.4) Rules 2013 have introduced a new six-week time limit for applying for judicial review which involved decisions made under the Planning Acts. The separate requirement of "promptness" has now gone.

The Pre Action Protocol has been amended, but the requirement for a PAP letter has not been removed:

> "This protocol may not be appropriate in cases where one of the shorter time limits in Rules 54.5(5) or (6) applies. In those cases, the parties should still attempt to comply with this protocol but the court will not apply normal cost sanctions where the court is satisfied that it has not been possible to comply because of the shorter time limits."

[32] [2013] P. & C.R. 8.